UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**No. S1-4:06CR00337 CEJ/MLM**
v.	)	
	)	
BETONSPORTS PLC, et al.,	)	
	)	
Defendants.	)	
	)	

GOVERNMENT'S RESPONSE TO DEFENDANT PENELOPE A. TUCKER'S MOTION FOR SEVERANCE OF TRIAL FROM ALL CODEFENDANTS

The United States, through counsel undersigned, hereby responds to defendant Penelope A. Tucker's Motion for Severance of Trial from all Codefendants (Doc. #477), and incorporates by reference its previous Response to defendant Monica Lenis's Motion for Severance (Doc. #207), and its previous Consolidated Response to the Motions for Severance filed by defendant Neil Scott Kaplan, Tim Brown, and William Luis Lenis (Doc. #281).

INTRODUCTION

Defendant Penelope A. Tucker has moved for a severance from her codefendants on the ground that she will be prejudiced by what she describes as the "spillover" effect of having to be tried with other persons in a case in which a large portion of the evidence will have nothing to do with her. She adds that she does not believe that the jury will be able to compartmentalize the evidence against her from the evidence presented against her codefendants.

As will be shown below, the grounds raised by Tucker in her motion for severance are not sufficient for this Court to deviate from the established rule that persons who are charged in a conspiracy should be tried together. This Court should deny Tucker's motion for severance because she has not shown why she would be prejudiced by having to participate in a joint trial

with her codefendants.

ARGUMENT

Defendant Penelope A. Tucker has moved this Court to sever her trial from that of her codefendants. Tucker does not allege anywhere in her motion that she was improperly joined with her codefendants under Rule 8(b) of the Federal Rules of Criminal Procedure. Rather, Tucker bases her motion for severance on Rule 14 of the Federal Rules of Criminal Procedure, which permits a court to sever trials if a joinder of offenses or defendants appears to prejudice a defendant or the government. Tucker quotes extensively, but selectively, from Zafiro v. United States, 506 U.S. 534, 539 (1993), where the Supreme Court refused to hold that severance is required when two or more defendants have conflicting defenses. The full quotation from the Supreme Court as to the standard for granting a severance under Rule 14 is, as follows:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a 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. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, the risk of prejudice is heightened. See Kotteakos v. United States, 328 U.S. 750, 774-75, 66 S.Ct. 1239, 1252-53, 90 L.Ed. 1557 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See Bruton v. United States, 391 U.S. 123, 66 S.Ct. 1620, 20 L.Ed.2d 1557 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See e.g., Tifford v. Wainwright, 588 F.2d 954 (CA5 1979) (per curium). The risk of prejudice will very with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in Richardson v. Marsh, less drastic measures, such as limiting instructions, often will suffice to cure any risk of

prejudice. See 481 U.S., at 211, 107 S.Ct., at 1709.

Id. at 539.

It is interesting to note that Tucker does not allege any of the grounds referred to by the Supreme Court in Zafiro as possible grounds for prejudice. She does not state that there is evidence which would not be admissible if she was tried alone, but which would be admissible against a codefendant. She also does not contend that there is exculpatory evidence which would be available to her if tried alone, but would not be available in a joint trial. Nor does she allege that her level of culpability is different from that of other defendants.

Rather, Tucker's main objections to being tried together with her codefendants are that the evidence against them will spillover onto her, and that the jury will not be able to compartmentalize the evidence against her. However, according to the Eighth Circuit, a defendant must make a specific showing that a jury could not reasonably be able to compartmentalize the evidence in order to obtain a severance. United States v. Hively, 437 F.3d 752, 765 (8th Cir. 2006). Courts examine whether the roles played by each of the defendants were sufficiently distinct to enable the jury, on proper instructions, to compartmentalize the evidence against each defendant. United States v. Jones, 880 F.2d 55, 62-63 (8th Cir. 1989); United States v. Finn, 919 F.Supp. 1305, 1324 (D. Minn. 1995), adopted, 911 F.Supp 372 (D. Minn. 1995), aff'd sub nom United States v. Pemberton, 121 F.3d 1157 (8th Cir. 1997), cert. denied, 522 U.S. 1113 (1998).

Tucker has made no showing as to why jury instructions and admonitions to the jury would not be sufficient to enable the jury to compartmentalize the evidence. Tucker has also not stated which specific evidence that will be admitted against her codefendants the jury will not be

able to compartmentalize as to her or any reasons why her role in the conspiracy alleged in Count 1 of the indictment could not be distinguished from the actions of her codefendants.

The Eighth Circuit has rejected the "prejudicial spillover" argument made by Tucker in a number of cases. In United States v. Lueth, 807 F.2d 719, 731 (8th Cir. 1986), one of the defendants contended that the jury would not be able to compartmentalize the evidence which was admissible against a codefendant on a tax charge from the evidence applicable to the moving defendant on drug conspiracy charges. The Eighth Circuit noted how the trial judge had utilized charts identifying the defendants and the counts of the indictment as the evidence was being introduced. In addition, the district court made repeated cautionary instructions to the jury that they should consider testimony and exhibits only with respect to the charges enumerated by the government. Tucker has not shown why similar procedures could not be utilized in this case to prevent any "prejudicial spillover" of the evidence against her codefendants.

