UNITED STATES DISTRICT COURT
for the
WESTERN DISTRICT OF NORTH CAROLINA
Case Number 5:19-CR-22

UNITED STATES OF AMERICA	)
	)
vs.	)
	)
JOHN D. GRAY	)
_____	)

MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM PREJUDICIAL JOINDER

Background

John Gray is charged with Conspiracy to Commit Honest Services Wire Fraud and with Federal Program Bribery. Originally charged as co-conspirators were Greg E. Lindberg, John V. Palermo and Robert Cannon Hays. Pursuant to Rule 8, Federal Rules of Criminal Procedure, all defendants were joined for trial. The first trial began on February 19, 2020 and concluded, on March 5, 2020, in convictions of Lindberg and Gray. Mr. Palermo was acquitted.[1] Mr Gray was sentenced to 30 months imprisonment.

The bill of indictment alleged that Lindberg had made and attempted to make campaign contributions to North Carolina Commissioner of Insurance Mike Causey in an effort to persuade Causey to assign oversight of Lindberg's insurance companies to Department of Insurance regulators more favorable to those companies. During the relevant time period, Gray was a political consultant hired

[1]Prior to trial, Defendant Hayes entered a guilty plea.

by Lindberg to interact with the Department of Insurance.

Six months after his conviction, Defendant Lindberg purchased an advertisement in the on-line edition of the Wilmington (North Carolina) Star-News. The advertisement was a page-long protestation of Lindberg's innocence. The headline proclaimed, "I Relied On A Team of Advisors Who Said 'There Was Nothing Wrong With It" and, then, referred in detail to John Gray:

> "I tried my best at all times to follow the law. I called my lawyer. I hired experienced political consultants, and I asked experience politicians like Robin Hayes for advice.
>
> . . .
>
> "No one – not my lawyers, not Robin Hayes, not the consultants I had hired, not the FBI, not Mike Causey – ever gave me a simple one-word warning that there was anything amiss here.
>
> . . .
>
> "Until this case came along, I was a political neophyte. I was the least experienced person in the room. Mike Causey, Robin Hayes, and John Gray all had decades of political experience. How was I supposed to know that they were guiding me potentially in the wrong direction?" [Emphasis supplied.]

On June 29, 2022, the United States Court of Appeals for the Fourth Circuit reversed the convictions of Defendants Lindberg and Gray and remanded for a new trial herein.[2]

Following his release from the Bureau of Prisons (BOP), Lindberg self-published a book, 633 Days Inside: Lessons on Life and Leadership. The "633 Days Inside" of the title refers to the time Lindberg spent in prison. In the book, he again blames John Gray, among others, for mis-leading him about the criminality of his conduct:

"If I had hired better people to help with government relations, I

[2]Mr. Gray remained in custody until July 27, 2022, his "Good Conduct Time Release" date. It appears that he has served his entire sentence.

> wouldn't be writing this book. I had a VP of compliance. I had a consultant. I had a head of government relations. I had a general counsel. I had outside counsel. But I didn't have the right people on my team. None of these people ever gave me even the slightest warning something been have been amiss. I better team would have done better.
>
> . . .
>
> "This lesson applies to every relationship in your life – your love life, your spouse, your friends, your business associates, your partners, your co-workers, your lawyer, and your accountant. Just one wrong person on your bus in any one of these areas can mean the difference between misery and a beautiful and rewarding life." [Emphasis supplied.][3]

Argument

The law favors joinder of defendants indicted together for related conduct. Zaffiro v. United States, 506 U.S. 534, 537, 122 L.ED. 2d 317, 113 S. Ct. 933 (1993). Joinder is particularly appropriate in cases charging that co-defendants acted in conspiracy with each other. United States v. Reavis, 48 F.3d 763, 767 (4th Cir. 1995). Criminal Procedure Rule 14, however, states the exception to the general rule:

> "If it appears that a defendant . . . is prejudiced by joinder of defendants . . . for trial together, the court may grant a severance of defendants or provide whatever relief justice requires." Fed. R. Crim. P. 14(a).

