

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION  
 :  
 HABEEB MALIK : NO. 08-0614-01  
 :

**SURRICK, J.**

**JULY 2, 2009**

**MEMORANDUM**

Presently before the Court is Defendant Habeeb Malik's Motion for Dismissal of Count One Pursuant to *United States v. Kotteakos*; for Relief from Misjoinder; and for Severance. (Doc. No. 28.) For the following reasons, the Motion will be denied.

**I. BACKGROUND<sup>1</sup>**

From 2000 through 2005, Habeeb Malik ("Defendant") operated a business out of his basement known as the Foundation of Human Services ("the Foundation"), the purpose of which was to assist foreign individuals in obtaining United States citizenship. On October 2, 2008, a grand jury returned an Indictment charging Defendant with naturalization fraud and conspiracy to commit naturalization fraud. (*See* Indictment, Doc. No. 1.) The charges arose out of a scheme with two physicians, co-defendants Ira Weiner ("Weiner") and Thongchai Vorasingha

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<sup>1</sup> In considering a motion to dismiss an indictment or for severance, "the district court accepts as true the factual allegations set forth in the indictment." *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952)); *see also United States v. Liss*, 265 F.3d 1220, 1228 (11th Cir. 2001) (noting that "[t]he propriety of joinder 'is to be determined before trial by examining the allegations contained in the indictment'" (citation omitted); *United States v. Harrelson*, 754 F.2d 1153, 1176 (5th Cir. 1985) ("The propriety of joinder under Rule 8 is determined by the initial allegations of the indictment, which are accepted as true absent arguments of prosecutorial misconduct.") (citing *Schaffer v. United States*, 362 U.S. 511, 513 (1960)), *cert. denied*, 474 U.S. 908 (1985).

(“Vorasingha”). The foreign individuals who sought the Foundation’s services had difficulty reading and writing English. (*Id.* ¶ 8.) Foreign individuals must be able to speak, read, and write basic English to be eligible for United States citizenship. (*Id.* ¶ 5.) Those who are unable to meet this requirement because of a physical or mental impairment can apply for a waiver. (*Id.*)

For a \$2,000 fee, Defendant sent the foreign individuals to Weiner and Vorasingha for “examinations” to determine if they qualified for a waiver. (*Id.* ¶ 9.) Weiner’s “examination” consisted of talking with the foreign individuals for approximately three minutes and talking privately with Defendant for approximately ten minutes. (*Id.* ¶ 10.) Similarly, Vorasingha’s “examination” consisted of drafting a written questionnaire that asked “if the applicant would agree if . . . Vorasingha diagnosed him or her with mild retardation.” (*Id.* ¶ 11.) Vorasingha diagnosed applicants based on the written answers. (*Id.*) Defendant paid Weiner and Vorasingha \$120 for each “examination.” (*Id.* ¶ 9.)

After the examinations, Weiner and Vorasingha completed waiver forms stating that the individuals suffered from various maladies – including learning disorder, depression, anxiety, post traumatic stress disorder resulting from the hostilities overseas, and mental retardation – that impaired their ability to learn English. (*Id.* ¶ 12.) The individuals did not actually suffer from these maladies. (*Id.*) As a result of the conspiracy, the individuals applied for United States citizenship through a waiver for which they did not qualify. (*Id.* ¶ 13.)

Count One of the Indictment alleges a single conspiracy among the three Defendants as follows:

From in or about a date unknown to the grand jury, beginning at least in or about 2000 through in or about July 2005, in the Eastern District of Pennsylvania, and elsewhere, defendants HABEEB MALIK, IRA WEINER, and THONGCHAI

VORASINGHA conspired and agreed, together and with others known and unknown to the grand jury, to commit an offense against the United States, that is, to procure and obtain, contrary to law, naturalization as a United States citizen for foreign individuals by making false statements on the Form N-648, including statements that the applicants suffered from various impairments that made it impossible for them to learn and understand the English language, in an effort to obtain waivers of the language requirement on the Form N-400 for the foreign applicants, in violation of Title 18, United States Code, Section 1425.

