UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:-04-CR-175**
	)	
v.	)	
	)	
XXX XXX XXX,	)	
	)	
Defendant.	)	
	)	

MOTION FOR SEVERANCE AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendant XXX XXX XXX, pursuant to Fed. R. Crim. P. 14, hereby moves this Court to sever Count 1 from Count 2 in the above referenced case. In support of this Motion, Mr. XXX sets forth the following facts and argument.

1. Mr. XXX is charged in Count 1 of the indictment filed in this case with arson in violation of 18 U.S.C. § 844(i).

2. He is charged in Count 2 with being a felon-in-possession of a firearm, in violation of 18 U.S.C. § 922(g). Count 2 alleges five predicate felony convictions alleged to have been sustained by Mr. XXX including four convictions for burglary and one for interference with a police officer.

3. Fed. R. Crim. P. 14(a) provides that, if the joinder of offenses against one defendant for trial appears to prejudice a defendant, the court may order separate trials of the counts.

4. As the United States Court of Appeals for the Fifth Circuit noted in *United States v. Singh* 261 F.3d 530 (5th Cir. 2001) and later reaffirmed in *United States v. McCarter*, 316 F.3d 536 (5th Cir. 2002), it has "long recognized the obvious dangers in inherent in trying a felon-

inpossession count together with other charges, as it acts as a conduit through which the government may introduce otherwise inadmissible evidence of a defendant's prior convictions, thereby potentially tainting the reliability of the verdict rendered by the jury on other counts." *Id*. at 538. Indeed, in both *Singh* and *McCarter*, the Fifth Circuit found that district court judges had abused their discretion in failing to sever felon-in-possession charges from other charges and reversed the defendants' convictions. *See also, e.g., United States v. Jones*, 16 F.3d 487, 492-93 (2d Cir. 1994) (same); *United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (same); *United States v. Lewis,* 787 F.2d 1318, 1320-23 (9th Cir. 1986) (same).

5. As noted in *Lewis*:

> Studies have shown that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case. *See* Tanford, Penrod & Collins, *Decision Making in Joined Criminal Trials: The Influence of Charge Similarity, Evidence Similarity, and Limiting Instructions*, 9 Law and Human Behavior 319, 331-35 (1985); Bordens & Horowitz, *Joinder of Criminal Offenses: A Review of the Legal and Psychological Literature*, 9 Law and Human Behavior 339, 343, 347-51 (1985).

Lewis, 787 F.2d at 1322.

6. While the government has not yet provided discovery in this case, Mr. XXX submits that the government's evidence on the arson charge is "thin." *See McCarter*, 316 F.3d at 539. In any event, it will be hotly contested. The underlying felonies forming the basis for the felon-in-possession charge would not be admissible on the arson charge alone. Indeed, because of their age, they would not even be admissible in the event Mr. XXX was to testify regarding the arson charge.

7. A failure to sever the charges will prejudice Mr. XXX in two ways. First, he would be prejudiced on the arson charges if the jury was to learn of his criminal record. *Id*. at 539 n.12, *quoting Jones*, 16 F.3d at 493 ("[A]lthough 'jurors are presumed to follow instructions from the

court,' it 'would be quixotic to expect the jurors to perform such mental acrobatics' in cases in which felon-in-possession counts are joined with other counts."). Second, Mr. XXX wishes to testify in his defense if the arson charge is tried by itself but he will not testify regarding the felon-in-possession charge. Therefore, the failure to sever would, in essence, deny him the right to testify on his own behalf and present a defense.

8. The arson case will be complex and the trial likely will be lengthy. The felon-in-possession case, on the other hand, will be simpler to try and will likely only take one or two days to try. In the event the Court denies this Motion to Sever, based upon the Fifth Circuit precedent cited above, it is likely that the convictions will be reversed, thereby, squandering the Court's resources that went into trying the complex arson case.

WHEREFORE, Mr. XXX respectfully requests this Court to sever Count 1 from Count 2 in the above referenced case

Respectfully submitted,

/s/

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XXX XXX XXX

CERTIFICATE OF CONFERENCE

Pursuant to the local rules of the Eastern District of Texas, I, F. Clinton Broden, certify that I attempted to conference with Ernest Gonzalez, the Assistant United States Attorney assigned to the case by leaving a message on his voice mail on January 18, 2005, but as of the time of the mailing of this motion, did not hear back from Mr. Gonzalez.

/s/
F. Clinton Broden

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January 20, 2005, I caused the foregoing document to be served by first class mail, postage prepaid, on Ernest Gonzalez, Assistant United States Attorney, One Grand Centre, Suite 500, Sherman, Texas 75090.

________/s/__________________________
F. Clinton Broden

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Defendant.	)	
______________________________	)	

ORDER

________Defendant XXX XXX XXX's Motion to Sever is this ____ day of January, 2005 GRANTED.

ORDERED pursuant to Fed. R. Crim. P. 14, Count 1 of indictment in this case is hereby severed from Count 2.

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RICHARD SCHELL
UNITED STATES DISTRICT JUDGE