UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	
	:	
LANCE JONES	:	3:99CR264(AHN)
LEONARD JONES	:	
LUKE JONES	:	
LYLE JONES	:	
LESLIE MORRIS	:	
WILLIE NUNLEY	:	

RULING ON DEFENDANTS' MOTIONS FOR SEVERANCE, TO DISMISS THE INDICTMENT OR SPECIFIC COUNTS THEREIN, FOR CHANGE OF VENUE, AND TO CHALLENGE THE JURY ARRAY

Defendants Lance Jones, Leonard Jones, Luke Jones, Lyle Jones, Leslie Morris, and Willie Nunley have filed the following motions with respect to the above-reference case: (1) to sever Luke Jones, the capital defendant, from the trial of the remaining, non-capital defendants; (2) to sever from the trial of the non-capital defendants certain counts pertaining to Luke Jones contained in the Fifth Superceding Indictment ("Indictment"); (3) to dismiss Counts One and Two of the Indictment; (4) to dismiss Counts Thirteen, Fourteen, Fifteen, Sixteen, Eighteen, and Twenty of the Indictment; (5) to dismiss the Indictment for multiplicitous indictment or, in the alternative, to require the government to elect either Count Five or Count Six; (6) to dismiss the Indictment for

unreasonable delay; (7) for change of venue; and (8) to challenge the jury array.

As discussed below, all motions other than the two severance motions are hereby denied.

THE INDICTMENT

The government's 55-page Indictment charges the above-named defendants, as well as eight other defendants, with narcotics trafficking and racketeering offenses committed while functioning as an "Enterprise" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968.[1] Count Two charges Defendants with RICO conspiracy in violation of 18 U.S.C. § 1962(d). Count Five charges Luke Jones, Lyle Jones, Leslie Morris, and Willie Nunley with conspiracy to possess narcotics with intent to distribute in violation of 21 U.S.C. § 846. Count VI concerns a drug conspiracy charge under 21 U.S.C. 846 involving Luke Jones, Lance Jones, and Leonard Jones. Counts Thirteen, Fourteen, and Fifteen charge Leslie Morris and Willie Nunley with various offenses related to the murder of Kenneth Porter in violation of 18 U.S.C. § 1959 ("Violent Crimes in Aid of Racketeering Act" or "VCAR") and 18 U.S.C. § 924. Counts

[1] The court has previously severed the trial of these eight additional defendants from the defendants involved in the instant case.

Eighteen, Nineteen, and Twenty charge Luke Jones, Lyle Jones, and Willie Nunley with similar offenses relating to the attempted VCAR murder of Lawson Day.

DISCUSSION

I. Motions for Severance and for Severance of Specific Counts

[Luke Jones, Doc. # 979, 981; Lance Jones, Doc. # 1027 (adopting Luke Jones); Leonard Jones, Doc. # 1017 (adopting Luke Jones), 1090; Lyle Jones, Doc. # 1145 (adopting Leonard Jones); Leslie Morris, Doc. # 1081; Willie Nunley, Doc. # 1072 (adopting Luke Jones)]

Defendant Luke Jones has filed a motion to sever his trial from the trial of the non-capital co-defendants. In turn, several non-capital defendants have moved for a trial separate from him. Although the government has opposed these motions, it has expressed a preference to try Luke Jones separately on all counts without trying him jointly with the other defendants.

On September 9, 2002, the court held a status conference on the severance motions with the government and defense counsel. In the interests of justice and judicial economy, the court ruled in open court (1) to sever the trial of Luke Jones on all counts from the trial of the remaining non-capital defendants; (2) to commence jury selection for the trial of the non-capital defendants on October 2, 2002, with evidence to begin on October 8, 2002; and (3) to commence jury

selection for the trial of Luke Jones on January 7, 2003.

II. Motions to Dismiss the Fifth Superceding Indictment or Counts Therein

[Luke Jones, Doc. # 1002, 1004, 1006, 1008; Lance Jones, Doc. #1027 (adopting Luke Jones), 1055; Leonard Jones, Doc. # 1017 (adopting Luke Jones); Lyle Jones, Doc. # 1016, 1067 (adopting Luke Jones); Leslie Morris, Doc. # 1053; Willie Nunley, Doc. # 1072 (adopting Luke Jones)]

Defendants have filed motions to dismiss several counts of the Indictment on various grounds. Theses motions are without merit and are denied for the reasons that follow.

