UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Docket No. 2:18-cr-63-GZS
	)	
MR, LLC	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR SEVERANCE

The United States of America, by and through its attorneys, Halsey B. Frank, United States Attorney for the District of Maine, and David B. Joyce, Assistant United States Attorney, respectfully objects to Defendant MR, LLC's Motion for Severance (ECF No. 316). For the reasons set forth below, the United States requests that the motion be denied without a hearing.

BACKGROUND

The Superseding Indictment contains 41 counts. Count 12 charges Defendants Brian Bilodeau and MR, LLC, with manufacturing a controlled substance. Count 25 charges Defendant MR, LLC, with maintaining a drug involved premises. Count 30 charges Defendants Bilodeau and MR, LLC, with a promotional money laundering conspiracy occurring between November 15, 2016, and July 10, 2017.

Defendant MR, LLC, now asserts that it is improperly joined with co-defendants and should be severed.

LEGAL STANDARDS

Rule 8(b) of the Federal Rules of Criminal Procedure provides:

> 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. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b).

This rule allows the Government to "charge serial transactions, and indict persons jointly, on the basis of what it reasonably anticipates being able to prove against the defendants collectively, measured as of the time the indictment is handed up." United States v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991). "[A] rational basis for joinder of multiple counts should be discernible from the face of the indictment." Id. A conspiracy count "can forge the needed linkage." Id. at 307. In a multi-defendant case, "it is not a necessary precondition to joinder that a defendant be involved in each offense charged in an indictment; joinder is proper as long as there is some common activity binding the objecting defendant with all the other indictees and that common activity encompasses all the charged offenses." Id. at 307.

Rule 14(a) of the Federal Rules of Criminal Procedure provides:

> 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.

There is a strong preference for trying together defendants who have been properly joined in a single indictment. Zafiro v. United States, 506 U.S. 534, 537 (1993). Trial judges have considerable discretion in deciding whether a severance is warranted. Natanel, 938 F.2d at 308. Obtaining severance is "a difficult battle for a defendant to win" even "[u]nder the best of circumstances." Id. (internal quotation marks and citations omitted). A defendant is not entitled to a severance simply because he claims he will be prejudiced by a joint trial. United States v. Richardson, 515 F.3d 74, 81 (1st Cir. 2008) (internal citations omitted). This is because some prejudice results in almost every joint trial and "[g]arden variety prejudice" will not, by itself, warrant severance. Id. The relatively minor role in the crime that a particular defendant played also does not normally mean he is entitled to severance. United States v. Welch, 15 F.3d 1202,

1210 (1st Cir. 1993). Neither is severance mandated even in cases where "large amounts of testimony are irrelevant to one defendant...." United States v. Boylan, 898 F.2d 230, 246 (1st Cir. 1990). Nor is a defendant entitled to severance merely because he might have better chances of acquittal if he were tried alone. Id. Rather, the burden is on the defendant to make a showing of prejudice that is "strong" and "convincing" and establishes that a joint trial would be fundamentally unfair. Richardson, 515 F.3d at 81.

ARGUMENT

A. Joinder of Counts Is Proper

In this case, every count in the indictment charging Defendant MR, LLC, relates to cultivation and distribution of marijuana and associated financial activities. The Government anticipates proving that Defendant Bilodeau was a member of the Bellmore Drug Trafficking Organization ("DTO") from its early days until at least the fall of 2017 and corporate Defendant MR, LLC, conspired with the DTO in 2016 and 2017.

Defendant's primary argument that the Superseding Indictment charges two conspiracies – the Bellmore DTO conspiracy and a second conspiracy between Bilodeau and MR, LLC. This is incorrect. Count 25 charges MR, LLC, with maintaining a drug premises during the course of the Count One conspiracy. Count 30 alleges conduct that occurred during the course of the Count One conspiracy, which the Government expects to prove was in furtherance of this conspiracy. Specifically, this Count involves the acquisition of a property used to cultivate marijuana in furtherance of the conspiracy. The fact that MR, LLC, is not named in Count One is of little consequence. See, e.g., United States v. Azor, 881 F.3d 1, 11 (1st Cir. 2018) ("[T]he government's decision not to charge Appellant as a co-conspirator in Count One does not evidence misjoinder. While a conspiracy charge may provide the required link to render joinder

