

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 06-80148-Cr-RYSKAMP

UNITED STATES OF AMERICA,

vs.

**GARY KAFKA,
SONDRA PASTORE, and
MICHAEL DISALVO,**

Defendants.

**REPORT AND RECOMMENDATION CONCERNING DEFENDANT GARY KAFKA'S
AMENDED MOTION TO SEVER COUNTS FOR TRIAL (DE 40)**

THIS CAUSE is before the Court upon the District Court's referral of the instant motion to the undersigned United States Magistrate Judge for Report and Recommendation. (DE 41). After being fully advised in the premises, the Court hereby **RECOMMENDS** Defendant's motion be **DENIED**.

On November 7, 2006, Defendant Gary Kafka filed an Amended Motion to Sever Counts for Trial. (DE 40). The Government responded to Defendant's motion on November 14, 2006. (DE 44). Defendant failed to file a reply.

BACKGROUND

Defendant is charged in a twenty-four count indictment with conspiracy to defraud lending institutions and with making false statements and writings to the United States Probation Office. (DE 40, ex). Count one of the indictment alleges that Defendant and two co-defendants participated in a conspiracy, through which the Defendants sought to "enrich themselves unlawfully by defrauding

lending institutions, by providing false and fraudulent information, and credit card companies by transferring assets to defendant PASTORE and liabilities to defendant KAFKA, and it was a further object of the conspiracy to conceal defendant KAFKAS's true finances and employment status by concealment of material facts from, and false and fraudulent representation to, the United States Probation Office.” (DE 40, ex). Count two of the indictment alleges that Defendant and co-defendant Pastore fraudulently obtained a \$25,000 line of credit while Defendant was incarcerated. (DE 40, ex). Count three of the indictment alleges that Defendant and co-defendant Pastore submitted mortgage applications, seeking to refinance their home, claiming more than \$18,000 per month income while Defendant was reporting only minimal earnings to the United States Probation Office and further reporting that he maintained no ownership interest in the home. (DE 40, ex.). Defendant is further charged with several counts of false oral statements to the United States Probation Office, based upon Defendant's statements providing allegedly false employment and financial information, concealing his alleged employment with certain lending companies, and allegedly concealing his actual income and liabilities. (DE 40, ex).

DISCUSSION

Defendant seeks to sever counts from a 24-count indictment, trying the counts alleging mortgage, loan and credit fraud separately from the counts alleging false and fraudulent statements to the United States Probation Office. (DE 40). Defendant asserts that “the defendant would be highly prejudiced by having to proceed to trial on allegations which would put the jury on notice that the defendant was on probation at the time of the alleged financial fraud offenses.” (DE 40 at 2). (citing Fed. R. Evid. 404(b), evidence of a prior crime is only admissible for limited purposes).

Fed. R. Crim. P. 14 provides:

(a) Relief. 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, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. . .

The Eleventh Circuit has held that in order to determine if separate offenses were properly tried at the same time, the government must initially “ demonstrate that the initial joinder of offenses was proper under Rule 8(a) of the Fed. R. Crim. P. . .” *United States v. Walser*, 3 F.3d 380, 385 (11th Cir. 1993) (noting that Rule 8(a) is construed broadly in favor of initial joinder).

Fed. R. Crim. P. 8(a) provides:

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 mor more offenses 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 are connected with or constitute parts of a common scheme or plan.

“Rule 8 is broadly construed in favor of the initial joinder.” *United States v. Dominguez*, 226 F. 3d 1235, 1238 (11th Cir. 2000). In order to determine if charges are properly joined, the court must examine the allegations stated in the indictment. *Id.* Defendant, with little discussion, asserts that “the indictment charges two separate and distinct sets of criminal activity.” (DE 40 at 2). The Defendant contends that the counts relating to mortgage, loan and credit fraud should be tried separately from counts alleging false and fraudulent statements to U.S. Probation. (DE 40). The Government asserts that joinder of the loan fraud and false statements charges is proper under both the first and third options - that the charges “are of the same or similar character,” and that the charges “are connected with or constitute parts of a common scheme or plan.” (DE 44 at 5).

In *Walser*, the Eleventh Circuit held that joinder is proper if they are of the same or similar

character, “even if such offenses do not arise out of the same series of acts or transactions.” *Walser*, 3 F.3d at 385 (discussing the definition of similar: “[n]early corresponding, resembling in many respects, somewhat alike, having a general likeness.”). The court upheld the district court’s refusal to sever a perjury and aiding and abetting count from charges of false and fraudulent statements made to a government agency, finding that the counts were similar as they all related “to the attempt or to the coverup of those attempts- to obtain by fraud federal crop relief.” *Id.* The court found that the counts were all similar in that the falsehoods and the need to cover up the falsehoods led to the perjury charge. *Id.* at 386 (“In sum, the charges alleged in the indictment are sufficiently related to *Walser*’s schemes to mislead the government and obtain unwarranted crop relief. Accordingly, the offenses charged here are similar within the meaning of rule 8(a)”).

Similarly, the loan fraud activity alleged by the indictment provided the need for Defendant’s alleged fraudulent statements to United States Probation- the charges alleging fraudulent statements to U.S. Probation are similar to the loan fraud charges as the allegedly fraudulent statements to U.S. Probation were needed to conceal the other allegedly fraudulent activity, and as the defendant allegedly provided fraudulent employment and asset information in both sets of charges.

In *United States v. Dominguez*, the Eleventh Circuit held that joinder of charges alleging mortgage loan fraud were properly joined with drug related charges where the mortgage fraud was necessary to conceal the fact that the defendant’s “income had been derived from drug activity.” 226 F. 3d at 1239. The court held that “the fact that one illegal activity provides the impetus for the other illegal activity is sufficient to constitute a common scheme for joinder purposes.” *Id.* The *Dominguez* court relied upon *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), a case in which the court found that charges of filing false income tax returns were properly joined with other

non-tax related offenses, including racketeering, conspiracy and extortion. *Id.* at 1314. The court held that the tax offenses furthered the non-tax offenses, and facilitated the conspiracy's efforts to avoid detection, thus the tax offenses were properly joined with the others as they were "part of a series of acts committed in furtherance of the overall conspiracy." *Id.* ("It is well established that substantive offenses arising out of a single conspiracy can properly be joined, since the conspiracy provides a common link connecting the offenses").

Defendant's statements to U.S. Probation allegedly concealed the true amount and source of Defendant's income, as well the nature of his employment. Such concealment permitted Defendant to continue his participation in the alleged conspiracy. Analogous to *Dominguez*, the allegedly illegal mortgage loan activity in this case provided the impetus for allegedly fraudulent statements to U.S. Probation.

Pursuant to the above discussion, this Court concludes that joinder was proper. This Court will now address the issue of prejudice.

Defendant asserts that severance is necessary as "the defendant would be highly prejudice by having to proceed to trial on allegations which would put the jury on notice that the defendant was on probation at the time of the alleged financial fraud offenses." (DE 40).

Once it has been determined that joinder was proper under Fed. R. Civ. P. 8(a), the Court must determine whether the defendant will be prejudiced if the counts are not severed for trial. *United States v. Benz*, 740 F.2d 903, 911 (11th Cir. 1984). In order to determine if severance of properly joined counts is appropriate, the court must "balance the prejudice to the defendant against the interests of judicial economy." *Id.* The Eleventh Circuit has held that "the burden of demonstrating prejudice is a difficult one and the ruling of the trial judge will rarely be disturbed on

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