A. Counts One and Two

1. Insufficient Allegation of Interstate Commerce Under RICO

First, Defendants contend that Counts One and Two of the Indictment should be dismissed because these counts do not properly allege under RICO the Enterprise's effect on interstate commerce. This claim lacks merit. Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an indictment shall be "a plain, concise and definite written statement of the essential facts constituting the offense charged" and "shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated." Fed. R. Crim. P. 7(c)(1). The indictment should "provide sufficient detail to assure against double

jeopardy and state the elements of the offense charged, thereby apprizing the defendant of what he must be prepared to meet." United States v. Tramunti, 513 F.2d 1087, 113 (2d Cir. 1975).

The Indictment comports with Rule 7(c)(1) because it plainly states that Defendants engaged in interstate commerce by virtue of their involvement in drug trafficking. Count I states, among other things: (1) that the Defendants were part of an "Enterprise," as defined in 18 U.S.C. § 1961(4), which "engaged in, and its activities affected, interstate and foreign commerce"; and (2) that "[m]embers and associates of the Enterprise regularly obtained large, wholesale quantities of narcotics, including heroin and cocaine, from sources of supply inside and outside the District of Connecticut." Indictment at 2 and 3 (emphasis added). Similarly, Count II states that the Defendants were either employees or associates of the Enterprise, which "was engaged in, and the activities of which affected, interstate and foreign commerce." Id. at 23 (emphasis added). The Second Circuit has held that drug trafficking is an economic activity with a substantial effect on interstate commerce. United States v. Feliciano, 223 F.2d 102, 119 (2000). Thus, Counts One and Two sufficiently allege that the Defendants, as part of the Enterprise, had an effect

on interstate commerce.

2. Insufficient Allegation of a "Pattern of Racketeering Activity" under RICO

Second, Defendant Nunley contends that the Indictment fails to allege that he, as part of the Enterprise, participated in a pattern of racketeering activity. Under 18 U.S.C. § 1962(c), the Government must show that the defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c) (emphasis added). A "pattern of racketeering activity" requires the commission of at least two acts of racketeering activity within ten years. Id. Moreover, the indictment must contain sufficient facts to show that "the racketeering acts are related and that those acts establish or threaten continuing criminal activity." United States v. Palumbo Bros., Inc., 145 F.3d 850, 877 (7th Cir. 1998) (citing H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239 (1989) (requiring "continuity plus relationship" in a defendant's predicate acts)).

The plain language of the Indictment sufficiently alleges that Nunley engaged in a pattern of racketeering on behalf of the Enterprise. In Count One, the Government posits seven related racketeering activities, as defined by 18 U.S.C. §

1961(4), through which defendant Nunley allegedly participated for the Enterprise. Indictment at 9-22 (Racketeering Acts 1-C, 7-A, 7-B, 9, 10-A, 10-B and 17). These alleged acts, such as murder and witness tampering, qualify as "racketeering activities" under 18 U.S.C. § 1961(4). Moreover, the Indictment expressly provides that all seven acts allegedly occurred within a six-year time period beginning in 1995 pursuant to 18 U.S.C. § 1961(5). Thus, there is no merit to Nunley's claim that the Indictment fails to allege that he participated in a pattern of racketeering activity on behalf of the Enterprise.

3. Charge of Multiple Conspiracies under RICO

In addition, Nunley contends that Counts One and Two of the Indictment should be dismissed because they charge multiple RICO conspiracies under 18 U.S.C. § 1962(d). These counts, however, unambiguously charge him with participating in, and agreeing to participate in, one enterprise through multiple racketeering activities. See Indictment at 2-23 (Count One charging violation of 18 U.S.C. § 1962(c) and Count Two charging violation of 18 U.S.C. § 1962(d)). Moreover, the Indictment comports with the Second Circuit's requirement that a charge of violating § 1962(d) must allege, at a minimum, a conspiracy to violate 18 U.S.C. §§ 1962(a), (b), or (c). See

Hecht v. Commerce Clearing House, 897 F.2d 21, 25 (2d Cir. 1990) (conspiracy to violate RICO must allege an agreement by each defendant to commit at least two predicate acts). Count Two of the Indictment clearly alleges that Nunley and others associated with the Enterprise defined in Count One

> "did combine, conspire, confederate, and agree with each other . . . to violate Title 18, United States Code, Section 1962(c), that is to conduct and participate, directly and indirectly, in the conduct of the affairs of the Enterprise through a pattern of racketeering activity, to wit, the racketeering acts set forth in paragraphs 20 through 54 of Count One . . . . It was part of the conspiracy that each defendant agreed that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the Enterprise."