(*Id.* ¶ 7.)

The Indictment recites the overt acts that underlie the alleged conspiracy: in 2002 and 2003, Weiner signed waivers on nine occasions that falsely stated the grounds for a medical waiver of the English requirement. (*Id.* ¶¶ 1-18.) In 2005, Vorasingha signed such waivers on two occasions. (*Id.* ¶¶ 19-22.) Weiner and Vorasingha are charged in separate, individual counts for each substantive violation of naturalization fraud. Defendant, however, is charged in the same counts as Weiner and Vorasingha for each and every substantive violation of naturalization fraud. The Indictment also includes a single conspiracy charge against Defendant, Weiner, and Vorasingha.

Defendant has filed the instant Motion seeking dismissal of the single conspiracy charge in Count One based upon *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). (*See* Doc. No. 28.) Defendant alternatively seeks severance of Count One from the other charges or severance of Defendant from the trial of co-defendants. (*Id.*)

## **II. LEGAL STANDARD**

### **A. Dismissal of the Indictment**

“An indictment is an accusation only, and its purpose is to identify the defendant’s alleged offense . . . and fully inform the accused of the nature of the charges so as to enable him

to prepare any defense he might have.” *United States v. Stanfield*, 171 F.3d 806, 812 (3d Cir. 1999) (quotation marks and citations omitted). An indictment need include only “a plain, concise, and definite written statement of the essential facts constituting the offense charged” and “the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.” Fed. R. Crim. P. 7(c)(1). Federal Rule of Criminal Procedure 12(b)(3) permits a defendant to assert any “defect in the indictment” prior to trial. Fed. R. Crim. P. 12(b)(3)(B). The Third Circuit has summarized the standard for evaluating the sufficiency of an indictment as follows:

We deem an indictment sufficient so long as it (1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution. Moreover, no greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution.

*United States v. Kemp*, 500 F.3d 257, 280 (3d Cir. 2007) (quotation marks and citations omitted), *cert. denied*, -- U.S. --, 128 S. Ct. 1329 (2008). Dismissal under Rule 12(b)(3) “may not be predicated upon the insufficiency of the evidence to prove the indictment’s charges.” *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000). The court must assume that the allegations in the indictment are true. *Besmajian*, 910 F.2d at 1154; *see also United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994) (noting that the indictment “is to be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true”); *accord United States v. Caicedo*, 47 F.3d 370, 371 (9th Cir. 1995); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir. 1978), *cert. denied*, 437 U.S. 903 (1978). The court

must review the indictment “using a common sense construction,” *United States v. Hodge*, 211 F.3d 74, 76 (3d Cir. 2000), “examine the [statutes at issue] as applied to the facts as alleged in the indictment, and determine whether the defendant’s conduct, as charged, ‘reflect[s] a proper interpretation of criminal activity under the relevant criminal statute[s],’” *United States v. Shenandoah*, 572 F. Supp. 2d 566, 571 (M.D. Pa. 2008) (citing *United States v. Delle Donna*, 552 F. Supp. 2d 475, 482 (D.N.J. 2008)) (citations omitted). A challenge to the sufficiency of an indictment under Rule 12(b)(3)(B) “should be decided based on the facts alleged within the four corners of the indictment, not the evidence outside of it.” *United States v. Vitillo*, 490 F.3d 314, 321 (3d Cir. 2007).

