

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 JOSEPH MERLINO, FRANK GAMBINO, :  
 RALPH ABRUZZI, STEVEN FRANGIPANI, :  
 and ANTHONY ACCARDO : NO. 99-0363-01--05

MEMORANDUM AND ORDER

HUTTON, J.

March 16, 2000

Presently before the Court are the severance motions of Joseph Merlino ("Merlino") (Docket No. 64), Frank Gambino ("Gambino") (Docket No. 99), Ralph Abruzzi ("Abruzzi") (Docket No. 98), Anthony Accardo ("Accardo") (Docket No. 101), and Steven Frangipani ("Frangipani") (Docket No. 110), Merlino's Supplemental Letter Brief in Support of Severance (Docket No. 114), the Government's Response Opposing Defendant Merlino's Motion for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 82), the Government's Consolidated Response Opposing Motions for Severance Filed by Defendants Gambino, Abruzzi, and Accardo (Docket No. 106), the Government's Supplemental Response Opposing Defendants Merlino's, Gambino's, Abruzzi's, and Accardo's Motions for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 108), the Government's Response Opposing Motion for Severance Filed by Defendant Steven Frangipani (Docket No. 109), and the Government's Response to Supplemental Letter

Brief Filed in Support of Defendant Merlino's Motion for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 115). For the reasons stated hereafter, each severance motion currently before the Court is **DENIED**.

### **I. BACKGROUND**

Merlino was arrested on drug charges by Federal Bureau of Investigation agents on June 28, 1999. He was ordered temporarily detained for a pretrial detention hearing. On June 30, 1999, Merlino was charged in a two count indictment with conspiracy to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 846, and with unlawful use of a communication facility in relation to a drug trafficking offense, in violation of 21 U.S.C. § 843(b).

During the course of the June 1999 arrest, Merlino allegedly made certain statements to Detective Mark Pinero ("Pinero"). These statements led to Merlino being charged under 18 U.S.C. § 115(a)(1)(B) and 18 U.S.C. § 115(a)(1)(B) for threatening Pinero and his family.

On July 1, 1999, Chief United States Magistrate Judge James R. Melinson held a pretrial detention hearing. Magistrate Judge Melinson found there was probable cause to believe that Merlino had committed the offenses with which he was charged and ordered that Defendant be detained pending trial pursuant to the Bail Reform Act of 1984, 18 U.S.C. § 3142. See Pretrial Detention Order, filed

July 2, 1999, by Honorable Magistrate Judge James R. Melinson, United States v. Merlino, Cr.No.99-363.

On July 12, 1999, Defendant filed with this Court a Motion to Reconsider the Pretrial Detention Order and to Permit Bail. On July 27, 1999, the Government filed a Response to the Merlino's Motion as well as its own Motion and Memorandum for Hearing on Merlino's Pretrial Detention. On July 28, 1999, this Court held a hearing on the two motions regarding Merlino's pretrial detention. On July 30, 1999, the Court denied Merlino's Motion to Reconsider the Pretrial Detention Order and to Permit Bail. The Court's decision relied in part on the fact that Merlino's second indictment indicated that he posed a significant threat of death or serious physical injury to Pintero and his family.

A seven day jury trial on the second indictment commenced on October 12, 1999, before the Honorable Jerome B. Simandle, United States District Judge for the District of New Jersey. The jury returned a verdict of "not guilty" on both counts. See Judgment of Acquittal, filed October 21, 1999, by Judge Jerome B. Simandle, United States v. Merlino, Cr.No.99-430 (JBS). Subsequent to Judge Simandle's decision, this court also upheld its prior decision to deny Merlino's motion for bail and pre-trial release.

On December 15, 1999, a grand jury returned a twelve-count superseding indictment (the "Superseding Indictment") which alleges that Merlino's authorization of the drug activities, as the Acting

Boss of the Philadelphia La Cosa Nostra ("LCN"), was part of a larger pattern of racketeering activity engaged in by members and associates of the Philadelphia LCN to generate money. The Superseding Indictment alleges that each defendant was a member of or was associated with an Enterprise, as defined in 18 U.S.C. § 1961(4), known as the Philadelphia LCN and which was headed by Merlino. Frank Gambino is alleged to have been a "soldier" and a "made" member of the Philadelphia LCN. Abruzzi, Accardo, and Frangipani are alleged to have been associates but not made members of the Philadelphia LCN.

The Superseding Indictment also alleges that Merlino authorized and directed Gambino, Abruzzi, Accardo, and Frangipani to receive and distribute stolen goods on behalf of the Philadelphia LCN. Moreover, as the Acting Boss of the Philadelphia LCN, Merlino allegedly approves all criminal activities conducted by LCN members and their associates, and also allegedly receives a portion of the monies generated through the criminal activities conducted by LCN members and their associates.

Regardless of their particular roles in the Enterprise, each defendant is alleged to have conducted and participated in the affairs of the Enterprise: (1) to perpetuate the Enterprise by concealing from law enforcement authorities the existence of the Enterprise, the identity of its members and associates, the manner in which it conducted its affairs, and the decisions and orders

given by the Enterprise's leaders to those working for the Enterprise; and (2) to expand the reach and profitability of the Enterprise.

