IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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

DEFENDANT VICTOR J. ZABORSKY'S MOTION FOR SEVERANCE

Defendant Victor J. Zaborsky ("Zaborsky"), by and through counsel, respectfully requests that the Court sever his trial from the trial or trials of Dylan M. Ward ("Ward") and Joseph R. Price ("Price") 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 *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), *Crawford v. Washington*, 541 U.S. 36 (2004), and *Bruton v. United States*, 391 U.S. 123 (1968).

I. FACTUAL BACKGROUND

Zaborsky and Price are the former owners and residents of 1509 Swann Street, N.W., Washington, D.C., where they lived with their longtime friends and tenants, Ward and Sarah Morgan.

Robert Wone ("Wone"), Price's friend of more than fifteen years, made arrangements to spend the night of August 2, 2006, at the Swann Street home. 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 Price and Zaborsky's home rather than commute to his home in Oakton,

Virginia. Wone arrived at the Swann Street home at approximately 10:30 p.m. At 11:49 p.m., Zaborsky called 9-1-1 and reported that 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, 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. None of the Defendants was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and none of the Defendants was permitted to speak with counsel, despite invoking their right to do so.

The government seized a variety of items from the Swann Street residence, including, *inter alia*, a variety of items used by individuals engaged in bondage and domination ("B&D") practices. The government has indicated its intent to introduce and rely upon the B&D evidence. Neither the government nor any of the Defendants has asserted that Zaborsky engaged in B&D practices or had any connection to the B&D evidence recovered in this case.

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

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[1] By separate motion, Zaborsky seeks 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 or permitted to speak with an attorney before being detained and interrogated, in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution.

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 the Defendants' statements in their joint trial.

II. ARGUMENT

A. The Court Must Sever Zaborsky's Trial To Eliminate Prejudice To Zaborsky From The Introduction Of Ward And Price's Statements.

The government has indicated that it intends to introduce Ward's and Price's statements to law enforcement agents as part of its case against Zaborsky. The introduction of these statements in a joint trial, where Zaborsky will be unable to cross-examine either Ward or Price, would violate Zaborsky's rights under the Confrontation Clause of the Sixth Amendment and would cause him substantial prejudice, requiring severance under Rule 14 of the Superior Court Rules of Criminal Procedure.

i. Introduction Of Ward's And Price's Statements Would Violate The Confrontation Clause.

The United States Constitution grants the accused in a criminal trial the right "to be confronted with 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, 55-6 (1899).

The Defendants' statements to law enforcement on the night Wone died are unquestionably "testimonial" as the Supreme Court has interpreted that term. *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2531-2532 (2009); *Davis v. Washington*, 547 U.S. 813,

821-822 (2006); *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). In *Crawford*, the Supreme Court characterized "[s]tatements taken by police officers in the course of interrogations" as a paradigmatic example of testimonial statements that cannot be introduced to establish the truth of the matters asserted in the absence of an opportunity to cross-examine the maker of the statements. *Crawford*, 541 U.S. at 52. In this case, the police immediately identified the Defendants as potential suspects in Wone's murder and interrogated them for hours at the police station, without advising them of their *Miranda* rights or heeding their request for counsel. The resulting statements qualify as testimonial "under any definition" of the term. *Id.*

In *Bruton v. United States*, the Supreme Court held that severance was the appropriate remedy for a violation of the Confrontation Clause in a joint criminal trial. *See Bruton*, 391 U.S. 123, 136-37 (1968). 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. 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 (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 137. Although the Court subsequently concluded that redaction could be used in some cases as an alternative to severance if the out-of-court statement is redacted to eliminate "not only the defendant's name, but *any reference to his*

or her existence," *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (emphasis added), the Confrontation Clause is still violated if the redacted statements "obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." *Gray v. Maryland*, 523 U.S. 185, 196 (1998).

The D.C. Court of Appeals has recognized that the remedial measures prescribed by *Bruton*, *Marsh*, and *Gray* apply to any statements that are "testimonial," and therefore subject to the Confrontation Clause. *See Thomas v. United States*, 978 A.2d 1211, 1224-25 (D.C. 2009). In this case, however, redaction and a limiting instruction is not a feasible remedy. Each Defendant's statement (recorded on videotape) refers repeatedly to his co-Defendants, such that redaction of the existence of each co-Defendant from his statement would be impossible. Moreover, because all three of the Defendants lived together, the inescapable conclusion would be that they were speaking of one another. *Cf. Gray*, 523 U.S. at 196. 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 Zaborsky's rights under the Confrontation Clause, and a severance should be granted.

ii. Introduction Of Ward's And Price's Statements Would Prejudice Zaborsky In Violation Of The Court's Duty Under Rule 14.

