UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIM. NO. 94-10287-MLW
	)	
JAMES J. BULGER,	)	
	)	
Defendant.	)	

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION FOR CONSOLIDATION OF CASES

Defendant has moved to consolidate the two "pending" federal cases against him: this case (hereinafter, "the 1994 Case"),[1] and the case of United States v. James J. Bulger, 99-10371-RGS (hereinafter, the "RICO Murder Case"). Defendant's motion, filed just twenty-four hours after the government dismissed all charges in the 1994 Case, is unprecedented and entirely without legal basis, and it should be denied.

Contrary to defendant's claim, Fed R. Crim. P. 13 provides no basis for consolidation of

[1] While the 1994 Case is technically still pending, on June 28, 2011, the government filed a Notice of Dismissal, pursuant to Fed. R. Crim P. 48(a), dismissing all counts against defendant for the reasons set forth therein. See United States v. James J. Bulger, 94-10287-MLW, ECF Dkt. No. 2340 (hereinafter, "Government's Dismissal Notice"). Without restating all of those reasons, it bears repeating that the Government's Dismissal Notice was filed because, inter alia: (1) the 1994 Case has become weaker with time as critical witnesses have died; (2) the 1994 Case does not include any of the at-least 19 murders defendant allegedly committed, thereby limiting the penalties defendant faces and denying swift justice to the families of defendant's many victims; and (3) the 1994 Case presents legal issues and challenges that the RICO Murder Case does not.

As the Court noted at its hearing yesterday, in light of the legal issues previously identified by the Court regarding the RICO "enterprise" in the 1994 Case, the Government's Dismissal Notice was "anticipated." As the Court also noted, its discretion with respect to whether to grant the government's Notice of Dismissal is very limited. In light of this, it would make no sense to consolidate defendant's two cases before the forum in which all charges against defendant had been dismissed. To that end, defendant's allegation that the *government* is forum-shopping is puzzling.

defendant's two cases. Indeed, the weakness of defendant's motion is best illustrated by the absence of a single First Circuit or District of Massachusetts case in which Fed R. Crim P. 13 was used to consolidate criminal cases over the government's objection, let alone in an instance like this, in which the government had already dismissed all charges against defendant in the forum in which defendant *subsequently* sought consolidation.

Fed. R. Crim. P. 13 provides: "[t]he court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." Critically, however, as each of the cases cited by defendant at page 3 of his consolidation motion acknowledge, Fed. R. Crim. P. 13 must be applied in conjunction with Fed. R. Crim. P. 8(a). See United States v. Gilmore, 284 F.Supp.2d 393, 394-95 (W.D. Va. 2003) (reading Rule 13 and Rule 8(a) together); United States v. Agboola, 2001 WL 1640094 at **6-7 (finding that "[r]ule 13 applies in two circumstances: when one defendant is charged with multiple offenses that could have been joined under Rule 8(a), and when multiple defendants charged in separate indictments could have been joined under Rule 8(b)"); United States v. Simmons, 739 F.Supp. 1040, 1041 (W.D.N.C. 1990) (finding that "[i]n determining whether the offenses could have been joined in a single indictment [to apply Rule 13], the Court must look to Rule 8(a) of the Federal Rules of Criminal Procedure"); United States v. Moriarty, 327 F.Supp. 1045, 1048 (E.D. Wis. 1971) ("[i]n order to determine whether joinder of indictments or defendants, or both, would be proper, it is necessary to refer to the standards found in Rule 8, Federal Rules of Criminal Procedure").[2]

[2] Defendant's consolidation motion not only ignores Fed. R. Crim. P. 8(a), it fails to acknowledge that in three of the four consolidation cases he cites, the motion for consolidation was filed by the government, not by the defendant. And in the fourth case, Gilmore, the

In order to prevail on his Fed. R. Crim. P.13 motion, defendant thus must meet the standard set forth in Fed. R. Crim. P. 8(a). Fed. R. Crim. P. 8(a) provides: "[t]he indictment or information may charge a defendant in separate counts with two or more offenses if the offenses charged - whether felonies or misdemeanors or both - are of the same or similar character or are based on the same act or transaction or are connected with or constitute parts of a common scheme or plan."

Defendant has not even attempted to meet this standard - presumably because he knows he cannot. Again, without repeating all of the reasons set forth in the Government's Dismissal Notice, the simple fact remains that the 1994 Case and the RICO Murder Case both charge racketeering and racketeering conspiracy yet allege different enterprises and different patterns of racketeering activity. These four racketeering counts cannot be joined together in the same indictment without creating additional legal issues and ultimate confusion for any jury hearing the case. For example, many of the predicate acts and substantive offenses alleged in the RICO Murder Case were simply not committed pursuant to the racketeering conspiracy and the racketeering enterprise alleged in the 1994 Case. These two cases are simply not subject to consolidation.

Defendant's reliance on Local Rule 40.1(J), in the concluding paragraph of his motion, is also misplaced. While defendant cites no case in which Local Rule 40.1(J) was used to consolidate criminal cases, the government has found only one such case in which this rule (previously labeled 40.1(H)) was used as the basis for consolidating criminal cases. See, e.g., United States v. Rostoff, 956 F.Supp. 38, 40 n. 1 (D. Mass. 1997). Notably, and in stark contrast to this case, in Rostoff, the

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government did not oppose the request for consolidation. It also goes without saying that defendant has not found any case in which a court, where a pending notice of dismissal had been filed by the government, prior to its ruling on that motion, consolidated its soon-to-be dismissed case with another totally different case, charging an entirely different RICO "enterprise," that was indicted five years later and randomly assigned to a different forum.

consolidation occurred "with the parties' consent." Id.[3]

Rather than providing a cogent legal argument supporting his motion for consolidation, the defendant alleges that the government is "forum shopping." Defendant suggests that the RICO Murder Case should not have been indicted separately, but should have been indicted as a superseding case. This argument simply demonstrates the defendant's lack of knowledge regarding the legal proceedings which developed as a result of the 1994 Case as well as his lack of understanding regarding the government's ability to supersede a five-year old racketeering case with a new indictment alleging a new enterprise and a different pattern of racketeering.[4] In fact, the only logical explanation for the defendants counter-intuitive strategy of opposing dismissal and requesting that he be prosecuted for additional offenses is that the defendant is engaging in forum shopping.

Finally, it is unclear to the government that the defendant has standing to file a substantive motion on a matter in which the defendant has yet to be arraigned and the government has filed a notice of dismissal.

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[3] The only other cases the government could find on Rule 40.1(J) were McMorris v. TJX Companies Inc., 493 F.Supp.2d 158, 166 (D.Mass., 2007), a civil class action and Raytheon Co. v. Underwriter's At Lloyd's London, 2002 WL 1034852, 2 (D.Mass.)(denying plaintiff's attempt to consolidate under former Local Rule 40.1(J), also a civil matter.

[4] The government recalls that there was extensive litigation before the Court in 1996 after the government filed the Third Superseding indictment which added several murders as racketeering acts. Further, the 1999 RICO Murder Case initially charged Kevin Weeks and Kevin O'Neill and was randomly assigned because there is no related case rule in the District of Massachusetts. It was only after both Weeks and O'Neill cooperated regarding the defendant's conduct in furtherance of the Bulger Group's criminal activities that the government was able to add the defendant to the 1999 case.

Conclusion

For the reasons set forth above, defendant's motion for consolidation should be denied.

Respectfully submitted,

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Date: June 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on June 29, 2011.

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Dated: June 29, 2011