

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

UNITED STATES OF AMERICA

*

v.

*

**Crim. No. XXXXXXXXXXXX;
Crim. No. XXXXXXXXXXXX**

XXXXXXXXXXXXXXXXXXXX

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**DEFENDANT'S OPPOSITION TO GOVERNMENT'S MOTION
FOR JOINT TRIAL OF INDICTMENTS**

Defendant XXXXXXXXXXXXXXXXXXXX, through counsel, James Wyda, Federal Public Defender for the District of Maryland, and Michael T. CitaraManis, Assistant Federal Public Defender, submits this memorandum of law in opposition to the Government's Motion for Joint Trial of Indictments. For the reasons set forth below, consolidation of the two indictments is not appropriate under Rule 13 of the Federal Rules of Criminal Procedure.

I. BACKGROUND

On December 16, 1998, the Government filed a twenty-three count Indictment against XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, and XXXXXXXXXXXXXXXXXXXX. Specifically, in Counts One through Five, the Government charged XXXXXXXXXXXX and XX. XXXXe with mail fraud in violation of 18 U.S.C. §§ 1341 and 1346; in Counts Eight through Twelve, the Government charged XXXXXXXXXXXX and XXXXXXXXXXXX with mail fraud in violation of 18 U.S.C. §§ 1341 and 1346. In the remaining counts of the Indictment, the Government charged XXXXXXXXXXXr with possession of stolen goods (Counts Six, Seven, and Thirteen), possession of motor vehicle parts with obliterated identification numbers (Count Fourteen and Sixteen), engaging in a monetary transaction in property from specified unlawful

activity (Count Fifteen), interstate transportation of stolen property (Count Seventeen), removing motor vehicle identification number (Count Eighteen), Obstruction of Justice (Count Nineteen), witness tampering (Counts Twenty and Twenty-one), operating a chop shop (Count Twenty-two), and racketeering (Count Twenty-three). The Government subsequently filed two superseding indictments, neither of which altered the allegations against XXXXXXXXXXXX contained in the original indictment.¹

The primary allegations against XXXXXXXXXXXX are that he falsely certified the “roadworthiness” of salvaged vehicles in signing Motor Vehicle Administration salvage certificates for XXXXXXXXXXXX, gave XXXXXXXXXXXX preferential treatment in signing off on the salvage certificates, and that he received money and other things of value from XXXXXXXXXXXX. The “preferential” treatment consisted of inspecting the salvage vehicles off-site instead of at the police barracks and doing so during off-duty hours.

Trial was scheduled for May 10, 1999, but was continued at the request of the defendants.

On July 21, 1999, the Government charged XXXXXXXXXXXX in a three-count indictment with mail fraud in violation of 18 U.S.C. § 1341.² The counts in this indictment allege that XXXXXXXXXXXX, after retiring from the XXXXXXXXXXXXXXXXXXXXXXXXXXXX, falsely certified salvage inspections for three cars, one in a salvage certificate, and two in letters to the Motor Vehicle Administration on Maryland State Police stationery.

The Government subsequently moved to try both indictments in one trial.

¹ The second superseding indictment is attached hereto as Exhibit A.

² The indictment against XXXXXXXXXXXX alone is attached hereto as Exhibit B.

II. ARGUMENT

B. THE OFFENSES INDICTED SEPARATELY SHOULD NOT BE TRIED TOGETHER.

Rule 13 of the Federal Rules of Criminal Procedure provides, in pertinent part: “The court may order two or more indictments . . . to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment.” Rule 8 sets forth the standard for determining whether offenses are properly joined. Under Rule 8(a), offenses may be joined in an indictment if the offenses: (1) “are of the same or similar character”; (2) “are based on the same act or transaction; or (3) “are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” In addition, under Rule 8(b), defendants may be joined 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 Government acknowledges, as it must, in its memorandum, that even if the requirements of Rule 8 are met, the indictments are not automatically to be consolidated: Rather, cases charged separately “should be tried together only if expediency can be served without interference with substantial justice.” 1A Wright, *Federal Practice and Procedure: Criminal*, § 212 (3d. ed. 1999). “The court should refuse to order a joint trial if there is any doubt about the fairness of the trial.” *Id.*; *See also Fed. R. Crim. P. 14* (authorizing court to refuse to join counts and/or defendants even if requirements of Rule 8 are met if party is prejudiced by such joinder); *United States v. Shuford*, 454 F.2d 772, 776 (4th Cir. 1971)(holding that “if a substantial degree of prejudice springs from a joint trial, a severance is mandated”). In this case, as demonstrated below, the Government has not met the standards of Rule 8 or Rule 13.