## **B. Joinder of Multiple Defendants**

Federal Rule of Criminal Procedure 8(b) provides that an

indictment or information may charge 2 or more defendants 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 defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). The Third Circuit has interpreted Rule 8(b) as permitting “joinder of defendants charged with participating in the same . . . conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged . . . as acts undertaken in furtherance of, or in association with, a commonly charged . . . conspiracy.” *United States v. Eufrazio*, 935 F.2d 553, 567 (3d Cir. 1991), *cert. denied*, 502 U.S. 925 (1991). The Third Circuit has agreed with the Second Circuit that “[t]he 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.” *United States v. Irizarry*, 341 F.3d 273, 289 n.5 (3d Cir. 2003) (quoting *United States v. Friedman*, 854 F.2d 535 (2d Cir. 1988)), *cert. denied*, 540 U.S. 1140 (2004).

When an indictment charges two or more defendants together, Federal Rule of Criminal Procedure 14(a) permits a court to sever the defendants’ trials if “the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government.” Fed. R. Crim. P. 14(a). When the defendants have been properly joined under Rule 8(b), “a district court should grant severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Voigt*, 89 F.3d 1050, 1094 (3d Cir. 1996) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)), *cert. denied*, 519 U.S. 1047 (1996). In evaluating the risk of prejudice, courts must consider “the facts in each case.” *Zafiro*, 506 U.S. at 539. “When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” *Id.* (citations omitted).

Federal courts have “a preference for joint trials of defendants who are indicted together.” *Voigt*, 89 F.3d at 1094. Moreover, Rule 8(b) encourages charging multiple defendants 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.” Fed. R. Crim. P. 8(b). This preference is especially strong in conspiracy cases because “joint trials of defendants charged under a single conspiracy aid the finder of fact in determining the full extent

of the conspiracy.” *Voigt*, 89 F.3d at 1094 (internal quotation marks omitted); *see also United States v. Provenzano*, 688 F.2d 194, 199 (3d Cir. 1982) (noting that “it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed”) (citations omitted), *cert. denied*, 459 U.S. 1071 (1982). This preference arises because joint trials “promote efficiency in the courts and serve the interests of justice by preventing ‘the scandal and inequity of inconsistent verdicts.’” *Voigt*, 89 F.3d at 1094 (quoting *Zafiro*, 506 U.S. at 537).

Nonetheless, the Third Circuit has noted that

no defendant should ever be deprived of a fair trial because it is easier or more economical for the government to try several defendants in one trial rather than in protracted multiple trials. The goal of the judicial process is not to decide cases as quickly and as inexpensively as possible.

*United States v. Boscia*, 573 F.2d 827, 833 (3d Cir. 1978), *cert. denied*, 436 U.S. 911 (1978).

Ultimately, however, “[d]efendants seeking a severance bear a ‘heavy burden’ and must demonstrate not only that the court would abuse its discretion if it denied severance, but also that the denial of severance would lead to a clear and substantial prejudice resulting in a manifestly unfair trial.” *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) (citing *Zafiro*, 506 F.3d at 539) (internal quotation marks omitted). “[A] district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005) (quoting *Zafiro*, 506 F.3d at 539).

“Mere allegations of prejudice are not enough,” *United States v. Reichert*, 647 F.2d 397, 400 (3d Cir. 1981), and courts will not grant severance merely because defendants “may have a better chance of acquittal in separate trials,” *Zafiro*, 506 U.S. at 540; *see also Eufrazio*, 935 F.2d at 567

“As long as the crimes charged are allegedly a single series of acts or transactions, separate trials are not required.”).

