UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. LOUIS DANIEL SMITH, also known as Daniel Smith, also known as Daniel Votino; KARIS DELONG, also known as Karis Copper; TAMMY OLSON; and CHRIS OLSON, Defendants.	NO: 13-CR-14-RMP ORDER DENYING MOTIONS TO SEVER TRIAL

BEFORE THE COURT are Motions to Sever Trial from Defendant Smith filed by Codefendants Tammy Olson and Karis Delong, respectively. ECF Nos. 317, 318. Also before the Court is a motion to accept a late-filed declaration in support of the motions to sever, filed by Defendant Louis Daniel Smith, ECF No. 361, and a motion to expedite the same, ECF No. 362, which was granted in the Court's Order Memorializing Court's Oral Rulings at ECF No. 367.

BACKGROUND

Codefendants Tammy Olson and Karis Delong were indicted, along with Defendant Smith, on one count of conspiracy to commit an offense against the United States or to defraud the United States in violation of 18 U.S.C. § 371; four counts of delivering misbranded drugs into interstate commerce in violation of 21 U.S.C. §§ 331(a) and 333(a)(2); and one count of smuggling in violation of 18 U.S.C. § 545. ECF No. 1. The Indictment alleges that the Defendants engaged in a scheme to import, manufacture, and sell hazardous material that was marketed as a health product. *Id.* Specifically, the Indictment alleges that Defendants, operating through a company called "PGL International," misbranded sodium chlorite, a harmful chemical, as Miracle Mineral Solution ("MMS") and marketed it to the public for consumption to cure such ailments as malaria, HIV/AIDS, hepatitis, and various forms of cancer. *Id.* at 4, 7.

With regard to count one of the Indictment, Defendants are accused of conspiring "to obtain the chemicals needed to manufacture the drug MMS without revealing to regulators and suppliers the true purpose of the chemicals; to use those chemicals to manufacture the drug MMS in a facility that was hidden from regulators; to offer MMS for sale on websites they had established; and to enrich themselves by obtaining money from the interstate sales of the misbranded drug MMS." *Id.* at 7. The Indictment contains numerous specific allegations as to

Codefendants Karis Delong and Tammy Olson's alleged involvement in the conspiracy, along with Defendant Smith and Codefendant Chris Olson.[1]

Codefendants Tammy Olson and Karis Delong filed motions to sever their trial from the trial of Defendant Smith, contending that they require access to exculpatory testimony that Defendant Smith only can provide at their separate trial. ECF Nos. 317, 318. At the Codefendants' request, the Court allowed for supplemental briefing on the Codefendants' motions to sever. ECF No. 337. Codefendants Tammy Olson and Karis Delong filed their supplemental memoranda *ex parte*. ECF Nos. 354, 355.[2] Codefendants explained that they were filing their memorandum *ex parte* due to their reliance on certain materials to which Defendant Smith has claimed attorney-client privilege and which have not been disclosed to the Government.

On July 14, 2014, after the deadline set forth in the Court's Pretrial Order, Defendant Smith filed a declaration in support of Codefendants Tammy Olson's and Karis Delong's motions to sever. ECF No. 357. The Government filed its supplemental response within the time frame set forth in the Court's Pretrial Order and argued in part that Defendant Smith's supporting declaration was not timely

[1] Codefendant Chris Olson has since pleaded guilty to one count of Shipment of Misbranded Drugs in violation of 21 U.S.C. §§ 331(a) and 333(a)(1).

[2] Codefendant Delong filed her supplemental memorandum as a separate motion, but the Court reviews it as a supplement to her original motion.

filed. ECF No. 359. The Court determined at oral argument that it would accept Defendant Smith's late-filed declaration. ECF No. 367 at 2. The Court additionally will consider a reply brief that Defendant Smith filed in support of Codefendants Tammy Olson's and Karis Delong's motions to sever, ECF No. 363.

DISCUSSION

Codefendants Tammy Olson and Karis Delong both premise their motions to sever on the basis that Defendant Smith would provide exculpatory testimony as to those two Codefendants in a separate trial. *See, e.g., United States v. Mariscal*, 939 F.2d 884, 885 (9th Cir. 1991).

There exists a preference in the federal system that codefendants jointly charged should be jointly tried. *E.g., United States v. Hernandez-Orellana*, 539 F.3d 994, 1001 (9th Cir. 2008). Federal Rule of Criminal Procedure 8(b) provides for joinder of two or more defendants if the defendants "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." However, a court may sever defendants' trials under Federal Rule of Criminal Procedure 14(a) where joinder "appears to prejudice a defendant."

When joinder was originally proper under Rule 8(b), "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." *Zafiro v. United States*, 506 U.S. 534, 539 (1993). "Rules 8(b) and 14 are designed 'to promote economy and efficiency and to avoid a multiplicity of trials, [so long as] these objects can be achieved without substantial prejudice to the right of the defendants to a fair trial." *Id.* at 540 (quoting *Bruton v. United States*, 391 U.S. 123, 130 (1968)) (alteration in *Zafiro*).

One basis for ordering separate trials is when a codefendant will provide exculpatory testimony at another defendant's separate trial. *E.g.*, *Mariscal*, 939 F.2d at 885. In considering a request for severance on this ground, the court must weigh such factors as "the good faith of the intent to have a codefendant testify, the probability that the testimony will materialize, the economy of a joint trial, the possible weight and credibility of the predicted testimony, and the degree to which the predicted testimony is exculpatory." *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir. 1992) (citing *Mariscal*, 939 F.2d at 885)). The predicted testimony is not sufficiently exculpatory where it would merely be favorable to the moving defendant; rather, the predicted testimony must instead be "substantially exculpatory." *Mariscal*, 939 F.2d at 886 (quoting *United States v. Ford*, 870 F.2d 729, 732 (D.C. Cir. 1989)). "A showing that the testimony would merely contradict portions of the government's proof is insufficient." *Id.* The test for

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.