IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. JERRY BAPTISTE, *et al*.	Criminal Action No. 1:20-CR-296-JPB-CMS-13

DEFENDANT BAPTISTE'S MOTION TO SEVER

Defendant Jerry Baptiste ("Defendant"), through counsel, pursuant to the Rules 12(b)(3) and 14 of the Federal Rules of Criminal Procedure, and the Confrontation Clause of the Sixth Amendment and *Bruton v. United States*, 391 U.S. 123 (1968), respectfully moves this Court to sever his case and order that his trial be separate from any other defendant in this case.

SECOND SUPERSEDING INDICTMENT

The Second Superseding Indictment ("SSI") alleges 63 counts against 16 defendants, 14 of whom, including Defendant, are still before the Court as of the filing of this motion.[1] (Doc. 290.) The SSI alleges *18 separate conspiracies* allegedly arising from 14 loans made by five financial institutions under the Paycheck Protection Program ("PPP") and involving a hodgepodge of defendants

[1] Defendants Blakely and Christian have change of plea hearings currently scheduled for March 15 and 23, 2022, respectively. (February 28, 2022, and March 7, 2022, docket entries).

and yet more individuals alleged but not charged in the SSI.[2] (*Id.*) Four of the alleged conspiracies are money laundering conspiracies relating to the proceeds of some of the PPP loans alleged in the SSI. (*Id.* at ¶¶ 184 – 98.) The SSI alleges a variety of different and overlapping defendants in each of the 18 separate conspiracies.[3] In other words, with one exception, every one of the 18 separate conspiracies involves a different set of defendants who are alleged to have conspired together.[4] In addition to the 18 separate conspiracies, the SSI alleges 20 wire and bank fraud charges and six counts of making a false statement to a financial institution, again all involving differing defendants and different loans. (Doc. 290.) Finally, the SSI alleges 18 individual money laundering counts involving a variety of defendants and one aggravated identity theft count. (*Id.*)

Defendant is named in only one of the conspiracy counts, Count Nine, relating to only one of the 14 loans, made to Bern Benoit's company Transportation Management Services ("TMS"). (*Id.* at ¶¶ 88-92.) Although the SSI also charges Defendant in Counts Ten and Eleven with substantive bank and

[2] Such additional individuals were charged in the original indictment or in other cases pursuant to an information. For example, in Case No. 1:21-CR-179-JPB, the Government charged and obtained a guilty plea from Denesseria Slaton, alleged throughout the SSI as a participant in several of the alleged conspiracies.

[3] Counts One, Three, Six, Nine, Twelve, Fifteen, Eighteen, Twenty, Twenty-Three, Twenty-Five, Twenty-Seven, Thirty, Thirty-Two, Thirty-Four, Sixty, Sixty-One, Sixty-Two, and Sixty-Three. (Doc. 290).

[4] In essence, the SSI and the original indictment in this case charge a central, hub conspiracy and individual conspiracies, or spokes, radiating outward from the central hub, with the separate spokes acting independently of and unaware of the other spokes. "The Supreme Court has characterized such a conspiracy as a 'rimless wheel' because there is no rim to connect the spokes into a single scheme." *United States v. Chandler*, 388 F.3d 796, 807 (11th Cir. 2004) (quoting *Kotteakos v. United States*, 328 U.S. 750, 755 (1946)). The one exception referenced above are Counts Twelve and Twenty-Three, which allege the same two defendants as co-conspirators, but otherwise involve different loans.

wire fraud counts, in Count Thirty-Eight with a false statement to a financial institution, and three money laundering counts in Counts Forty-Eight through Fifty, all of these counts relate only to the TMS loan. (*Id.* at ¶¶ 93-97, 180-81, 182-83.) The SSI does not charge Defendant, or even allege anything about him, in any of the other loans, conspiracies, or counts.

Counts Nine, Ten, Eleven, and Thirty-Eight in which Defendant is named included only three co-defendants: Foster, Christian, and Petty, who has since plead guilty and been sentenced. (*Id.* at ¶¶ 93-97, 180-81, 182-83); (Doc. 393, 427.) Unlike Defendant, Foster is charged in 14 separate conspiracy counts, i.e., with conspiracies related to each of the PPP loans at issue, and in 22 substantive counts relating to such loans. (Doc. 290.) Like Foster, Christian is charged in 5 alleged separate conspiracies and 9 other counts relating to several PPP loans in addition to the TMS loan. (*Id.*) If Christian enters a guilty plea as scheduled on March 23, 2022, then Foster will be the only remaining defendant charged in the same counts as Defendant. None of the remaining individuals before the court are charged in the money laundering counts alleged against Defendant (Petty was the sole codefendant in the money launder charges). (*Id.* at ¶ 183.)

