

YM

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

**FILED**  
SEP 23 2005  
MICHAEL W. DOBBINS  
CLERK, U.S. DISTRICT COURT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	02 CR 1050—6
	)	
PAUL SCHIRO,	)	Judge James B. Zagel
	)	
Defendant.	)	Second Superseding Indictment

DEFENDANT SCHIRO'S  
MOTION FOR SEVERANCE

Defendant PAUL SCHIRO, through his attorney, PAUL A. WAGNER, respectfully moves this Honorable Court, pursuant to Rule 14(a) of the Federal Rules of Criminal Procedure and the Fifth and Sixth Amendments to the Constitution of the United States, to sever his trial from those of the co-defendants so that he may receive a fair trial.

**BRIEF MEMORANDUM IN SUPPORT**

THE INDICTMENT: AN OVERVIEW

A. Specific Charges:

Mr. Schiro is indicted in one count of a nine-count indictment. Schiro and nine co-defendants are charged in a RICO conspiracy with violating 18 U. S. C. § 1962(d) and § 1963 by conducting the affairs of the "Chicago Outfit" through a pattern of racketeering activity.

In count two of the indictment, co-defendants James Marcello, Michael Marcello, Thomas Johnson, Joseph Venezia and Dennis Johnson are charged with

running an illegal gambling business, in violation of 18 U. S. C. §§ 1955 and 2. Mr. Schiro is neither charged nor referred to in this count.

In count three of the indictment, co-defendants James Marcello and Michael Marcello are accused of obstructing justice, in violation of 18 U. S. C. §§ 1510 and 2. Mr. Schiro is neither charged nor referred to in this count.

Count four of the indictment alleges that co-defendants Frank Calabrese, Sr. and Nicholas Ferriola committed extortion by collecting "street tax" from a business, in violation of 18 U. S. C. §§ 1951 and 2. Mr. Schiro is neither charged nor referred to in this count.

In count five, co-defendants Frank Calabrese, Sr. and Nicholas Ferriola are charged with conducting an illegal sports bookmaking business, in violation of 18 U. S. C. §§ 1955 and 2. Mr. Schiro is neither charged nor referred to in this count.

In count six co-defendant Frank Schweihs is alleged to have committed extortion in the attempt to obtain "street tax" from an adult entertainment club, in violation of 18 U. S. C. §§ 1951 and 2. Mr. Schiro is neither charged nor referred to in this count.

In count seven of the indictment Mr. Schweihs is alleged to have knowingly participated in the use of extortionate means by threatening the use of violence in attempting to collect a sum of money, in violation of 18 U. S. C. §§ 894 and 2. Mr. Schiro is neither charged nor referred to in this count.

In count eight of the indictment, co-defendant Michael Ricci allegedly made false statements to the FBI, in violation of 18 U. S. C. § 1001(a)(2). Mr. Schiro is neither charged nor referred to in this count.

In count nine, co-defendants James Marcello, Michael Marcello, Joseph Venezia and Thomas Johnson conspired to defraud the United States by impeding the Internal Revenue Service in the collection of income taxes, in violation of 18 U. S. C. § 371. Mr. Schiro is neither charged nor referred to in this count.

B. Enterprise Allegations:

Paragraphs one through five of count one of the indictment provide the government's view of the structure and illegal activities of the Chicago Outfit. These paragraphs make no mention of the specific activities of any individual.

This sociological description is followed in paragraphs six through nineteen with brief discussions of the roles of the named defendants and others in the alleged conspiracy. Certain criminal activities, such as murder and the collection of street tax, are attributed to various defendants, but in large part these paragraphs refer to the defendants more generally engaging in "criminal activities" for the Outfit.

Paragraph fifteen of count one, referring to Paul Schiro, is illustrative of this section of the indictment:

Defendant PAUL SCHIRO, also known as "the Indian," was a criminal associate of defendant SCHWEIS, "made" member Anthony Spilotro, and Outfit associate Joseph Hanson, who committed murder and other criminal activities on behalf of the Chicago Outfit.

This paragraph does not state what "other criminal activities" Mr. Schiro purportedly engaged in.

C. The Racketeering Conspiracy

Paragraphs twenty through forty-seven of count one assert the nature of the racketeering conspiracy to conduct the affairs of the Chicago Outfit through a pattern of racketeering activity and the collection of unlawful debt.

In paragraph 21 it is alleged that "each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise."

In paragraph twenty-two it is alleged that "the defendants . . . each agreed to conduct and to participate in the conduct of the Chicago Outfit's affairs through the collection of unlawful debt."

In these two paragraphs and all the remaining paragraphs through paragraph forty-seven, with the exception of paragraph twenty-three, there is no reference to a specific individual engaging in a specific act alleged to have been a part of the conspiracy. Each paragraph starts with "It was further part of the conspiracy that the conspirators . . .," and then goes on to state the alleged illegal conduct, such as using violence (§ 27), conducting a gambling business (§ 28), obstructing justice (§ 32), conducting surveillance of law enforcement while committing illegal activities (§ 39), etc. No defendant is named as having committed a specific act covered by these general categories.

