

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 1:06CR394
)	
Plaintiff,)	JUDGE ANN ALDRICH
)	
-VS-)	
)	DEFENDANT ANTON ZGOZNIK'S
)	MOTION TO SEVER
JOSEPH SMITH and)	DEFENDANTS AND/OR COUNTS
ANTON ZGOZNIK,)	
)	
Defendants.)	

Defendant, Anton Zgoznik, by and through undersigned counsel, requests that his case be severed from the case of defendant Joseph Smith pursuant to Federal Rules of Criminal Procedure 8(b)(for improper joinder) and 14(a)(due to prejudice from joinder). In addition and alternatively, Defendant Anton Zgoznik seeks severance of the tax counts and joins the Motion of Defendant Smith in that regard.

DISCUSSION AND ARGUMENT

The indictment in this case charges defendants Joseph Smith and Anton Zgoznik with conspiracy to commit mail fraud under 18 U.S.C. §§ 371 and 1349 (Count 1), mail fraud under 18 U.S.C. §§ 1341 and 1346 (Counts 2 through 9), conspiracy to defraud the IRS under 18 U.S.C. § 371 (Count 18) and corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212(a) (Count 23). Defendant Smith only is charged with money laundering under 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 10

through 17) and defendant Smith only is charged with making false tax returns for the tax years 1999 through 2002 relative to his Forms 1040 for those years under 26 U.S.C. § 7206(1) (Counts 19 through 22). Defendant Zgoznic only is charged with aiding and assisting in the preparation of a false document under 26 U.S.C. §7206(2) (Count 24) and with aiding and assisting in the preparation of a false return, relative to corporate tax returns of Institutional Financial Advisors, Inc. (IFA) for the tax years ended June 2001, June 2002 and December 2002 (Counts 25 through 27).

The General Allegations of the Indictment as well as Counts 1 through 9 allege four separate "schemes." First are payments to defendant Smith by Defendant Zgoznic. Second is the creation of an account labeled "The DOC Fidelity Account Scheme" although defendant Zgoznic does not appear to be actually charged for this conduct, rather the conduct is only charged as a tax matter for Smith. Even in Count 18, in which both defendants are charged, the "DOC Fidelity Account" activity is only directed at Smith. Third are payments to Defendant Smith through the Catholic Cemeteries Association ("CCA"). Defendant Zgoznic is definitely not charged in connection with this "scheme" and has nothing to do with this transaction. Fourth are payments to defendant Smith from a national insurance brokerage firm with an office in Cleveland. Again, Zgoznic is not charged in connection with the payments to Smith by the insurance broker and has nothing to do with this transaction.

The issue of severance of defendants in a criminal trial involves the interplay between Federal Rule of Criminal Procedure 8 and Rule 14. Fed. R. Crim. Pro. 8(b) provides:

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. Pro. 14(a) provides:

(a) Relief. If the joinder of offenses or defendants in an indictment, an information or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials or provide any other relief that justice requires.

The proper analysis for whether a severance of defendants is required is a two step process. First, it must be determined if the requirements for joinder under Rule 8(b) were met in the first place. The failure to meet the requirements for joinder under Rule 8(b) constitutes misjoinder as a matter of law and severance is mandatory. *United States v. Hatcher*, 680 F.2d 438, 440-441 (6th Cir. 1982). Only if joinder is proper does the prejudice test of Rule 14(a) come into play. *Hatcher*, at 440. In this case joinder was improper and defendant Zgoznic would be unfairly prejudiced by a joint trial.

I. Joinder of Defendants Smith and Zgoznic is Improper as the Indictment Charges Smith with Offenses Arising From Acts or Series of Acts That are Unrelated to Anton Zgoznic.

The joinder of multiple defendants is proper under Rule 8(b) only if each of the counts of the indictment arises out of the same act or transaction or series of acts or transactions, even if all counts of the indictment include a common defendant. *Hatcher, Supra*. Multiple defendants may be joined only if a sufficient nexus exists between the defendants and the single or multiple acts or transactions charged as offenses. See 1 C. Wright, *Federal Practice & Procedure* § 144. In the *Hatcher*, case, the Sixth Circuit found that the requisite "series" of transactions was not present. In *Hatcher*, defendants Hatcher and Manetas were jointly indicted and jointly tried for federal narcotics crimes. Both Hatcher and Manetas were charged with three counts relating to possession and distribution of heroin; Hatcher alone was charged with three counts relating to

possession and distribution of cocaine. The Hatcher court held the fact that all counts against both defendants were based on possession and distribution of narcotics was not sufficient to justify joinder, even though the evidence showed that Manetas was Hatcher's source of heroin. This court held that the trial judge committed reversible error by not granting Manetas' motion for Rule 8(b) severance because "the indictment on its face alleges no connection between Manetas and the cocaine related charges against Hatcher. Neither does the record reveal any evidence of such connection." *Hatcher*. at 441.

