

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

Norfolk Division

UNITED STATES OF AMERICA,)	
)	
)	
)	
)	
v.)	Criminal No. 84-130-N
)	
WILLARD J. MOODY, et al.,)	
)	
)	
Defendants.)	

MEMORANDUM OPINION

This matter comes before the Court on the defendants' motion for a severance or in the alternative to sever Counts Seventeen, Eighteen, Nineteen and Twenty charging obstruction of justice and perjury against Willard J. Moody.

Defendants contend that they are entitled to separate trials because the indictment does not charge the defendants Moody and Joannou, together with unindicted co-conspirator Clarence Mixon, with a single conspiracy, but with a series of unrelated offenses. Defendants, relying primarily on Kotteakos v. United States, 328 U.S. 750 (1946), argue that there will be no evidence at trial that Moody and Joannou were any more than "unconnected spokes" in a conspiracy where Mixon was the "hub." Under Kotteakos, co-conspirators must have been aware of each other and must have done something in furtherance of some single, illegal enterprise. Without such proof, the "rim" is incomplete and no conspiracy

exists. There must be something more in common between the co-defendants than the law they are breaking and the center of the hub.

In this action, Count 1 specifically alleges that the defendants conspired to violate the mail fraud statute, participated in the agreement and carried out acts in furtherance of the agreement. Defendants' contentions that the government will not be able to prove such a conspiracy are simply speculation about the nature of proof at trial. If the government fails to connect the defendants at trial as required by Kotteakos and its progeny, it will be this Court's duty to direct a severance at the end of the government's evidence and perhaps order new trials altogether under Rule 14.

Defendants also urge the Court to exercise its discretion under Rule 14 and order a severance based upon the potential prejudice the defendants would suffer by being tried together. The Court has carefully reviewed the potential for such prejudice here and concludes that there is little danger that the defendants would be unfairly prejudiced by a joint trial. Any potential prejudice can be handled at trial by giving the jury proper limiting instructions. Moreover, the Court notes that a joint trial expedites the administration of justice, conserves judicial time, and lessens the burden both upon witnesses and upon citizens who must serve upon juries. Therefore, the motion for a severance is denied.

Finally, defendant Joannou has moved the Court to sever Counts 17, 18, 19 and 20 of the indictment which charge defendant

Moody with perjury and obstruction of justice. Under Rule 8(b) of the Federal Rules of Criminal Procedure, two defendants may be charged in the same indictment if they are alleged to have participated in the same act or series of acts constituting the offenses; all defendants need not be charged in each count.

Defendant Joannou's motion for severance of the four counts is based upon United States v. Whitehead, 539 F.2d 1023 (4th Cir. 1976), and Ingram v. United States, 272 F.2d 567 (4th Cir. 1959). In those cases, however, the Court was concerned primarily with the joinder of independent offenses in which there was little or no commonality of proof or overlap in evidence. The Fourth Circuit has determined that these two cases are not applicable where substantially all of the evidence in one count would be relevant to the proof of the actual crime charged in the other count. United States v. Seidel, 620 F.2d 1006, 1012 (4th Cir. 1980). In this action, the evidence establishing Moody's perjury and obstruction of justice before the grand jury is substantially the same as a part of the evidence required to prove several of the other counts, including Count 1. The only additional proof required for Counts 17, 18, 19 and 20 will relate to the materiality and authenticity of Moody's grand jury testimony. Such evidence would not be prejudicial to Joannou's defense. Accordingly, the motion to sever the four counts must also be denied.

Let the Clerk send a copy of this memorandum opinion to all counsel of record.

DATE: 1/2/85

Richard L. Williams

UNITED STATES DISTRICT JUDGE

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

Norfolk Division

UNITED STATES OF AMERICA)	
)	
)	
)	
v.)	CRIMINAL NO. 84-130-N
)	
WILLARD J. MOODY, et al.)	
)	
)	

ORDER

This matter came before the Court for pretrial motions on November 27, 1984. The various motions are disposed of as follows:

1. Defendant Moody's motion to dismiss based on prosecutorial misconduct is DENIED. A memorandum opinion will follow explaining the reasons for the Court's order.

2. For the reasons stated from the bench, Moody's motion for a bill of particulars is GRANTED in part and DENIED in part. Requests 1(a) and (b) are DENIED. Requests 1(c) and (d) are GRANTED. Requests 2(a),(b) and (d) are DENIED. Request 2(c) is GRANTED. Requests 3 and 5 are DENIED. Request 4 is GRANTED.

3. For the reasons stated from the bench, defendant Joannou's motion for a bill of particulars is GRANTED in part and DENIED in part. Request 1(a) is GRANTED. Requests 1(b) and (c) are DENIED. Request 2 is GRANTED to the extend that it covers

the words or conduct of defendant Joannou. Requests 2(a), 3 and 4 are DENIED.

