SeverCounts[2012]

I.

MOTION TO SEVER THE TRIALS OF THE TWO COUNTS IN THE INDICTMENT

CLIENTNAME moves to sever the trial for the two offenses contained in the indictment issued against him on DATE. Count I of the indictment charges CLIENTNAME with knowingly and intentionally importing and bringing into the United States from Mexico approximately QUANTITY kilograms of iodine, contrary to law, in that the merchandise was not presented for inspection, entered, and declared as provided by 18 U.S.C. § 545 and 19 U.S.C. §§ 1433, 1461. Count II of the indictment charges CLIENTNAME with knowingly and intentionally attempting to import methamphetamine into the United States, in violation of 21 U.S.C. §§ 952, 960.

A. The Federal Rules of Criminal Procedure Require Severance in This Case.

Federal Rule of Criminal Procedure 8(a) provides for the joinder of two or more offenses if the offenses are (1) "of the same or similar character[;]" (2) "based on the same act or transaction[;]" or (3) "connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a); see also United States v. Jawara, 474 F.3d 565, 572 (9th Cir. 2007). Thus, the Court must find that one of the conditions listed in Fed. R. Crim. P. 8(a) exists or sever the two counts. See Jawara, 474 F.3d at 574 ("At least one of Rule 8(a)'s three conditions must be satisfied for proper joinder . . . ."). In applying the criteria in Rule 8(a), it is important to note that although the three conditions are "'phrased in general terms, [they] are not infinitely elastic.'" Id. (quoting United States v. Randazzo, 80 F.3d 623, 627 (1st Cir. 1996)); see also United States v. Cardwell, 433 F.3d 378, 385 (4th Cir. 2005) ("Rule 8(a) is 'not infinitely elastic,' however, because unrelated charges create the possibility that a defendant will be convicted based on considerations other than the facts of the charged offense.").

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CLIENTNAME is alleged to have committed two separate offenses on DATE: (1) knowingly and intentionally importing QUANTITY kilograms of iodine, in violation of 18 U.S.C. § 545, because he failed to present the iodine for inspection, enter, and declare it as required by 19 U.S.C. §§ 1433 and 1461; and (2) knowingly and intentionally attempting to import methamphetamine into the United States, in violation of 21 U.S.C. §§ 952 and 960. Joinder of the two charges is legally incorrect and would unduly and unfairly prejudice CLIENTNAME's ability to receive a fair trial, thereby infringing upon his due process rights.

First, the two counts are not of "the same or similar character," and joinder therefore fails Rule 8(a)'s similarity requirement. *See* Fed. R. Crim. P. 8(a). The alleged violation in Count I is CLIENTNAME's failure to present and declare the iodine. This is in contrast to Count II, where the violation centers on the actual item that CLIENTNAME imported, methamphetamine. Count I is a violation of customs duties and is of a regulatory nature. On the other hand, Count II is a drug crime that involves a controlled substance–which is prohibited regardless of the importation element. The counts therefore differ with respect to the "the elements of the statutory offenses . . . [and] the modus operandi of the crimes." Jawara, 474 F.3d at 578. Additionally, given these differences, the "extent of evidentiary overlap" between the counts is slim. Id.

Second, the counts are not "based on the same act or transaction" or on two or more acts or transactions "connected with or constitut[ing] parts of a common scheme or plan." Id. The alleged improper act relating to Count I is CLIENTNAME's failure to present and declare the iodine. On the contrary, in Count II, CLIENTNAME's alleged criminal act was the actual importation of methamphetamine. Because the importation of iodine (absent a failure to present and declare the iodine) is not a violation of law, the Counts are based on different acts. In other words, "'[c]ommission of [count one] [n]either depended upon [n]or necessarily led to the

commission of [count two]; proof of the one act [n]either constituted [n]or depended upon proof of the other.'" Id. (quoting United States v. Halper, 590 F.2d 422, 429 (2d Cir. 1978)).

Third, Counts I and II are not connected through "a common scheme or plan." Id. To determine whether the Counts are sufficiently connected together, the Court looks for a "logical relationship between the offenses." United States v. Sarkisian, 197 F.3d 966, 975 (9th Cir. 1999). Although iodine may be used to manufacture methamphetamine, Count II involved the finished product of methamphetamine. Furthermore, nowhere does the indictment allege that the iodine in Count I was part of the manufacturing process for the methamphetamine in Count II. See Jawara, 474 F.3d at 572 (decision regarding joinder must be made solely on allegations in the indictment). Without some connection between the two, there is no "logical relationship" between failing to declare iodine and importing methamphetamine. Sarkisian, 197 F.3d at 975. Therefore, severance is required under Rule 8(a).

Whether joinder is proper under Rule 8 is "determined solely by the allegations in the indictment." United States v. Terry, 911 F.2d 272, 276 (9th Cir. 1990) (emphasis added). While generally joinder is favored, the indictment must still allege some commonality between the joined offenses to warrant joinder. See id. In this case, the indictment completely fails to allege any commonality between the two offenses. The government has made no effort in the indictment to suggest the two counts are (1) of the same or similar character; (2) based on the same act or transaction; or (3) connected together or constituting a common scheme or plan. See Fed. R. Crim. p. 8(a). As a result, the counts are improperly joined, and the Court must order a severance.

B. The Extreme Prejudice to CLIENTNAME That Results from Joinder of the Two Counts Requires Severance in the Interest of Justice.