STATEMENTS TO LAW ENFORCEMENT DURING THE INVESTIGATION BY CHRISTIAN

During the course of the government's investigation, government agents conducted recorded interviews of co-defendant Christian. During the first recorded

interview, the government agent specifically asked Christian about Defendant. Christian responded to this question with statements allegedly about Defendant's conduct. The agent also asked Christian about the TMS loan, which she said that she could not recall. In April 2021, prior to her indictment in this case, the government again interviewed Christian pursuant to a "proffer" letter. During this interview, the AUSA and government agent asked Christian numerous questions about Defendant, both related and unrelated to the TMS loan, Petty, and the loan to TMS, among many other things. In response to these questions, Christian made various statements about these subjects and also allegedly Defendant's conduct.

LEGAL STANDARDS

Rule 14(a) states "[i]f the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a). The Court must grant a severance if (1) "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or (2) if a joint trial would "prevent the jury from making a reliable judgment about guilt or innocence." *United States v. Thompson*, 422 F.3d 1285, 1292 (11th Cir. 2005) (quoting *Zafiro v. United States*, 506 U.S. 534, 539 (1993)). Among other reasons, courts sever defendants in a multi-count, multi-defendant case where defendants rely on mutually antagonistic defenses; where inculpatory

evidence will be admitted against one defendant that is not admissible against the other; and where cumulative and prejudicial "spill over" effect may prevent the jury from sifting through the evidence to make an individualized determination as to each defendant. *United States v. Chavez*, 584 F.3d 1354, 1360-61 (11th Cir. 2009). Severance is appropriate "where one defendant is being charged with a crime that, while somehow related to the other defendants or their overall criminal scheme, is significantly different than those of the other defendants." *United States v. Blankenship*, 382 F.3d 1110, 1125 (11th Cir. 2004).

"[I]f the defendant can demonstrate that a joint trial would result in specific and compelling prejudice to the conduct of his defense," a Rule 14 severance should be granted. *United States v. Blasingame*, 219 Fed. App'x 934, 948 (11th Cir. 2007). To determine "compelling prejudice," the Court must assess "whether under all the circumstances of a particular case, as a practical matter, it is within the capacity of the jury to follow the [instructions] and accordingly . . . appraise the independent evidence against each defendant's own acts, statements and conduct." *Id.* (alterations and omission in original). A defendant can show compelling prejudice "by showing that the jury [would be] unable to sift through the evidence and make an individualized determination as to each defendant." *United States v. Cassano*, 132 F.3d 646, 651 (11th Cir. 1998).

"Under *Bruton*, severance may be required where the Government seeks to introduce a non-testifying co-defendant's extrajudicial confession that directly incriminates the defendant, even when introduced only against the co-defendant. If the confession is introduced, and the co-defendant does not testify, the defendant's Sixth Amendment right to directly confront adverse witnesses against him may be infringed." *United States v. Hardwick*, No. 1:16-CR-65-ELR-CMS, 2016 WL 7638476, at *2 (N.D. Ga. Dec. 12, 2016), *report and recommendation adopted*, 2017 WL 36402 (N.D. Ga. Jan. 4, 2017) (citing *Bruton*, 391 U.S. at 126). While a statement can be redacted to comply with *Bruton*, the statement must be redacted to remove all incriminating references. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Gonzalez*, 183 F.3d 1315, 1321-22 (11th Cir. 1999). However, even when the statement is redacted, "a defendant's confrontation right is violated when the court admits a codefendant statement that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt." *United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008).

ARGUMENT AND AUTHORITY

Under the above standards, Defendant will be impermissibly prejudiced and his constitutional rights will be violated if he is tried jointly with the other defendants in this case. Faced with a blizzard of evidence regarding 18 separate conspiracies and the associated numerous wire and bank fraud, false statement, and

money laundering charges all involving a hodgepodge of 14 defendants, no jury in a joint trial will be able to segregate the evidence relevant to the charges against Defendant and make "a reliable judgment about guilt or innocence even if limiting instructions are given." *United States v. Lopez*, 649 F.3d 1222, 1235 (11th Cir. 2011). Moreover, assuming that she does not plead guilty as currently scheduled, admission of Christian's statements against her at a joint trial with Defendant will violate Defendant's Confrontation Clause Rights and *Bruton*.

I. A Joint Trial Will Deny Defendant A Fundamentally Fair Trial And Prevent the Jury From Making a Reliable Judgment About Guilt or Innocence.

The Government did not allege facts differentiating the individuals charged in the SSI or individuals that are alleged in the SSI but that have been charged in other instruments. Had it done so, the Court would readily understand that Defendant's alleged role is different than that allegedly played by other individuals who the Government seeks to jointly try him with. Defendant was not a borrower, did not have a company that allegedly received one of the PPP loans at issue, and did not sign any of the alleged loan applications, which distinguishes him from many of the other individuals charged in the SSI. For example, Benoit, who has plead guilty, was the sole borrower and sole signatory on the loan application for his company TMS. With regard to the remaining non-borrower defendants, such as Foster and Christian and others similarly situated, such defendants allegedly

participated in multiple loans in various ways the Government claims are fraudulent. That is not the case with Defendant.