Indictment at 23. Thus, Nunley's claim lacks merit and shall be dismissed.

B. Counts Thirteen, Fourteen, Fifteen, Eighteen, Nineteen, and Twenty

Next, Defendant Nunley asserts that this court lacks jurisdiction over the charges brought in Counts Thirteen, Fourteen, Fifteen, Eighteen, Nineteen and Twenty brought under 18 U.S.C. § 1959 ("Violent Crimes in Aid of Racketeering" or "VCAR") because the Government cannot substantiate that the murders and attempted murders alleged therein were done "for the purpose of gaining entrance into" or "increasing position in an enterprise engaged in racketeering activity." See United States v. Adorno, 5 Fed. Appx. 65, 66 (2d Cir. 2001)

(citing 18 U.S.C. § 1959(a)). This motive requirement is satisfied if the jury can "properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992). A conviction under VCAR requires only a minimal connection, not a substantial one, between interstate commerce and the activities of the criminal enterprise. Feliciano, 223 F.2d at 119.

Nunley's claims are without merit. The inquiry into his motive in allegedly committing the VCAR murders involves questions of fact, not law, that a jury must resolve. The Indictment alleges that the murders of Monteneal Lawrence and Kenneth Porter, as well as the attempted murder of Lawson Day, were motivated in part by the desire of Defendants Luke Jones and Nunley to maintain or increase their position in the criminal enterprise. According to the Indictment, moreover, Nunley and other members of the Enterprise used violence to maintain control over the territory in which they allegedly trafficked narcotics. The Second Circuit has held that drug trafficking, even if primarily local in character, is an economic activity that has a "substantial effect on interstate

commerce." Id. Thus, the court denies Defendants' motion to dismiss Counts Thirteen, Fourteen, Fifteen, Eighteen, Nineteen, and Twenty.

C. Counts Five and Six Based on Multiplicitous Indictment

Defendants move to dismiss Counts Five and Six or, in the alternative, for an order directing the government to proceed under only one of these counts. Count Five charges, among others, Luke Jones, Lyle Jones, Leslie Morris, and Willie Nunley with conspiring to possess with intent to distribute various quantities of cocaine and heroin in violation of 21 U.S.C. § 846. Count Six charges Luke Jones, Lance Jones, and Lyle Jones with similar offenses. Defendants argue that these charges are multiplicitous and thereby violate the Double Jeopardy Clause of the Fifth Amendment.

An indictment is multiplicitous when it charges a single offense multiple times in separate counts when only one crime has been committed in law and fact. See United States v. Holmes, 44 F.3d 1150, 1153-54 (2d Cir. 1993). The Second Circuit has identified a number of factors to be considered in individuating conspiracies, including (1) the criminal violations charged; (2) the overlap of participants; (3) the overlap in time; (4) the similarity of the operation; (5) the existence of common overt acts; (6) the geographic scope fo

the conspiracies; and (8) the degree of interdependence between the conspiracies. See, e.g., United States v. Urlacher, 784 F. Supp. 61, 64 (W.D.N.Y.), aff'd, 979 F.2d 935 (2d Cir. 1992).

An application of these factors to the instant case shows that two separate conspiracies were involved. It is true that Counts Five and Six charge conspiracies under 21 U.S.C § 846 that overlap in time.[2] These two conspiracies, however, involved participants other than Luke Jones. The conspiracy named in Count Five involved Luke Jones, Lyle Jones, Leslie Morris, Willie Nunley, and nine other individuals. In contrast, the conspiracy named in Count Six involved only Luke Jones, Lance Jones, and Leonard Jones. Moreover, the government has represented in its brief that Count Five refers to Racketeering Act 1-C in the Indictment, which involved narcotics trafficking in the Middle Court area of the P.T. Barnum Housing Project. On the contrary, Count Six refers to Racketeering Act 1-D in the Indictment, which involved narcotics trafficking in the entrance area of the P.T. Barnum Housing Project. The government has further represented that the two conspiracies sold different brand names of narcotics,

[2] Count Five refers to a conspiracy that began in January 1995 until February 24, 2000; Count Six refers to a conspiracy beginning in January 1997 and continuing to February 24, 2000.

employed different street-level sellers, and functioned independently of each other. Accordingly, the court denies Defendants' motion to dismiss Counts Five or Six.