As discussed above, the focus of the Government's original two-count indictment was Merlino's involvement in a drug conspiracy. It is alleged that in an effort to expand the reach and profitability of the Philadelphia LCN, Merlino included, inter alia, Robert Luisi, Jr, ("Luisi") and Shawn D. Vetere ("Vetere"), each of whom was based in Boston, Massachusetts, in the Enterprise's efforts in Boston. <sup>1</sup> At various times, Merlino authorized and approved members and associates to traffic in illegal drugs.

The focus of the Government's Superseding Indictment is broader than that of its original indictment. Not only does the Superseding Indictment include charges against Merlino arising from his alleged participation in Boston drug conspiracy, but it alleges that each named defendant trafficked in stolen merchandise. Therefore, while the Superseding Indictment does not allege that defendants Gambino, Abruzzi, Accardo, and Frangipani participated in the drug conspiracy charged to Merlino, it does allege that they and Merlino participated in a racketeering conspiracy. The acts which are charged as part of the racketeering conspiracy include the receipt of stolen televisions, television/vcr combinations,

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<sup>1</sup> Luisi and Vetere are not defendants in this action.

baby formula, ceiling fans, toy trains, bicycles, and sweat suits. Each defendant is also charged with conspiring to receive stolen goods. Merlino is specifically charged with violations of 18 U.S.C. §§ 1962(d), 1962(c), 659, 2, and 371 and 21 U.S.C. § 843(b). The Superseding Indictment charges Gambino and Abruzzi with violations of 18 U.S.C. §§ 1962(d), 1962(c), 659, 2, and 371. Accardo and Frangipani are charged with violations of 18 U.S.C. §§ 1962(d), 659, 2, and 371.

Before the Court is Merlino's severance motion which seeks the following: (1) dismissal on the basis of misjoinder; (2) severance of the drug charges from the charges of a RICO conspiracy; and/or (3) severance of his trial from the trial of his co-defendants. Defendants Gambino, Abruzzi, Accardo, and Frangipani each seek severance of their RICO conspiracy cases from that of co-conspirator Merlino. On February 25, 2000, the Court conducted a hearing on the defendants' pending severance motions.

## **II. LEGAL STANDARD**

There exists a preference in the federal system for joint trials of defendants who are indicted together. See Zafiro v. United States, 506 U.S. 534, 537, 113 S. Ct. 933, 937 (1993). Joint trials "play a vital role in the criminal justice system." See id. (citation omitted). Indeed, the Supreme Court has repeatedly approved joint trials because such trials promote

efficiency and "serve justice by avoiding the scandal and inequity of inconsistent verdicts." See id. (citation omitted).

Federal Rule of Civil Procedure 8, which governs joinder in criminal cases, states as follows:

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information 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. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8. "The standards of Rule 8(a) and (b) joinder are nearly the same. Both permit joinder of offenses and defendants, respectively, when a transactional nexus exists between the offenses or defendants to be joined." United States v. Eufrazio, 935 F.2d 553, 570 n.20 (3d Cir. 1991).

The purpose of Rule 8(a) is to promote judicial economy and to preserve the prosecution's resources. See, e.g., United States v. Taylor, Crim. No. 91-00634, 1992 WL 333589, at \*1 (E.D. Pa. Nov. 9, 1992); United States v. Lipari, Crim. No. 92-164, 1992 WL 165799 (D.N.J. July 8, 1992). Rule 8(a) allows free joinder of offenses charged against a single defendant if the offenses charged are (1) based on the same act or transaction, (2) constitute part of a common scheme or plan, or (3) are of the same or similar character.

See United States v. Dileo, 859 F. Supp. 940, 942 (W.D. Pa. 1994) (citing 1 Charles A. Wright, Fed. Prac. & P., § 243 (1983)); see also 1 Charles A. Wright, Fed. Prac. & Proc., § 222 (1999). The Third Circuit alternatively stated that for joinder to be proper under Rule 8(a), there must be a "transactional nexus" between the offenses joined. See United States v. McGill, 964 F.2d 222, 241 (3d Cir. 1992) (citation omitted); Dileo, 859 F. Supp. at 942 . Accordingly, with regard to a Rule 8(a) Motion, the dispositive issue generally is whether the two sets of charges are sufficiently related so as to be transactionally related or part of a common scheme or plan. See United States v. Eufrazio, 935 F.2d 553, 570 n.20 (3d Cir. 1991); Dileo, 859 F. Supp. at 942 .

While Rule 8(a) historically permitted joinder of offenses against one defendant so long as he or she was the only defendant in the case, see, e.g., United States v. Ashley, 905 F. Supp. 1146, 1163 (E.D.N.Y. 1995); United States v. Vastola, 670 F. Supp. 1244, 1261 (D.N.J. 1987), the Third Circuit suggested in dicta that Rule 8(a) might be the appropriate standard for the joinder of multiple offenses against one defendant, even in a multi-defendant case. See Eufrazio, 935 F.2d at 570 n.20. The Eufrazio court stated that "contrary to the jurisprudence in other circuits, when a joinder of offenses charged against the same defendant is challenged, the literal meaning of the Rule requires application of Rule 8(a), irrespective of whether multiple defendants are involved in the

case." Id. The Third Circuit cited its Eufrasio dicta in United States v. McGill, 964 F.2d 222 (3d Cir. 1992), but declined to adopt a new rule with regard to Rule 8(a) joinder. Id. at 241. Therefore, Rule 8(a) remains applicable to only those cases in which there is one defendant.