The Eighth Circuit also rejected the "spillover" argument in Jones, holding that the jury was able to compartmentalize the evidence because each defendant had a distinct role in the conspiracy, and because the district court repeatedly gave cautionary instructions. Tucker contends that her involvement in the gambling activity of her codefendant Gary Kaplan is limited to administrative and personal financial matters which are "virtually" unrelated to the RICO charges. However, the government anticipates that the evidence will show in this case that defendant and her coconspirators had distinct roles in the racketeering conspiracy alleged in the indictment and that the jury will not have any difficulty in differentiating between the actions of the various defendants.

Finally, in United States v. Darden, 70 F.3d 1507, 1526 (8th Cir. 1995), cert. denied, 517

U.S. 1149 (1996), the Eighth Circuit also rejected a similar spillover argument in a large racketeering conspiracy case, recognizing that all of the evidence against the defendants who did not request a severance would have been admissible against the requesting defendants because they were charged with conspiracy. The Eighth Circuit explained its reasoning, as follows:

> Bennett, Seals, and Williams contend that only a small part of the evidence implicated them in the activities of the JLO [the racketeering enterprise] and that such a disparity of evidence resulted in a "spill-over" effect that was prejudicial. Their argument is fatally flawed, however, because they gloss over the fact that they were indicted as members of a RICO conspiracy that included all of their co-defendants. Each defendant may be held accountable for actions taken by other defendants in furtherance of the conspiracy, and thus all of the evidence offered at trial relating to the activities of the JLO, regardless of whether Bennett, Darden, Seals, and Williams directly participated in those activities, would be admissible against them if they had been given separate trials.

Id. at 1527.

Similarly, Tucker is charged as part of a racketeering conspiracy with all of her codefendants. Under the law of conspiracy, she is liable for the actions of her coconspirators during the course of and in furtherance of the conspiracy. Pinkerton v. United States, 328 U.S. 640, 645-48 (1946); United States v. Navarrete-Barron, 192 F.3d 786, 792 (8th Cir. 1999). As a result, all of the evidence which would be admitted against Tucker's coconspirators in a joint trial would be admissible against her if she would be tried separately.

The Eighth Circuit said in United States v. Kehoe, 310 F.3d 579, 590 (8th Cir. 2002), cert. denied, 538 U.S. 1048 (2003), "It will be the rare case, if ever, where a district court should sever the trial of alleged coconspirators." Id. at 590. The general rule is that coconspirators should be tried together. United States v. Adams, 401 F.3d 886, 895 (8th Cir.), cert. denied, 546 U.S. 966 (2005); United States v. Kuenstler, 325 F.3d 1015, 1024 (8th Cir. 2003), cert. denied, 540 U.S. 1112 (2004). In Zafiro, the Supreme Court said that there is a preference in the federal

system for joint trials of defendants who are indicted together. Id. at 537.

Tucker contends that she is entitled to a severance because much of the evidence has nothing to do with her both as to the time frame of her involvement and the specific conduct at issue. However, the Eighth Circuit has upheld the denial of a severance motion on the grounds that the evidence may be more damaging against one defendant than other defendants and because the evidence established that a coconspirator was not involved during the entire duration of the conspiracy. United States v. Frazier 280 F.3d 835, 844 (8th Cir.), cert. denied, 536 U.S. 931 (2002). A defendant's limited involvement in a conspiracy does not warrant severance. United States v. Al-Muqsit, 191 F.3d 928, 941 (8th Cir.1999); United States v. Pecina, 956 F.2d 186, 188 (1992). Not every defendant joined as defendants must have participated in every offense charged. United States v. Williams, 97 F.3d 240, 243 (8th Cir.1996). There is no requirement in joint trials that the evidence of each defendant's culpability be quantitavely or qualitatively equivalent. Jones, at 63; United States v. O'Connell, 841 F.2d 1408, 1432 (8th Cir.), cert. denied, 487 U.S. 1210 (1988).

In Darden, the Eighth Circuit recognized the advantages of joint trials for the courts, prosecutors, witnesses and the parties themselves, as follows:

> The United States has a strong interest in the joint trial of the members of a criminal enterprise. Such trials save time and money for the courts, prosecutors and witnesses. Most importantly, however, justice is best served by trying members of a racketeering conspiracy together because a joint trial "gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." (internal citation omitted)

Id. at 1527-28.

Similarly, there is no reason to sever Tucker's trial from that of her codefendants when, as the Eighth Circuit observed in Darden, it is more likely that a joint trial will lead to the correct

outcome, as opposed to separate trials of herself and perhaps other defendants.

CONCLUSION

Tucker has not shown why her trial should be severed from the trials of her codefendants in the face of the established preference for coconspirators to be tried together. This Court should take into account the convenience to the Court, parties, witnesses and the government, as well as the advantages that joint trials provide to the administration of justice, and overrule defendant Tucker's motion to sever her trial from the trial of her codefendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2007, the foregoing was filed with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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