1. The Two Indictments Should Not Be Joined for Trial Because the Standards of Rule 8 Have Not Been Met.

In this case, the offenses charged in the two indictments are not of the same or similar character, are not based on the same act or transaction, and are not based on transactions connected together or constituting parts of a common scheme or plan. Indeed, the Government does not even make this claim. Rather, in urging this court to consolidate both indictments for one trial, the Government simply states that “both indictments deal with the same type of activity.” Government’s memorandum at 2. However, this vague assertion does not demonstrate compliance with the strictures of Rule 8. Indeed, courts have considered such assertions insufficient to warrant joinder. *Ingram v. United States*, 272 F.2d 567, 570-71 (4th Cir. 1959)(holding that consolidating two indictments was reversible error where only link between cases was that both involved same allegation of illegal activity -- defendant’s possession of non-tax-paid liquor); *Halper*, 590 F.2d 422, 430 (2d Cir. 1978)(holding that consolidation of offenses constituted reversible error and considering government’s “characterization of the essential nature of the charged offenses entirely too broad to warrant the joint trial of two otherwise distinct indictments”); *United States v. Buchanan*, 930 F. Supp. 657, 662 (D. Mass. 1996)(stating that “[a] vague thematic connection among offenses may not support joinder” and that “the government cannot link cases simply by changing the level of abstraction—namely that this case is about an abuse of trust, rather than about two distinct allegedly illegal schemes”); *United States v. Winchester*, 407 F. Supp. 261, 266 (D. Del. 1975)(holding in fraud case that two indictments that reflected two unrelated activities should not be consolidated and rejecting government’s arguments that Rule 8 requirements were met because both indictments involved “abuse of

office”); *See also United States v. Whitehead*, 539 F.2d 1023, 1025-26 (4th Cir. 1976)(holding that prosecution of one defendant for distribution of cocaine was improperly joined with prosecution with defendant on similar charge on basis that both distributions involved common third party and both defendants lived in same apartment house).

a. The indictments allege two different schemes to defraud.

To bolster its argument for consolidation, the Government attempts to minimize the differences between the two indictments. However, an examination of the allegations in the two indictments reveals significant differences. In the original indictment,³ the Government alleges a scheme with XXXXXXXXXXXX and XXXXXXXXXXXX; in the subsequent indictment, the Government alleges that XXXXXXXXXXXX acted alone. In the original indictment, the Government alleges that Mr. Downing received things of value to falsify certificates; the subsequent indictment contains no such allegation. In the original indictment, the Government alleges that the certificates at issue were false in that they misrepresented the “roadworthiness” of vehicles; the subsequent indictment contains no such allegation.

In addition, in the original indictment, the Government alleged that XXXXXXXXXXXX did not follow Maryland State Police procedures; the subsequent indictment includes no such allegation, and alleges that XXXXXXXXXXXX did not have the authority to perform inspections

³ As noted above, this case involves several indictments — the first indictment, the first superseding indictment, the second superseding indictment, all of which charge XXXXXXXXXXXX, XXXXXXXXXXXX, and XXXXXXXXXXXX with mail fraud in violation of 18 U.S.C. §§ 1341 and 1346, and the fourth indictment which charges XXXXXXXXXXXX alone with mail fraud in violation of § 1341. The new allegations in the superseding indictments did not relate to the counts in which XXXXXXXXXXXX was charged. To avoid confusion, XX. XXXXXXXX will refer to the allegations contained in the first indictment and the superseding indictments as the “Original Indictment” and the allegations contained in the fourth indictment against XXXXXXXXXXXX as the “Subsequent Indictment.”

and sign certificates. In the original indictment, the Government’s theory is based on fraud allegedly perpetrated against the customers of the car dealerships, the people of Maryland, and the Motor Vehicle Administration; in the subsequent indictment, the Government’s theory is based on fraud allegedly perpetrated against the Motor Vehicle Administration only. Finally, in the original indictment, the principle issue will be whether XXXXXXXXXXXX agreed with XXX XXXXXX to perpetrate the alleged fraudulent scheme; in the subsequent indictment, the principle issue will be whether XXXXXXXXXXXX had the authority to sign the certificates at issue or whether he thought he could lawfully do so.⁴

