UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION

UNITED STATES OF AMERICA	)	DOCKET NO. 5:19-CR-00022-MOC
	)	
v.	)	
	)	**RESPONSE IN OPPOSITION TO**
(2) JOHN D. GRAY	)	**MOTION FOR RELIEF FROM**
	)	**JOINDER**

NOW COMES the United States of America, by and through the undersigned attorneys, and hereby responds in opposition to Defendant John Gray's "Motion for Relief from Prejudicial Joinder" [Doc. #385, hereinafter referred to as "Motion to Sever"] for the reasons set forth below.

INTRODUCTION

This Court should deny the defendant's eleventh-hour motion for severance because he has failed to justify the extraordinary burden he seeks to place on this Court, jurors, witnesses, the government, and others by asking the Court to hold two separate trials of unambiguously interconnected charges and defendants.

It cannot be disputed that the defendants were properly joined in this case. After all, "they are alleged to have participated in the same … series of acts or transactions[] constituting an offense or offenses," Fed. R. Crim. P. 8(b); namely their respective roles in bribing a public official to take action to benefit Defendant Lindberg's companies. The allegations contained in the Indictment are more than sufficient to meet the longstanding "preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Indeed, Defendant Gray concedes that he was properly joined with co-defendant Greg Lindberg for the joint re-trial of their case in which they are charged with conspiring together and with others to commit honest services wire fraud and with aiding and abetting each other to commit

federal funds bribery. Gray also concedes that the law particularly favors joint trials of defendants alleged to have conspired with one another.

While he claims that there is a possibility of "antagonistic" defenses, Gray fails to demonstrate the exceptional circumstances required to justify severance, which demand a showing of "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. While noting that the Court has significant discretion to sever a defendant prejudiced by joinder, he acknowledges that, when the request to sever is based on co-defendant finger pointing, he "must establish that co-defendant defenses are antagonistic to the point of being **irreconcilable and mutually exclusive**." Doc. 385 at 3, *citing United States v. Najiar*, 300 F.3d 466 (4th Cir. 2002) (emphasis added). Gray has not and cannot make such a showing.

Despite these concessions and failures, and despite the purported bases for his request having occurred years ago, Gray now asks this Court to sever his re-trial from the trial of Lindberg, which is scheduled to begin on May 6, 2024, merely a few weeks from now. Gray's request should be denied. The purported prejudice that he claims might result from a joint re-trial is entirely speculative. And even if the evidence about which he speculates is in fact offered, he has failed to show it would rise to the level of "irreconcilable and mutually exclusive" defenses. Finally, when balanced against the extraordinary burden a severance would place on this Court, jurors, the witnesses (which would be nearly identical in each trial), and the government, plus the fact that this case was originally tried over four years ago, severance would considerably degrade the efficient administration of justice.

BACKGROUND

On March 18, 2019, a federal grand jury returned a true bill of indictment charging Defendants Gray and Lindberg each with a violation of 18 U.S.C. § 1349, for conspiring to commit honest services wire fraud (Count One), and a violation of 18 U.S.C. § 666, for federal programs bribery (Count Two). Indictment [Doc. 3].

The case was tried in February 2020, the jury returning a verdict of guilty on both counts as to Gray and Lindberg.[1] Following sentencing, both defendants filed notices of appeal. On June 29, 2022, the Fourth Circuit Court of Appeals issued an opinion reversing defendants' convictions and remanded the case for a new trial, issuing its mandate on July 6, 2022.

On August 29, 2022, this Court, upon motion of the United States, held a Status Conference to address scheduling the retrial of this matter. Transcript of Status Conference [Doc. #345]. During the Status Conference, the parties and the Court addressed the status of counsel for Gray, among other issues. *Id.* Thereafter, on December 30, 2022, with the consent of the Government and Lindberg, Gray moved to continue the trial date, then set for the Court's March 2023 criminal term. [Doc. #355]. Through supplemental pleadings, the parties asked the Court to set the retrial of this matter for November 2023, and the Court agreed. [Doc. ## 357, 358].

Over seven months later, and two and half months before the then-scheduled retrial, then-counsel for Gray moved to withdraw on August 17, 2023. [Doc. # 364]. The Government initially opposed the motion to withdraw but ultimately withdrew its opposition. [Doc. ## 367, 376]. Current counsel for Gray filed their notices of appearance on September 26, 2023, and again moved to continue the trial date on October 4, 2023. The Government and Lindberg did not oppose, and the case was set for its currently scheduled re-trial date of May 6, 2024.