proper, a particular defendant need not be charged with all crimes alleged in an indictment for the criminal matters to be properly joined."); see also Pacelli v. United States, 588 F.2d 360, 367 (2d Cir. 1978) (holding that joinder is proper when evidence exists of conspiratorial activity, even if the conspiracy is not charged in the indictment); United States v. Scott, 413 F.2d 932, 934-35 (7th Cir. 1969) ("[I]t is not necessary under Rule 8(b) that all the defendants need to be charged in the same count nor need the evidence [to] show that each defendant participated in the same act or transaction."). Furthermore, even if Bilodeau and MR, LLC, formed a separate conspiracy in the fall of 2017, and establish their withdrawal from the Count One conspiracy, the property transaction at issue in Count 30 occurred in late 2016 and the maintaining a drug premises charge in Count 25 begins prior to any fall of 2017 withdrawal. The Government expect to prove that between the fall of 2016 and at least the fall of 2017, the property owned by defendant MR, LLC, was involved in the Count One conspiracy. Joinder, therefore, is appropriate. Any split during the later days of the conspiracy does not absolve conspirators from earlier participation.

Count 12 alleges a substantive offense -- not a conspiracy – resulting from the February 27, 2018, enforcement activity.[1] This offense is of the same nature as other charged offenses and thus are properly joined. See, e.g., Azor, 881 F.3d at 11 ("In order for joinder to be proper, there must be some common "mucilage" or activity between an objecting defendant and the other indictees, such as participation in a common drug distribution scheme. Joinder is proper, however, even when the objecting defendant is only connected to one part of that scheme").

[1] Contrary to Defendant's suggestion, Count 12 does not allege a conspiracy between Defendant Bilodeau and MR, LLC. This is a substantive count naming two defendants.

B. Severance is Not Warranted

a. Severance is Not Required to Avoid Prejudicial Spillover

Defendant MR, LLC, alleges it will be denied a fair trial because evidence inadmissible as to it, will confuse issues and prevent the jury from fairly considering the evidence against MR, LLC, in isolation. This argument fails. It is well established that disparity in the quantity of evidence and of proof of culpability are inevitable in any multi-defendant trial, and by themselves do not warrant a severance. Azor, 881 F.3d at 12 ("Even where large amounts of testimony are irrelevant to one defendant, or where one defendant's involvement in an overall agreement is far less than the involvement of others, we have been reluctant to second guess severance denials.") (quoting United States v. Boylan, 898 F.2d 230, 246 (1st Cir. 1990)); United States v. Levy-Cordero, 67 F.3d 1002, 1007 (1st Cir. 1995) (mere fact that a "minnow" stands trial with a "kingfish," and the government aims most of its ammunition at the kingfish, does not, without more, necessitate separate trials) (citing United States v. O'Bryant, 998 F.2d 21, 26 (1st Cir. 1993)). Although there may be "differences in degree of guilt" of the defendants, that is not sufficient grounds for separate trials. United States v. Aloi, 511 F.2d 585, 598 (2d Cir. 1975). Indeed, a properly joined defendant is not entitled to a separate trial merely because there would be testimony relating to other criminal activities of a codefendant. O'Bryant, 998 F.2d at 25; United States v. Boylan, 898 F.2d 230, 246 (1st Cir. 1990).

Defendant alleges nothing more than "garden variety" prejudice. They cannot establish that the prejudice is so pervasive that it will result in a miscarriage of justice, United States v. Trainor, 477 F.3d 24, 36 (1st Cir. 2007), or deprive them of a fair trial, Richardson, 515 F.3d at 81.

b. Any Evidentiary Issues Are Remedied by Limiting Instructions

There is nothing unusual in this case that cannot be cured by a proper limiting instruction. See United States v. Baltas, 236 F.3d 27, 34 (1st Cir. 2001) (noting appropriate limiting instruction provides adequate safeguard against evidentiary spillover prejudice); see also United States v. Bartlett, No. 2:12-cr-28-GZS, 2013 U.S. Dist. LEXIS 39864, *4-5 (D. Me. Mar. 22, 2013).

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Defendant's motion be denied.

Date: July 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2019, I filed the foregoing response using the CM/ECF system, which will cause a copy to be sent to all counsel of record

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