⁴ For the convenience of the Court, the differences between the allegations in the original indictment and the subsequent indictment are represented in the following chart:

Original Indictment

Subsequent Indictment

- | | |
|---|--|
| 1. Alleges a scheme with XXXXX XXXXXX and XXXXXXXXXXXXXXXX | Alleges XXXXXXXXXXXXXXXX acted alone |
| 2. Alleges XXXXXXXXXXXXXXXX received things of value to falsify certificates | No allegation
XXXXXXXXXXXXX received anything of value from car dealer |
| 3. Alleges certificates were false in that they misrepresented the “roadworthiness” of vehicles | No such allegation |
| 4. Allegation is that XXX XXXXXXXX did not follow MSP procedures | Allegation is that XXX XXXXXXXX did not have authority to do inspections and sign certificates |
| 5. Fraud allegedly perpetrated against customers of dealership, people of MD and MVA | Fraud allegedly perpetrated against MVA only |

The other commonalities upon which the Government relies are insufficient to warrant consolidation. First, the Government contends that both indictments focus “largely” on the same year -- 1996. Government’s Memorandum at 2. The offenses in the original indictment are alleged to have occurred on May 30, 1996 (Count Eight); June 6, 1996 (Counts Nine and Ten); June 20, 1996; (Count Eleven); and July 2, 1996 (Count Twelve) . The significant dates in the subsequent indictment are November 4, 1996 (Counts One, Two and Three), November 20, 1996 (Count One), November 8, 1996 (Count Two), and July 8, 1997 (Count Three). Second, the Government contends that both cases would involve “background” evidence relating to XXX XXXXXXXX career and the obligations of a salvage inspector. As the above cases demonstrate, these two factors, whether considered separately, or taken together, do not make the different schemes to defraud alleged in the two indictments sufficiently similar under Rule 8. Of course, if this were the test, consolidation under Rule 13 would occur with alarming regularity.

The cases on which the Government relies in support of its request for joinder under Rule 13 do not provide it with the relief it seeks. In *Spear v. United States*, 216 F.2d 185 (4th Cir. 1954), the Court in a per curiam opinion simply stated that the consolidation of the cases was authorized under Rule 13 because the requirements of Rule 8 were met. The opinion does not include any analysis as to why the requirements of Rule 8 were met or whether the two

6. Principle issue will be whether XXXXXXXX agreed with XXXXXXXX to perpetrate the alleged fraudulent scheme

Principle issue will be whether XXXXXXXXXXXXX had authority to sign certificates or whether he thought he lawfully could do so

indictments alleged similar schemes. Accordingly, this opinion is of limited value in determining the propriety of consolidation under Rule 13 in this case.

In addition, the Government relies on *United States v. Haney*, 914 F.2d 602 (4th Cir. 1990). In *Haney*, the indictments of two defendants who participated in two bank robberies together were joined together for trial. The Fourth Circuit approved of the consolidation in this case, noting that the two bank robberies, in which both defendants were involved, were sufficiently related under Rule 8 to permit joinder. Not only did both bank robberies share the two participants, but the manner in which the robberies were executed in both cases was substantially similar. The two indictments at issue in *Haney* are not analogous to the two indictments in this case. Unlike *Haney*, the offenses are not alleged to have been executed in the same manner. In addition, unlike *Haney*, the participants in the alleged offenses are not even the same. Thus, *Haney* does not support the Government's argument that consolidation of the two indictments is appropriate in this case.⁵

b. Proof of the offenses charged in one indictment does not constitute or depend upon proof of the offenses charged in the other indictment.

In determining whether the acts alleged in different indictments are sufficiently connected to warrant joinder, courts have focused on whether proof of one of the offenses constituted or depended on proof of another offense. *Halper*, 590 F.2d at 429. In this case, the Government does not, nor can it contend, that proof of the offenses charged in either indictment constitutes or depends upon proof of the other offenses. In other words, the Government need not demonstrate anything with respect to XXXXXXXXXXXXXXXX post-retirement conduct in order to satisfy its

⁵ Indeed, despite the similarity of participants in *Haney*, the trial of one of the participants, Messer, was severed from the other defendants.

burden of proof on the counts contained in the original indictment. Similarly, proof of the allegations in the subsequent indictment does not depend on the allegations contained in the original indictment. Indeed, trial on the original indictment was scheduled before the Government had even charged XXXXXXXXXXXX in the subsequent indictment. The Government was prepared for trial and even opposed a continuance. Accordingly, the Government cannot claim now that the two indictments are so inextricably linked that trial on one cannot proceed without trial on the other.