[1] Prior to trial, Defendant Robin Hayes pleaded guilty to a violation of 18 U.S.C. § 1001. Defendant John Palermo was acquitted at trial.

On March 25, 2024, six weeks before re-trial, Gray filed the instant Motion to Sever. In his motion, Gray claims that public statements by Lindberg following the first trial indicate a possibility that Lindberg will defend himself by telling the jury that he relied on his advisers to provide him with good counsel, and if he did anything wrong it is because he relied on them, not because he intended to commit a crime. Def.'s Memo at 2-3. Gray claims this amounts to "antagonistic" defenses that warrant a severance. *Id.* at 3.

LEGAL STANDARD

Joinder of defendants is proper where, as here, the defendants "are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). "There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro*, 506 U.S. at 538. The United States Supreme Court has instructed federal courts to interpret the requirements of Rule 8(b) liberally in favor of joinder. *Id.* at 537. Rule 8(b) is designed to promote judicial economy and efficiency and to avoid a multiplicity of trials, but only so long as these objectives can be achieved without substantial prejudice to the right of the defendants to a fair trial. *Id.* at 540. Severance of properly joined defendants is improper unless the defendant can show that a joint trial would be unfairly prejudicial when weighed against the court's interest in judicial economy. *See United States v. Duke*, No. 3:16-cr-00221-MOC, 2018 WL 5266852, at *3 (W.D.N.C. Oct. 23, 2018) (Cogburn, J.), citing *United States v. Adoma*, No. 3:14-cr-00229-MOC, 2017 WL 220132, at *2 (W.D.N.C. Jan. 18, 2017).

The Fourth Circuit has recognized a strong interest in joint trials because joinder reduces the waste of precious judicial and prosecutorial time in an overburdened federal judicial system. "The Fourth Circuit strictly adheres to the principle that 'when defendants are indicted together,

they should be tried together.'" *Duke*, 2018 WL 5266852, at *1, citing *United States v. Dinkins*, 691 F.3d 358, 368 (4th Cir. 2012) (citing *United States v. Singh*, 518 F.3d 236, 255 (4th Cir. 2008)); *see also United States v. Medford*, 661 F.3d 746, 753 (4th Cir. 2011) ("[T]here is a presumption in favor of joint trials in cases in which defendants have been indicted together."). Therefore, the defendant must "establish that actual prejudice would result from a joint trial, … and not merely that a separate trial would offer a better chance of acquittal." *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995). This presumption is especially strong in conspiracy cases, such as this one. *Duke*, 2018 WL 5266852, at *1, citing *United States v. Lawson*, 677 F.3d 629, 639 (4th Cir. 2012); *United States v. Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992); *United States v. Tedder*, 801 F.2d 1437, 1450 (4th Cir. 1986) ("The gravamen of conspiracy is that each conspirator is fully liable for the acts of all coconspirators in furtherance of the conspiracy. Thus, joinder is highly favored in conspiracy cases, over and above the general disposition towards joinder for reasons of efficiency and judicial economy."). As such, severance pursuant to Rule 14 is rarely granted. *Id.*

The United States Supreme Court has also spoken clearly on this topic: "There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro*, 506 U.S. at 537. As such, severance of defendants properly joined under Federal Rule of Criminal Procedure 14 is only warranted when "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

"The presence of conflicting defenses alone does not require severance." *Najjar*, 300 F.3d at 474, citing *Zafiro*, 506 U.S. at 538. "The mere presence of hostility among defendants … or a desire of one to exculpate himself by inculpating another are insufficient grounds to require

separate trials." *Id.*, citing *United States v. Spitler*, 800 F. 2d 1267, 1271 (4th Cir. 1986). "The rule requires more than finger pointing." *Id.* "When co-defendants have antagonistic defenses, the courts have applied very specific tests to determine whether the trial was unfair." *United States v. Romanello*, 726 F.2d 173, 177 (5th Cir. 1984). "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." *Najjar*, 300 F.3d at 474, citing *Romanello*, 726 F.2d 173, 177 (5th Cir. 1984) and *United States v. Becker*, 585 F.2d 703, 707 (4th Cir. 1978).

