

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

UNITED STATES OF AMERICA)	
)	DOCKET NO. 3:06-CR-74 (Britt)
v.)	
)	
(1) HOWELL WAY WOLTZ)	GOVERNMENT’S OPPOSITION TO
(4) VERNICE CHAITAN WOLTZ)	DEFENDANTS’ MOTION TO SEVER
_____)	

COMES NOW the United States of America, by and through Gretchen C.F. Shappert, United States Attorney for the Western District of North Carolina (Matthew T. Martens and Kurt W. Meyers, Assistant United States Attorneys, appearing), and hereby opposes Defendants’ motion for severance.

PRELIMINARY STATEMENT

The Bill of Indictment properly joins the tax conspiracy and CFTC obstruction charges because they are both part of a common scheme to allow wealthy U.S. citizens to evade taxes using an offshore “dual trust structure” -- undetected by the Government. The Bill of Indictment clearly alleges this connection by, among other things, charging Vernice Woltz with obstructing the CFTC investigation by lying about the “dual trust structure” to the CFTC and Howell Woltz with lying to the CFTC about the credit card used by Sterling’s wealthy tax clients to repatriate their offshore funds. More generally, the Indictment charges that the obstruction hampered the CFTC from determining the nature of the Sterling entities’ business.

Nor will Defendants suffer undue prejudice from joinder. They have not made a “particularized showing” of the testimony they would give but for the joinder, as the Fourth Circuit requires. Nor have they shown other cognizable prejudice. Evidence of the CFTC obstruction would be relevant at their tax trial to show consciousness of guilt, and evidence of the tax conspiracy would be relevant at their CFTC conspiracy trial to show motive.

PROCEDURAL BACKGROUND

On April 4, 2006, the grand jury returned a Bill of Indictment charging Defendants Howell Woltz and Ricky Graves with offenses relating to obstructing and hampering the functions of the IRS (Counts One and Two), Samuel Currin with various offenses relating to obstructing the grand jury (Counts Three through Eight), and Howell and Vernice Woltz with perjury and obstruction relating to the CFTC investigation (Counts Nine through Thirteen). On September 22, 2006, Defendant Currin filed a plea agreement, disposing of Counts Three through Eight in the Bill of Indictment.¹

On August 21, 2007, Defendant Graves filed a motion to sever his trial from the trial of Defendants Howell and Vernice Woltz pursuant to Fed. R. Crim. P. 14 (Docket #63). The Government opposed. (Docket #115.) Now, Defendants Howell and Vernice Woltz argue that the Court should sever Counts One and Two from Counts Nine through Thirteen pursuant to Fed. R. Crim. P. 8(a) and 14(a). (Dockets #143, 148.)² Trial commences April 2, 2007.

FACTUAL BACKGROUND

The Government incorporates by reference the Factual Background set forth in its response to Graves' motion to sever (Docket #115). That discussion lays out in detail the connection between the tax conspiracy and the conspiracy to obstruct the CFTC. In summary, Graves and Howell Woltz promised their tax clients privacy and the ability to frustrate any governmental inquiry into their offshore dealings. This was important because the tax conspiracy was, as Graves put it, "rel[ying] to some degree on the IRS never finding out about

¹ The Government incorporates by reference the procedural background set forth in its response to Defendant Graves' motion to dismiss. (Docket #83.)

² If all of these motions to sever were granted, the Court would conduct three trials in this matter rather than one. It would try Graves alone on Counts One and Two. The Court would then try Howell Woltz alone on Count One. Finally, the Court would try Howell and Vernice Woltz together on Counts Nine through Thirteen.

it.” He told his tax clients not to worry, however. The Government would have difficulty “connect[ing] the dots” because Graves was “comfortable enough with that group down there [Sterling] that privacy is utmost to their existence.” Indeed, Graves promised his tax clients, “Sterling’s not gonna answer a subpoena. They’re not coming to testify.”

The CFTC obstruction fulfilled this promise. As alleged in the Bill of Indictment, the CFTC obstruction hampered the Government from determining, *inter alia*, “the source of the funds” held by the Sterling entities, and “what the nature of the Sterling entities’ business was.” (Indictment at ¶41.) Thus, Defendant Vernice Woltz lied to the CFTC when they asked her about the “dual trust structure,” claiming she “had no idea” what the “tax benefits” of setting up the two trusts might be. (Indictment at ¶48.) Further, she evaded and refused to answer the CFTC’s subpoenas -- just as Graves had promised his tax clients.