2. Expedience Does Not Outweigh the Prejudice to the Defendant.

As noted above, even if cases charged separately meet the requirements of Rule 8, this does not end the inquiry under Rule 13. The court must determine if “expediency can be served without interference with substantial justice.” 1A Wright at § 212. Applying this standard to this case compels the conclusion that the indictments should not be consolidated for one trial. The concerns of judicial economy in this case do not weigh in favor of conducting a joint trial. Indeed, at XXXXXXXXXXXXXXXX arraignment on the subsequent indictment, the Government estimated that the entire trial, including “background” evidence would take approximately two to three days. Even in its memorandum, the Government states that the evidence relating to the subsequent indictment is very limited, consisting of one witness and fewer than twenty pages of documents. In light of these facts, the Government cannot claim that concerns of judicial economy loom so large in this case that the two indictments should be consolidated.

On the other hand, the prejudice to the defendant by joining the two indictments is great. The danger that the jury will consider evidence of one scheme in determining whether the Government has satisfied its burden of proof as to another is substantial. In addition, the joinder

of the two indictments creates the danger that the jury will cumulate the evidence and convict him of both schemes when the evidence is insufficient to convict when viewed separately.

Moreover, if the Court has any doubt about the fairness of the trial, it should refuse to order a consolidated trial. 1A Wright at § 212.

3. The Acts Underlying the Counts in the Subsequent Indictment Should Not Be Admitted In a Trial on the Original Indictment Under Rules 404(b) and 403 of the Federal Rules of Evidence.

The Government argues that the two indictments should be consolidated because, prior to charging XXXXXXXXXXXX in the subsequent indictment, it had intended to offer the acts underlying the charges under Federal Rule of Evidence 404(b) in a trial on the original indictment. In this regard, the Government’s argument proceeds on the premise that its request for admission under 404(b) would have been granted. For the reasons stated below, XXXXXXXXXXXX submits that the Government should not have been permitted and should not now be permitted to introduce evidence relating to any conduct that post-dates the allegations in the original indictment.⁶

Pursuant to Federal Rule of Evidence 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake” The burden is on the proponent of the “other acts” evidence to demonstrate its relevance. *United*

⁶ XXXXXXXXXXXX submits that the indictments should not be joined for trial based on the Federal Rules of Criminal Procedure governing joinder and based on his contention that the Rules of Evidence also militate in favor of excluding the evidence. Rather than filing a separate evidentiary motion, XXXXXXXXXXXX incorporates this aspect of the analysis herein.

States v. Hogue, 827 F.2d 660, 662 (10th Cir. 1987); *United States v. Biswell*, 700 F.2d 1310, 1317 (10th Cir. 1983). The proponent must “articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred from the evidence of other acts.” *Hogue*, 827 F.2d at 662.

In addition to the requirement that the evidence be relevant to an issue other than character, the Fourth Circuit requires such evidence to be both “reliable” and “necessary.” *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1988). Moreover, even if the evidence satisfies this standard, it should only be admitted if its probative value outweighs the danger of unfair prejudice to the defendant. *Id.* Rule 403 poses an additional hurdle to the admission of evidence even if it is deemed relevant.

Applying these principles to the instant case demonstrates that the Government should not be permitted to prosecute XXXXXXXXXXXX for the charges set forth in the original indictment -- charges which involve an alleged scheme by XXXXXXXXXXXX and XXXXXXXXXXXX to defraud the MVA, the people of Maryland, and the customers of a car dealership, while XXXXXXXXXXXX was a XX -- by introducing evidence of an unrelated alleged scheme by XXXXXXXXXXXX to defraud the MVA after XXXXXXXXXXXX had retired. The Government claims that XXXXXXXXXXXX post-retirement conduct is relevant to XXXXXXXXXXXX intent, knowledge and absence of mistake. While the Government refers to permissible theories of admissibility under 404(b), its contention is unsupported by the facts of this case. Just as characterizing a particular piece of evidence admissible under Rule 404(b) does not make it so, characterizing evidence as relevant to a permissible theory under 404(b) in the abstract does not make it so in every case. “Its

relevance to an issue truly in dispute must be demonstrated.” *Halper*, 590 F.2d at 432.