### III. DISCUSSION

Defendant argues that Count One must be dismissed pursuant to *Kotteakos v. United States*, 328 U.S. 750, 755 (1946), because it fails to allege a single conspiracy among the three Defendants. (*See* Doc. No. 28 ¶ 1.) In other words, Defendant argues that there is a “fatal variance between the prosecution for a single overall conspiracy” because “the indictment, by its terms, shows only his/her [sic] participation in a single act.” (*Id.*) Defendant also argues that he “is prejudiced by a joinder in this indictment in that the offense[s] charged are not of the same or similar character, are not based on the same act or transaction, nor are the acts part of a common scheme or plan.” (*Id.* ¶ 2; *see also id.* ¶ 5 (“Defendant Habeeb Malik would be prejudiced by the spill-over effect of evidence against his/her [sic] co-defendants on entirely unrelated transactions, and would be subject to the transference of guilt from said co-defendants in the minds of the jury.”).) In addition, Defendant “avers that several of the co-defendants have criminal records which would be admissible and impeach [sic] them should they elect to testify.” (*Id.* ¶ 4.) Finally, Defendant argues that “one or more of the co-defendants has given inculpatory statements which are admissible as to his [sic] and upon trial conflicting defenses may be presented.” (*Id.* ¶ 3.)

The Government responds that “all that is required to defeat a pretrial motion to dismiss [is an allegation] that these three defendants conspired with each other to commit a crime.” (Doc. No. 48 at 3.) The Government contends that it is premature to consider a variance because the Indictment alleges that “all members agreed to make false statements in applications for

citizenship in the same manner” and that “they acted in concert.” (*Id.* at 4.) Thus, the Government contends that the Indictment sufficiently alleges a single conspiracy, and “[t]he government is prepared to prove the existence of a single conspiracy at trial.” (*Id.* at 5.) Regarding severance, the Government responds that the Indictment sufficiently alleges a single conspiracy and joinder is proper because “the facts of each offense . . . are so inextricably intertwined and so closely related that they surely can be tried together.” (*Id.* at 6.) The Government reiterates that it does not seek to introduce any evidence of the co-defendants’ criminal records because “it is not aware of any criminal records of any of the defendants in this case.” (*Id.* at 20.) Finally, the Government contends that Defendant’s “bare allegations” of inconsistent defenses do not justify severance. (*Id.*)

**A. Sufficiency of Count One**

Count One sufficiently alleges a single conspiracy claim among Defendant, Weiner, and Vorasingha. It alleges that the three Defendants “conspired and agreed” to commit an offense against the United States. (*See* Indictment ¶ 7.) It identifies the specific offense as the unlawful procurement of naturalization in violation of 18 U.S.C. § 1425. (*Id.*) The means by which Defendant committed the offense are also identified: Defendant is alleged to have carried out the offense by bringing the foreign individuals to Weiner and Vorasingha, who then falsified the waiver forms. (*Id.*) Defendant is further alleged to have “subsequently assisted the applicants in preparing the Form N-400, which included the representations that the applicants could not speak English, which [Defendant] submitted to the INS on the foreign applicants’ behalf.” (*Id.* ¶ 13.)

These allegations permit Defendant “to prepare his defense and to invoke double jeopardy in the event of a subsequent prosecution.” *Kemp*, 500 F.3d at 280. Defendant is “sufficiently

apprised of what he must be prepared to meet.” *Id.* Count One contains the elements of the offense, the underlying factual circumstances, and citations to the relevant law. *See* Fed. R. Crim. P. 7(c)(1) (requiring indictment to include concise statement of facts and citation to law that the defendant is alleged to have violated). Hence, Count One sufficiently alleges a single conspiracy to commit naturalization fraud.

**B. Effect of *Kotteakos* and its Progeny**

Defendant contends that Count One must be dismissed because it alleges the existence of two conspiracies, not one. (Doc. No. 28 ¶ 1.) Defendant cites *Kotteakos v. United States* in the title of his Motion.<sup>2</sup> *See* 328 U.S. at 767. In *Kotteakos*, the indictment named thirty-two defendants in a single conspiracy to obtain loans under a Federal Housing Administration program based upon fraudulent applications. *Id.* at 752. The only connection the government proved between the defendants was their common use of the services of co-defendant Simon Brown, the president of a lumber company who had experience in applying for loans under the National Housing Act and who used his expertise to assist others in acquiring loans. *Id.* at 753. Brown processed the loan applications knowing that the applications contained fraudulent information. *Id.* “In many cases the other defendants did not have any relationship with one another, other than Brown’s connection with each transaction.” *Id.* at 754. At trial, the government presented evidence of at least eight separate conspiracies, with Brown at the center of each. *Id.* at 755. The trial court instructed the jury that they could convict only if they found a single, overarching conspiracy between the defendants. *Id.* at 767. The jury returned guilty