4. With respect to defendant Moody's motion for discovery of favorable evidence, requests I(a), (b) and (c)(1) have been agreed upon by the parties. Request I(c)(2) is DENIED to the extent that the government has not already complied or agreed to comply because it is beyond the scope of Brady. Requests I(c)(3) (4), and (5) have been resolved by the parties. Request I(c)(6) is DENIED to the extent that the government has not already agreed to comply under Brady. Request I(c)(7) is DENIED except to the extent required under Jencks and to the extent that the government has not already complied or agreed to comply. Request I(d) is DENIED as being beyond the scope of Brady. Request 1(e) has been resolved by the parties.

Requests II(a)(1)-(4) and (b)(1)-(3) have been resolved by the parties. Requests II(b)(4) and (5) are DENIED as being beyond the scope of Brady. Requests II(b)(6) and (7) have been resolved by the parties. Request II(b)(8) is DENIED as being beyond the scope of Brady. Request II(c)(1) is DENIED except to the extent that the government has complied or has agreed to comply. Requests II(c)(2) and (d) have been resolved by the parties.

5. With respect to defendant Joannou's motion and supplemental motion for discovery of favorable evidence, requests 1, 2 and 3(a), (b) and (c) have been resolved by the parties. Request 3(d) is DENIED as being beyond the scope of Brady. Requests 4, 5 and 6 have been agreed upon by the parties.

6. With respect to defendant Moody's motion and supplemental motion for discovery and inspection, all of the requests have been resolved by the parties with the exception of request 2. Request 2 is DENIED as being beyond the scope of Rule 16, except to the extent that the government has agreed to comply with this request under Brady and Jencks.

7. With respect to defendant Joannou's motion for discovery and inspection of exculpatory information, requests 1, 3, 4 and 6-14 have been resolved by the parties. Request 2 is beyond the scope of Brady and therefore is DENIED except to the extent that the government has complied or has agreed to comply under Rule 16. Request 5 is DENIED except to the extent that the documents are within the "possession, custody or control" of the government as provided by Rule 16. Other documents not within the scope of Rule 16 may be reviewed by the defendant if they fall within the scope of Rule 17(c). Request 15 is DENIED for being beyond the scope of Brady.

8. Defendant Joannou's motion for disclosure of Rule 404 evidence is DENIED except to the extent that the government has complied or has agreed to comply.

9. With respect to defendant Moody's motion for disclosure of specific information regarding the indicting grand jury, requests 2, 3, 4 and 5 have been withdrawn. For the reasons stated from the bench, request 1 is DENIED. The Court has reviewed the United States District Court for the Eastern District of Virginia's order extending the term of the grand jury, and finds that the order was entered during the original

eighteen month term of that grand jury. Furthermore, the Court finds that the extension was based upon a finding that such an extension was in the public interest within the meaning of Rule 6(g).

10. For the reasons stated from the bench, defendant Joannou's motion for early disclosure of Jencks material is GRANTED. The government is ordered to turn over all Jencks material regarding Clarence Nixon on December 21, 1984 and all other Jencks material on December 28, 1984.

11. By agreement, the parties resolved defendant Joannou's motion to require government agents to retain rough notes.

12. For the reasons stated from the bench, defendant Joannou's motion to excise portions of the indictment is DENIED. The Court orders the parties to either agree to a summary of the facts found in the indictment or for each to submit such a summary to the Court prior to trial.

13. For reasons stated from the bench, defendant Joannou's motion for a list of witnesses is DENIED.

14. For the reasons stated from the bench, defendant Moody's motion to sever is DENIED.

15. For the reasons stated from the bench, defendant Joannou's motion to sever is PROVISIONALLY DENIED. The Court will entertain defendant Joannou's motion for a separation of counts if a basis for that motion develops prior to trial.

16. For the reasons stated from the bench, defendant Moody's motion to dismiss the indictment for failure to state an offense is DENIED.

17. For the reasons stated from the bench, defendant Joannou's motion to file additional pretrial motions and defendant Moody's motion for extension of time to file additional pretrial motions are both DENIED. The Court will entertain additional motions as it appears that such motions are necessary prior to trial.

18. Defendant Joannou's motion for a James hearing to determine the existence of a conspiracy is DENIED. At trial, the Court will order the government to vouch the record regarding its independent proof of a conspiracy between the two defendants.

19. For the reasons stated from the bench, the government's motion for reciprocal discovery is GRANTED.

20. For the reasons stated from the bench, defendant Moody's motion to adopt certain pleadings of codefendant and defendant Joannou's motion to join are GRANTED.

Let the Clerk of the Court send a copy of this order to all counsel of record.

DATE: 11/30/84

Richard C. Williams

UNITED STATES DISTRICT JUDGE