

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 11-CR-109

BINH J. NGUYEN,

Defendant.

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**BINH NGUYEN'S MOTION TO SEVER**

Binh J. Nguyen, by his attorney Michael J. Fitzgerald, pursuant to Fed. R. Crim. P. 8(b) and 14(a), moves the Court for an order severing his trial from the trial of those defendants charged with conspiracy to distribute marijuana in Count 1 of the indictment.

**BACKGROUND**

On March 17, 2011, the grand jury returned a four count indictment charging twenty-four defendants. The indictment includes a forfeiture provision.

Seventeen defendants are charged in Count 1 with conspiracy to distribute marijuana, contrary to 21 U.S.C. §841(a)(1), §841(b)(1)(A), §846, and 18 U.S.C. §2.

Thirteen defendants, including Binh Nguyen (hereinafter “Binh”)<sup>1</sup> are charged in Count 2 with the offense commonly known as commercial gambling, contrary to 18 U.S.C. §1955.

One defendant, Quan Hoac, is charged in Count 3 with interstate travel to facilitate the distribution of marijuana, contrary to 21 U.S.C. §841(a)(1).

One defendant, Jimmy Ho, is charged in Count 4 with interstate travel to facilitate an illegal gambling business, contrary to 18 U.S.C. §1952(a)(3) and §2.

Broadly speaking, the indictment can be described as charging a drug conspiracy case and a gambling case. Seven of the defendants are charged in both counts. Binh is only charged in the commercial gambling count.

For two reasons, his case should be severed from that of the defendants charged in the drug conspiracy case. First, Binh is not properly joined in the indictment with those defendants. Second, even if the indictment properly charges Binh, he is entitled to a severance because he would be prejudiced by a joint trial.

## **MISJOINDER**

Fed. R. Crim. P. 8(b) allows the government to charge multiple defendants in the same indictment “if they are alleged to have participated in the same act or transaction, or the same series of acts or transactions, constituting an offense or offenses.” The court is to

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<sup>1</sup> Because the indictment charges eight defendants with the surname of Nguyen, the defendant will simply be referred to by his first name.

evaluate proper joinder under Rule 8(b) solely from the perspective of the indictment. *United States v. Todosijevich*, 161 F. 3d 479, 484 (7th Cir. 1998).

The test for proper joinder is whether the acts or transactions charged in the indictment are part of a common scheme or plan, “which is to say (in the usual case) that the acts are part of a single conspiracy.” *United States v. Velasquez*, 772 F. 2d 1348, 1353 (7th Cir. 1985).

In *Velasquez, supra*, the court found that the government improperly joined a heroin distribution count against some defendants with a cocaine conspiracy count against other defendants. The fact that the two offenses had overlapping membership did not permit joinder without some link between the conspiracies. *Velasquez*, 772 F.2d at 1353.

Here, the Court must assess proper joinder from the face of the indictment. The government chose to issue an indictment that satisfies the minimum requirements for sufficiency. The indictment simply tracks the statutory language of the charge and provides no factual detail at all.

Consequently, the indictment fails to explain how Binh (and the other five defendants charged only with commercial gambling) are properly joined with the defendants in the drug conspiracy count. Absent from the indictment is any showing that the defendants charged only with commercial gambling (Binh Nguyen, Tony Tran, Khanh Lam, Hoang Hoang, Laura Phan and Kevin Ho) are connected with the drug count as part of a common scheme or plan, much less a single conspiracy. And, as the *Velasquez* court noted, the mere fact that

seven defendants are charged in both the drug conspiracy count and the commercial gambling count does not provide a proper basis for joinder of Count 1 with Count 2 in the same indictment.

Accordingly, pursuant to Rule 8(b), Binh's case should be severed from that of the defendants charged in the drug conspiracy count for the purpose of trial.

### **PREJUDICIAL JOINDER**

Even if Binh is properly joined in the indictment with the defendants charged in the drug conspiracy, his case should be severed because he would be prejudiced by a joint trial.

Rule 14(a) permits a court to order "separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires" if a joint trial would be prejudicial to the defendant. The defendant must show that a joint trial would compromise a specific trial right or prevent the jury from making a reliable judgment about guilt or innocence. *United States v. Mohammad*, 53 F.3d 1426, 1431 (7th Cir. 1995), *overruled on other grounds*, *United States v. Sawyer*, 521 F.3d 792 (7th Cir. 2008).

A severance motion based on prejudicial joinder can be raised prior to trial or at trial (and must be renewed at the close of the evidence or be deemed waived). *United States v. Rollins*, 301 F.3d 511, 518 (7th Cir. 2002).

At this early stage of the case there are a number of different factual scenarios which might develop to cause prejudice at a joint trial.<sup>2</sup> One circumstance in which the defendant

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<sup>2</sup> Although the defendant is raising this issue now, it may be that the district judge will be in a better position to assess the issue of prejudice.

can be prejudiced by a joint trial, and which can be identified at this early stage, is where evidence inadmissible against the defendant alone is admissible if the defendants are tried jointly. *Zafiro v. United States*, 506 U.S. 534, 539-41 (1993); *United States v. Olson*, 450 F.3d 655, 677 (7th Cir. 2006) (defendant failed to show that harmful evidence would have been inadmissible in joint trial).

Here, Count 1 charges a significant marijuana distribution conspiracy over the course of three years, involving seventeen charged defendants and others known and unknown to the grand jury. The case originated in Seattle and involves a sizable multi-state operation. The evidence in the case includes all of the usual hallmarks of an historical drug conspiracy prosecution – extensive Title III recordings, search warrants, forensic computer analysis, drug trafficking records, financial records, and cooperating witness testimony.

None of this evidence is relevant and admissible against Binh. There is no indication that Binh is an unindicted co-conspirator in Count 1. There is no indication that he had any involvement in drug dealing whatsoever. There is no basis for a jury determining Binh's guilt or innocence on the commercial gambling charge to hear any of the drug dealing evidence.

It is commonly thought that joint trials promote judicial economy. Defense counsel disagrees. Anyone who has tried a multiple defendant, multiple week historical drug conspiracy case knows that there is nothing efficient about it. To the contrary, two smaller trials, one involving the drug conspiracy charge and another involving the commercial

gambling charge, would be easier to present, far less confusing for jurors, and ultimately more fair to the defendants.

For these reasons, and pursuant to Fed. R. Crim. P. 14(a), Binh Nguyen moves to sever his trial from that of the defendants charged with conspiracy to distribute marijuana, as charged in Count 1 of the indictment.

## **CONCLUSION**

Binh Nguyen's case is not properly joined in the indictment, under Rule 8(b), with that of the defendants charged with conspiracy to distribute marijuana. Even if it is properly joined Binh would be prejudiced by a joint trial, pursuant to Rule 14(a). For either reason, the defendant's motion to sever should be granted.