

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
NORTHERN DIVISION**

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**UNITED STATES OF AMERICA**

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v.

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**Criminal No. CCB-98-0424**

**MARK WILLIAMS, et al.**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SEVER CO-DEFENDANTS**

Defendant, Mark Williams, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Kathryn Frey Balter, Assistant Federal Public Defender, respectfully submits this memorandum of law in support of Mr. Williams's Motion To Sever Co-Defendants.

**STATEMENT OF FACTS**

Mr. Williams is here charged in a two-count indictment with conspiracy to distribute and possess with intent to distribute cocaine (Count One) and kidnapping (Count Two). He is charged along with eight co-defendants in Count One, and is charged with one co-defendant in Count Two.

The government's theory with respect to Count Two is that on January 4, 1998, Mr. Williams allegedly kidnapped Kevin Sanders to prevent him from testifying in a state prosecution of Odessa Cash, in which Mr. Cash was charged with assaulting Sanders in retaliation for Sanders selling drugs on his (Cash's) turf.<sup>1</sup> The government's case against Mr.

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<sup>1</sup> The act of kidnapping, which underlies both counts, is alleged to have occurred on January 4, 1998, however, Mr. Williams was not arrested until December 15, 1998.

Williams consists primarily of one witness: the alleged victim, Kevin Sanders.<sup>2</sup>

With respect to Count One, the government's theory is that Mr. Williams is guilty of conspiring with the eight other co-defendants to distribute crack cocaine, solely by virtue of his alleged conduct in Count Two. The government has disclosed that Mr. Williams did not ever distribute, import, package, or otherwise have any contact with or involvement directly in the drug trade which Count One charges. Rather, the only connection between Mr. Williams and Count One is the same single witness who embodies the evidence in Count Two.<sup>3</sup>

### ARGUMENT

- A. Severance of Co-Defendants Is Necessary Under Rule 14 Of The Federal Rules Of Criminal Procedure. A Joint Trial On The Scheduled Date Will Subject Mr. Williams To Excessive Pretrial Delay And Will Force Him To Terminate His Attorney-Client Relationship, Thus Prejudicing Him. Furthermore, such prejudice will arise by virtue of admission of evidence of drug dealing and drug-related violence against his co-defendants at a joint trial, which would otherwise be inadmissible against Mr. Williams. In Addition To Eliminating Such Prejudice, A Severance Will Provide For A Significantly Shorter Trial For Mr. Williams, Which Would Further The Goal Of Efficient Use of Judicial Resources.**

It is well-understood that a joinder of counts or co-defendants “can be so prejudicial as to

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<sup>2</sup> To date, counsel has received several discovery packages, none of which mentions the substance of either count as it relates to Mr. Williams. Government counsel has advised that discovery which will directly impact Mr. Williams consists solely of the grand jury testimony of alleged victim, Kevin Sanders, which, pursuant to the standard discovery agreement entered into in this case, will not be provided until two weeks before trial. Notwithstanding defense counsel's request for early discovery of relevant Jencks material and its alternative proposed compromise whereby the government would simply provide a synopsis of Kevin Sanders's grand jury testimony, government counsel maintains that such discovery will not be provided until two weeks before trial. Thus, discussion in this motion concerning the government's theory is based on conversations with government attorneys and information gleaned from the brief preliminary hearings in the case.

<sup>3</sup> Indeed, Mr. Williams is the only person, co-defendants and victim Kevin Sanders included, who is not alleged to have sold drugs or otherwise been involved in the drug trade.

require severance” under Rule 14. United States v. Kopituk, 690 F.2d 1289, 1314 (11th Cir. 1982); see Fed. R. Crim. P. 14 (when it appears that defendant will be prejudiced by joinder of co-defendants for trial together, court may sever defendant’s trial from that of co-defendants). A court’s decision to grant or deny a motion for severance will be overturned only for a clear abuse of discretion. Person v. Miller, 854 F.2d 656, 665 (4th Cir.1988). See also Charles Alan Wright, 1A Federal Practice and Procedure: Criminal 3d § 221, at 464-65 (1999) (under Rule 14, the severance of defendants is a “matter of sound judicial discretion”) (footnote omitted).

While it is true that, barring “special circumstances,” defendants who are charged together should be tried together, see United States v. Rusher, 966 F.2d 868, 877 (4th Cir. 1992), this rule is most applicable when the defendants have all been somehow involved in the same set of acts which constitute the offense conduct. For example, members of an alleged drug conspiracy are usually tried together because, in one form or another, they each have entered into an agreement with other co-conspirators to possess and distribute narcotics. In this case, however, Mr. Williams is not accused of distributing drugs in any fashion, or of entering into any agreement to do so. This serves to distinguish him from every other co-defendant. Rather, the government claims only that Mr. Williams kidnapped Kevin Sanders, and that the person who allegedly offered to pay for the kidnapping was a conspirator. According to the government, this makes Mr. Williams also a conspirator.