ARGUMENT

The present case does not involve any circumstances that would justify severance. The Indictment and evidence in this case paint a clear picture of Defendants Lindberg and Gray working together, physically present at numerous meetings with Commissioner Causey, and participating in countless communications in a joint effort to bribe Commissioner Causey to take official action that would benefit Lindberg's companies. In meeting after meeting, call after call, and text after text, Gray joined Lindberg to push Commissioner Causey to replace the most senior regulator over Lindberg's companies. They are properly charged in the same indictment. Moreover, the charges against one defendant are not significantly more serious than the charges against the other, they are identical. Thus, there is no concern that there will be a "spillover" effect on a defendant charged with lesser crimes than his co-defendant. These defendants are charged in the same counts (Counts One and Two) and alleged to have participated in the same course of conduct leading to the charges in the Indictment, namely, a scheme to bribe Commissioner Mike Causey. Their defenses are not antagonistic, indeed they are essentially consistent with one

another (each says he did not intend to commit the crime of bribery and was entrapped by Commissioner Causey). The motion should be denied.

A. Finger Pointing Is Not An Adequate Justification for Severance.

The defendant's purported concern about the potential for Lindberg to blame Gray for their conspiracy to bribe Commissioner Causey is an insufficient reason to sever the defendants and conduct two separate (and nearly identical) trials. If Gray's speculation were to materialize, it would not deny him a fair trial or result in a miscarriage of justice. The Court should deny the defendant's request.

As an initial matter, there is no indication that Defendant Lindberg will indeed blame Defendant Gray for their respective roles in the charged conspiracy to bribe Commissioner Causey. Lindberg did not testify at the last trial, and neither party pointed the finger at the other. Moreover, statements by Lindberg in the press are not reliable indicators of his likely defense strategy in the upcoming second trial. The defendant's mere speculation about Lindberg's defense is insufficient to support a motion to sever. As the moving party, Gray "must establish that actual prejudice would result from a joint trial." *Reavis*, 48 F.3d 763, 767 (4th Cir. 1995) (quotations and citations omitted). Severance should be granted only where "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants," or to "prevent the jury from making a reliable judgment about guilt or innocence." *Duke*, 2018 WL 5266852, at *1, citing *United States v. Shealey*, 641 F.3d 627, 633 (4th Cir. 2011) ("Appellant's theory of injury is indirect at best … [and] fails to articulate any injury to 'a specific trial right.'"). "It is not sufficient that defendant states he would have a better chance of acquittal if severance were granted." *Reavis*, 48 F.3d at 767. Here, Gray has simply speculated that Lindberg might present a new defense blaming Gray for failing to warn him, and he has not identified a specific trial right that would be compromised.

He simply implies that he would have a better chance of acquittal if this case were severed. His motion fails for these reasons alone.

Nevertheless, were Lindberg to employ the strategy that purportedly worries Gray and accuse Gray of negligence in failing to warn Lindberg that it was illegal to bribe a public official, such finger pointing would not provide a basis for severance. First of all, as Gray concedes, "advice of a political consultant is not a legal defense." Def.'s Memo. at 4. As such, Lindberg should be precluded from making this argument as a defense, and therefore Gray's concern is meritless.

Secondly, *Najjar* makes clear that one defendant blaming the criminal enterprise on another, and thereby forcing the jury to choose one defendant over the other, would not alone justify a severance. *Najjar*, 300 F.3d at 474. To be sure, the Fourth Circuit noted that "Najjar points to several instances in the record where counsel for co-defendants … attacked his credibility or otherwise blamed the whole criminal enterprise on Najjar." *Id.* Najjar testified and counsel for co-defendants cross-examined him, which Najjar later asserted rendered their defenses antagonistic. "Counsel's statement focused on Najjar's part in the criminal enterprise. It did not, however, present a situation where Najjar's guilt was dictated by the asserted innocence of the co-defendants." *Id.* As such, it amounted to nothing more than "mere finger pointing, which does not provide the stark conflict necessary for relief." *Id.* The court further noted that "[t]here does appear to be some conflict in the presentation of defenses." *Id.* "The presence of conflicting or antagonistic defenses alone does not require severance, however." *Id.*, citing *Zafiro*, 506 U.S. at 538. "The mere presence of hostility among defendants … or a desire of one to exculpate himself by inculpating another [are] insufficient grounds to require separate trials." *Id.* "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." *Id.*; *see also United States v. Smith*, 44 F.3d 1259, 1266-67 (4th Cir. 1995) ("Because joint participants in a scheme often will point the finger at each other to deflect guilt from themselves or will attempt to lessen the importance of their role, a certain amount of conflict among defendants is inherent in most multi-defendant trials."). Accordingly, the Fourth Circuit affirmed the district court's denial of Najjar's motion for severance despite the apparent hostilities between the co-defendants.