Even assuming that the government could introduce Price and Ward's statements without violating *Bruton*, "'satisfaction of a defendant's Sixth Amendment right to confrontation under the *Bruton-Nelson* standard does not terminate the trial judge's continuing duty to take adequate steps to reduce or eliminate any prejudice arising from joinder' -- a duty imposed on the trial

judge by Criminal Rule 14." *Thomas*, 978 A.2d at 1223 (quoting *Carpenter v. United States*, 430 A.2d 496, 503 (D.C. 1981) (en banc)).

Rule 14 provides that, "[i]f 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 of defendants, or provide whatever other relief justice requires." SUP. CT. R. CRIM. P. 14. In this case, Zaborsky will be prejudiced by the joinder of Price and Ward because the government intends to admit statements procured from Price and Ward through custodial interrogation, before the government advised either Price or Ward of their *Miranda* rights, and in defiance of their request for counsel.[2] These statements will add substantial weight to the government's case, because they describe the activities of the three Defendants on the night Wone died. Moreover, if the jury was to rely on either Price's or Ward's statements as evidence of their guilt, the risk that the jury will draw an impermissible inference that Zaborsky was also guilty is high. *See, e.g.*, *Carpenter*, 430 A.2d at 503 ("[T]he out-of-court statement of a codefendant which implicates a nonconfessing defendant is likewise inherently prejudicial.") (citing *Bruton*, 391 U.S. at 135-36).[3]

The only acceptable remedy to the prejudice inherent in the government's reliance on the Price and Ward statements is severance of Zaborsky's trial. Redaction alone is an inadequate remedy, because Price and Ward's statements repeatedly refer to Zaborsky, and even if Zaborsky's name were redacted, the jury would undoubtedly infer from the fact that the

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[2] The MPD also subjected Zaborsky himself to interrogation on the night of Wone's death without advising him of his *Miranda* rights, and in defiance of his request for counsel. By separate motion, Zaborsky will move to suppress his own statements.

[3] Zaborsky reserves the right to renew his motion for a severance under the Sixth Amendment and Rule 14 in the event the government seeks to introduce any evidence regarding a polygraph examination performed on Ward on the night of Wone's death.

Defendants shared a home that the redacted name was Zaborsky's. *Cf. Gray*, 523 U.S. at 196. Thus, because "a limiting instruction directing the jury not to consider the extrajudicial statement against the co-defendant is almost never an acceptable alternative to redaction and severance," *Geter v. United States*, 929 A.2d 428, 431 (D.C. 2007), and because redaction is infeasible here, Zaborsky is entitled to a severance.

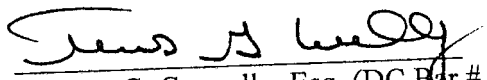
B. The Court Must Grant Severance Under Rule 14 To Eliminate Prejudice To Zaborsky From The Introduction Of Inflammatory Evidence.

In addition to the prejudice inherent in the government's potential reliance on Price's and Ward's out-of-court statements, the Court must sever Zaborsky's trial to avoid prejudice to him from the government's reliance on inflammatory evidence that is irrelevant to Zaborsky. Specifically, the government has indicated that it intends to rely on some or all of the B&D evidence recovered from the Swann Street residence. Irrespective of the purpose for which the government intends to introduce this evidence, there is no indication that Zaborsky ever engaged in B&D, and no reason to believe this evidence has any relevance to the charges against Zaborsky. Because of the obviously inflammatory nature of this evidence, Zaborsky should therefore be granted a severance. *Cf. United States v. Sampol*, 636 F.2d 621, 646 (D.C. Cir. 1980) (holding under Federal Rule of Criminal Procedure 14 that "not only the weight of the evidence, but also the quantity and type of evidence adduced against the co-defendants, is a vital consideration in evaluating the necessity for severance."); *Jones v. United States*, 625 A.2d 281, 284-88 (D.C. 1993) (discussing potential prejudice of evidence relating to sexual acts).

III. CONCLUSION

For the foregoing reasons, Defendant Victor J. Zaborsky respectfully moves the Court to sever his trial pursuant to the Sixth Amendment and Rule 14 of the Superior Court Rules of Criminal Procedure.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Defendant Victor J. Zaborsky's Motion for Severance was served by first-class mail, postage prepaid, this 26th day of February, 2010, upon:

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