In such circumstances, where an alleged participant has played such a peripheral role in a charged drug conspiracy, and especially where that peripheral role did not involve the distribution of narcotics, a severance from co-defendants is proper and appropriate. This is especially the case given the prejudice to Mr. Williams that will result from a joint trial. In

particular, Mr. Williams will suffer a very lengthy period of pretrial detention if his case is not severed before the September 1999 trial date. In addition, if his case is not severed and proceeds to the scheduled trial date, Mr. Williams's attorney-client relationship will be destroyed, in that undersigned counsel is unable to try the case in September 1999. Because joinder results in such prejudice to Mr. Williams, a severance of co-defendants is warranted under Rule 14.<sup>4</sup>

**1. If his case is not severed from that of his co-defendants, Mr. Williams will suffer excessive pre-trial delay.**

A joint trial in September of 1999 subjects Mr. Williams to an excessive pretrial delay. On December 15, 1998, Mr. Williams was arrested on the two count indictment. On December 16, 1998, an initial appearance was held and the Office of the Federal Public Defender was appointed. On December 21, 1998, a detention hearing and arraignment were held. After a

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<sup>4</sup> An alternative ground for severance is that the co-defendants in this case have been misjoined under rule 8(b) of the Federal Rules Of Criminal Procedure, and therefore severance is mandated. The co-defendants in this case have been joined for trial under Rule 8(b) of the Federal Rules of Criminal Procedure. Rule 8(b) provides that two or more defendants may be charged in the same indictment 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." When there has been improper joinder under Rule 8, the granting of a motion for severance is mandatory and not discretionary with the district court. United States v. Kopituk, 690 F.2d 1289, 1314 (11th Cir. 1982). Here, Mr. Williams's case has been misjoined with that of his co-defendants.

As described herein, Mr. Williams is charged in Count One with conspiring with eight co-defendants to distribute narcotics. However, the government does not claim that Mr. Williams ever engaged in the distribution of crack cocaine or had any involvement in the drug trade described in Count One apart from his alleged conduct in Count Two.

Given this unique situation, Mr. Williams is not charged with participating in "the same act or transaction or in the same series of acts or transactions" as his co-defendants on Count One. He is not accused of having distributed any drugs whatsoever, or having entered into any conspiratorial agreement to do so. Although Mr. Williams and his co-defendants are all loosely charged with engaging in a "conspiracy," the acts claimed to have been committed by Mr. Williams are fundamentally different and separable from the core conduct which the government claims constitutes the co-defendants' conspiratorial activity. At most, Mr. Williams's case should be joined only with Odessa Cash, the co-defendant who is alleged to have approached him and offered to pay him if he kidnapped Kevin Sanders. No other co-defendant participated in the alleged kidnapping, which constitutes the only act which the government claims Mr. Williams committed in connection with either Count of the indictment. Under such circumstances, Mr. Williams's case must be severed from that of his co-defendants pursuant to Rule 8 of the Federal Rules of Criminal Procedure.

contested hearing, Mr. Williams was ordered detained. Undersigned counsel has represented Mr. Williams at all proceedings including the initial appearance.

As of the date of the filing of this motion, Mr. Williams has been incarcerated, primarily at the Baltimore City Detention Center, since December 15, 1998, for a total of 93 days.<sup>5</sup> Pursuant to the Speedy Trial Act, the time period beginning the day following Mr. Williams's initial appearance (December 17, 1998) and ending on the date of the last initial appearance of co-defendants (January 25, 1999 - Odessa Cash & Bertrand Curtis's initial appearances), totaling 39 days, is excluded from Mr. Williams's Speedy Trial Act computations, unless a severance is granted. See 18 U.S.C. §§3161(c) & (h)(7).

The equities require that Mr. Williams not be so burdened by excessive pretrial delay. Such delay is beyond Mr. Williams's control, and was no way caused by his actions. Of Mr. Williams's eight co-defendants, six have been arrested. Of those six, at least five are currently serving State or Federal sentences, and are therefore receiving credit toward those sentences. The prompt appearance and arraignment of these co-defendants was in the sole control of the government.<sup>6</sup> Given the historic nature of the case, the lengthy investigation, and the concomitant foresight enjoyed by the government, which had the responsibility for determining

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<sup>5</sup>As of on or about March 11, 1999, Mr. Williams was moved from the Baltimore City Detention Center to an Eastern Shore facility.

