IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff v. BRIAN BURROWS, Defendant.	CRIMINAL NO. 2:19-CR-00064-JLS-3

REPLY IN FURTHER SUPPORT OF DEFENDANT BRIAN BURROWS' MOTION TO SEVER COUNTS 97 – 116 FOR A SEPARATE TRIAL

Defendant Brian Burrows respectfully submits this Reply in Further Support of his Motion to Sever Counts 97 through 116 and for a Separate Trial.

INTRODUCTION

This case consists of allegations of two separate and distinct criminal schemes: one to embezzle funds from the International Brotherhood of Electrical Workers Local Union 98 ("Local 98" or the "Union"), and one to pay Councilman Robert Henon a salary from Local 98 in return for his taking certain actions to benefit John Dougherty and the Union. These alleged conspiracies are based on completely separate factual allegations, involve entirely distinct proofs, and have different sets of victims. The involvement of Mr. Dougherty in both the Conspiracy Counts and the Embezzlement Counts – the only link between the two alleged conspiracies – is not sufficient to render joinder proper. Because these charges were not properly joined under Federal Rule of Criminal Procedure 8(b), severance is mandatory.

Should this Court rule that joinder was proper under Rule 8(b), the Embezzlement Counts should nevertheless be severed from the Bribery Counts under Rule 14(a), as the factual

allegations underlying the bribery-related charges are inflammatory and designed to ignite the passions of the jury and the general public. The allegations in the Bribery Counts would not be admissible against Mr. Burrows in a separate trial on the Embezzlement Counts, and are likely to shock the conscious of the jury. The joinder of the allegations related to the bribery scheme with the balance of the Indictment is severely prejudicial to Mr. Burrows' defense, and such prejudice far outweighs any minimal benefit to judicial economy that will be gained by trying the Bribery Counts and the Embezzlement Counts together

Accordingly, this Court should sever counts 97 through 116 from the balance of the Indictment and conduct a separate trial on those counts.

I. COUNTS 97 THROUGH 116 WERE IMPROPERLY JOINED WITH THE EMBEZZELMENT-RELATED CHARGES IN THE BALACE OF THE INDICTMENT.

The Bribery Counts and the Embezzlement counts do not arise from the same series of acts or transactions, nor are any of the seven defendants charged in the Embezzlement Counts alleged to have participated in the bribery scheme except for Mr. Dougherty. Accordingly, there is no transactional nexus between the defendants in the alleged bribery conspiracy and those in the alleged embezzlement conspiracy; joinder is therefore improper under Rule 8(b) of the Federal Rules of Criminal Procedure.

Rule 8(b) provides that two or more defendants may be charged together in an indictment if "they 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) (emphasis added). The standard for joinder under Rule 8(b) is more stringent that under Rule 8(a), as joinder under Rule 8(a) is proper "where the offenses are of the same or similar character.'" *United States v. Irizarry*, 341 F.3d 273, 287 n.4 (3d. Cir. 2003). Such is not the case under Rule

8(b). While "it is not a necessary precondition to joinder that a defendant be involved in each offense charged in an indictment; joinder is proper as long as there is some common activity binding the objecting defendant with all the other indictees *and that common activity encompasses all the charged offenses*." *United States v. Bryant*, 556 F. Supp. 2d 378, 463 (D.N.J. 2008) (emphasis added) (citing *United States v. Natanel*, 938 F.2d 302, 307 (1st Cir. 1991)). The Government has not and cannot allege that there is a common activity that binds Burrows to the Bribery Counts. Indeed, Mr. Burrows is not alleged to have participated in *any* act or transaction related to the Bribery Counts.

Unable to show that the alleged bribery scheme and the alleged embezzlement scheme were part of the "same series of acts or transactions," as Rule 8(b) requires, the Government invents a new standard, arguing that the transactional nexus is found where the separate conspiracies each allege a misappropriation of assets for the benefit of the defendants. (*See, e.g.*, Op. Br. at 3 ("The offenses and defendants are properly joined, because all of the offenses are part of the same series of acts or transactions, all of which involve the misuse of Local 98 assets for the personal benefit of the defendants."); *id.* ("The charges in the Indictment are part of the same series of acts or transactions: all involve the misuse of Local 98 assets for the personal benefit of the defendants."); *id.* at 5 ("The embezzlement and corruption counts allege a series of transactions involving the misuse of Local 98 assets for the benefit of the defendants."); *id.* ("Like the embezzlement counts, the corruption counts also allege acts which were committed for the personal benefit of the defendants."); *id.* at 6 ("As set forth above, all of the counts are properly joined, because they charge related schemes involving the misuse of Local 98 funds for the benefit of the defendants.").) This Court should decline the Government's invitation to

create a new Rule 8(b) standard.[1] There is simply no allegation that the honest services bribery scheme was to benefit Mr. Burrows.