Rule 8(b) provides substantial leeway to prosecutors who wish to join racketeering defendants in a single trial. See United States v. Eufrasio, 935 F.2d 553, 567 (3d Cir. 1991). The rule allows joinder of defendants charged with participating in the same conspiracy or racketeering enterprise. Id. "[J]oinder ... of a conspiracy count and substantive counts arising out of the conspiracy [is permitted], since the claim of conspiracy provides a common link, and demonstrates the existence of a common scheme or plan." United States v. Somers, 496 F.2d 723, 729-730 (3d Cir. 1974) (citation omitted). A RICO conspiracy charge provides that required link.<sup>2</sup> Therefore, joinder is allowed against racketeering

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<sup>2</sup> The Eufrasio court adopted the reasoning of United States v. Friedman, 854 F.2d 535, 561 (2d Cir. 1988), a Second Circuit decision, which stands for the proposition that joinder of a conspiracy count and substantive counts arising out of the conspiracy is permitted as a claim of a RICO conspiracy provides the common link that is needed and demonstrates the existence of a common scheme or plan. The Friedman court reasoned that although Rule 8(b) limits a prosecutor's power to charge multiple defendants in a single proceeding, that power is probably at its greatest when RICO conspiracy charges are brought. As one judge observed:

The mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants named have engaged in the same series of acts or transactions constituting an offense. The presence of a substantive RICO count under 18 U.S.C. § 1962(c), and of a RICO conspiracy count under 18 U.S.C. § 1962(d), further broadens the government's power to charge multiple defendants together. A RICO charge under § 1962(c) necessarily incorporates allegations that each of the defendants named was associated with or employed by the same enterprise, and participated in the enterprise by engaging in at least two acts of racketeering related to the enterprise. In short, by loosening the statutory requirements for what constitutes joint criminal activity, Congress

defendants even where different defendants are charged with different acts, so long as the indictments indicate that all the acts charged against each joined defendant are charged as racketeering predicates or acts undertaken in furtherance of, or in association with a commonly charged RICO enterprise or conspiracy. Id. (citation omitted).

A party may seek relief from prejudicial joinder under Rule 14 of the Federal Rules of Criminal Procedure. Rule 14 states as follows:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Fed. R. Crim. P. 14.

Although joinder is lawful under Rule 8, severance under Rule 14 may be appropriate in cases where joinder creates a risk of substantial prejudice to a particular defendant or the government. See United States v. Spencer, No. 99-256-06, 1999 WL 973856, at \*2 (E.D. Pa. Oct. 25, 1999). Thus, Rule 14 recognizes that severance

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limited the force of Rule 8(b) in such situations.

United States v. Friedman, 854 F.2d 535, 561 (2d Cir. 1988) (quoting United States v. Castellano, 610 F. Supp. 1359, 1396 (S.D.N.Y. 1985)). As stated in the Eufrazio decision, the Third Circuit agrees with the Second Circuit's position that a RICO conspiracy charge provides that required link. See Eufrazio, 935 F.2d 553 at 567 (citations omitted).

may be appropriate even in the circumstance of lawful joinder of parties or offenses.

Before a court may consider a motion for severance, said motion must be filed prior to trial. See United States v. Mazza, Nos. CRIM.A. 98-113-1, 98-113-2, 1999 WL 1244418, at \*5 (E.D. Pa. Dec. 20, 1999). Severance under Rule 14 is a matter committed to the trial court's discretion. See United States v. Eufrazio, 935 F.2d 553, 568 (3d Cir. 1991). Where a motion is timely filed and prejudice is shown, the trial court still has discretion to deny severance. See Fed. R. Crim. P. 14 ("If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." (emphasis added)).

Prejudice is the touchstone of a Rule 14 motion for severance. The Third Circuit stated, however, that mere allegations of prejudice are not enough and that a defendant must affirmatively show "clear and substantial prejudice." See United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981); see also United States v. Lipari, Crim. No. 92-164, 1992 WL 165799, at \*10 (D.N.J. July 8, 1992). In so doing, defendant bears the burden of demonstrating that he or she has been prejudiced. See United States v. Spencer, No. 99-256-06, 1999 WL 973856, at \*2 (E.D. Pa.

Oct. 25, 1999). Defendant must show more than the fact that a separate trial might offer him or her a better chance of acquittal. Spencer, 1999 WL 973856, at \*2 (E.D. Pa. Oct. 25, 1999).

In deciding whether to grant a defendant's severance motion, the court should balance the public interest in joint trials against the possibility of prejudice inherent in the joinder of defendants. See United States v. Eufrazio, 935 F.2d 553, 568 (3d Cir. 1991); United States v. Mazza, Nos. CRIM.A. 98-113-1, 98-113-2, 1999 WL 1244418, at \*6 (E.D. Pa. Dec. 20, 1999). Prejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant or some evidence adduced is more damaging to one defendant than others. See United States v. Balter, 91 F.3d 427, 433 (3d Cir. 1996); United States v. Console, 13 F.3d 641, 655 (3d Cir. 1993). Indeed, the Zafiro Court stated severance should be granted "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." Zafiro, 506 U.S. at 538-39, 113 S. Ct. at 937-38. "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." Id. at 539, 113 S. Ct. at 938. The Zafiro Court cited three specific examples in which this might occur: (1) "a complex case" involving "many defendants" with

markedly different degrees of culpability;" (2) a case where evidence that is probative of one defendant's guilt is technically admissible against only a co-defendant; and (3) a case where evidence that exculpates one defendant is unavailable in a joint trial. Id. at 539, 113 S. Ct. at 938; see also United States v. Balter, 91 F.3d 427, 433 (3d Cir. 1996).