As demonstrated above, the schemes to defraud set forth in the two indictments are not related. Thus, evidence relating to the scheme set forth in the subsequent indictment does not tend “to make the existence of any fact that is of consequence” in the original indictment more or less probable. Fed. R. Evid. 401. Since it is not relevant to an issue truly in dispute, it should not be admitted into evidence. Fed. R. Evid. 402. That the two schemes shares general commonalities, such as the events occurring in the same year or similar terminology, does not mean that the previously uncharged (and now charged) scheme involving XXXXXXXX post-retirement conduct is truly relevant to any of the issues the jury would have to decide in passing on XXXXXXXX guilt or innocence in the original indictment. Rather, “the level of similarity is sufficiently abstract that the prejudice of admitting one scheme would give rise to precisely the sort of ‘bad character’ testimony deemed inadmissible under Rule 404(b).” *Buchanan*, 930 F. Supp. at 667.

In this case, the evidence at issue is not relevant to an issue other than character; rather it suggests only that the defendant is a bad person or that he is disposed toward criminal behavior. These are not permissible bases for admissibility under the Federal Rules of Evidence. *United States v. Hernandez*, 975 F.2d 1035, 1038 (4th Cir. 1992). Accordingly, the Government’s “other acts” evidence should be excluded.

In addition, the proffered evidence does not meet the additional requirements of reliability and necessity. While the Government has now taken its 404(b) evidence to the grand jury, the allegations contained therein remain mere allegations, not “proof” of any illegal conduct. Accordingly, its reliability should not weigh strongly in favor of admission. More importantly,

however, the Government's evidence fails the necessity prong of the 404(b) test. As noted above, proof of the scheme to defraud in the original indictment is in no way dependent upon or related to proof of the scheme set forth in the subsequent indictment.

Even if this evidence is deemed to have some permissible probative value, it must be weighed against the unfair prejudice to the defendant. In this case, the evidence contains minimal, if any, probative value, yet the prejudice to the defendant is grave. The likelihood that the jury will be confused or misled by the admission of evidence relating to two different and unrelated schemes, one in which XXXXXXXX is alleged to have acted with others while he was a police officer, and one in which he is alleged to have acted alone after he retired as a police officer, is great. As noted above, prejudice will arise from simultaneous jury consideration of the two indictments in this case because the jury may confuse the separate incidents and fail to consider each without reference to the other. Such confusion invites the jury to cumulate the evidence against the defendant and convict him of the counts contained in each indictment when the evidence is insufficient to convict when viewed separately.

In addition, if the post-retirement conduct is admitted either through joinder of indictments or through one of the evidentiary exceptions under 404(b), XXXXXXXX will have to defend against two different cases at once, though the Government had the opportunity to indict them separately. Thus, even if the court finds that the evidence at issue is not impermissible character evidence under Rule 404(b), it should still exclude the evidence under Rule 403. The court should likewise refuse to order that the two indictments be joined for one trial, relying on the policies underlying Rule 403. *See Winchester*, 407 F. Supp. at 268 (holding that even if government's evidence was relevant to a common design or plan under Rule 404(b), it should be

excluded based on the prejudice to the defendant and observing that “[t]he danger of such prejudice, which would possibly be manifested in a jury perception of criminal propensity on [the defendant’s] part or a jury tendency to cumulatively misapply ‘plan’ evidence is too great to allow the evidence’s admission regardless of its minimal probative value”). In short, the Court should not permit the Government to get in through the back door what it should not have been permitted to get in through the front door.

III. CONCLUSION

Based on the foregoing, XXXXXX respectfully requests this Court to deny the Government’s Motion for Joint Trial of Indictments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ___ day of September, 1999, a copy of the foregoing Defendant's Opposition to Government's Motion for Joint Trial of Indictments was delivered to Assistant United States Attorney Stuart A. Berman, 6500 Cherrywood Lane, Greenbelt, Maryland, 20770 and to counsel for co-defendants, Timothy J. Sullivan, Esq. Sullivan & Sullivan, 7305 Baltimore Avenue, Suite 301, College Park, Maryland 20740, Robert C. Bonsib, Esq., Marcus & Bonsib, 6411 Ivy Lane, Greenbelt, Maryland 20770, and Harry J. Trainor, Jr. Esq., Knight, Manzi, Nussbaum & Laplaca, 14440 Old Mill Road, Upper Marlboro, Maryland 20774.

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