IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

UNITED STATES OF AMERICA, v. DYLAN M. WARD, JOSEPH R. PRICE, and VICTOR J. ZABORSKY, Defendants.	Criminal Nos. 2008-CF1-26996 2008-CF1-27068 2008-CF1-26997 Judge Lynn Leibovitz Status Hearing – March 12, 2010

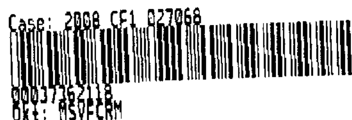
DEFENDANT DYLAN M. WARD'S MOTION FOR SEVERANCE

Defendant Dylan M. Ward, by and through counsel, respectfully requests that the Court sever his trial from the trials of his co-defendants, Joseph R. Price and Victor J. Zaborsky, pursuant to the Sixth Amendment of the United States Constitution, Rule 14 of the Superior Court Rules of Criminal Procedure, and the Supreme Court's rulings in *Bruton v. United States*, 391 U.S. 123 (1968), and *Crawford v. Washington*, 541 U.S. 36 (2004).

I. FACTUAL BACKGROUND

On August 2, 2006, Messrs. Price and Zaborsky, committed domestic partners, owned and resided at 1509 Swann Street, N.W., Washington, D.C., with their longtime friends and tenants, Mr. Ward and Sarah Morgan.

Robert Wone, Mr. Price's friend of more than fifteen years, made arrangements to spend the night of August 2, 2006, at the Swann Street home. Mr. Wone, who served as General Counsel for Radio Free Asia, planned to visit with the radio station's night crew and asked to spend the night at Messrs. Price and Zaborsky's home, rather than commute to Oakton, Virginia, where Mr. Wone resided with his wife, Katherine Wone. Mr. Wone arrived at 1509 Swann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Street at approximately 10:30 p.m. At 11:49 p.m., Mr. Zaborsky called 9-1-1 and reported that Mr. Wone had been stabbed.

Paramedics arrived on the scene approximately five minutes and forty seconds into the 9-1-1 call. Metropolitan Police Department ("MPD") officers arrived on the scene at about the same time. Messrs. Price and Zaborsky each spoke with one or both of the EMS responders, and all three defendants spoke with a number of the MPD officers who responded to 1509 Swann Street. Shortly after MPD's arrival, the defendants were taken into custody and transported separately to the MPD's Violent Crimes Branch in Anacostia. Each defendant was interviewed independently, without counsel, for what was collectively more than twenty-five hours.[1] Each defendant's statement details what that defendant knows of the sequence of events at the Swann Street home the evening of August 2, 2006, and integrally involves the other defendants. Certain portions of each defendant's statement are videotaped.

In October 2008, the government sought and secured an indictment charging each of the three defendants with obstruction of justice in violation of D.C. CODE § 22-722(a)(6). A superseding indictment was returned on or about January 15, 2009, adding the charges of conspiracy to obstruct justice in violation of D.C. CODE § 22-1805(a), and tampering with evidence in violation of D.C. CODE § 22-723. The superseding indictment specifically alleges that each defendant "made statements to law enforcement authorities that were false in material respects and intended to misdirect and mislead law enforcement authorities." Indictment ¶¶ 13, 15-16. During the course of this proceeding, the government has repeatedly indicated its intent to seek to admit each of the defendants' statements in their joint trial.

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[1] Mr. Ward preserves his right to seek to exclude the statements he made during his custodial interrogation on August 2-3, 2006, on the basis that he was not advised of his legal rights prior to being taken into custody and interrogated in violation of the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

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II. ARGUMENT

Rule 14 of the Superior Court Rules of Criminal Procedure states:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance or defendants, or provide whatever other relief justice requires.

SUP. CT. R. CRIM. P. 14. The Supreme Court has explained, with regard to the federal rule,[2] that "where there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants," the trial court should grant a severance. *Zafiro v. United States*, 506 U.S. 534, 539 (1993). Moreover, this Court is under a "continuing obligation to grant a severance of codefendants if, at any time during trial, undue prejudice to either defendant arises as a result of the joinder." *Evans v. United States*, 392 A.3d 1015, 1024 (D.C. 1978) (citing *Shaffer v. United States*, 362 U.S. 511, 516 (1960)). Thus, "the court must balance throughout the trial 'the possibility of prejudice to the defendant against the legitimate probative force of the evidence and the interest in judicial economy.'" *Hammond v. United States*, 880 A.2d 1066, 1089 (D.C. 2005) (citing *Crutchfield v. United States*, 779 A.2d 307, 322 (D.C. 2001)).

In this case, the government intends to admit statements of each defendant that discuss the actions and conduct of the other two defendants with respect to the events surrounding the death of Mr. Wone. The indictment itself alleges that the defendants' statements constitute substantive elements of the crime. However, the statements of Mr. Price and Mr. Zaborsky will not be subject to cross-examination by Mr. Ward. Consequently, admitting his codefendants' statements at trial, statements which discuss the actions of Mr. Ward, without Mr. Ward being

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[2] The federal rule is largely mirrored by SUP. CT. R. CRIM. P. 14; specifically, it states: "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial 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.

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able to cross-examine his codefendants, violates Mr. Ward's Sixth Amendment right to confront the witnesses against him. For that reason, this Court should grant severance of Mr. Ward's trial from that of his codefendants.

