IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

ORDER

(SEALED)

04-CR-0028-C-01

v.

DANIEL E. DANFORD,

Defendant.

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Defendant Daniel E. Danford has filed objections to the report and recommendation filed by United States Magistrate Judge Stephen L. Crocker on August 12, 2004. Defendant objects to only one of the magistrate judge's recommendations, which is that the court deny defendant's motion to sever counts 7 and 8 from counts 1-6.

Having reviewed the report and recommendation, the record and defendant's objection, I have decided to grant defendant's motion to sever. The magistrate judge acknowledged that the issue was a "wobbler." R&R at 6. I agree that it is a close question, but I come down on the side of granting the motion. The two groups of counts relate to entirely different fraud schemes. The first six counts relate to a mail fraud scheme arising

out of an allegedly fake robbery of defendant's store and false insurance claims for reimbursement for items supposed taken in the robbery. The seventh and eighth counts relate to a bank fraud in which defendant is charged with making a false statement in 1995 when he failed to disclose a default judgment entered against him in 1990. The last two counts are complicated by the fact that the default judgment was entered against defendant when he was in the Witness Protection Program, living under the name Daniel DuPont.

Fed. R. Crim. P. 8(a) allows the government to join separate charges in one indictment if they are of "the same or similar character" or are based on a set of acts or transactions connected together or constituting parts of a common scheme or plan. I am not persuaded that acts are of the same or similar character, when they are based on two different kinds of fraud, are 3 1/2 years apart in time and have no obvious relationship.

Although application of Rule 8(a) is sufficient to support severance, Fed. R. Crim. P. 14 provides additional support for the decision. Rule 14 allows severance when prejudice will result from the joinder of offenses. Defendant maintains that his entire defense for counts 7 and 8 is based on his participation in the Witness Protection Program. He argues that admission of evidence of his participation in the program may give the jury cause to question his credibility with relation to all the charges against him. Although defendant has been less than definitive in explaining why he needs to put in this evidence and exactly how it provides him a defense, I agree that there is a possibility of prejudice if he opens up the

subject. Taking into consideration the lack of fit under Rule 8(a) and the potential prejudice to defendant under Rule 14 if the charges are joined for trial, I conclude that defendant's motion for severance should be granted.

ORDER

IT IS ORDERED that defendant Daniel E. Danford's motion for severance is GRANTED; his motions to suppress evidence and to dismiss counts 7 and 8 for precharging delay and for failure to state a cause of action are DENIED for the reasons stated in the magistrate judge's report and recommendation.

Entered this 23rd day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge