

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC SHIBLEY,

Defendant.

CASE NO. CR20-0174-JCC

ORDER

This matter comes before the Court on Defendant's motion for a trial without COVID-related restrictions (Dkt. No. 77) and his motion to dismiss assertedly multiplicitous counts or, alternatively, require the Government to elect the counts for which it will try him (Dkt. No. 78). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES both motions for the reasons explained below.

A. Motion for Trial Without COVID-related Restrictions

Defendant asks the Court to order that mask-wearing in the courtroom be optional for "trial participants and the public, alike, and that no mask mandate apply for vaccinated persons," and "for removal of Plexiglass barriers in the courtroom." (Dkt. No. 77 at 2.)

Although the District's General Orders require "[a]ll individuals" to wear a facemask "unless directed to remove their mask by the presiding judge," W.D. Wash., General Order 11-21 (August 13, 2021), that does not mean a judge may simply suspend masking requirements

1 wholesale. Moreover, as the Government points out, under the General Order, the default
 2 procedure is for individuals addressing the Court and witnesses on the stand to remove their
 3 masks. *Id.* at 2.

4 Moreover, while Defendant and his counsel may be vaccinated, recent studies suggest
 5 that vaccine immunity may wane over time,¹ and the highly transmissible Delta variant is
 6 thought to spread readily even among vaccinated people.²

7 Finally, while Defendant relies on the Fifth and Sixth Amendments to the Constitution,
 8 he cites no legal authority supporting his position except for a single case in the Southern District
 9 of New York that *rejected* a Confrontation Clause challenge to mask-wearing requirements.

10 The Court DENIES Defendant’s motion to hold trial without COVID-related protections.

11 **B. Motion to Dismiss Multiplicitous Counts**

12 The indictment alleges that Defendant obtained COVID-19 pandemic relief funds
 13 authorized under the CARES Act by submitting fraudulent applications on behalf of several
 14 business entities he controlled that, in fact, had no business operations. (*See generally* Dkt. No.
 15 31.) Defendant is charged with seven counts of wire fraud, three counts of bank fraud, and five
 16 counts of money laundering. (*Id.* at 9–15.) He argues that, because Counts 2 and 4 alleging wire
 17 fraud are based on “virtually identical conduct” as Counts 8 and 10 alleging bank fraud, the
 18 counts are multiplicitous and violate Defendant’s rights under the Constitution’s Double

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 20 ¹ Hiam Chemaitelly, et al., *Waning of BNT162b2 Vaccine Protection against SARS-CoV2*
 21 *Infection in Qatar*, NEW ENG. J. OF MED. (OCT. 6, 2021), available at https://www.nejm.org/doi/full/10.1056/NEJMoa2114114?query=featured_home; Einav v. Levin, et al., *Waning*
 22 *Immune Humoral Response to BNT162b2 Covid-19 Vaccine over 6 Months*, NEW ENG. J. OF
 23 MED. (OCT. 6, 2021), available at [https://www.nejm.org/doi/full/10.1056/NEJMoa2114583?](https://www.nejm.org/doi/full/10.1056/NEJMoa2114583?query=featured_home)
 24 [query=featured_home](https://www.nejm.org/doi/full/10.1056/NEJMoa2114583?query=featured_home).

25 ² Nidhi Subbaraman, *How Do Vaccinated People Spread Delta? What the Science Says*, NATURE
 26 (Aug. 12, 2021), available at <https://www.nature.com/articles/d41586-021-02187-1>; see also
Interim Public Health Recommendations for Fully Vaccinated People, CTRS. FOR DISEASE
 CONTROL & PREVENTION (Sep. 1, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (recommending that fully vaccinated people wear
 mask in “public indoor settings in areas of substantial or high transmission”).

1 Jeopardy Clause. (Dkt. No. 78 at 2–4.)

2 Where the same conduct violates multiple statutes, the Government’s ability to charge
3 separate offenses depends on the test from *Blockburger v. United States*, 284 U.S. 299, 304
4 (1932). Under *Blockburger*, charging the same conduct in separate counts is generally
5 permissible if each charge requires proof of an element that the other does not. *United States v.*
6 *Zalapa*, 509 F.3d 1060, 1062 n.1 (9th Cir. 2007). It does not matter that there may be “a
7 substantial overlap in the proof offered to establish the crimes.” *United States v. Wahchumwah*,
8 710 F.3d 862, 869 (9th Cir. 2013).

9 Defendant is charged with wire fraud under 18 U.S.C. § 1343 and bank fraud under 18
10 U.S.C. § 1344(2). The wire fraud statute requires the Government to prove a wire transmission in
11 interstate commerce; the bank fraud statute does not. The bank fraud statute requires proof that
12 the target of the fraud was a federally insured financial institution; the wire fraud statute does
13 not. Thus, the indictment is not multiplicitous. See *Bald Eagle Area School Dist. v. Keystone*
14 *Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999) (“[T]he same set of facts can support convictions for
15 mail fraud, wire fraud, bank fraud and securities fraud without giving rise to any multiplicity
16 problems. Each of those offenses requires proof of a fact which the others do not.” (citations
17 omitted)). The Court thus DENIES Defendant’s motion to dismiss.

18 For the foregoing reasons, Defendant’s motions (Dkt. Nos. 77–78) are both DENIED.

19 DATED this 18th day of October 2021.

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23 John C. Coughenour
24 UNITED STATES DISTRICT JUDGE
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