Whether a defendant may be actually prejudiced may depend on the likelihood that the jury will have the capacity to "compartmentalize" the evidence adduced. See United States v. Sebetich, 776 F.2d 412, 427 (3d Cir. 1985). For example, where many defendants are tried together in a complex trial and the defendants have markedly different degrees of culpability, the risk of prejudice is heightened. See Zafiro, 506 U.S. at 539, 113 S. Ct. at 938. The relevant inquiry regarding "compartmentalization" is whether it is within the jury's capacity to follow the trial court's instructions requiring separate consideration for each defendant and the evidence admitted against him or her. See 25 James Wm. Moore et al., Moore's Federal Practice 3d § 608.03(3).

The preeminent Third Circuit case on Rule 14 severance is United States v. Eufrazio, 935 F.2d 553 (3d Cir. 1991). At the trial level, the Eufrazio defendants, Idone, Eufrazio, and Iacona were convicted and sentenced for RICO violations, attempted extortion, and illegal gambling. They were charged together and tried jointly before an anonymous jury. Their RICO liability was

predicated on attempted extortion, illegal video poker machine gambling, and collecting unlawful debts. Only Idone was charged and convicted on a separate racketeering predicate of murder conspiracy.

On appeal Idone, Eufrazio, and Iacona alleged the following errors: with respect to the RICO counts, the superseding indictment failed to charge a valid pattern of racketeering activity; evidence of uncharged crimes was admitted without adequate limiting instructions and without articulating a Federal Rule Evidence 403 balance; the district court empaneled an anonymous jury without a hearing and without stating its reasons on the record; and, various insufficiencies of evidence warranted reversal of appellants' convictions. Eufrazio and Iacona also argued that the trial court erred by not severing their trials from Idone's trial when only Idone was indicted under RICO on the murder conspiracy predicate, evidence of which allegedly prejudiced Eufrazio and Iacona. Idone argued that it was error not to dismiss the murder conspiracy charge from his trial, or alternatively, to sever the RICO counts from his trial on the other charges.

Evidence introduced at trial showed that during 1982 and 1983, Idone participated in the affairs of an organized crime enterprise through a murder conspiracy and that during 1981-1986, all appellants conspired to and did participate in the same enterprise through a pattern of illegal gambling and the attempted extortion

of a competitor of their gambling business, and through the collection of unlawful debts. From 1981 to 1986, appellants conspired to participate, and participated knowingly in the Scarfo "Family," a Philadelphia and New Jersey based subdivision of La Cosa Nostra. At times relevant to appellants' convictions, the Scarfo organization was a RICO "enterprise" consisting of approximately 60 full members of LCN, and at least 100 criminal associates. Appellants' participation in Scarfo-related criminal activities resulted in their RICO convictions.

During the period 1981-1986, Idone supervised a crew of soldiers and associates, including Eufrazio and Iacona. Idone's crew participated in the crimes at issue in their trial: the conspiracy to murder Thomas Auferio; the illegal video poker machine gambling business; the attempt to extort competitors of that business; and the collection of unlawful debts. As required by Mafia rules, Capo Idone periodically reported his crew's criminal activities to his Boss, Scarfo. Eufrazio regularly arranged meetings with Scarfo to facilitate Idone's reporting.

Appellants and their fourth co-defendant, Peticca, who did not appeal, were originally charged in a four count indictment with racketeering, racketeering conspiracy, extortion and illegal gambling. This indictment charged that appellants conspired to and did associate with the Scarfo enterprise through a pattern of racketeering activity occurring over the period 1982-1986. The

pattern of racketeering charged against each appellant consisted of extortion and illegal gambling. This original indictment also charged each appellant with collecting unlawful debts, an alternative basis of RICO liability. Eight months later, the government returned another indictment against appellants. This superseding indictment enlarged the pattern of racketeering activity alleged in the original indictment, by charging an additional racketeering predicate against Idone only; he was charged with participating in the Auferio murder conspiracy. The Auferio murder conspiracy, Racketeering Act One in the Superseding Indictment, is the distinguishing difference between the two indictments. Charging the Auferio murder conspiracy as a racketeering predicate resulted in other differences between the two indictments, but generally speaking, the two indictments are the same but for the murder conspiracy charge against Idone. Both indictments alleged appellants conspired to and did in fact participate in the affairs of the Scarfo enterprise through a pattern of racketeering activity and collecting unlawful debts. Despite the similarities, however, the superseding indictment charged Idone alone with the murder conspiracy predicate.