The decision to sever or grant other relief lies within the discretion of the Court. To justify severance, a defendant must establish that co-defendant defenses are antagonistic to the point of being irreconcilable and mutually exclusive. United States v. Najiar, 300 F.3d 466 (4th Cir. 2002).

At the first trial, the defenses of Lindberg and Gray defenses were

[3]P. 83, Greg Lindberg, 633 Days Inside: Lessons on Life and Leadership, Global Growth (2022).

compatible if not identical: we did nothing wrong but, if we did, we were entrapped to do so.

Defendant Gray will maintain his position at the upcoming retrial. If Mr. Lindberg's published thoughts are any indication, he now asserts a different defense – that, yes, he was involved in criminal conduct but that his involvement was blameless and he was misled into crime by Gray and others.

Neither Lindberg nor Gray testified at the first trial. Mr. Gray does not intend to testify at the upcoming retrial. Mr. Gray has been informed that Mr. Lindberg desires to testify in the retrial.

Lindberg's assertions that "Gray-made-me-do-it" are consonant with arguments made by government counsel at Gray's sentencing.[4] At the upcoming re-trial, the government's position would be enhanced considerably and Mr. Gray's defense unfairly prejudiced by Lindberg's newfound defense. United States v. Tootick, 952 F.2d 1078, 1082)(9th Cir. 1991)("Defendant's who accuse each other bring the effect of a second prosecutor into the case with respect to their co-defendant.")

Defense counsel understands that "advice of political consultant" is not a legal defense. Lindberg now contends, however, that Gray was one of a group of

[4]"So I just wanted to dispel this idea that Mr. Gray was kind of a bystander in this. [Defense] Counsel made the statement about him getting kind of caught up in this thing. Well, he wasn't just caught up in this thing. He was a major participant in this thing. . . . [O]ver a nine-month period he was the most persistent. He pushed the hardest of all the defendants, quite frankly, and he was the most explicit in what he wanted. . . We get to sentencing and he's a farmer and a simple man. During the tapes he was a wheeler dealer. Okay. He was – he was name dropping every five minutes about another powerful member of the state senate or even higher within state government. He was constantly talking about all of his wheelings and dealings with the important political people in the state. And it's suggested to you that that's why he was brought in. That's why Lindberg paid him at least 250, 350 thousand dollars. . . . He's brought in to be a wheeler dealer, not the farmer / soil tester guy." P. 2526, Transcript of Sentencing Hearing Before the Honorable Max O. Cogburn, Jr., August 19, 2020.

professionals – including attorneys – who misled him regarding his dealings with Commissioner Causey. Evidence of the contemporaneous advice given him by lawyers will be inextricable from evidence of the advice Lindberg claims was provided by Gray.

The Fourth Circuit has rarely addressed prejudicial joinder. In United States v. Najiar[5], the Court noted that:

> "The rule requires more than finger pointing. There must be such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the core of the other , , , or 'that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty'."

The facts of Najiar are readily distinguishable from the facts involved here. At trial, Defendant Najiar's testimony implicated not only himself but two co-defendants to a degree that required hostile cross-examination of him by the co-defendants' counsel. The Fourth Circuit concluded:

> "Perhaps Najiar would have fared better had his co-defendants not been there to cross-examine him. However, absent other circumstances not present here, we decline to adopt a rule that would allow a defendant to testify and then immunize himself from the consequences of that choice by limiting the ability of his co-defendant's to test the veracity of that testimony, especially when that testimony implicated them." 300 F.3d 466 at 474.

Here, Gray would be relatively powerless to combat a problem that he had no hand in making. Other cases have held that "[t]he essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." United States v. Romanello, 726 F. 2d 173 (5th Cir. 1984), citing United States v. Berkowitz, 662 F.2d 1127, 1134 and Sheikh, 645 F.2d 1057,1065. Implicit – or, perhaps, explicit -- in Lindberg's new defense is the admission that his – and Gray's – conduct was illegal.

---

[5]300 F. 3d 466, 2002 U.S. App. LEXIS 15724 (4th Cir. 2002).

In order to acquit Gray, the jury must now, in addition to rejecting the government's arguments, discount Lindberg's contention that Gray and others beguiled him into committing certain crimes. Lindberg, in testifying or offering other evidence in support of this theory, would become a "second prosecutor" of Gray. United States v. Tootick, 952 F.2d 1078, 1083 (9th Cir. 1001).

