SeverDefendants[2012]

CLIENTNAME'S CASE SHOULD BE SEVERED

This Court has authority to sever CLIENTNAME's case from that of her co-defendant under either Rule 8(b) or Rule 14 of the Federal Rules of Criminal Procedure.

Rule 8(b) provides that joinder of defendants may be proper:

> The indictment or information may charge 2 or more defendants 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.

Fed. R. Crim. P. 8(b). Where defendants have been improperly joined, however, and a joint trial would be manifestly prejudicial, severance is mandatory under Rule 8(b). See United States v. Donaway, 447 F.2d 940, 943 (9th Cir. 1971).

Rule 14(a) provides for the severance of defendants under certain conditions:

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

Fed. R. Crim. P. 14(a). Although a motion for severance is addressed to the trial court's discretion, see, e.g., United States v. Seifert, 648 F.2d 557, 563 (9th Cir. 1980), the granting of such a severance is warranted "'if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants . . . .'" United States v. Stinson, 647 F.3d 1196, 1205 (9th Cir. 2011) (quoting Zafiro v. United States, 506 U.S. 534, 539 (1993)).

A. The Trial of CLIENTNAME Should Be Severed Because It Has Been Misjoined.

Pursuant to Rule 8(b), "'when multiple defendants are involved, joinder is improper unless all offenses arise out of the same series of acts or transactions." United States v. Sarkisian, 197 F.3d 966, 975 (9th Cir. 1999) (quoting United States v. Martin, 567 F.3d 849, 853 (9th Cir. 1977)). In considering whether a particular set of events constitutes a "series of acts or transactions," the

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Ninth Circuit has stated that the term "transaction" has a flexible meaning. See United States v. Ford, 632 F.2d 1354, 1371 (9th Cir. 1980), overruled on other grounds by United States v. De Bright, 730 F.2d 1255, 1259 (9th Cir. 1984) (en banc). In practice, the determination of whether multiple offenses joined in an indictment constitute a "series of acts or transactions" turns on "the degree to which they are related," Satterfield, 548 F.2d at 1344,, and whether there is a "'logical relationship' between the offenses." Sarkisian, 197 F.3d at 975-76.

Mere factual similarity of events will not suffice; rather, there must be a "logical relationship . . . shown by the existence of a common plan, scheme, or conspiracy." Ford, 632 F2d at 1381-72. Alternatively, "[a] 'logical relationship' may also be shown if 'the common activity constitutes a substantial portion of the proof the joined charges.'" Sarkisian, 197 F.3d at 976 (quoting United States v. Vasquez-Velasco, 15 F.3d 833, 844 (9th Cir. 1994)). While each defendant need not be charged in every count of an indictment or have participated in every act to justify joinder, acts alleged to be part of the "same series" of transactions must "evince a more substantial relationship" than that required to meet the "same or similar character" test for joinder of offenses. United States v. Adams, 581 F.2d 193, 197 (9th Cir. 1978).

The Ninth Circuit has stated that the controlling standards for joinder of defendants are best understood by contrasting them with the standards of joinder of offenses in a single defendant trial under Rule 8(a). See id. The Court has described the operation of the rule as follows:

> Under Rule 8(b), the sole basis for joinder of charges against multiple defendants is that the defendants "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." It is irrelevant that Rule 8(a) permits charges "of the same or similar character" to be joined against a single defendant, even though they do not arise out of the same or connected transactions. Charges against multiple defendants may not be joined merely because they are similar in character . . . and even dissimilar charges may be joined against multiple defendants if they arise out of the same series of transactions constituting an offense or offenses.

United States v. Roselli, 432 F.2d 879, 898 (9th Cir. 1970) (citations omitted).

In this case, however, the two co-defendants are merely [insert distinguishing facts here]. Such facts, asserted by the Government, are insufficient to justify joinder of the co-defendants. The purpose of Rule 8(b) is to balance a need to avoid the prejudice that results from joining multiple defendants for trial with the need to maintain the efficient administration of justice. These objectives are best served by joinder when "'the common activity constitutes a substantial portion of the proof of the joined charges.'" Martin, 567 F.2d at 853.

Because the Government's showing of proof is insufficient to justify joinder under the same "series of transactions," the trial of CLIENTNAME should be severed from that of her co-defendant.

B. The Trial of CLIENTNAME Should Be Severed Due to Prejudicial Joinder.

Rule 14 provides relief whenever a defendant may be prejudiced by joinder of defendants in an indictment or by joinder for trial altogether. See United States v. Hernandez-Orellana, 539 F.3d 994, 1001 (9th Cir. 2008). In exercising its discretion under Rule 14, a district court must consider four factors, including:

> "(1) whether the jury may reasonably be expected to collate and appraise the individual evidence against each defendant; (2) the judge's diligence in instructing the jury on the limited purposes for which certain evidence may be used; (3) whether the nature of the evidence and the legal concepts involved are within the competence of the ordinary juror; and (4) whether [defendants] could show, with some particularity, a risk that the joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."