Before trial, Idone made a motion in the alternative under Federal Rules of Criminal Procedure 8 and 14, to either dismiss the murder conspiracy predicate alleged against him, or to sever his trial on the RICO counts (which incorporated the murder conspiracy

predicate) from his trial on the two non-RICO counts (extortion and illegal gambling). Idone's motion was denied. The trial court also denied Eufrazio's and Iacona's pretrial motions to sever Idone's trial from their own, and for a Bill of Particulars on the extortion count. After granting the government's motion for an anonymous jury, the trial court tried appellants jointly.

As previously stated, the jury found each defendant guilty on four counts: conspiring to participate, and participating in the affairs of an enterprise through a pattern of racketeering activity and the collection of unlawful debt in violation of 18 U.S.C. § 1962(d) and (c) (counts one and two); attempted extortion in violation of 18 U.S.C. § 1951 (count three); and conducting an illegal gambling business in violation of 18 U.S.C. § 1955 (count four). Only Idone was charged with and convicted on a separate racketeering predicate of murder conspiracy.

On appeal, Eufrazio and Iacona argue that joinder of their trials with Idone's constituted reversible error because Eufrazio and Iacona were wholly unconnected with and unaware of the murder conspiracy charged as a racketeering predicate against Idone only. Eufrazio and Iacona alleged that the joinder of their trials with Idone's prejudiced them because the murder conspiracy alleged against Idone infected the entire trial with evidence of uncharged Mafia crimes and the murder conspiracy itself. They claim the joinder exposed the jury to evidence of numerous mob murders and

attempted murders related to the Auferio murder conspiracy and the Scarfo/Riccobene mob war, in which Eufrazio and Iacona did not participate.

The Third Circuit, upon review of the superseding indictment, concluded that charging and proving the Auferio murder conspiracy as a racketeering predicate against Idone, but not against Eufrazio and Iacona, did not preclude Rule 8(b) joinder of all appellants. The court reasoned that the murder conspiracy and all the other acts charged in the case were related and formed a single pattern of racketeering activity, because each was committed in furtherance of the Scarfo enterprise. The Eufrazio court concluded that there was no Rule 8(b) misjoinder of appellants because, consistent with the law of joinder in RICO cases, all the criminal acts charged against each defendant, including the murder conspiracy implicating Idone, were undertaken in furtherance of a single, commonly charged racketeering enterprise and conspiracy.

### **III. DISCUSSION**

The Court hereafter separately considers each defendant's arguments for severance.

#### **A. Merlino's Motion for Severance**

Merlino's severance motion implicates both sub-sections of Rule 8. He first argues for dismissal on the basis of misjoinder. See United States v. Camiel, 689 F.2d 31 (3d Cir. 1982). Generally, the Court looks to the indictment to determine whether

the prosecutor joined claims properly. See United States v. Lipari, Crim. No. 92-164, 1992 WL 165799, at \*8 (D.N.J. July 8, 1992). In racketeering cases, the allegation of a racketeering conspiracy provides the necessary "common link" to make joinder proper under the theory that there exists a common scheme or plan as required by Rule 8(a). Indeed, a prosecutor's power to join multiple defendants and offenses in a single indictment is formidable in the RICO context. Merlino neither persuasively argues that the "common link" in this racketeering case is insufficient to support joinder nor provides other bases on which this Court can find misjoinder. The Court therefore denies Merlino's prayer for the remedy of dismissal. Notwithstanding a finding of proper joinder, the Court may still order severance.

Merlino also seeks a severance of offenses, whereby his drug charges will be severed from the RICO charges. He contends that the factual bases supporting the counts enumerated in the Superseding Indictment are so unrelated that it would be impossible for a jury to sort out the evidence at trial without producing "spillover" and "guilty by association" effects, thereby causing him substantial prejudice. (See Merlino's Letter Brief, 12/29/99, at 5).

The Eufrazio court intimated in dicta that Rule 8(a) may be applicable to motions to sever offenses in multi-defendant cases. See Eufrazio, 935 F.2d at 570 n.20. That statement of the Eufrazio

court contravenes the historical application of Rule 8(a) to cases in which there was one defendant only. In United States v. McGill, 964 F.2d 222 (3d Cir. 1992), the Third Circuit resolved the ambiguities created by the Eufrazio decision when it expressly declined to adopt a new practice for Rule 8(a) severance. See id. at 241. Therefore, severance of offenses under Rule 8(a) is not available to a defendant in a multi-defendant suit. Accordingly, Rule 8(a) does not permit Merlino to sever his drug charges from the RICO conspiracy charges and his Motion is denied to the extent that he seeks a severance of offenses.

Merlino also seeks severance of the charges brought against him from those brought against his co-defendants. At oral argument, his counsel argued that the other defendants and their counsel would be "useless ornaments" during the weeks it would take Merlino to defend against the drug charges brought against him. (See Tr., 2/25/00, at p. 9, l. 19-23). Merlino's counsel also argued that during the weeks of trial that would be dedicated solely to the drug charges brought against Merlino, the other defendants would be forced to miss work, would needlessly incur counsel fees as their respective counsel attended a portion of the trial that is not germane to the RICO conspiracy offenses charged, and that this is not "fair" to the other defendants. (See Tr., 2/25/00, at p. 9, l. 19-24). Merlino's counsel concluded that Merlino's severance motion is therefore about what is "fair."