In United States v. McGlon[6], the District Court, pre-trial, considered the circumstance of two co-defendants in a conspiracy indictment seeking severance from a third co-defendant, an attorney who had advised both of them. The motion to sever was denied without prejudice:

> "However based on the limited information now before it, the court cannot say that the presentation of an advice of counsel defense, where a co-defendant is the counsel in questions, necessitates a severance per se. The court, at this time, cannot assess whether belief in [Lawyer] West's potential defense will preclude belief in the defenses asserted by Watlington and McGlon." McGlon, at 3.

No subsequent appellate history appears. Apparently, further assessment was unnecessary or inconsequential. In our case, this Court can conclude pretrial that Lindberg's blaming of Gray would preclude, in the eyes of the jury, defenses offered by Gray. In McGlon, that determination would have been speculative and premature.

Another formulation of the level of prejudice necessary to justify severance is the inevitability of conviction of one co-defendant occasioned by the acquittal of another. United States v. Adler, 879 F.2d 491, 497 (9th Cir. 1988). The inevitability can be one-sided. That is, reversible prejudice exists when "only one defendant accuses the other, and the other denies any involvement". Romanello, 726 F.2d 173, 177, or when one of the defendant's "substantive rights" such as the "opportunity to present an individual defense" is abridged. United States v. Escalante, 637 F.2d 1197, (9th Cir.1980); Tootick, 952 F.2d at 1082 ("Prejudice will exist if the jury is

[6]2005 U.S. Dist. LEXIS 60766 (EDNC 2005).

unable to assess the guilt or innocence of each defendant on an individual and independent basis.") In the upcoming retrial, the evidence that Lindberg may be bent on offering would curb Gray's ability to present an individual defense.

An additional element is introduced by the other federal criminal charges pending against Greg Lindberg. An ongoing insurance business and investment adviser fraud investigation has resulted in the indictment, in a separate proceeding, of Mr. Lindberg.[7] Those allegations, while they relate indirectly to the accusation that Lindberg and Gray sought to obtain less critical regulation of Lindberg's insurance business dealings, do not otherwise involve Gray.[8] At the first trial, the government agreed to avoid any use or mention of the financial fraud allegations. On February 12, 2024, Government counsel informed counsel for the defendants that:

> "At this point, as we begin to reengage and prepare for trial, we are not in a position to commit to avoiding any and all aspects of the fraud matter. This is particularly true considering that certain aspects of the fraud matter may be an appropriate response to certain defenses you all may raise."

Evidence of financial misconduct by Lindberg, inadmissible in a trial of Gray alone, are unfairly prejudicial to Gray in a joint trial.

For all of these reasons, Defendant Gray respectfully moves this Court to order his trial severed from the trial of Greg Lindberg.

Respectfully submitted this 25th day of March, 2024.

---

[7]United States v. Greg E. Lindberg, 23 CR 48-MOC (WDNC, Charlotte Division)

[8]The problem emerged in the first trial. Counsel for the defendants objected to government witnesses' testimony regarding DOI "concerns" about the financial condition of Lindberg's various companies. p. 68 ff, Tr. Vol I-A.

Devereux & Banzhoff, PLLC
Counsel for John Duncan Gray
Suite 1100, Jackson Building
22 South Pack Square
Asheville, North Carolina 28801
828-285-9455
sdevereux@dblawoffices.com

By: S/ Sean Devereux
Sean Devereux
North Carolina State Bar Number 7691

SEARSON, JONES, GOTTSCHALK & CASH, PLLC

Stephen L. Cash
N.C. State Bar 39101
21 Battery Park Avenue, Suite 205
Asheville, North Carolina 28801
Telephone: (828)252-5555
Facsimile: (828) 232-9158
Email: steve@lawyersasheville.com
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this date the foregoing MOTION FOR RELIEF FROM PREJUDICIAL JOINDER was filed electronically with the Clerk of Court by means of the CM/ECF system and served on the attorneys of record via the Court's electronic case filing system.

This 25th day of March, 2024.

S/ Sean Devereux
Sean Devereux