<sup>6</sup> Co-defendants Cash, Whaley, Curtis, and Benjamin are currently serving State sentences. Co-defendant Bonner is serving a federal sentence. Arrest warrants for these co-defendants were issued on October 29, 1998. At that time the government must have known that each of these co-defendants was serving sentences. However, Writs of Habeas Corpus ad Prosequendum were not requested until January 7, 1999. The United States Marshals require at least a fourteen day notice for such a Writ to be effectuated. In this case, the co-defendants' initial appearances occurred between January 21 and 25, 1999. Pursuant to 18 U.S.C. §3161(h)(7), the Speedy Trial Act does not begin to run for any co-defendant until the time for the last co-defendant begins to run. In this case, as set forth above, Odessa Cash and Bertrand Curtis's initial appearances were held on January 25, 1999. Thus, Mr. Williams suffered an excludable delay from December 17, 1998 until January 25, 1999: 39 days.

when this prosecution would be initiated and for assuring the prompt appearance of all co-defendants, this lengthy delay between Mr. Williams's arrest and the appearance of all the co-defendants is troublesome. In any event, the fact remains that, while at least five of the six co-defendants are receiving credit for each day spent incarcerated awaiting the September 1999 trial date, Mr. Williams is not. This lengthy and prejudicial pretrial delay can and should be avoided by a severance.

**2. Without a severance, Mr. Williams's current attorney-client relationship will be destroyed.**

As explained during the pretrial conference, if Mr. Williams's trial is not severed and is held on the scheduled date, in addition to unfairly suffering a lengthy period of pretrial delay, Mr. Williams will no longer be represented by undersigned counsel, who has consistently been his attorney since December 16, 1998, when the Office of the Federal Public Defender was appointed. Since that date, a productive attorney-client relationship has been established. A solid attorney-client relationship is developed over time through a balance of good rapport and trust. Such a relationship has been forged here, and should not be disturbed.

A September 1999 trial date would be disruptive not only to the very important relationship between Mr. Williams and undersigned counsel, but also to Mr. Williams's defense. Counsel has been directly involved in significant investigation in this case, and has conducted many face-to-face interviews with critical government and defense witnesses. Although a defense attorney's relationship with witnesses may not be as sacrosanct as her relationship with a client, it is nonetheless true that an important aspect of the attorney's ability to present an effective defense is her ability to communicate with, and gain the trust and respect of, potential

witnesses. In this case, counsel has established a relationship of mutual trust and rapport with several witnesses, which cannot at all easily be transferred from one attorney to another.

The prosecution has been put on ample notice of undersigned counsel's scheduling conflict. On several occasions shortly after Mr. Williams's arraignment, counsel advised both government attorneys of her inability to try this case in September of 1999. Though these conversations were informal, notice was given, and feedback from government counsel indicated government counsel's availability in Spring 1999. Thus, undersigned counsel felt confident in maintaining the case and developing ongoing relationships with both the client and witnesses.

Although a trial in September 1999 would comport with the schedule of government counsel, it would conflict with the availability of counsel for Mr. Williams. Thus, one attorney will need to be reassigned, either for the prosecution or the defense. Both government and defense counsel are members of government offices which can reassign counsel. If Mr. Williams's trial is severed from that of his co-defendants and takes place in the spring of this year, it may require that another prosecutor take over the case, but this is nonetheless a more appropriate alternative than not severing Mr. Williams's trial and forcing him to relinquish the trusted services of his current attorney. If either a prosecutor or defense attorney must be reassigned, it should be the prosecutor, given that a defense attorney's relationship with a client is of more constitutional moment than is a prosecutor's relationship with her agents. Moreover, given the likely brief duration of a trial involving only Mr. Williams, as further discussed below, it is reasonable to believe that another prosecutor could get up to speed quickly and effectively try the case.

### **3. Mr. Williams is not alleged to have committed**

**any of the multiple acts of drug distribution or the series of drug-related violent acts which his co-defendants are accused of, and a severance is therefore necessary to prevent the prejudice he would suffer if proof of such acts were submitted to the jury in a joint trial.**

As discussed above, the government claims that Mr. Williams was a member of the alleged drug conspiracy described in Count One merely by virtue of his alleged conduct in Count Two. Mr. Williams is not accused of even one act of drug distribution. There is no cooperating witness who is testifying against him, no video surveillance of him engaged in drug sales, no controlled buys in which he participated, and no evidence that he was at all involved in the drug trade. Rather, the evidence against Mr. Williams will consist solely of the alleged kidnapping victim's testimony.