Likewise, the CFTC obstruction hampered the Government from learning the true facts about Sterling’s use of an offshore credit card to carry out the tax conspiracy, as discussed in Paragraphs 21, 24, and 53B of the Bill of Indictment. This credit card allowed the conspirators’ U.S. tax clients to exercise control over and repatriate offshore funds to the United States undetected. As Defendant Howell Woltz explained to the IRS undercover agent on October 19, 2004, the card would allow the IRS agent to access his money offshore and “take out fifty-thousand a day, a hundred thousand a day . . . it’s up to you.”

A mere seven weeks later, on December 10, 2004, Defendant Howell Woltz lied about the credit card to the CFTC, in accordance with his promise to his tax clients. As alleged in Count Nine of the Bill of Indictment, the CFTC asked during his deposition, “[d]id you have any involvement with the credit card business through any Sterling entities?” Defendant Howell Woltz falsely replied, “no.” (Indictment at ¶74.) The other conduct alleged in Counts Nine

through Thirteen of the Bill of Indictment was similarly designed to frustrate the Government's attempt to obtain information about Sterling's network of offshore companies.

STANDARD OF REVIEW

The decision whether to deny a motion to sever "is committed to the district court's discretion." *United States v. Brainard*, 690 F.2d 1117, 1126-27 (4th Cir. 1982). Likewise, "[i]n deciding whether to grant a Rule 14 motion, the district court is given broad discretion" *United States v. Smith*, 44 F.3d 1259, 1266-67 (4th Cir. 1995). "[R]eversal under Rule 14 is required only if the defendant shows that requiring him to defend against the joined offenses in the same trial resulted in 'clear prejudice.'" *United States v. Cardwell*, 433 F.3d 378, 387-88 (4th Cir. 2005).

ARGUMENT

I. JOINDER OF THE TAX AND OBSTRUCTION CHARGES WAS PROPER UNDER RULE 8(A)

A. Joinder of All Offenses is Favored

The Fourth Circuit has been clear that "Rule 8(a) permits *very broad joinder* because of the efficiency in trying the defendant on related counts in the same trial." *United States v. Cardwell*, 433 F.3d 378, 385 (4th Cir. 2005) (quotation omitted) (emphasis added). As courts have explained, "[m]ultiple trials are unfair to both the government and the accused. A prosecution is expensive and time-consuming, for the government and the court." *United States v. McGrath*, 558 F.2d 1102, 1106 (2d Cir. 1977); *see United States v. Niederberger*, 580 F.2d 63, 66 (3d Cir. 1978) ("The obvious purpose of Rule 8(a)'s liberal joinder provision is to promote judicial and prosecutorial economy by the avoidance of multiple trials."); *United States v. Dennis*, 625 F.2d 782, 801-2 (8th Cir. 1980) ("Judicial economy and legitimate public interests favor a joinder of all offenses against the accused.").

B. The Tax and Obstruction Counts Constitute Parts of a Common Scheme or Plan

According to Federal Rule of Criminal Procedure 8(a), “[t]wo or more offenses may be charged in the same indictment if based on ‘two or more acts or transactions connected together or constituting parts of a common scheme or plan.’” *Brainard*, 690 F.2d at 1126-27 (quoting Fed. R. Crim. P. 8(a)). The Bill of Indictment here alleges such a common scheme or plan, making joinder proper under Rule 8(a). This common scheme or plan was to allow U.S. citizens to evade taxes through the use of an offshore “dual trust structure” without detection by the Government. As noted above, the CFTC obstruction scheme charges Vernice Woltz with lying to the CFTC about whether she knew about the “dual trust structure,” and whether she understood the tax benefits of the “dual trust structure.” (Indictment at ¶48.) It likewise charges Howell Woltz with lying to the CFTC about the credit card used in the tax conspiracy. (Indictment at ¶¶ 21, 24, 53, and 74.) Overall, the CFTC obstruction hampered the Government from determining, *inter alia*, “the source of the funds” held by the Sterling entities, and “what the nature of the Sterling entities’ business was.” (Indictment at ¶41.)

It is well-established that joinder is proper where, as here, “the purpose of the alleged obstruction of justice was to prevent [the Government] from adducing proof of the underlying scheme.” *United States v. Weiss*, 491 F.2d 460, 467 (2d Cir. 1974). Thus, in *United States v. Brainard*, 690 F.2d 1117 (4th Cir. 1982), the Fourth Circuit held that the Government had properly joined a charge of making a materially false statement to the SEC with substantive mail fraud counts when “the false statements were intended to . . . protect the fraudulent scheme” by preventing the SEC from uncovering that a co-conspirator was involved in businesses used in the mail fraud scheme. *Id.* at 1126-27. The same occurred here, where Defendant Howell Woltz

lied to the CFTC to prevent them from learning that Jeremy Jaynes, a tax client and business partner, was involved in Sterling Casualty & Insurance and Sterling Bank. (Indictment at ¶74.)