In *United States v. Sims-Robertson*, 16 F.3d 1223 (6th Cir. 1994)(unpublished opinion – copy attached), multiple defendants were charged in a conspiracy obtain unnecessary blood tests from patients at a medical clinic (called SSMC in the case) in exchange for prescriptions to Schedule II narcotics. Further, pharmacies that filled the prescriptions for the SSMC patients were charged with paying kickbacks to the owner of SSMC. The charges included RICO, drug conspiracy, mail fraud conspiracy, distribution and substantive counts. In addition, one of the pharmacists was charged with unlawful distribution of Dilaudid which did not involve the other defendants. One of the pharmacist-defendants that did not work with the pharmacist charged regarding the Dilaudid, moved for severance of those counts (counts 149 and 150 of that indictment).

In *Sims-Robertson*, the government argued that the offenses charged in counts 149 and 150 against defendant McAlpin were 'interrelated and pertained to similar types of offenses' as those charged in the other counts of the indictment. Specifically, that counts 149 and 150, like the counts against the other defendants, charged McAlpin with unlawfully distributing controlled substances outside the course of usual professional practice.

The Sixth Circuit disagreed. The Court, citing *Hatcher*, found that the government's

broad view of offenses that can be joined under an indictment is unwarranted. The Court reasoned that, under the government's broad view of joinder, the *Hatcher* facts would have been appropriate for joinder because the offenses were similar.

The Court found that Counts 149 and 150 would have been closely related to the other counts if they involved the SSMC drug conspiracy. However, since there was no link between the drug conspiracy charges and the charges against the first pharmacist in counts 149 and 150 and the pharmacist who sought severance, the failure of the trial court to grant the motion for severance as to counts 149 and 150 was an error of law. *Sims-Robertson*, at Page 8.¹

In the instant case, the Indictment can be broken down into three categories: fraud charges (counts 1 through 9); money laundering by Smith (counts 10 through 17) and tax related charges (counts 18 through 27).

With regard to the fraud charges, the Indictment only charges Mr. Zgoznic with one fraud "Scheme," that is making payments to Joseph Smith. The remainder of the allegations are used to charge Joseph Smith for conduct unrelated to Anton Zgoznic. The other fraudulent "schemes" alleged, the "CCA Scheme" and the "Insurance Scheme," all involve Joseph Smith and third parties and do not involve Anton Zgoznic.

The same is true with Counts 10 through 17 that allege that Joseph Smith committed the crime of money laundering. Anton Zgoznic is not charged in those counts, nor does he have any involvement in Mr. Smith's children's educations, landscaping, country club dues or Florida condominiums.

Even the tax charges against Mr. Smith allege that Mr. Smith knowingly filed false tax

¹ While the Court found the error to be harmless, that was only with the benefit of hindsight. Clearly, had the Sixth Circuit reviewed the matter before trial, the motion for Severance would

returns. The returns in issue in these counts (19 through 22) were prepared by and filed by Mr. Smith. Anton Zgoznic had nothing to do with the preparation of those returns. The way in which receipts were reported and deductions claimed had nothing to do with Mr. Zgoznic and he had no input into the process.

There is no link between Anton Zgoznic and the "CCA Scheme" or the "Insurance Scheme." Anton Zgoznic did not "launder money" for Mr. Smith and he had nothing to do with the preparation and filing of Mr. Smith's tax returns. Accordingly, joinder is improper under Fed. Rule Crim. Pro. 8(b) and defendant Zgoznic's motion for severance should be granted.

II. Defendant Anton Zgoznic Should be Granted Severance from Defendant Smith as a Joint Trial Will Cause Substantial Prejudice to Defendant Anton Zgoznic.

If the Court finds that joinder was proper under Fed. Rule Crim. Pro. 8(b), severance should be granted under Fed. Rule 14(a) due to the substantial prejudice defendant Anton Zgoznic would suffer in a joint trial of this case.

Under Rule 14, severance should be granted if there is a serious risk that a joint trial would compromise a specific trial right of a properly joined defendant or prevent the jury from making a reliable judgment about guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 598, 113 S.Ct. 933, 938 (1993). The risk of prejudice will vary with the facts in each case, and the Rule leaves determination of the risk, and the tailoring of any necessary remedy, to the sound discretion of the district courts. *Zafiro*, at 598. Although separate trials will more likely be necessary when the risk is high, less drastic measures, such as limiting instructions, often will suffice. *Id.* Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a

have been granted.

codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. *Zafrio*, at 598, citing, *Kotteakos v. United States*, 328 U.S. 750, 774-775, 66 S.Ct. 1239, 1252-1253 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. *Zafrio*, at 598, citing, *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. *Zafrio*, at 598.

Severance should be granted whenever it "is deemed to promote a fair determination of a defendant's guilt or innocence of each offense." ABA Standards for Criminal Justice, Joinder and Severance § 13-3.1(b)(1)(1980). Rule 14 "must be read against the backdrop of Rule 2, which provides that the Federal Rules of Criminal Procedure 'are intended to provide for the just determination of every criminal proceeding.'" *United States v. Andrews*, 754 F.Supp. 1161, 1170 (N.D.Ill. 1990).

