UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR 05-1046(E)-DSF	Date	February 19, 2008

Present: The Honorable	DALE S. FISCHER, United States District Judge
Interpreter	N/A

Yvette Louis	Not Present	Not Present
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
8) TERRY CHRISTENSEN	NOT	X		8) TERREE BOWERS and PATRICIA L. GLASER	NOT	X	

Proceedings: (In Chambers) Order Granting Defendant Terry Christensen's Motion for Severance of Counts 106 and 107 Under Federal Rules of Criminal Procedure 8(b) and 14(a)

Defendant Terry Christensen seeks to sever Counts 106 and 107 of the Fifth Superseding Indictment, contending that he is improperly joined in this action under Federal Rule of Criminal Procedure 8(b) because he did not participate in the same series of acts or transactions as his co-defendants. In the alternative, Christensen argues that, even if Rule 8(b) joinder is appropriate, the Court should sever these counts pursuant to Federal Rule of Criminal Procedure 14(a) because a joint trial would be unduly prejudicial.

I. BACKGROUND

In December 2007, the Grand Jury returned the Fifth Superseding Indictment ("Indictment") against defendants Anthony Pellicano, Mark Arneson, Rayford Earl Turner, Kevin Kachikian, Abner Nicherie, and Terry Christensen. The Indictment charges 111 Counts, spanning a period from January 1999 to July 2002, including allegations of four separate conspiracies, racketeering, wire fraud, identity theft, unauthorized computer access, computer fraud, false statements, interception of wire communications, destruction of evidence, and

possession of a wiretapping device.

Christensen, an attorney, is charged only in Counts 106 and 107. These Counts charge Christensen and Pellicano with conspiracy to intercept and interception of wire communications over a three-month period from March 2002 to May 2002. Allegedly, Christensen and Pellicano conspired to wiretap the communications of Lisa Bonder Kerkorian to achieve a tactical advantage for Christensen's client in an ongoing litigation. The Indictment alleges, *inter alia*, that the other Defendants intercepted the communications or illegally accessed the information of more than 100 individuals, including Kerkorian.

The Court has previously issued an order regarding joinder of Christensen. That order, dated July 31, 2007, rejected the argument that Christensen was part of a common plan, scheme, or conspiracy with any defendant other than Pellicano. The Court deferred judgment on whether the evidence in a trial of all other defendants overlaps enough with evidence against Christensen to make joinder proper.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 8(b) provides:

> Two or more defendants may be charged in the same indictment . . . 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. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

"Joinder under rule 8(b) cannot be based on a finding that the offenses charged were merely of the same or similar character. In considering what constitutes a 'series of transactions' [the Ninth Circuit has] stated that the term 'transaction' is a word of flexible meaning. Whether or not multiple offenses joined in an indictment constitute a 'series of acts or transactions' turns on the degree to which they are related." United States v. Satterfield, 548 F.2d 1341, 1344 (9th Cir. 1977) (internal citations omitted). Relatedness can be established by showing either (1) the existence of a common plan, scheme, or conspiracy, United States v. Vasquez-Velasco, 15 F.3d 833, 844 (9th Cir. 1994), or (2) that substantially the same facts must be adduced to prove each of the joined offenses, Satterfield, 548 F.2d at 1344.

III. ANALYSIS

The Court has previously rejected the argument that Christensen was involved in a common plan, scheme, or conspiracy with any defendant other than Pellicano. (See July 31, 2007 Order.) Therefore joinder is proper only if "the common activity constitutes a substantial portion of the proof of the joined charges." United States v. Roselli, 432 F.2d 879, 899 (9th Cir. 1970). "The 'overlapping evidence' test suggests a rule of proportionality: for each defendant, the relevant evidence at trial should exceed the irrelevant." United States v. Maranghi, 718 F. Supp. 1450, 1451 (N.D. Cal. 1989); see United States v. Martin, 567 F.2d 849, 853-54 (9th Cir. 1977).

Christensen and the government provide little additional information beyond what the Court had for its July 31, 2007 order on this issue. The government continues to contend that a trial of Christensen alone would be very similar to a trial of all defendants together. Specifically, for both trials the government would have to present large amounts of background evidence about its searches of Pellicano's office and the computer items seized. (Gov't Response to Supp. Mem. at 3). It will have to detail the chain of custody for the audio recordings, the method of decryption for the audio recordings, and the development of the Telesleuth program for conducting wiretaps. (Gov't Response to Supp. Mem. at 3-5, 10-11). This evidence appears to be relevant and admissible against Christensen. It is difficult to determine how time-consuming presentation of such evidence will be.

In addition, the government claims that evidence of other wiretaps conducted by Pellicano, which do not involve Christensen, and the police database requests run by defendant Mark Arneson in conjunction with those unrelated wiretaps, will be admissible against Christensen in a separate trial. The Court does not now rule on how much of this evidence will be admissible at a separate trial of Christensen alone. Suffice it to say that the Court concludes that, in a trial of all defendants, the evidence that is irrelevant to the counts naming Christensen is likely to exceed the relevant. The Court therefore grants the motion to sever.

IV. CONCLUSION

For the foregoing reasons, Christensen's motion to sever Counts 106 and 107 of the Indictment is granted.

IT IS SO ORDERED.

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IV. CONCLUSION

For the foregoing reasons, Christensen's motion to sever Counts 106 and 107 of the Indictment is granted.

IT IS SO ORDERED.