This Court in *Duke* similarly rejected a motion for severance based on purportedly antagonistic defenses (notably, that one defendant had a limited role in the scheme and relied on the counsel of another), holding "a defendant is not entitled to severance 'merely because his defense conflicts with or is antagonistic to a codefendant's defense.'" 2018 WL 5266852, at * 3, citing *Zafiro*, 506 U.S. at 539; *Spitler*, 800 F.2d at 1271 ("hostility among defendants … or the desire of one to exculpate himself by inculpating another [are] insufficient grounds to require separate trials"). "This is true, even where one defendant desires to exculpate himself by inculpating a codefendant." *Id.*, citing *United States v. Allen*, 491 F.3d 178, 189 (4th Cir. 2007); *see also Smith*, 44 F.3d at 1266-67. In *Duke*, defendant Duke's defense was that he played a limited role in promoting the stock at issue, relied on defendant Stencil to provide him with truthful information, and if investors were misled, then Duke was misled by Stencil too. 2018 WL 5266852, at *4. Despite these purportedly antagonistic defenses (the defendant's "characterizations are overly simplistic and, to some extent, appear designed to manufacture mutual exclusivity between possible defenses"), this Court held that "even if the parties assert incompatible defenses – namely, that each was misled by the other – such defenses are not

irreconcilably mutually exclusive of one another because to believe one does *not* require complete disbelief of the other – i.e., the jury could believe that each misled the other, that both are lying and that both were fully apprised of the scheme, that neither is lying and the whole scheme was the product of a misunderstanding or lack of knowledge, etc." *Id.* (emphasis in original). As such, the moving party had failed to provide a sufficient basis for severance. *Id.*

Defendant Gray has similarly failed to make the required showing. For starters, the primary defense is likely (again) to be that Commissioner Causey is vindictive, not credible, and he entrapped both defendants. There is no reason to believe that Lindberg will argue that Gray is the guilty party – i.e., that Gray bribed Commissioner Causey on his own and misled Lindberg about it. Moreover, the public statements of Lindberg cited by Gray in his motion do not amount to an accusation that Gray intentionally committed the charged offenses on his own and duped Lindberg into going along with the plan. Rather, they amount to assertions of negligence, at best, and more accurately, denials of Lindberg's own intent. That happens all the time in criminal cases. Even if Lindberg were to attempt to justify his conduct by arguing to the jury that he did not believe his conduct was illegal but if it was, his advisors, including Gray, should have told him the bribes were illegal, Gray's defense is unlikely to be antagonistic at its core. Gray, too, is likely to argue that he did not believe the conduct of the co-conspirators was illegal, and therefore he had no reason to warn Lindberg, and in any event they were all entrapped by Commissioner Causey. To be sure, that is what Gray argued during the last trial. Tr. at 1713 ("Now, you might not like some of the things that John Gray said, and that's okay. But that's very different from being illegal. Very different."). Lindberg does not become the "second prosecutor" in this hypothetical scenario. Lindberg would likely not testify that a crime was committed and identify Gray as the guilty party. Instead, each defendant would likely argue that he did not intend to commit a crime (or was

entrapped) and therefore did not withdraw from the conspiracy or warn the other to do so. These are not the irreconcilable and mutually exclusive defenses that would warrant a severance. Not even close.

Contrast Gray's weak offering with the defenses at issue in *Romanello*. There, multiple defendants were charged with stealing jewelry, transporting the stolen jewelry and other stolen goods, and conspiracy. 726 F.2d at 175-76. One defendant – Vertucci – argued that he did not participate in the thefts but that his two co-defendants robbed him at gunpoint, thereby committing the charged offenses themselves. *Id.* at 177. The "core" of Vertucci's defense was not only that was he innocent of the charged offenses, but his two co-defendants were guilty, thereby exonerating Vertucci from the charges and placing blame squarely on his co-defendants. *Id.* at 177-78. Similarly, the two co-defendants argued that Vertucci's version was a lie invented by the true smugglers. *Id.* As such, the defenses were irreconcilable – if the jury believed Vertucci, then it would convict the co-defendants and not Vertucci. If the jury believed the co-defendants, then Vertucci's defense collapses.