D. Dismissal of the Entire Indictment for Unreasonable Delay

Next, Defendants argue that an eighteen-month delay between the initial indictment and the Fifth Superceding Indictment violated their Fifth Amendment right to a fair trial and their Sixth Amendment right to an expeditious prosecution. The government counters that it informed defense counsel the grand jury was considering additional charges against the Defendants, including murder and violent crimes in aid of racketeering, and that the Defendants agreed to waive speedy trial time and elected not to go to trial on the charges in the previous indictments.

Rule 48(b) allows a court to dismiss an indictment if there is "unnecessary delay in bringing a defendant to trial." Fed. R. Crim. P. 48(b). The Due Process Clause of the Fifth Amendment requires dismissal of an indictment if pre-indictment delay causes "substantial prejudice to [defendant's] right to a fair trial and [if] the delay was an intentional device to gain tactical advantage over the accused." United States v. Marion, 404 U.S. 307, 324 (1971). The Sixth Amendment explicitly provides that "[in] all

criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. U.S. Const. Amend VI. The test for determining whether a Sixth Amendment violation has occurred is to balance the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." Barker v. Wingo, 407 U.S. 514, 530 (1972).

The Defendants have not demonstrated the existence of an unreasonable delay that conflicts with Criminal Rule 48(b) or the Fifth or Sixth Amendments. First, under Rule 48(b), a delay for valid and justifiable reasons should not weigh against the government. See Barker, 407 U.S. at 531. In this case, the government's continuing investigation yielded new information that required the issuance of multiple superseding indictments. The Defendants chose to wait and go to trial on the Fifth Superceding Indictment.

Second, no Fifth Amendment violation exists because the Defendants have not claimed any unreasonable pre-indictment delay on the government's part. On the contrary, the Defendants complain about the delay between the initial indictment and the Fifth Superceding Indictment. See Marion at 324.

Third, an application of the Barker four-factor test demonstrates that no Sixth Amendment violation has occurred.

Defendants correctly state that eighteen months is indeed a significant period of time to elapse between the initial indictment and the Fifth Superceding Indictment. Nevertheless, the three other Barker factors militate against any finding of improper delay by the government. In this case, superceding indictments were warranted because the government's continuing investigation of the Enterprise after the initial indictment uncovered additional criminal activity. The government consolidated the charges in order to avoid trying the same defendant multiple times. Notably, the Defendants have not adduced any evidence showing that the government possessed all evidence contained in the counts of the superceding indictments at the time of the original indictment, or that it deliberately engaged in a strategy of illegitimate delay. On the contrary, the experienced and competent defense counsel representing the Defendants agreed to file motions tolling the speedy trial clock. Finally, under the last prong of Barker, the Defendants have not shown that they suffered any prejudice due to the delay between the initial indictment and the Fifth Superceding Indictment. Although Luke Jones makes the conclusory statement that the delay has caused him to lose potential defense witnesses, he names no specific examples of such individuals. Accordingly,

the court denies the Defendants' motion to dismiss based on improper delay.

III. Motion for Change of Venue

[Lance Jones, Doc. #1027 (adopting Luke Jones Doc. # 977); Leonard Jones, Doc. # 1017 (adopting Luke Jones); Lyle Jones, Doc. # 1016 (adopting Luke Jones); Willie Nunley, Doc. # 1072 (adopting Luke Jones)]

Defendants Lance Jones, Leonard Jones, and Lyle Jones maintain that extensive pre-trial publicity in the District of Connecticut has influenced jurors so that they cannot obtain a fair and impartial trial.[3] Rule 21(a) provides that the district court shall grant a motion for change of venue "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." Fed. R. Crim. P. 21(a).