The Third Circuit's Eufrazio decision confines the Court's analysis to whether Merlino met his burden of showing clear and substantial prejudice as a result of joinder. Evidencing such prejudice requires more than alleging that acquittal is more likely if severance is granted or that all the evidence that will be adduced will not be germane to a particular defendant. The Court interprets Merlino's Rule 8(b) severance motion to argue that joinder is inappropriate as it is unfair to his co-defendants. Merlino does not demonstrate that severance is appropriate because the joinder of defendants Gambino, Abruzzi, Accardo, and Frangipani is prejudicial to him. As Merlino fails to demonstrate that the Superseding Indictment's joinder of defendants prejudices him, Merlino does not meet his burden of showing clear and substantial prejudice. See United States v. Reicherter, 647 F.2d 397, 400 (3d Cir. 1981).

Merlino also argues for severance under the authority of Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239 (1946). Kotteakos was a case in which the government tried to prosecute multiple conspiracies against multiple defendants in a single trial. The trial subjected each alleged co-conspirator to evidence about multiple conspiracies that he or she never joined. In the instant matter, however, the Government alleges that each defendant was a member of a single racketeering conspiracy. (See Superseding Indictment at ¶ 11). Additionally, the Kotteakos case predated the

enactment of RICO and it is well settled that RICO allows the inclusion of multiple defendants and multiple offenses in a single indictment where the defendants agreed to commit a substantive RICO offense. Thus, the prejudicial problems that were present in the Kotteakos case are not present in this case and the Court therefore finds unavailing Merlino's argument that Kotteakos supports severance in this matter.

**B. Abruzzi's Motion for Severance**

Abruzzi's severance motion argues that because he is not named in the counts of the Superseding Indictment which charge drug-related offenses and because it is not alleged that he was involved in any drug-related conspiracy or conduct, "[c]learly, it would be enormously prejudicial to join [him] in a trial wherein drug activity is alleged." (Abruzzi's Motion for Severance at ¶¶ 3-6). At oral argument, Abruzzi's counsel stated that severance will prevent his client from being "disadvantaged unfairly" by the jury's contemplation of the drug charges brought against Merlino and possible association of said charges with Abruzzi.

The crux of Abruzzi's argument appears to be that the jury will not have the capacity to compartmentalize the evidence adduced against Merlino. Nevertheless, there is neither evidence before the Court that Abruzzi will suffer substantial prejudice as a result of joinder nor is there substantive argument that the jury will be unable to compartmentalize the evidence adduced at trial.

Moreover, as Abruzzi was jointly indicted with his co-defendants and jointly charged with participating in the same conspiracy, the public interest in judicial economy favors joinder. Indeed, the Government alleges that during the drug conspiracy, it taped numerous conversations in which Abruzzi, Merlino, and Gambino talk about continuing thefts. (See Tr. at 26, l. 4-6). Severance is inappropriate as drug trafficking and the theft and sale of merchandise are alleged to be criminal acts performed in furtherance of the Enterprise, the evidence that may be introduced at trial is intertwined as to both drug trafficking and the theft and sale of merchandise, and a joint trial will serve the complementary interests of judicial economy and the preservation of prosecutorial resources.

**C. Gambino's Motion for Severance**

Gambino's severance motion argues that because the RICO theft-related charges against him and his co-defendants are joined with Merlino's drug-related charges, and "drug trafficking is viewed as taboo by society," the combination of allegation in a single indictment "may prove lethal for" him. (See Gambino's Mot. for Sever. at ¶¶ 3-4). Gambino further argues that no logical or temporal connection exists between the drug trafficking charges and the RICO theft-related charges. (See Gambino's Mot. for Sever. at ¶ 5). He then argues that the Government's strategy is to convict

him on the basis of "guilt by association." (See Gambino's Mot. for Sever. at 2).

There exists both a temporal and logical connection between the drug and RICO charges. Government counsel stated "there clearly is [such a relationship]. At the same time and we have the same tapes when they're talking about drugs, they're talking about stolen property." (Tr. at 29, l. 12-17). The Government also stated that some of its tapes talk about "both theft and drugs. And that [the Government] is looking at judicial economy, the same tapes on a number of occasions are to be played for drugs, for theft, and also to prove the [E]nterprise." (Tr. at 26, l. 11-14). Additionally, the Government alleges that during the drug conspiracy, it taped numerous conversations in which Abruzzi, Merlino, and Gambino talk about continuing thefts. (See Tr. at 26, l. 4-6).

At oral argument, Gambino's counsel referenced United States v. Eufrazio, 935 F.2d 553 (3d Cir. 1991), for the proposition that a court's decision on whether to grant a party's severance motion should be informed by "the quantity and limited admissibility of the prejudicial evidence." (Tr. at 16, l. 20-24). While his counsel claimed that there are over two hundred tapes that deal only with the drug charges against Merlino, the Government countered counsel's argument by challenging both the number of tapes referenced by counsel and the content of those tapes. As

stated above, the Government argues that many of its tapes discuss drugs, theft, and the Enterprise. Therefore, counsel's argument that the Court's decision should be tempered by the quantity and limited admissibility of the prejudicial evidence is unavailing. The Court also finds unpersuasive Gambino's argument as it ignores two instructive statements of the Third Circuit: (1) that "[p]rejudice should not be found in a joint trial just because all evidence adduced is not germane to all counts against each defendant;" and (2) that "[n]either disparity in evidence, nor introducing evidence more damaging to one defendant than others entitles seemingly less culpable defendants to severance." Id. (citations omitted).