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<sup>2</sup> Defendant does not discuss *Kotteakos* in his Motion or provide any discussion of the case in a memorandum of law.

verdicts on the main conspiracy charge in the indictment. *Id.* The Supreme Court reversed the defendants' convictions, holding that the evidence at trial did not show the single "mass conspiracy" that was charged in the indictment. *Id.* at 777. Rather, the evidence showed a number of separate conspiracies. *Id.* Since the peripheral members were not shown to have been aware of one another and to have done something in furtherance of a single, illegal enterprise, the conspiracy lacked "the rim of the wheel to enclose the spokes." *Id.* at 755. No "spoke" gained from the fact that others were involved in the scheme.

When a defendant is put on notice that the scope of the conspiracy extends beyond his own activities, however, he may be held responsible for the actual scope of the organization. *See Blumenthal v. United States*, 332 U.S. 539, 558 (1947). In *Blumenthal*, three salesmen were convicted of conspiring to sell whiskey at above-ceiling prices. *Id.* at 541. The Supreme Court held that while "each salesman aided in selling only his part," each nevertheless formed part of a single large conspiracy because each "knew or must have known that others unknown to [him] were sharing in so large a project." *Id.* at 559. Distinguishing these facts from *Kotteakos*, the Supreme Court noted that

no two of those [loan] agreements [in *Kotteakos*] were tied together as stages in the formation of a large all-inclusive combination, all directed to achieving a single unlawful end or result. On the contrary each separate agreement had its own distinct, illegal end. Each loan was an end in itself, separate from all others, although all were alike in having similar illegal objects. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. And none aided in any way, by agreement or otherwise, in procuring another's loan. The conspiracies therefore were distinct and disconnected, not parts of a larger general scheme, both in the phase of agreement with Brown and also in the absence of any aid given to others as well as in specific object and result. There was no drawing of all together in a single, over-all, comprehensive plan.

*Id.* at 558. In contrast, the salesmen in *Blumenthal* "knew of and joined in the overriding

scheme” and “sought a common end” to sell the whiskey, so that “the several agreements were essential and integral steps.” *Id.* at 559. The salesmen knew that the wholesaler had received an entire carload of whiskey, which was far more than each had bought individually. *Id.* The Court found a single conspiracy because even though “each salesman aided in selling only his part,” he also “knew the lot to be sold was larger and thus that he was aiding in a larger plan.” *Id.*

There must be some interdependence among the members of a single conspiracy so that each member depends upon, is aided by, or has any interest in the success of the others. *See Kemp*, 500 F.3d at 287-89. In *Kemp*, the defendants were officials of the City of Philadelphia who were convicted of a variety of corruption charges, including a single conspiracy charge. *Id.* at 264. Two of the defendants challenged their conspiracy convictions on the grounds that the government had charged a “hub-and-spokes” conspiracy but failed to prove the existence of a rim connecting the spokes, similar to the situation in *Kotteakos*. *Id.* at 287-88. That is, they argued that City officials were the hub who entered into separate agreements with the defendants as the unconnected spokes. *Id.* at 288. The Third Circuit agreed, finding that the evidence at trial proved only the existence of multiple separate conspiracies, not the single conspiracy that was charged.<sup>3</sup> *Id.* The court observed that “there was an insufficient degree of interdependence between [several of the co-conspirators],” which made it “difficult to conceive” how their activities “were interdependent or mutually supportive” to support a single conspiracy charge among them. *Id.* at 290. The court found “no evidence” that the defendants “should have known that the conspiracy involved parts beyond [two of the other defendants],” notwithstanding the

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<sup>3</sup> The Third Circuit nevertheless found that the variance was not prejudicial and affirmed the convictions.

fact that the indictment charged multiple other defendants with the single conspiracy. *Id.* at 289; *see also United States v. Chandler*, 388 F.3d 796, 811 (11th Cir. 2004) (stating that “although each of these alleged spoke conspiracies had the same goal, there was no evidence that this was a common goal”).