A host of other cases have recognized that joinder is proper when perjury or obstruction charges are, as here, designed to conceal or further an underlying criminal conspiracy. *See United States v. Altomare*, 625 F.2d 5, 8 n.9 (4th Cir. 1980) (approving joinder where “attempt to obstruct the grand jury process . . . was an effort to prolong the unlawful activities of the enterprise in which [the defendant] and his co-conspirators were engaged.”); *United States v. Jamar*, 561 F.2d 1103, 1105-06 (4th Cir. 1977) (perjury charge was properly joined with charges of unlawful possession and uttering of a stolen United States treasury check, where the perjury occurred in a preliminary hearing on the possession and uttering charges); *United States v. Winn*, 948 F.2d 145, 161 (5th Cir. 1991) (approving joinder where “[u]nquestionably, the perjury charge grew out of [the defendant’s] attempt to avoid implication in and the detection of the conspiracy.”); *United States v. Moeckly*, 769 F.2d 453, 465 (8th Cir. 1985) (holding for purposes of joinder that “perjury and conspiracy charges are sufficiently related because the perjury charges helped conceal [defendant’s] participation in the conspiracy.”).

Although unnecessary, the Court also may look beyond the Bill of Indictment to the Government’s proffer of evidence to determine whether joinder was proper. In *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005), the Fourth Circuit held that “we examine compliance with Rule 8(a) by looking to the allegations in the indictment *and the evidence* produced at trial.” *Id.* at 385 (emphasis added). Although noting a Circuit split on the issue of whether a district court may consider governmental proffers in ruling on motions to sever and declining to weigh in, the Fourth Circuit observed that “if the indictment does not allege a sufficient relationship for

Rule 8(a) purposes, but the evidence at trial reveals that such a relationship exists, it is difficult to see how the defendant could ever be prejudiced by the technical misjoinder.” *Id.* at 385 n.1.

Accordingly, this Court also may approve the Rule 8(a) joinder on the basis of a governmental proffer of the evidence -- evidence which would overwhelmingly show that joinder was proper. Defendants Howell Woltz, Vernice Woltz, and Graves discuss at length on the undercover IRS tapes their ability to frustrate any governmental investigation or inquiry into their offshore business. With regard to the credit card, Vernice Woltz discusses its “privacy” benefits and Howell Woltz explains how the card can be used to repatriate money directly into the country. Likewise, witnesses for the Government will explain how they used their own Sterling cards to repatriate offshore money. To further the tax conspiracy, Howell Woltz lied to the CFTC about the credit card. With regard to the Sterling offshore business in general, the undercover tapes evidence shows that the conspirators believed a necessary component of the tax scheme was to prevent the Government from learning about the “dual trust” system. Indeed, Graves recognized that this need for secrecy from the Government was “thin ice” upon which the tax conspirators were skating, and he thought it important that Sterling would not answer a subpoena. Accordingly, as discussed above, Howell and Vernice Woltz’s obstruction, perjury about the “dual trust system” to the CFTC, and willingness to frustrate or refuse to answer subpoenas directly furthered the tax conspiracy. Thus, although the Court should have no doubt that joinder was proper from the face of the Bill of Indictment, this evidence would make it unmistakable. *Brainard*, 690 F.2d at 1126-27.

II. DEFENDANTS HAVE NOT MET THEIR BURDEN OF SHOWING PREJUDICE UNDER RULE 14

A “defendant making a motion for severance pursuant to Rule 14 has the burden of demonstrating a strong showing of prejudice, and it is not enough to simply show that joinder

makes for a more difficult defense.” *United States v. Goldman*, 750 F.2d 1221, 1225 (4th Cir. 1984). Defendants do not come close to meeting that burden here.

A. Defendants Have Made No “Particularized Showing” Regarding the Testimony They May Wish to Give

As an initial matter, Defendants do not meet their burden of showing that their right to testify would be unduly prejudiced by joinder. The Fourth Circuit has clearly held that, where such an allegation of prejudice is made:

[A] *particularized showing* must be made concerning the testimony the defendant wishes to give and his reasons for remaining silent on the joined counts, so that the court can make an independent evaluation of whether the defendant will be prejudiced to an extent that outweighs the interests favoring joinder.