#### **D. Accardo's Motion for Severance**

Accardo's motion argues that there exists no temporal or logical relationship between the drug related charges which stem from Merlino's alleged drug-related activities in 1999 and the RICO theft-related charges which allegedly took place in 1997 and 1998. (Accardo's Motion for Severance at ¶¶ 3-4). He argues that to include him in an indictment that contains unrelated drug charges is fundamentally unfair and inappropriate and cites United States v. Giampa, 904 F. Supp. 235 (D.N.J. 1995), in support thereof. (Accardo's Motion for Severance at ¶ 6).

In Giampa, several defendants argued for severance in a case in which they were each charged with violating RICO. Id. at 266.

The defendants argued, inter alia, that they would be prejudiced by the "spillover effect" created by a single trial of all defendants because "the jury would be unable to compartmentalize the evidence against them while evidence was presented which implicate[d] their co-defendants." Id. The court concluded, however, that the defendants "did little more than make conclusory allegations of prejudice, and, accordingly, failed to meet their burden of pinpointing clear and substantial prejudice which would result from a joint trial." Id. In Giampa, severance was not granted to a single defendant.

Accardo does not distinguish or, indeed, discuss Giampa whatsoever in his motion or in a memorandum of law. The Court is therefore perplexed by Accardo's citation of Giampa. Indeed, the Giampa court's reasoning for denying severance seems ideally suited to the reasons this Court should deny Accardo's severance motion as he, like the Giampa defendants, has not met his "heavy burden" of "pinpointing clear and substantial prejudice" which would justify severance. See id. at 265 (citation omitted); see also Eufrazio, 935 F.2d at 568.

#### **E. Frangipani's Motion for Severance**

Frangipani argues that "[t]here is no relationship whatsoever between [Merlino's] drug-related charges which occurred in 1999 . . . and the theft charges [which relate to him] involving receipt of stolen goods which occurred in different years." (Frangipani's

Motion for Severance at ¶ 4). He continues that "[t]here is no allegation whatsoever that [he] was involved in any drug-related conspiracy or conduct which would warrant his inclusion in the Merlino conspiracy." (Frangipani's Motion for Severance at ¶ 4). He concludes that it will be enormously prejudicial to join [him] in a trial wherein drug activity is alleged." (Frangipani's Motion for Severance at ¶ 6).

As to his argument that there is no relation between the drug and RICO charges contained in the Superseding Indictment, Frangipani ignores the fact that he, Merlino, and the other co-defendants are joined in a RICO conspiracy and that "a RICO conspiracy charge provides [the] required link" to make joinder lawful and appropriate. Id. at 567. Moreover, because the criminal acts charged against Frangipani are alleged to have been undertaken in furtherance of a commonly charged racketeering enterprise and conspiracy," there exists a common link such that all charges are related under the umbrella of RICO. Eufrazio, 935 F.2d at 567. Most importantly, however, Frangipani ignores the Government's statement (or was unaware) that Luisi will "identify Frangipani as an associate of Merlino and will testify that Frangipani traveled to Boston and picked up a sum of money for Merlino which Luisi was loaning to Merlino." (Tr. at 28 l. 9-12).

As to meeting the "heavy burden" of showing that he will be prejudiced by joinder, Frangipani, like the other defendants,

resorts to a single unsupported assertion. As such, Frangipani does not convince the Court that he will be prejudiced by a joint trial such that severance is appropriate.

#### **IV. CONCLUSION**

Prejudice is the touchstone of a Rule 14 motion for severance. While the denial of severance is committed to the sound discretion of the trial court, it is defendant's burden to demonstrate that clear and substantial prejudice will occur if a joint trial goes forward. None of the defendants in this matter met this burden. Moreover, each defendant's motion ignored Eufrasio, the seminal Third Circuit case on severance.

The similarity of Eufrasio to the instant case is striking. One similarity is that the allegation of a RICO conspiracy provides the necessary link whereby each defendant is brought within the fold of the Superseding Indictment. The Eufrasio court agreed with the Second Circuit's position that a RICO conspiracy charge provides the required link between the different charges such that joinder is appropriate. As alleged by the Government in its racketeering indictment, the purpose of the Enterprise was "to control, manage, finance, supervise, participate in and set policy concerning the making of money for the Enterprise through legal and illegal means." Ultimately, the circumstance presented to the Court is one in which money was made illegally through the auspices of the racketeering enterprise--the

Philadelphia LCN. This factual circumstance is much like the factual circumstance that was before the Eufrasio court.

A second analogy that may be drawn between this case and the Eufrasio decision is the importance of compartmentalizing the evidence adduced and the trial court's ability to draft limiting instructions to lessen the likelihood of prejudice. The Court is confident that just as the trial court did in Eufrasio, it can fashion a limiting instruction that will reduce the probability that defendants Gambino, Accardo, Abruzzi, and Frangipani will be prejudiced by Merlino's alleged involvement in a drug conspiracy. Indeed, the Court's belief is buttressed by the fact that the trial court in Eufrasio successfully fashioned such an instruction, although the threat of prejudice was arguably greater in that case as one defendant was charged with murder.