Hernandez-Orellana, 539 F.3d at 1001 (quoting United States v. Sullivan, 522 F.3d 967,982 n.9 (9th Cir. 2008)).

Applying these four factors, it is clear that a joint trial would greatly prejudice

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CLIENTNAME. First, CLIENTNAME and her co-defendant will offer irreconcilable, mutually exclusive defenses. Second, CLIENTNAME will be denied access to the exculpatory testimony of her co-defendant, whom she would be able to call to testify at a separate trial. Third, CLIENTNAME will be denied her Sixth Amendment rights of the Confrontation Clause and cross-examination. Finally, if tried together with the co-defendant, the jury may wrongly find CLIENTNAME guilty by association, impinging on CLIENTNAME's Due Process Rights. For these reasons, CLIENTNAME's case must be severed from that of her co-defendant.

1. Without Severance, the Defendants Will Offer Mutually Exclusive Defenses

Severance may be granted where the defendant "show[s] that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." United States v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996) (citing United States v. Sherlock, 962 F.2d 1349, 1363 (9th Cir. 1989)).

The Ninth Circuit has recognized that "'[t]he prototypical example is a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime.'" United States v. Tootick, 952 F.2d 1078, 1081 (9th Cir. 1991) (quoting United States v. Holcomb, 797 F.2d 1320, 1324 (5th Cir. 1986)). "Mutual exclusivity [also] may exist when 'only one defendant accuses the other, and the other denies any involvement.'" Id. (quoting United States v. Romanello, 726 F.2d 173, 177 (5th Cir. 1984)); see also United States v. Mayfield, 189 F.3d 895, 899-900 (9th Cir. 1999). For example, in Tootick, the co-defendants, Mr. Tootick and Mr. Frank, each claimed that the other acted alone in stabbing Mr. Hart, the victim. See 952 F.2d at 1081. There was no dispute that all three men were present at the scene, and that Mr. Hart did not injure himself. See id. Mr. Frank testified that he watched in horror as Mr. Tootick stabbed

Mr. Hart. See id. Mr. Tootick, who did not testify, presented a defense that he passed out or was asleep throughout the episode. See id. Thus, their defenses contradicted each other such that "the acquittal of one necessitate[d] the conviction of the other." Id. The joint trial resulted in substantial prejudice to both defendants because their mutually exclusive defenses prevented the jury from determining the "guilt or innocence of the defendants on an individual and independent basis." Id. at 1083. The Ninth Circuit held that the district court abused its discretion in refusing to sever, and reversed both defendants' convictions. See id. at 1085.

Here, as in Tootick, severance of CLIENTNAME's case from a joint trial is appropriate. [Insert facts] Under these circumstances, severance of the cases is appropriate to ensure that the jury can "assess the guilt or innocence of the defendants on an individual and independent basis." Id. at 1083.

2. Without Severance, CLIENTNAME Will Have No Right to Call the Co-Defendant to Testify

A joint trial precludes CLIENTNAME from being able to elicit any favorable testimony from the co-defendant. CLIENTNAME would have no right to call the co-defendant as a witness, and might cause that co-defendant to invoke his Fifth Amendment privilege against self-incrimination in front of the jury. See United States v. Vigil, 561 F.2d 1316, 1318 (9th Cir. 1977) (per curiam).

At a separate trial, however, even if a co-defendant would not voluntarily testify, CLIENTNAME has a constitutional right to call him as a witness. See Bruton v. United States, 391 U.S. 123, 126-27 (1968). To ensure the invocation of this right, severance must be granted. Severance to facilitate the testimony of a co-defendant is proper if the three-element test of Rule 14 is satisfied. Under the test, a defendant must show that (1) the defendant would call the co-defendant to the

stand in the severed trial, (2) that the co-defendant would testify, and (3) that the testimony would be favorable to the severing party. See United States v. Reese, 2 F.3d 870, 892 (9th Cir. 1993). If the current cases were severed, CLIENTNAME could and would call her co-defendant to testify.

If a co-defendant is called as a witness and refuses to answer questions based upon his Fifth Amendment privilege against self-incrimination, CLIENTNAME can seek to compel that testimony by requesting immunity as to in-court statements. At that time, CLIENTNAME could seek an order requiring the government to grant use immunity to the co-defendant's testimony under 18 U.S.C. § 6003(b)(1). Such use of this statute is compelled by the Sixth Amendment's guarantee of compulsory process and by the Fifth Amendment's due process considerations of fairness. See United States v. Leonard, 494 F.2d 955, 985-86 n.79 (D.C. Cir. 1974) (Bazelon, C.J., concurring in part and dissenting in part).