Now that jury selection has been completed in the instant case, the court is convinced that the Defendants will be tried by a fair, impartial, and objective jury. Although a significant amount of media attention has been devoted to the Defendants' case, particularly with respect to the capital

[3] The court reserves its ruling on the venue motion with respect to Defendant Luke Jones because his jury will not be impaneled until January 7, 2003.

case involving Luke Jones, media coverage alone is not enough to require a change of venue. See Dobbert v. Florida, 432 U.S. 282, 303 (1977)(holding that extensive knowledge in the community of either the crime or the putative criminal is not sufficient by itself to render a trial constitutionally unfair). Jurors who, through pretrial publicity, have some knowledge of a defendant or the alleged crime are not automatically disqualified. They are disqualified only if they are unable to put aside any impression or opinion they may have formed as a result of the publicity and cannot render an unbiased, impartial verdict based on the evidence presented in court. See Irvin v. Dowd, 366 U.S. 717, 723 (1961) (stating that it would establish an impossible standard to hold that the mere existence of any preconceived notion as to the guilt or innocence of the accused without more is sufficient to rebut the presumption of a prospective juror's impartiality). Indeed, as the Supreme Court has stated, the Constitution does not require ignorant jurors, only impartial ones. See Murphy v. Florida, 421 U.S. 794, 800 (1975).

Furthermore, in supervising the jury selection process, the court adopted procedural measures that enabled defense counsel and the government to identify those jurors whose views may have been affected by the pretrial publicity. In

advance of the actual jury selection day in court, potential jurors completed an extensive questionnaire that asked, among other things, about their exposure to such media reports. Based on their responses to the questionnaires, counsel were able to identify those jurors who may have developed such a bias.[4] Moreover, on the day of jury selection, the court further inquired of potential jurors to ascertain whether media coverage had prejudiced them to a degree that would prevent them from being fair and impartial. All jurors who indicated that they had been influenced or prejudiced by the media reports–and thus could not be fair and objective–were excused for cause.

Based on these procedures, it is clear that the pretrial publicity has not "caused a 'clear and convincing' buildup of prejudice among the jurors." Knapp v. Leonardo, 46 F.3d 170, 176 (2d Cir. 1995)(citations omitted). The jury which has been selected to serve in this case is composed of unbiased individuals who stated that they can be fair and impartial. Even though some individuals may have indicated on their questionnaires or on voir dire that they had heard of the Defendants, each indicated that they would not be influenced

[4] With consent of defense counsel and the government, the court excused for cause more than fifty individuals from the jury pool in advance of the jury selection day.

by what they had read or heard and would render a verdict based solely on the evidence presented in this case.[5] See United States v. Stevens, 83 F.3d 60, 66 (2d Cir. 1996). Accordingly, the court denies Defendants' motion for change of venue.

IV. Motion to Challenge the Jury Array

[Lance Jones, Doc. #1067 (adopting Luke Jones Doc. # 1044); Leonard Jones, Doc. # 1064 (adopting Luke Jones); Lyle Jones, Doc. # 1069 (adopting Luke Jones); Willie Nunley, Doc. # 1072 (adopting Luke Jones)][6]

Finally, Defendants argue that the jury array does not represent a fair-cross section of the community and therefore deliberately and systematically discriminates against persons of African-American ancestry. The jurors, however, were selected from a pool of 300 individuals, who represent a fair cross section of the community, pursuant to the jury selection mechanism used to empanel juries by district courts in Connecticut.[7] It is settled law in the Second Circuit that

---

[5] The Defendants were given twenty-two peremptory challenges, twelve more than the ten required, see Fed. R. Crim. P. 24(b). These extra challenges could have been used to strike these individuals.

[6] The court reserves its ruling on the jury challenge motion with respect to Defendant Luke Jones because his jury will not be impaneled until January 7, 2003.

[7] In fact, two of the sixteen jurors (12.5%) selected for the jury of the non-capital trial are African-American.

this established jury selection mechanism does not compromise a defendant's right to a fair and impartial jury. See United States v. Rioux, 97 F.3d 648, 659 (2d Cir. 1996). Furthermore, the Defendants have failed to show that the system used to assemble jury panels for jury selection intentionally discriminates against certain minority groups or that the system results in a "systemic exclusion" of minorities. United States v. Miller, 116 F.3d 641, 657 (2d Cir. 1997). Thus, the court denies Defendants' challenge to the jury array.

CONCLUSION

For the reasons discussed, the motions for severance and for severance of counts are hereby GRANTED as set forth above. All other motions are hereby DENIED.

SO ORDERED this _____ day of October, 2002, at Bridgeport, Connecticut.

_____
Alan H. Nevas
United States District Judge