Jamar, 561 F.2d at 1108 (emphasis added). This “particularized showing” is required because where a “defendant merely alleges that he wishes to offer limited testimony,” the Court has found that “to require a severance based on such an unembellished assertion would effectively strip the trial court of its discretion in the matter of joinder, vesting it instead in the defendant.” *Id.*

Defendants have completely ignored the Fourth Circuit’s mandate on this issue. Defendant Howell Woltz merely protests that “he may otherwise choose to take the stand and testify on his own behalf with respect to the perjury and obstruction charges.” Motion to Sever, at 8. That “unembellished assertion,” 561 F.2d at 1108, is insufficient as a matter of law. As the Fourth Circuit explained again in *United States v. Clark*, 928 F.2d 639 (4th Cir. 1991), a defendant’s failure to “offer the substance of that possible testimony [and] explain why, had he elected to testify, he would have been subjected to additional prejudice than he would have encountered in a separate tax trial,” is sufficient to show no prejudice on this ground. *Id.* at 645. Accordingly, the Court should reject Defendants’ unembellished assertions that their right to testify would be prejudiced by joinder.

B. Defendants Have Shown No Other Undue Prejudice

Defendants have shown no other prejudice sufficient to warrant severance. The Court should note that Defendant Howell Woltz's motion mis-applies *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976). Although Defendant quotes *Foutz* for "three different sources of prejudice," Motion to Sever at 7, *Foutz* clearly states that the analysis quoted by Defendant applies *solely* when the theory of joinder is that the offenses "were of the same or similar character" under Rule 8(a). *Id.* at 736. But the Government offers no such theory of joinder. Rather, joinder is proper here because the tax conspiracy and CFTC obstruction were part of a "common scheme or plan."

Indeed, no prejudice should result from joinder in this case precisely because the joined offense were part of a common scheme or plan. As *Foutz* itself explains, "[w]hen offenses are joined under Rule 8 on the ground that they 'are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan' it is manifest that evidence of one offense would ordinarily be admissible at a separate trial for the other." *Id.* at 737. Accordingly, where, as here, "evidence of one crime is admissible at a separate trial for another, it follows that a defendant will not suffer any additional prejudice if the two offenses are tried together." *Id.* at 736.

Here, evidence of the tax conspiracy would be admissible in the CFTC obstruction trial to show motive, and evidence of the CFTC obstruction would be admissible in the tax trial to show consciousness of guilt. *Brainard*, 690 F.2d at 1126-27 (finding no prejudice because the "concealment charged . . . would in any event have been admissible in a separate mail fraud prosecution to show intent to defraud."); *United States v. Berardi*, 675 F.2d 894, 900 (7th Cir. 1982) ("evidence of [the defendant's] involvement in the alleged extortion and mail fraud tended to establish a motive for the obstruction of justice, and evidence of his efforts to influence [the

witness'] testimony tended to establish [the defendant's] guilty consciousness of the illegal payoffs.”). This fact eliminates any Rule 14 argument for severance since Defendants would be faced by the same prejudice even if the motion to sever were granted -- the only difference being that Defendants would face that prejudice in two different trials. *United States v. Cole*, 857 F.2d 971, 974 (4th Cir. 1988) (holding that “possibility of prejudice is greatly diminished where, as in this case, the evidence of the joined crimes would be mutually admissible for legitimate purposes in separate trials for each offense”) (quotation omitted).

Moreover, the mutual admissibility of the evidence here weighs in favor of joinder for reasons of judicial economy. As the Fourth Circuit explained in *United States v. Jamar*, 561 F.2d 1103 (4th Cir. 1977),

If a separate trial for perjury had been held, much of the damaging evidence against [the defendant] on the possession and uttering counts might nevertheless have been admissible to prove at least her motive and intent to lie This serves not only to mitigate, if not eliminate, any prejudice from joinder . . . but it argues strongly in favor of joinder of all three counts, in the interest of avoiding two trials entailing much of the same proof when one would suffice.

Id. at 1107. Thus, granting a severance would waste the time of the Court and the parties.

Neither the Court nor the litigants should have to hear twice the undercover tapes, the “real” (as opposed to undercover) clients who dealt with Graves and the Woltzes, the frustrated process servers, or the host of other witnesses that would be forced to testify twice if a severance was granted. *See Cole*, 857 F.2d at 974 (“[B]ecause much of the evidence of these crimes would have been admissible in separate trials, the interests of judicial economy were furthered by this joint trial.”).

Finally, the Court may cure any whisper of prejudice with a limiting instruction. “[J]uries are presumed to follow their instructions.” *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). Similarly, “a jury is presumed capable of considering each count separately, and any

prejudice may be cured by limiting instructions.” *United States v. Cope*, 312 F.3d 757, 781 (6th Cir. 2002) (internal citation omitted). Accordingly, if the Court instructs the jury to consider separately that evidence which relates solely to the tax conspiracy and CFTC obstruction counts, the jury will follow that instruction

CONCLUSION

For the foregoing reasons, Defendants’ Motion for Severance should be denied.

RESPECTFULLY SUBMITTED, this 22nd day of January 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January 2007, the foregoing document was served electronically through ECF filing upon Defendants at the following addresses:

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