*Kotteakos*, *Blumenthal*, and *Kemp* make clear that the existence of a single conspiracy or multiple conspiracies hinges on factual issues that arise at trial. An indictment that alleges a single conspiracy can result in an impermissible variance if the evidence adduced at trial shows only the existence of multiple conspiracies. *See Kemp*, 500 F.3d at 290. In this case, the Government will have to prove facts at trial that allow the jury to find interdependence between Defendant, the hub of the alleged conspiracy, and Weiner and Vorasingha as the spokes. *See id.* The Government will have to offer evidence that Defendants were in some way “mutually supportive.” *Id.* At this stage, we must accept the allegations in the Indictment as true. *See Hall*, 910 F.2d at 1154 (noting that the indictment “is to be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true”). We must decide the sufficiency of the Indictment based on the facts “alleged within the four corners,” not the evidence outside of it. *Vitillo*, 490 F.3d at 321. The facts within the four corners of the Indictment allege a single conspiracy between Defendant, Weiner, and Vorasingha. The burden now rests with the Government to prove this allegation at trial. The Government argues that it has the evidence necessary to do this.<sup>4</sup> (*See* Doc. No. 48 at 5 (“The government is prepared to

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<sup>4</sup> At oral argument, the Government asserted that Defendants Weiner and Vorasingha had to have known that other doctors were involved, even though they did not know each other, because the same forms were used with each applicant and it would have been too suspicious to carry out the enterprise with the same doctor every time. In other words, the Government asserted that its evidence at trial will show that the existence of other doctors was entirely

prove the existence of the single conspiracy at trial.”.) Defendant’s argument based upon *Kotteakos* is premature. *See, e.g., United States v. Rios*, No. 96-0540-06, 1997 WL 356329, at \*2 (E.D. Pa. June 20, 1997) (denying motion to dismiss a count in the indictment as premature under *Kotteakos* because the determination “necessarily involves the evaluation of the evidence presented by the government” at trial); *United States v. Simon*, 186 F. Supp. 223, 227-28 (S.D.N.Y. 1960) (denying motion to dismiss as premature under *Kotteakos* because the “indictment pleads one conspiracy on its face, and this motion is addressed to the pleading,” and noting that “[i]f there is a variance in proof at the trial from what is charged in the indictment, a motion will then be in order”).

### C. Severance

Defendant argues that he has been improperly joined because the Indictment fails to allege a conspiracy with Weiner and Vorasingha. (*See* Doc. No. 28 ¶ 1.) However, for the reasons set forth above, the Indictment sufficiently alleges the existence of a single conspiracy. The Government correctly argues that “since the indictment does, in fact, allege a proper conspiracy,” Defendant’s reliance on the Indictment as the basis for severance “fails *ab initio*.” (Doc. No. 48 at 5, 19.) In addition, joinder of Defendant is proper under Rule 8(b). Defendant is charged with participating in the same conspiracy with Weiner and Vorasingha. The “mere allegation” of this conspiracy “presumptively satisfies Rule 8(b),” since the allegation implies that Defendant “engaged in the same series of acts or transactions constituting an offense.” *Irizarry*, 341 F.3d at 289 n.5. Defendant is charged with performing acts that were allegedly undertaken in furtherance of the same commonly-charged conspiracy to commit naturalization

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foreseeable.

fraud. *See Eufrazio*, 935 F.2d at 567 (noting that Rule 8(b) permits “joinder of defendants charged with participating in the same . . . conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged . . . as acts undertaken in furtherance of, or in association with, a commonly charged . . . conspiracy”). The Indictment sufficiently alleges a conspiracy, and joinder of Defendant is not improper.