The exception is paragraph twenty-three wherein defendants Frank Calabrese, Joseph Lombardo, Frank Schweihs, James Marcello, Nicholas Calabrese and Paul Schiro are named as having committed various murders. The allegations are specific as to victim, time and place. Frank Calabrese is named in the murders of thirteen people, plus one attempted murder. James Marcello is named in the murders of two people, plus one attempted murder. Frank Schweihs is named in the murders of two people. Joseph Lombardo,

Nicholas Calabrese and Paul Schiro are each named in the murder of one person. These murders took place from August of 1970 to September of 1986.

D. Pattern of Racketeering Activity

Paragraphs forty-eight and forty-nine provide alternative grounds of liability for the pattern of racketeering activity. Paragraph forty-eight asserts the pattern of racketeering activity to be the multiple violations of state and federal laws, including state murder statutes, while paragraph forty-nine refers to the collection of unlawful debt.

EVIDENCE AS TO SCHIRO

As outlined above, defendant Schiro is alleged to have been involved in the murder of one person of the eighteen listed in the indictment. In the one count in which Schiro is named, the government has not identified any other criminal activity in which he was involved, although the indictment lists a plethora of criminal activities attributed to the Chicago Outfit in general. Counts two through nine, however, name specific defendants, but not Schiro, as having been involved in particular activities such as running a gambling business, obstruction, extortion, and conspiracy to defraud the IRS.

Furthermore, in the massive amount of information tendered by the government, counsel for Mr. Schiro has been able to identify only the information regarding the murder of Emil Vaci in Phoenix as related to Schiro. As far as counsel can tell without having had the opportunity to review all the recorded conversations, Mr. Schiro does not appear on any of these many thousand recordings.

Thus, although the specific allegation against Mr. Schiro is serious, we have a situation where the government's evidence against the defendants in a

joint trial would be far more extensive against the other defendants than against Mr. Schiro. The government would be trying to prove up thirteen murders against Frank Calabrese and two against James Marcello and Frank Schweihs, as well as other serious charges against the other defendants. Furthermore, Mr. Schweihs, also named with Schiro in the allegation regarding the murder of Emil Vaci, is charged with two incidents of extortion. The sheer volume of evidence, as well as the seriousness of the charges, would prejudice Mr. Schiro's right to receive a fair trial based upon the evidence against him.

#### LEGAL STANDARD

The Supreme Court commented on a similar situation in Zafiro v. United States, 506 U. S. 534, 539 (1993):

We believe that, when defendants properly have been joined 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. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. (citation omitted)

In order to show that severance should be granted, the defendant "must establish that the joint trial resulted in actual prejudice." United States v. Mohammad, 53 F.3d 1426, 1431 (7<sup>th</sup> Cir. 1995). Disproportionate evidence is not itself grounds for severance. United States v. Hendrix, 752 F.2d 1226, 1232 (7<sup>th</sup> Cir. 1985).

Nevertheless, under Rule 14 it is within the district court's discretion whether to

grant the motion if there is a showing of prejudice. United States v. Lane, 474 U. S. 438, 449, fn 12 (1986); Zafiro, 506 U. S. at 541.

Defendant submits that, given the broad scope and nature of the charges in this case, charges which allege a racketeering conspiracy covering more than four decades involving an extensive variety of criminal activity including murder, his right to a trial based upon relevant and competent evidence related to him is severely compromised. The very structure of the indictment puts at issue the jury's ability to make a "reliable judgment" about Mr. Schiro's guilt or innocence if, for example, he were to be tried with Frank Calabrese, who is charged with involvement in thirteen murders. This case is complex, and based upon the information tendered so far by the government, there are "markedly different degrees of culpability" between Mr. Schiro and other defendants. Thus, even though disproportionate evidence does not itself establish a basis for severance, when that disproportionate evidence represents "markedly different degrees of culpability," severance is appropriate and well within the sound discretion of the district court.

And while limiting instructions may at times cure any prejudice in joint trials, Richardson v. Marsh, 481 U. S. 200, 211 (1987), they are a slim reed upon which to rest such important matters, such as the right of a defendant to receive a fair trial based upon relevant and competent evidence related to the charges against him. As any trial lawyer knows, a limiting instruction frequently serves only to fix more firmly in the jurors' minds the evidence to which the instruction is directed. In the present case where such limiting instructions would deal with murder and other extensive criminal activities of the codefendants, defendant

submits that such instructions would be to no avail in providing him with a fair trial.

CONCLUSION

WHEREFORE, defendant PAUL SCHIRO, respectfully requests this Honorable Court to grant his motion to sever his trial from that of the codefendants.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul A. Wagner", written over a horizontal line.

PAUL A. WAGNER  
Attorney for Paul Schiro

Paul A. Wagner  
321 South Plymouth Court  
Suite 1500  
Chicago, Illinois 60604  
(312) 913-1145