While the mere fact that the evidence against one defendant is stronger than the evidence against other defendants does not in itself justify severance, see United States v. Brooks, 957 F.2d 1138, 1145 (4th Cir. 1992) (proper to jointly try five principals of large cocaine conspiracy, each of whom were heavily involved in drug trade and personally dealt drugs), the situation in this case is far more prejudicial to Mr. Williams. Here, it is not just that the evidence against the co-defendants on Count One is much stronger than that against Mr. Williams on the same charge, which is certainly true, but also that the evidence of the co-defendants' involvement in the drug conspiracy is of a fundamentally different, and more inflammatory, nature than is the evidence of Mr. Williams's alleged involvement.

Each of Mr. Williams's co-defendants is alleged to have committed very serious acts of drug dealing, including one transaction that allegedly involved 240 grams of crack cocaine and

another involving 375 grams of cocaine hydrochloride that was subsequently cooked into crack. Each co-defendant is alleged to have either been a supervisor of the entire drug organization or a lieutenant in charge of the day-to-day distribution of drugs on the street. In addition, the co-defendants are alleged to have committed several violent acts in order to protect their drugs and their area of drug distribution. These alleged acts include the shooting of a rival drug dealer, the slashing of a man's face in order to assert control over drug turf, a pistol whipping and beating for the same purpose, and a murder.

Mr. Williams, conversely, bought, sold, or distributed no drugs, nor was he involved in any of the alleged violent acts described above. While the claim that he forcibly took a man to Pennsylvania is serious, it does not rise to the level of violence reflected in the alleged behavior of his co-defendants. Mr. Williams will therefore be unduly prejudiced by a joint trial, because significant evidence of mass drug distribution and violence on the part of his co-defendants will be readily presented to the jury even though Mr. Williams is not accused of having committed any of those acts. Such prejudice provides an additional reason why severance is necessary and appropriate under Rule 14.

**4. This Court's interest in efficient use of judicial resources also warrants a severance of co-defendants.**

Even absent a showing of "prejudice," a court may still sever co-defendants in the interests of judicial economy. In United States v. McManus, 23 F.3d 878 (4th Cir. 1993), a district court sua sponte granted a severance of co-defendants in a large multi-defendant drug conspiracy case. The court separated the eleven defendants into two trials, due to the logistical difficulties of trying so many individuals simultaneously, even though neither the government

nor any defendant had claimed to be prejudiced by the joinder. Id. at 882. The Fourth Circuit affirmed this ruling, finding that the district court had not abused its discretion in granting the severance. Id. at 882-83.

McManus can fairly be read to establish that a district court has the authority to grant a severance of co-defendants in order to control its own docket and to ensure an efficient and fair trial for all those involved, even in the absence of a colorable claim of “prejudice.” Cf. United States v. Pack, 773 F.2d 261, 266 (10th Cir. 1985) (in determining merits of motion for severance, trial court must balance competing interests by weighing prejudice to defendant caused by joinder against considerations of economy and expedition in judicial administration).

A severance of Mr. Williams’s trial from that of the co-defendants would provide this Court with an efficient and effective alternative to a joint trial. If Mr. Williams is tried alone, the evidence against him, and any defense case, could be likely presented in one week, which is substantially shorter than a trial involving all co-defendants. As noted above, the government has advised counsel that its case against Mr. Williams on Count Two consists of only one witness, the alleged victim. This individual’s testimony should take no longer than one day. In addition, the evidence of Mr. Williams’s participation in Count One is limited to his conduct in Count Two -- there is no cooperator testimony, no video surveillance, no controlled buys, and no other direct evidence of drug trade involvement. Moreover, the government’s case as to Count One would certainly be dramatically pared down in a trial against Mr. Williams alone. While limited evidence of the drug offense would perhaps be admissible to establish the motive for the alleged kidnapping, the vast bulk of the government’s proof against all other co-defendants on Count One would be cumulative, unnecessary, and prejudicial, and therefore would be

inadmissible at Mr. Williams's trial.

For these reasons, a trial involving only Mr. Williams could be efficiently completed in a significantly shorter time period than a joint trial involving all co-defendants. The Court should opt for this efficient and economical alternative to a joint trial, especially in light of the prejudice that would otherwise be suffered by Mr. Williams. This alternative is reasonable and makes good sense, in that it would allow undersigned counsel to remain as Mr. Williams's attorney, would provide Mr. Williams with a prompt and speedy trial, and would allow the government to retain the scheduled trial date in regard to all other defendants.

WHEREFORE, Defendant Mark Williams respectfully moves this Honorable Court to sever his trial from that of his co-defendants.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18th day of March, 1999, a copy of the foregoing Motion to Sever Co-Defendants was delivered to the following Counsel:

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