Defendant next asserts that “several of the co-defendants have criminal records which would be admissible and impeach [sic] them should they elect to testify.” (Doc. No. 28 ¶ 4.) The Government has responded that it is not aware that any Defendant in this case has a criminal record. Defendant has offered nothing but the bald assertion and has not disputed the Government’s response. We will not grant a severance based upon the bald assertion.

Defendant also argues that there is a possibility of conflicting defenses at trial, which should justify severance. (*Id.* ¶ 3.) Defendant has not advised as to what those conflicting defenses might be. Severance is appropriate under Rule 14 “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Voigt*, 89 F.3d at 1094. With regard to mutually antagonistic defenses, “severance need be granted only if the defense theories are antagonistic ‘to the point of being irreconcilable and mutually exclusive.’” *United States v. Sandini*, 888 F.3d 300, 310 (3d Cir. 1989) (citing *Provenzano*, 688 F.2d at 198), *cert. denied*, 494 U.S. 1089 (1990). “The logic of granting a severance when there are irreconcilable and mutually exclusive defenses [is that the d]efendants should not be placed in a position where the mere fact that they are being tried together will effectively require the jury to convict at least one of them,

whereas in separate trials each could be acquitted.” *Id.* We find no such risk at this juncture. Defendant has been indicted together with Weiner and Vorasingha in a single charge of conspiracy. They are alleged to have participated in the same series of acts that constitute naturalization fraud. A joint trial will aid the finder of fact in determining the full extent of this conspiracy. *See Provenzano*, 688 F.2d at 199 (noting that “it is preferable to have all of the parties tried together so that the full extent of the conspiracy may be developed”). A denial of severance would not lead “to a clear and substantial prejudice resulting in a manifestly unfair trial” since the facts can be easily compartmentalized. *Lore*, 430 F.3d at 205. The Indictment does not allege a large number of defendants. The underlying facts are not complicated. Under these circumstances, a jury “will be able to make a reliable judgment about guilt or innocence.” *Urban*, 404 F.3d at 775.

Defendant states, without any further discussion or explanation, that he “would be prejudiced by the spill-over effect of evidence against his/her [sic] co-defendants on entirely unrelated transactions . . . .” (Doc. No. 28 ¶ 5.) Defendant is alleged to have conspired with Weiner and Vorasingha in a single conspiracy. Defendant is also alleged to have violated substantive immigration laws. Defendant is charged in every count of the Indictment. We “see no reason why . . . the fact that the grand jury charged one defendant separately with an additional criminal act somehow would interfere with the petite jury’s ability to consider the evidence against each defendant on each count separately.” *Lore*, 430 F.3d at 205. Indeed, Rule 8(b) expressly provides that “[a]ll defendants need not be charged in each count.” Fed. R. Crim. P. 8(b). To the extent that a joint trial presents any risk of evidentiary spillover, it can be cured with an appropriate limiting instruction.

**IV. CONCLUSION**

For these reasons, Defendant's Motion will be denied.

An appropriate Order will follow.

BY THE COURT:

A handwritten signature in dark ink, appearing to read "R. Surrick", is written over a horizontal line.

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R. Barclay Surrick, J.

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

UNITED STATES OF AMERICA :  
 :  
 v. : CRIMINAL ACTION  
 :  
 HABEEB MALIK : NO. 08-0614-01  
 :

**ORDER**

AND NOW, this 2<sup>nd</sup> day of July, 2009, upon consideration of Defendant  
Habeb Malik's Motion for Dismissal of Count One Pursuant to *United States v. Kotteakos*; for  
Relief from Misjoinder; and for Severance (Doc. No. 28), and after a hearing in open court, it is  
ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:



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R. Barclay Surrick, J.