A third similarity between this case and Eufrasio is the timing of the offense committed by one indicted defendant (i.e., Merlino's drug charges and the murder charge in Eufrasio) and the allegedly prejudicial effect that said offense will have on the other co-defendants. In Eufrasio, the murder occurred early in the conspiracy, well before the other co-defendants were involved and then the other crimes were charged. In this case, however, the drug conspiracy and the theft conspiracy allegedly occurred simultaneously. The Government alleges it has a tape recorded conversation in which the drugs and the thefts are discussed as

late as March 25, 1999. Additionally, during the drug conspiracy there are numerous conversations wherein Merlino, Abruzzi, and Gambino are recorded talking about continuing thefts. Accordingly, the Court is to hear the same tapes on a number of occasions when evidence is being presented concerning drugs, theft, and the existence of the Enterprise. As the same tapes will be heard repeatedly, a single trial for all the defendants and all the counts brought in the Superseding Indictment is desirable for, inter alia, the reason of judicial economy.

Furthermore, in the interest of judicial economy, the Court will also hear some witnesses testify as to drugs, theft, and/or the existence of the Enterprise. For example, Ron Previte will allegedly testify as to drugs, thefts, and the RICO Enterprise. Mike McGowan will allegedly testify as to drugs and the RICO Enterprise. Fred Angelucci will allegedly testify as to thefts and the RICO Enterprise. Most importantly, however, is Luisi's testimony as he will allegedly testify extensively as to drugs, thefts, and the existence of the Enterprise.

Indeed, Luisi will allegedly testify that Merlino is the Acting Boss of the Philadelphia LCN, that Merlino inducted him into the Philadelphia LCN (i.e., designated him a "made" member of the LCN), and that Merlino made him a captain in the Philadelphia LCN. He will also testify that the Philadelphia LCN generated money through a number of illegal activities including trafficking in

drugs and stolen property. Luisi will also testify that Merlino authorized him to distribute cocaine and that he and Merlino conspired to receive and possess stolen property. Luisi will allegedly also testify that Frangipani, as an associate of Merlino, traveled to Boston to pick-up \$15,000.00 which Luisi loaned to Merlino. Therefore, in light of the foregoing, it is prudent and judicious for the Court to uphold the joinder of defendants Merlino, Gambino, Accardo, Abruzzi, and Frangipani.

It is the Court's position that Eufrasio is controlling on the issue of severance and that the instant case fits directly within Eufrasio. Indeed, both cases concern the same Enterprise--the Philadelphia LCN. It is also the Court's position that the "spillover effect" predicted to occur in this case due to Merlino's drug charges are far less prejudicial than the "spillover effect" occasioned by the murder charge in Eufrasio. It is also the Court's position that the jury will have the ability to compartmentalize the evidence presented and that this Court will fashion limiting instructions that will enhance the jurors' ability to effectively compartmentalize the evidence in the record. Indeed, at the time that testimony about drugs is being heard, the Court will have the ability to caution the jurors that they are to consider such testimony only when deliberating on the charges brought against Merlino. It is also clear to the Court that a temporal relationship exists between the drug and theft charges.

Finally, it is the Court's position that there is no case law which supports the positions taken by the defendants in the their motions to sever. Accordingly, each severance motion before the Court is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 JOSEPH MERLINO, FRANK GAMBINO, :  
 RALPH ABRUZZI, STEVEN FRANGIPANI, :  
 and ANTHONY ACCARDO : NO. 99-0363-01--05

O R D E R

AND NOW, this 16<sup>th</sup> day of March, 2000, upon consideration of the severance motions of Joseph Merlino ("Merlino") (Docket No. 64), Frank Gambino ("Gambino") (Docket No. 99), Ralph Abruzzi ("Abruzzi") (Docket No. 98), Anthony Accardo ("Accardo") (Docket No. 101), and Steven Frangipani ("Frangipani") (Docket No. 110), Merlino's Supplemental Letter Brief in Support of Severance (Docket No. 114), the Government's Response Opposing Defendant Merlino's Motion for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 82), the Government's Consolidated Response Opposing Motions for Severance Filed by Defendants Gambino, Abruzzi, and Accardo (Docket No. 106), the Government's Supplemental Response Opposing Defendants Merlino's, Abruzzi's, and Accardo's Motions for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 108), the Government's Response Opposing Motion for Severance Filed by Defendant Steven Frangipani (Docket No. 109), and the Government's Response to Supplemental Letter Brief Filed in Support

of Defendant Merlino's Motion for Severance Under Rule 14 of the Federal Rules of Criminal Procedure (Docket No. 115), IT IS HEREBY ORDERED that:

- (1) Merlino's Motion for Severance (Docket No. 64) is **DENIED**;
- (2) Gambino's Motion for Severance (Docket No. 99) is **DENIED**;
- (3) Abruzzi's Motion for Severance (Docket No. 98) is **DENIED**;
- (4) Accardo's Motion for Severance (Docket No. 101) is **DENIED**;

and

(5) Frangipani's Motion for Severance (Docket No. 110) is **DENIED**.

BY THE COURT:

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HERBERT J. HUTTON, J.