IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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

DEFENDANT JOSEPH R. PRICE'S MOTION FOR SEVERANCE

Defendant Joseph R. Price, by and through counsel, respectfully requests that the Court sever his trial from the trials of his co-defendants, Dylan M. Ward 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

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. 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 took place at the Swann Street home the evening of August 2, 2006, and integrally involves the other defendants.

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 discovery in this matter, the government has repeatedly indicated its intent to seek to admit each of the defendants' statements in their joint trial.

II. ARGUMENT

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

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[1] Mr. Price 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.

> 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)).

Here, the government intends to admit statements that will add substantial weight to the government's case – in fact, the indictment specifically alleges that the defendants' statements constitute substantive elements of the crime. Nevertheless, Messrs. Ward and Zaborsky's statements are not subject to cross-examination by Mr. Price. Consequently, the admission of Messrs. Ward and Zaborsky's statements at trial will violate Mr. Price's Sixth Amendment rights to cross-examine, an unassailable right when testimonial hearsay, as here, is involved. Because a joint trial in this case will prejudice Mr. Price by compromising his Sixth Amendment rights, this Court should grant severance.

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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.

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*, the 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. The Court clarified – while declining to comprehensively define "testimonial" – 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. United States*, 129 S. Ct. 2527, 2536 (2009) ("We do not have license to suspend the Confrontation Clause when a preferable trial strategy is available.").

Mr. Price has a right to confront the witnesses against him. The statements the government seeks to introduce are clearly testimonial: they were taken by police officers during interrogation. Consequently, Messrs. Ward and Zaborsky's statements are inadmissible as to Mr. Price because they will not be tested "in the crucible of cross examination," as the Constitution demands. *Id.* at 61. The prejudice that would result to Mr. Price from the admission of his co-defendants' statements at a joint trial necessitates severance.

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

In *Bruton v. United States*, the Supreme Court emphatically stated that the admission of a co-defendant's statement which inculpates the defendant violates the defendant's Sixth Amendment Confrontation Clause rights. 391 U.S. 123 (1968). There, the Court stated that the risk the jury could not follow the court's limiting instruction cannot be ignored "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. Borrowing words from Justice Frankfurter, 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 (J. Frankfurter, 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 or her existence*." *Id.* at 211 (emphasis added). Later, in *Gray v. Maryland*, 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. 523 U.S. 185, 196 (1998).

Redaction is not an alternate remedy in this case. Both Messrs. Ward and Zaborsky's statements refer repeatedly to Mr. Price, such that redaction of the existence of Mr. Price from their statements would be impossible. Because all three of the defendants lived together, the inescapable conclusion would be that they were speaking of one another. Indeed, allowing the statements to be redacted and introduced with a limiting instruction would present the exact government windfall against which Justice Frankfurter warned: the jury would not be able to disregard the implications of each statement. Accordingly, redaction and a limiting instruction will not satisfy the Sixth Amendment, and admission of Messrs. Ward and Zaborsky's statements against Mr. Price violates *Bruton* and *Gray*.

Additionally, the District of Columbia Court of Appeals opined on *Bruton* in *Hammond*. 880 A.2d 1066. There, the court held that a co-defendant's statements which inculpated the defendant were admissible because the "statements were sufficiently reliable to satisfy the Confrontation Clause." *Id.* at 1091. In so holding, the court pointed to the Supreme Court's recognition that, in *Bruton*, "it did not have before it any question concerning whether the statement was admissible under any recognized exception to the hearsay rule," and reasoned that, "'[i]f the statement satisfied a recognized hearsay exception based on the statements' presumed reliability, that reliability in turn would satisfy the concerns of the Confrontation Clause.'" *Id.* at 1091 (citing *Bruton*, 391 U.S. at 128 n.3; *Akins v. United States*, 679 A.2d 1017, 1030 (D.C. 1996)). Nonetheless, as discussed above, *Crawford* foreclosed any such possibility here because the statements are testimonial and therefore not admissible under any recognized exception to the hearsay rule.

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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

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