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

Alexandria Division

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UNITED STATES OF AMERICA,)	
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)	
v.)	CRIMINAL NO. 84-37-A
)	
ROBERT EARL MARTIN, JR.,)	
RICARDO DAVID SERRENO,)	
JAMES SOMMERVELLE DAWSON, III,)	
DANIEL LEE McCARTY,)	
ROBERT W. SCOTT, JR.)	

ORDER

This matter comes before the Court on defendants' motions for severance. All defendants have moved for a separate trial and some defendants have also moved for severance of counts. For reasons stated below, the Court DENIES defendants' motions.

Severance of defendants is neither required by Rule 8 nor justified as a matter of discretion under Rule 14. Rule 8 permits joinder of defendants where "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 cases interpreting this provision have held that joinder of defendants is generally permissible where there is a good faith allegation that they were involved in a single conspiracy. See, e.g., U.S. v. Garza, 664 F.2d 135, 142 (7th cir. 1981); U.S. v. Kaiser, 660 F.2d 724 (9th Cir. 1981). This requirement is

satisfied here by Count I of the superseding indictment, which charges the defendants with involvement in a single conspiracy.

Even though severance may be permissible under Rule 8, Rule 14 gives the Court discretion to grant severance. In deciding whether to grant a discretionary severance, the Court must balance the inconvenience and expense severance would entail against the prejudice a defendant will suffer as a result of a joint trial. U.S. v. Santoni, 585 F.2d 667, 674 (4th Cir. 1978). The defendant bears the burden of persuading the Court that he will be substantially prejudiced by a joint trial. U.S. v. Mandel, 415 F. Supp. 1033 (D. Md. 1976).

The defendants contend that they will suffer great prejudice from a joint trial. Each of them points to the number of defendants and counts. Because none of them is charged in most of the counts or alleged overt acts of the conspiracy, they all contend that a joint trial will create an unacceptable risk of guilt by association. The Court, however, is satisfied that, given appropriate cautionary instructions, the jury will be able to render a fair verdict as to each defendant. Additionally, there is a strong efficiency interest in a joint trial. To a substantial extent, the evidence against the defendants will be overlapping.

Defendant Dawson's grounds for severance are more particularized. He alleges that if severance is granted his codefendants Martin, Serreno, and McCarty will testify on his behalf but that, if tried jointly, each will assert his Fifth Amendment privilege not to take the stand. Although two of his

codefendants have filed affidavits indicating their willingness to testify on Dawson's behalf in a separate trial, they have placed further conditions on their willingness to testify. One codefendant states that he will be willing to testify after his trial; the other states that he will testify if given immunity. These conditional offers to testify will not support a severance. The Fourth Circuit has squarely held that a motion for severance that is based on the need for a codefendant's testimony fails where the codefendant's willingness to testify is conditioned on his case being tried first. U.S. v. Parodi, 703 F.2d 768, 779 (4th Cir. 1983). The rationale for this rule is that the condition that the codefendant be tried first vitiates the good faith of the offer and the offer becomes in effect an alibi-swapping device. 703 F.2d at 780. The same rationale applies where the offer to testify is conditioned on a grant of immunity. The Court accordingly declines to grant Dawson a separate trial.

The Court also declines to sever counts. Efficiency strongly favors trying the substantive counts in the indictment along with the conspiracy counts. Many, if not all, of the substantive counts are also recited as overt acts of the conspiracy. The evidence will therefore be substantially overlapping. Some defendants also contend that there are two alleged conspiracies and that each must be tried separately. Absent some showing that the allegation of a single conspiracy lacks evidentiary support and is not made in good faith, the Court rejects defendants suggestion that there must be separate

trials. The Court will not usurp the role of the grand jury by presuming that there are actually two conspiracies, not the unitary conspiracy charged in the indictment.

DATE: 4/24/84

Richard L. Williams
UNITED STATES DISTRICT JUDGE