In this case, Zgoznic would be prejudiced by a joint trial as there is a serious risk that a joint trial would compromise his trial rights and prevent the jury from making a reliable judgment about his guilt or innocence due to the allegations against Smith that have nothing to do with Zgoznic. See, *Zafrio, supra; United States v. Breinig*, 70 F.3d 850.

The Indictment in this case itself is 41 pages long, charges 27 counts, consisting of three alleged conspiracies, 24 substantive counts of mail fraud, money laundering, and filing false returns or aiding and assisting in the preparation of false returns. Zgoznic is charged in 15 of the 27 counts. Zgoznic is not charged with the most serious counts – money laundering – and is not

charged in the tax counts against Smith (as Smith is not charged in Zgoznik's tax counts). In addition, the indictment alleges several other "schemes" which allege misconduct on the part of Smith that are either not charged against Zgoznik or have absolutely nothing to do with Zgoznik. Although the government has only charged two people, it is a complicated case. Furthermore, it involves the very sensitive issue of alleged improprieties at the Cleveland Catholic Diocese.

Zgoznik's defense, that he believed he was authorized to make the payments to Smith, similar to other payments the Diocese had him make to other employees of the Diocese or its Affiliates (all of which have been acknowledged by the Diocese and the government), will be severely hampered, if not fully foreclosed, by evidence that Smith was receiving payments from an insurance broker (labeled in the Indictment as "Smith's kickback Scheme with an Insurance Brokerage Firm") and that Smith was receiving payments from the Catholic Cemeteries Association (labeled in the Indictment as "Payments to Smith through the Catholic Cemeteries Association "CCA"). These do not involve Zgoznik and it would be impossible for a jury to exclude this evidence that relates on to Smith from a determination of innocence or guilt of Zgoznik. Further, evidence regarding the preparation and filing of Smith's tax returns has nothing to do with Anton Zgoznik.

Given the voluminous and complex evidence that the jury will already have to sift through in this case, coupled with the allegations of other alleged wrongdoings by defendant Smith, it would be "almost impossible for the jury to separate evidence as it relates to each defendant when determining each defendant's innocence or guilt" and, therefore, severance is required in this case. *United States v. Paul*, 150 F.R.D. 696 (DC SD FL 1993).

In *Paul*, a three defendant financial fraud case, in which one of the defendants was not charged in every count, the court granted motions for severance for two defendants, effectively

granting a separate trial for each defendant.

In that case, one defendant, Berry, was charged in only 22 out of 100 counts, while his co-defendant Paul was charged in all 100 counts. Berry's motion for severance was granted on two bases. First, under Rule 8(b) as he was not charged in and had no connection with the other counts. *Paul*, at 696. Second, the court found that, due to the apparent disparity between the number of counts against Paul as compared with those against Berry and the additional evidence that would be required against Paul that would negatively effect Berry, the Court was concerned "whether any jury would be able, or even willing, to intelligently and thoroughly deliberate over the enormous volume of evidence expected in a single trial of this action." *Paul*, at 699; *citing, United States v. Andrews*, 754 F.Supp. 1161 (ND Ill. 1990). The court went on to point out that:

"a single jury would be required to make almost a gross of separate decisions of guilt or innocence after a long and arduous trail. Much of the relevant evidence would have been introduced and stored in the jury's collective mind for many months—and a good deal of it introduced only as to certain defendants of certain charges."

Paul, at 699, *citing, United States v. Gallo*, 669 F.Supp. 736 (ED NY 1987)(emphasis supplied).

The court ultimately found that, the existence of the other charges and conduct on the part of Paul if not severed for purposes of trial, would permit the jury to impermissibly and prejudicially consider such evidence against Berry as well." *Paul*, at 699-700.

Here the government is going to introduce evidence against defendant Smith that has nothing to do with Anton Zgoznic, but will be similar of similar import with relation to defendant Smith. The jury will hear all of it and it would be unreasonable to expect the jury to keep separate the evidence as between Smith and Zgoznic. This will unfairly prejudice Zgoznic and deprive him of a fair trial. Accordingly, the Court should grant Defendant Anton Zgoznic's

motion for severance and grant him a separate trial,

III. The Court Should Sever the Tax Counts from the Fraud Counts in his Case or Sever the Tax Counts from the Fraud Counts Against Him and Defendant Smith.

To the extent that Defendant Smith's Motion to sever the Tax Counts seeks to sever the tax counts against Mr. Zgoznic from his case and/or seeks to sever all of the tax counts from the fraud counts against either Mr. Zgoznic and Mr. Smith, Mr. Zgoznic joins in that motion.

CONCLUSION

For the foregoing reasons, the Court is urged to grant Defendants' Motion for Severance of Defendants and/or Severance of Counts.

Respectfully submitted,

/s/ J. Scott Broome

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CERTIFICATE OF SERVICE

A true copy of the foregoing Motion for Severance of Defendants and/or Severance of Counts was filed via the Court's electronic filing system and will be served upon the persons listed therein.

/s/ J. Scott Broome
J. Scott Broome