This is a far cry from Gray's purported concern that Lindberg will testify or argue through counsel that, if their conduct had been illegal (which neither will concede), Lindberg expected one of his advisors to know that and warn him. These defenses are not contradictory. *See United States v. Johnson*, 478 F.2d 1129, 1132 (5th Cir. 1973).

In sum, "[t]he party moving for severance must establish that actual prejudice would result from a joint trial, … and not merely that a separate trial would offer a better chance of acquittal." *Najjar*, 300 F.3d at 474. Mere finger pointing does not provide the stark conflict necessary for relief. *Id.* The hypothetical scenario described in Gray's motion fails to justify his request for

severance. Their defenses would not be antagonistic, and therefore the defendant's motion should be denied.

B. <u>Lindberg's Separate Fraud Indictment Does Not Warrant Severance</u>.

The second basis for the defendant's motion for severance is also severely insufficient. Gray contends that because Lindberg has been charged in a separate indictment with fraud, there is a basis to sever his trial from Lindberg's. Gray fails to provide any support for this theory. Because he cannot.

First, Gray concedes that the fraud allegations underpinning the separate indictment against Lindberg "relate indirectly to the accusation that Lindberg and Gray sought to obtain less critical regulation of Lindberg's insurance business dealings." Def.'s Memo at 7. It is unclear what Gray means by "indirectly" relating to the charges in the present case, but the fraud at Lindberg's companies and the concern that the Department of Insurance might uncover it provide a motive for the charges in this case. That is not indirectly related, it is directly related.

Second, the existence of a separate indictment does not prejudice Gray in any way, which is made clear by the fact that Gray did not even bother to offer an explanation that could "satisfy the burden of showing prejudice which will interfere with such defendant's constitutional right to a fair trial." *United States v. Adoma*, No. 3:14-CR-00229-MOC, 2017 WL 220132, at *2 (W.D.N.C. Jan. 18, 2017), aff'd, 781 F. App'x 199 (4th Cir. 2019). The parties agreed prior to the last trial and likely will again agree that evidence of the existence of the separate indictment would not be offered by any party in the upcoming trial. However, evidence of DOI's concerns about financial and other improprieties at Lindberg's companies is relevant to the charges in the present indictment and, like last time, would be admissible and non-prejudicial in this trial. That evidence provides a motive for ***both*** defendants in this case, including Gray, to bribe Commissioner Causey

to replace the senior regulator overseeing Lindberg's companies. It is relevant to both defendants and both charges in this case, and does not provide a basis for the motion to sever.

CONCLUSION

WHEREFORE, for the reasons stated above, the Government respectfully requests that this Honorable Court deny Defendant Gray's Motion For Severance.

RESPECTFULLY SUBMITTED, this 12th day of April, 2024.

COREY R. AMUNDSON
Chief, Public Integrity Section
Criminal Division

/s/ William J. Gullotta
William J. Gullotta
Trial Attorney
Connecticut Bar # 423420
Public Integrity Section
U.S. Dept. of Justice, Criminal Division
1301 New York Avenue NW
Washington, DC 20530
Telephone: (202) 514-0014
Email: William.Gullotta2@usdoj.gov

DENA J. KING
UNITED STATES ATTORNEY

s/ Lawrence J. Cameron
Lawrence Cameron
Assistant United States Attorney
North Carolina Bar # 41922
227 West Trade Street, Suite 1650
Charlotte, North Carolina 28202
(704) 344-6222 (office)
(704) 344-6629 (facsimile)
Email: Lawrence.Cameron@usdoj.gov

s/ Dana O. Washington
Dana Washington
Assistant United States Attorney
Virginia Bar # 31981
227 West Trade Street, Suite 1650
Charlotte, North Carolina 28202
(704) 344-6222 (office)
(704) 344-6629 (facsimile)
Email: Dana.Washington@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April, 2024, the foregoing document was served electronically through ECF filing upon counsel of record for the defendants.

/s/ William J. Gullotta
William J. Gullotta
Trial Attorney, Dept. of Justice