Even if this Court does not find improper joinder of offenses, it should still sever the trials

for the two charges in the indictment because of the extreme prejudice that CLIENTNAME would suffer if the offenses were tried together. Rule 14 is captioned: "Relief from Prejudicial Joinder," and provides that "[i]f the joinder of offenses . . . 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[.]" Fed. R. Crim. P. 14(a). Severance is warranted under Rule 14 when "'there is a serious risk that a joint trial would . . . prevent the jury from making a reliable judgment about guilt or innocence.'" United States v. Stinson, 647 F.3d 1196, 1205 (9th Cir. 2011) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

The popular perception of iodine is that it is a disinfectant used for treating children's scraped knees and purifying water, not a precursor chemical for the manufacture of methamphetamine. If the two charges are joined in trial, the jury will necessarily know of iodine's use as a precursor chemical in the manufacture of methamphetamine and will undoubtably hold that fact against CLIENTNAME in its consideration of the methamphetamine importation charge. There is a serious and real possibility, then, the jury will be unable "to compartmentalize the evidence" relating to the two counts. Stinson, 647 F.3d at 1205.

The government's theory of prosecution is most likely that CLIENTNAME was a courier of iodine for others who might have intended to use the iodine for illicit purposes. However, there is no evidence to suggest that CLIENTNAME was to manufacture the iodine into a controlled substance. But this is what the jury may improperly assume—to the prejudice of CLIENT NAME—if the counts are not severed, and the jury hears evidence about how iodine is used, or why someone might fail to delcare it at the border. Given this risk of unfair prejudice as a result of the government's charging decision, this Court should sever the trials of the two counts.

C. Precedent Supports Severance of These Two Distinct Offenses.

In United States v. Lewis, the Ninth Circuit acknowledged that "[t]here is 'a high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" 787

F.2d 1318, 1321 (9th Cir. 1986) (quoting United States v. Daniels, 770 F.2d 1111, 1116 (D.C. Cir. 1985)). Thus, the court recognized "[t]he danger that a jury will infer present guilt from prior convictions." Id.

This Court should rely upon the Ninth Circuit's consideration of improper joinder issues as addressed in Jawara, 474 F.3d at 573-79, Sarkisian, 197 F.3d at 975-78, and Bean v. Calderon, 163 F.3d 1073, 1083-86 (9th Cir. 1998). These cases indicate that severance of the iodine charge from the attempted importation of methamphetamine charge is necessary.

In Jawara, the Ninth Circuit held that the it was improper to join the offenses of document fraud related to a personal asylum application and conspiracy to commit marriage fraud to avoid the immigration laws. See 474 F.3d at 569. The offenses did not involve a common scheme or plan because there was no common nexus between the charges and no "discernible link between the two offenses or . . . any overlapping evidence[,]" "[a]side from the subject matter of immigration[.]" Id. at 574. Additionally, the two offenses were not of the same or similar character, because the "indictment allege[d] two different statutory violations requiring proof of different elements." Id. at 578.

Similarly, in Sarkisian, the Ninth Circuit held that joinder in the same indictment of offenses of extortion and trafficking in stolen auto parts was error because there was "not a sufficient logical relationship between them" — it was "not an instance where one criminal activity naturally flow[ed] from separate criminal conduct." 197 F.3d at 976.

One year earlier, in Bean, the Ninth Circuit reversed a conviction resulting from misjoined counts. See 163 F.3d at 1083-86. There, the petitioner was charged in state court with two separate murders that occurred three days apart. See Bean, 163 F.3d at 1075-76. Over his objection, the trial court consolidated the two charges in one trial. See id. The Ninth Circuit held

that trying the two charges together violated due process. See id. at 1083. It found there is a "'high risk of undue prejudice whenever . . . joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible.'" Id. at 1084 (quoting Lewis, 787 F.2d at 1322). Further, the court recognized studies establishing "'that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case.'" Id. (quoting Lewis, 787 F.2d at 1322). The court based its finding of prejudice on the facts that: (1) the evidence was not cross-admissible across each count, and (2) the jury may have considered the two charges in concert as reflecting the defendant's modus operandi. See id.

Accordingly, the court observed that the "jury could not 'reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime,'" id. at 1084 (quoting United States v. Johnson, 820 F.2d 1065, 1071 (9th Cir. 1987)), when the state's closing argument and the import of several instructions it heard urged it to do just the opposite. Id. Thus, it found the jury instructions did little to lessen the prejudice from the joinder. While the court affirmed one conviction that was supported by "strong" evidence, it found conviction on the other murder, robbery, and burglary counts violated due process and therefore reversed. Id. at 1085-86.

Here, the evidence from the importation offenses would not be cross-admissible had the government chosen to charge them separately. The offenses do not have common physical evidence, except for—perhaps—the vehicle seized, nor do they have the same statutory elements. Thus, like in Bean, the jury, even if instructed to do otherwise, could not compartmentalize the evidence as to each offense and would likely deduce guilt for one offense from inadmissible evidence of the other. Admitting evidence of both charges in one trial allows the jury to

improperly infer that there was a common scheme, when nothing of the sort has even been alleged. Moreover, while both charges relate to importation across the border, there similarity ends there, and "[t]o extend the [joinder] rule so broadly would lead to absurd results and render the 'same or similar' test without meaningful limits." Jawara, 474 F.3d at 579.

Like in Jawara, Sarkisian, and Bean, misjoinder of the two importation charges here unquestionably would prejudice CLIENTNAME by its "'substantial and injurious effect or influence in determining the jury's verdict'" as to each alleged charge. See United States v. Lane, 474 U.S. 438, 449 (1986) (quoting Kotteakos v. United States, 328 U.S. 750, 775-76 (1946)).