

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

United States	:	
	:	
v.	:	No. 3:02cr81 (JBA)
	:	
Patrick Triumph	:	

Ruling on Motion for Severance

Defendant Patrick Triumph moves for severance of the counts in the Superceding Indictment pursuant to Rule 8(a) and Rule 14(a). For the reasons discussed below, the motion is granted in part in that Count 40, which charges Mr. Triumph with failure to appear under 18 U.S.C. § 3146(a)(1), is severed from the remaining Counts of the Superceding Indictment.

The Superceding Indictment returned on July 13, 2004 charges the defendant with 38 counts of aiding and abetting the filing of false tax returns, in violation of 26 U.S.C. § 7206(2), with one count of interference with the administration of internal revenue laws, in violation of 26 U.S.C. § 7212, and with one count of failure to appear, in violation of 18 U.S.C. §3146(a)(1). The defendant argues that these offenses were improperly joined under Fed. R. Crim. P. 8(a) and that, in the alternative, relief under Fed. R. Crim. P. 14(a) is appropriate because joinder is prejudicial to him.

The joinder of two or more offenses is permitted if they "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed.R.Crim.P. 8(a). Here, it is evident that Count 39 is part of a common scheme with the counts alleging aiding and abetting the filing of false tax returns, as it focuses on Mr. Triumph's alleged efforts to obstruct the IRS investigation of his preparation of fraudulent income tax returns.¹ See U.S. v. Ruiz, 894 F.2d 501, 505 (2d Cir. 1990) (finding proper joinder under Rule 8(a) where a perjury count focused on defendant's alleged attempts to mislead the grand jury about his participation in the underlying offense).

Likewise, defendant's failure to appear charge is properly joined as part of a common scheme or plan. "Courts have held that a failure to appear charge and the underlying offense are 'connected together' and may be joined under Rule 8(a) if three conditions are satisfied: (1) the charges are related in time; (2) the motive for flight was avoidance of prosecution of the

¹Count 39 alleges that the defendant "did corruptly obstruct and impede, and endeavor to obstruct and impede the due administration of the Internal Revenue Laws and Internal Revenue Service . . . in connection with that agency's efforts to investigate his preparation of individual income tax returns and amended returns by advising, persuading and instructing a third party, Pekah Wallace, to provide false and misleading information to Internal Revenue Service investigators." Superceding Indictment [Doc. # 102] at Count 39.

underlying offense; and (3) custody derived directly from the underlying offense." U.S. v. Martinez, Nos. S2 92 Cr. 839 (SWK), 1993 WL 322768, at * 7 (S.D.N.Y. 1993) (citing United States v. Gabay, 923 F.2d 1536, 1539 (11th Cir. 1991); United States v. Peoples, 748 F.2d 934, 936 (4th Cir. 1984), cert. denied, 471 U.S. 1067 (1985); United States v. Ritch, 583 F.2d 1179, 1181 (1st Cir.), cert. denied, 439 U.S. 970 (1978); United States v. Gambino, 809 F.Supp. 1061, 1072 (S.D.N.Y.1992)). Here, the failure to appear count alleges that Mr. Triumph, having been charged with the underlying offense of aiding and abetting the filing of false tax returns, and granted pre-trial release, failed to appear in court when he was scheduled to appear in connection with the underlying charges. Because the failure to appear is related in time to his arrest on the tax charges, because the underlying tax charges led to his custody and subsequent pre-trial release proceeding, and because the reasonably inferred motive is the avoidance of prosecution for the underlying offense, joinder of the failure to appear charge is proper as part of a common scheme under Rule 8(a).

The defendant also argues that the joinder of these counts is prejudicial, and therefore should be severed pursuant to Rule 14(a). Even if joinder is permissible under Rule 8(a), Rule 14(a) provides that "[i]f 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, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). "While the mere fact that juries are apt to regard with a more jaundiced eye a person charged with two crimes than a person charged with one does not call for relief under Rule 14, trial courts must be alert to the danger that . . . the jury may use the evidence cumulatively; that is, that although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." U.S. v. Werner, 620 F.2d 922, 929 (2d Cir. 1980) (citations and internal quotation marks omitted). However, "[w]hen the accused's conduct on several separate occasions can properly be examined in detail, the objection disappears, and the only consideration is whether the trial as a whole may not become too confused for the jury." Id. (citation and internal quotation marks omitted).

Here, the Court finds no prejudice meriting severance of Count 39, as it relates to a specific instance of obstruction or interference with the Internal Revenue Service investigation of the defendant, and there is no indication that trying this Count with the counts involving aiding and abetting the filing of false tax returns will confuse the jury, or that the jury will use the evidence cumulatively or as impermissible propensity evidence. According, defendant's motion to sever Count 39 is denied.

The Court grants defendant motion for severance as to Count 40, however, primarily to afford the defendant an opportunity to develop his insanity defense and to give the Government adequate opportunity to have him medically examined for rebuttal. The failure to appear charge was added in the Superceding Indictment returned on July 13, 2004. At jury selection on August 4, 2004, defendant waived his right to counsel, and the Court granted his motion to represent himself and ordered that any pre-trial motions be filed by August 11. On August 7, Mr. Triumph filed timely notice of his intention to raise an insanity defense, which he clarified at the pre-trial conference on August 24, 2004, was limited to the failure to appear charge in Count 40. At this late date, with trial scheduled to begin on August 25, 2004, there is no time for defendant to properly prepare such a defense or for the Government to rebut it. Further delay of this trial is unfeasible and inappropriate. A mistrial was declared for defendant's incompetence in February 2004; certification of return to competency was filed on June 29, 2004; a jury has been selected in this case, and evidence is scheduled to begin immediately. The defendant has been detained since his arrest for failure to appear, and the Court's criminal trial schedule would require postponement until November. Moreover, even aside from the prejudice stemming from delay or inadequate preparation time, the presentation of an insanity defense on one count of a

multi-count indictment could be confusing to the jury and ultimately prejudicial to the defendant.

While the Court acknowledges that the basis for finding of prejudicial joinder here is primarily logistics and distinct from the kinds of prejudice typically considered in a Rule 14 motion, Rule 14 does not circumscribe the factors that may be considered in a prejudice evaluation. In U.S. v. Wirsing, 719 F.2d 859 (6th Cir. 1983), the Sixth Circuit considering an analogous case in which defendant's counsel was prepared to go to trial on some counts but not others, the court reversed the district court's refusal to sever the counts under Rule 14. As the Sixth Circuit stated:

When it was made clear to the district court that trial counsel was not ready to proceed on the tax evasion charges, the court had an obligation to consider the possible prejudice from the evidence on the conspiracy count being presented in a trial on the tax evasion counts. The court should have considered the complexity of the charges and the possible "spillover" effect from trying the different types of offenses in a joint trial. If the court was concerned with the possibility of violations of the Speedy Trial Act, the court could have easily proceeded to trial on the conspiracy charge immediately while deferring trial on the tax evasion counts until counsel was given a reasonable amount of time for preparation.

Id. at 865.

In light of the above considerations, the Court finds that joinder of Count 40 is prejudicial to the defendant, and orders it severed from the remaining counts in the Superceding Indictment so that its defense can be adequately addressed by

both sides. Nothing in this ruling affects the use of evidence of the defendant's flight in this trial on Counts 1-39 as evidence consciousness of guilt. As well, to satisfy the sentencing requirements of Blakely v. Washington, 124 S.Ct. 2531 (2004), the subject matter may need to be submitted to the jury in the form of a specific advisory interrogatory.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut on this 24th day of August, 2004.