Unlike other defendants then, Defendant was neither a borrower nor a participant in the central hub of the alleged scheme. A joint trial will create the impermissible risk that Defendant will be found guilty because he is being tried with individuals who allegedly signed false loan applications (which Defendant did not) or who allegedly helped submit false loan documents for numerous loans (in which Defendant was not involved). The Government will not tender any evidence that Defendant dealt with anyone alleged in the SSI or related charging documents other than Benoit, Christian, and Petty in connection with the TMS loan – i.e., there should be no evidence that Defendant communicated with Foster, Slaton, or Thomas, or any of the other defendants or individuals alleged in connection with this case. Among other things, Defendant will argue at trial that he relied on Benoit, Christian, and Petty for the accuracy and appropriateness of matters related to Benoit's TMS loan. Defendant should not be dragged into a joint, multi-defendant, multi-count trial where the vast majority of the evidence will not be directly relevant to the relatively narrow charges and evidence against him. Such evidence will serve only as to him to impermissibly prejudice the jury's independent evaluation of his defense with regard the single relevant TMS loan.

If discovery is any indication, the Government's evidence in a joint trial will consist of a mountain of evidence, including numerous witnesses, recorded statements to law enforcement made by several defendants (but not Defendant, who was never interviewed), loan applications and related documents, emails, bank records, and other evidence relating to the 14 loans alleged in the SSI and any similar act evidence regarding the numerous other defendants that the Government is allowed to present. Putting evidence regarding the TMS loan aside, none of this will involve Defendant. *See United States v. Erwin*, 793 F.2d 656, 666 (5th Cir. 1986) (holding that severance of a particular co-defendant was required because "[t]he charges against her were only peripherally related to those alleged against the other [co-defendants, and] [a]s the trial progressed it became increasingly apparent that very little of the mountain of evidence was usable against her").

A joint trial in this case will involve proof of 18 separate conspiracies, no two of which, with one exception, are alleged to have the same co-conspirators.[5] And, as a result of guilty pleas, there is a very good chance that only one other co-defendant, or at most two co-defendants, at trial will even be charged in and standing trial on the counts alleged against Defendant. In other words, Defendant

[5] Counts Twelve and Twenty-Three allege the same two conspirators although the counts involve different loans.

would be tried with as many as 10 co-defendants with whom he is not jointly charged.[6]

That is too many for a fair trial where as here, Defendant is charged in connection with one transaction, occupies a role different than the other co-defendants, and the other defendants are charged in 17 other separate and varying conspiracies. This will swamp the jury's ability to "to collate and appraise the independent evidence against" Defendant and judge his guilt or innocence "solely upon [Defendant's] own acts, statements and conduct." *See United States v. Zicree*, 605 F.2d 1381, 1389 (5th Cir. 1979); *United States v. Fergerson*, No. 2:11-CR-00048-MEF, 2011 WL 4530576, at *4 (M.D. Ala. Sept. 12, 2011), *report and recommendation adopted*, 2011 WL 4530598 (M.D. Ala. Sept. 30, 2011) (quoting *Zicree*). A joint trial in this case "will result in specific and compelling prejudice to the conduct of" Defendant's defense. *United States v. Schlei*, 122 F.3d 944, 984 (11th Cir. 1997). Even with limiting instructions, the jury cannot reasonably sift the evidence relevant to Defendant in a joint trial and "make an individualized determination as to" him. *Cassano*, 132 F.3d at 651.

[6] There are currently 14 remaining defendants, including Defendant Baptiste. If Blakely and Christian enter guilty pleas as currently scheduled, Defendant and 11 other defendants remain for trial. Foster will be the only remaining defendant with whom Defendant is jointly charged.

II. A Joint Trial Will Deny Defendant His Sixth Amendment Confrontation Clause Rights and Violate *Bruton*.

As recounted above, co-defendant Christian made two recorded statements to law enforcement agents. Assuming the Government would offer Christian's statements at trial against her, Defendant must be severed from Christian if she does not enter a plea as currently scheduled. Christian gave two interviews and made direct statements about Defendant's conduct. While the second statement was made pursuant to a proffer letter, the standard proffer letter used by the U.S. Attorney's Office does not bar use of Christian's statements at trial in all circumstances. Rather, the proffer letter sets forth exceptions allowing the Government to use Christian's statements against her at trial if she takes a different position at trial than in the proffer session or if she lied in the proffer session. Based on the recording of her proffer produced by the Government in discovery, the Government can readily claim that either exception is met here and use her statements against her at trial.

Defendant Christian is scheduled to enter a guilty plea on March 23, 2022 *See* (March 7, 2022 Docket entry.) Obviously, this will obviate this basis for severance. Defendant respectfully requests the opportunity to promptly perfect this basis for severance and particularize Christian's statements that would violate *Bruton* in the event that she does not enter a guilty plea as expected.

CONCLUSION

For all of the foregoing reasons, the Court should sever Defendant's case and order that his trial be separate from any other defendant in this case.

Respectfully submitted this 14th day of March, 2022.

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LOCAL RULE 7.1D CERTIFICATE

The undersigned hereby certifies that the foregoing has been formatted in Times New Roman font, 14 point type, which complies with the font size and point requirements of Local Rule 5.1C.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record, including:

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This 14th day of March, 2022.

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