Even if statutory immunity is not appropriate, the Court can confer immunity independent of the prosecutor's statutory power because CLIENTNAME would be "prevented from presenting exculpatory evidence which is crucial to [her] case" if the trial court did not confer immunity. Government of the Virgin Islands v. Smith, 615 F.2d 964, 969-70 (3d Cir. 1980); see United States v. Alessio, 528 F.2d 1079, 1082 (9th Cir. 1976). CLIENTNAME's rights to compulsory process and to due process of law entitle her to a separate trial if the co-defendant refuses to testify at a joint trial.

3. Without Severance, CLIENTNAME's Sixth Amendment Confrontation And Cross-Examination Rights Are Nullified.

The Sixth Amendment guarantees the accused the rights to confront and to cross-examine witnesses against him. Lilly v. Virginia, 527 U.S. 116, 123-24 (1999); Bruton, 391 U.S. at 126. When the government seeks to introduce an accomplice's hearsay statements against the accused,

this Court must decide whether the Sixth Amendment permits the government to dispense with the accused's usual guarantee of confrontation and cross-examination. Lilly, 527 U.S. at 124. This Court has the power to sever CLIENTNAME's trial, and thus preserve her rights of confrontation and cross-examination. U.S. Const. amend. VI; Fed. R. Crim. P. 14.

In Bruton, the Supreme Court held that the admission in a joint trial of a co-defendant's confession, which implicated the defendant, violated the defendant's Sixth Amendment right to confront and cross-examine when the co-defendant, whose statement was introduced, did not testify. 391 U.S. at 126. The Supreme Court has repeatedly reaffirmed the validity of Bruton's Sixth Amendment analysis. See, e.g., Richardson v. Marsh, 481 U.S. 200, 206 (1987) (holding that "where two defendants are tried jointly, the pretrial confession of one cannot be admitted against the other unless the confessing defendant takes the stand.").

Here, the government may seek to introduce statements by the co-defendant that mention CLIENTNAME. Any such statements made by the co-defendant are inadmissible, prejudicial hearsay and cannot be admitted at a joint trial where CLIENTNAME has no opportunity to cross-examine the co-defendant regarding that statement. Admission of such a statement in a joint trial violates CLIENTNAME's Sixth Amendment right to confront and cross-examine witnesses against her. The Supreme Court has stated several times that "'the naive assumption that prejudicial effects can be overcome by instructions to the jury'" is known to "'all practicing lawyers [] to be unmitigated fiction.'" Bruton, 391 U.S. at 129 (quoting Krulewitch v. United States., 336 U.S. 440, 453 (1949) (Jackson, J., concurring)). The Court in Bruton held that instructing the jury to disregard the evidence was inadequate to remedy the significant prejudice inherent in such evidence. Id. at 135-36. The Court reaffirmed this principle in Cruz v. New York, 481 U.S. 186, 192-93 (1987), holding that an instruction to disregard such evidence is deficient when a co-

defendant's confession, which directly incriminates the defendant, is admitted into evidence without the co-defendant being compelled to testify. For this reason, counsel requests severance in this case.

4. Without Severance, the Jury May Find CLIENTNAME Guilty by Association, Impinging on CLIENTNAME's Due Process Rights.

It is important to note that "[n]either mere association and activity with a co-conspirator nor even knowledge of the conspiracy's existence . . . meets the standards we require to link a defendant to the conspiracy charged." United States v. Peterson, 549 F.2d 654, 658 (9th Cir. 1977). "Mere association and activity with a conspirator does not meet the test." United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (citation omitted). A jury ordinarily experiences great difficulty in following admonishing instructions and in keeping separate evidence that is relevant only to co-defendants. In most cases,

> [a] co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.

Krulewitch, 336 U.S. at 454 (Jackson, J., concurring). If a jury cannot compartmentalize the evidence that pertains to each defendant, the trial court runs the risk of allowing a conviction based upon a defendant's association with incriminating evidence alone.

The jury cannot reasonably be expected to compartmentalize the evidence as it relates to CLIENTNAME alone. Cf. United States v. DeRosa, 670 F.2d 889, 898-99 (9th Cir. 1982) (noting that when connections between co-defendants are limited and only implicit, the jury may more "easily compartmentalize the evidence"). Since CLIENTNAME will likely be prejudiced by evidence admissible only against her co-defendant, her rights can only be protected by severance of the defendant.