A. INTRODUCTION OF HIS CO-DEFENDANTS' STATEMENTS VIOLATES MR. PRICE'S SIXTH AMENDMENT CONFRONTATION CLAUSE RIGHTS.

The United States Constitution dictates the right of the accused in a criminal trial "to be confronted by the witnesses against him." U.S. CONST. AMEND. VI. The right of confrontation is "[o]ne of the fundamental guarantees of life and liberty . . . long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provision of the Constitution of the United States and in the constitutions of most if not all of the States" in our nation. *Kirby v. United States*, 174 U.S. 47, 55, 56 (1899).

In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court confirmed the Sixth Amendment's unequivocal command: "where testimonial evidence is at issue, the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Id.* at 68. While the Court declined in *Crawford* to comprehensively define the term "testimonial," it made clear that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. The Court further explained that "[t]he Constitution prescribes a procedure for determining the reliability of testimony in criminal trials, and we . . . lack authority to replace it with one of our own devising." *Id.* at 67; *see also Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2536 (2009) ("We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.").

Mr. Ward has an absolute constitutional right to confront the witnesses against him. The statements of the codefendants that the government seeks to introduce are clearly testimonial: They were taken by police officers during interrogation. Consequently, the statements of Mr.

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Price and Mr. Zaborsky cannot be admitted as evidence against Mr. Ward because Mr. Ward will not be able to test them in "the crucible of cross examination," as the Constitution demands. *Crawford*, 541 U.S. at 61. The prejudice that Mr. Ward would suffer from admission of his codefendants' statements at a joint trial requires that his trial be severed.

B. ADMISSION OF THE CO-DEFENDANTS' STATEMENTS VIOLATES *BRUTON*.

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court stated that the admission of a codefendant's statement which in any way inculpates the defendant violates the defendant's Sixth Amendment Confrontation Clause rights. The Court further stated that a limiting jury instruction could not safeguard the defendant's constitutional rights "where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial." *Id.* at 135-36. The Court explained that "[t]he government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Id.* at 129 (quoting *Delli Paoli v. United States*, 352 U.S. 232, 248 (1957) (Frankfurter, J., dissenting)). The Court therefore held that, "[d]espite the concededly clear instructions to the jury to disregard [the co-defendant's] inadmissible hearsay evidence inculpating [the defendant], in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." *Id.* at 127.

The Court subsequently limited its *Bruton* holding in *Richardson v. Marsh*, 481 U.S. 200 (1987). In *Richardson*, the Court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but *any reference to his*

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or her existence." *Id.* at 211 (emphasis added). Later, in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court held that redacted statements which "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury would ordinarily make immediately, even were the confession the very first item introduced at trial," fall within the *Bruton* rule and their admission is prohibited. *Id.* at 196.

As in *Gray*, redaction is not an adequate remedy in this case. The statements of Mr. Price and Mr. Zaborsky refer repeatedly to Mr. Ward, and during their interrogations, Mr. Price and Mr. Zaborsky were repeatedly asked about the actions of Mr. Ward. Given the fact that all three defendants lived together and were present in the home at the time Mr. Wone was murdered, and that all three defendants have been accused by the Government of an allegedly "elaborate" cover-up, it would be obvious to the jury that each defendant's statement would discuss not only his own conduct, but the conduct of the codefendants. Redacting the statements and introducing them with a limiting instruction would result in precisely the type of prejudice against which Justice Frankfurter warned: the jury would not be able to disregard the obvious inferences growing out of each statement. Accordingly, redaction and a limiting instruction will not satisfy the Sixth Amendment.

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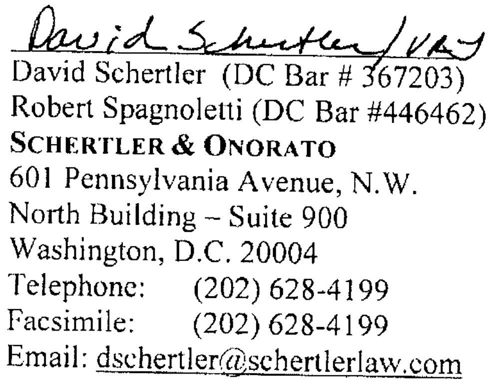
III. CONCLUSION

For the foregoing reasons, Mr. Price respectfully moves the Court to sever his trial from the trials of his co-defendants pursuant to SUP. CT. R. CRIM. P. 14.

Date: February 26, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Severance was served by hand, this 26th day of February, 2010, upon:

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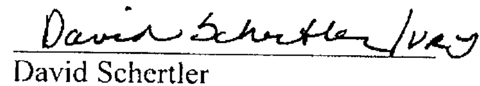

David Schertler

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UNITED STATES OF AMERICA, **v.** **DYLAN M. WARD,** **JOSEPH R. PRICE,** **and** **VICTOR J. ZABORSKY,** **Defendants.**	**Criminal Nos. 2008-CF1-26996** **2008-CF1-27068** **2008-CF1-26997** **Judge Lynn Leibovitz** **Status Hearing – March 12, 2010**

PROPOSED ORDER

Upon consideration of Defendant Dylan M. Ward's Motion for Severance, it is hereby

ORDERED this _____ day of March, 2010 that Defendant's Motion is GRANTED.

____
JUDGE LYNN LEIBOVITZ

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