The Government attempts to argue that the conduct in the Embezzlement Counts is similar to that in the Bribery Counts, stating, "The labor bribery charges thus involve the same type of conduct in which the defendants used Local 98 assets . . . to benefit themselves and their associates." (Op. Br. at 7.) Yet the Third Circuit has explicitly rejected the standard for Rule 8(b) joinder that the Government invites the Court to adopt here. Mere similarity of conduct is not sufficient to create a transactional nexus between two distinct conspiracies. As the Third Circuit has noted, "Although the standards of Rule 8(a) and Rule 8(b) are similar, in that they both require a 'transactional nexus' between the offenses or defendants to be joined, Rule 8(a) is more permissive than Rule 8(b) because Rule 8(a) allows joinder on an additional ground, i.e., where the offenses are of the same or similar character." *See United States v. Irizarry*, 341 F.3d 273, 287 n.4 (3d. Cir. 2003). Because this is a multi-defendant case the Government cannot rely on the standard for joinder under Rule 8(a). *See United States v. Velasquez*, 772 F.2d 1348, 1352 (7th Cir. 1985) ("Rule 8(b) allows charging in the same indictment two or more offenders 'if they 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.' But the government may not tack the two subsections together and in one indictment charge different persons with committing offenses of

[1] The Government cites *United States v. Fiorillo*, 186 F.3d 1136 (9th Cir. 1999) for the proposition that "the same series of acts or transactions" has been construed broadly. (Op. Br. at 4.) *Fiorillo* examines a claim of misjoinder under Rule 8(a), not Rule 8(b), and is therefore inapplicable here. *Fiorello*, 186 F.3d at 1145.

'similar character.'"). The Government's argument that joinder is proper because both the Embezzlement Counts and Bribery Counts involve the same type of conduct must therefore fail.[2]

In support of its argument, the Government cites to *United States v. Cooper*, 886 F.3d 146 (D.C. Cir. 2018). The Government's reliance is misplaced. As a preliminary matter, *Cooper* is a multiplicity case, and does not address Rule 8 joinder. Defendants are unaware of any Third Circuit caselaw (or, for that matter, caselaw on the issue of joinder under Rule 8(b)) that supports the Government's position. Based on its use of *Cooper*, neither, it appears, is the Government. In *Cooper*, the defendant appealed his conviction, arguing that a conspiracy to embezzle from a union and conspiracy to pay a kickback to the union official who embezzled the money were, in fact, one conspiracy, and that his conviction of both conspiracies was multiplicitous. *Id.* at 154. The D.C. Circuit agreed and ordered that one of the counts be vacated. *Id.* at 155.

Cooper is entirely distinguishable from the case at bar. In *Cooper*, a union official awarded a large contract to the defendant that included unnecessary fees and overpayments. *Id.* at 150. In return, the defendant paid a kickback to the union official. *Id.* The kickback to the union official was a necessary part of the embezzlement scheme. Such is not the case here, as the Bribery Counts are separate and distinct from the Embezzlement Counts. There is no allegation, for example, that Mr. Dougherty's alleged bribery of Mr. Henon was intended to effectuate Mr. Burrows' alleged embezzlement from Local 98. *Cooper* is therefore inapposite.

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[2] The Government's contention is, in any event, overly simplistic. The Government charged an embezzlement conspiracy and a bribery conspiracy. The Embezzlement Counts do allege the misuse of Local 98 funds for the benefit of the Defendants. But the Bribery Counts, it goes without saying, involve bribery. They describe the use of Local 98 funds to induce Councilman Henon to take action *for the benefit of John Dougherty and Local 98* – not the Defendants. The alleged bribery conspiracy is not, as the Government would have this Court believe, embezzlement by another name.

The Government all but ignores the case from our sister district which is directly on point: *United States v. Bryant*, 556 F. Supp. 2d 378 (D.N.J. 2008). In that case, the Government alleged that Wayne Bryant, a New Jersey State Senator, and Michael Gallagher, Vice Dean and later Dean of the School of Osteopathic Medicine ("SOM"), which operated as part of the University of Medicine and Dentistry of New Jersey ("UMDNJ"), engaged in a conspiracy to defraud the people of New Jersey of Bryant's honest services. 556 F. Supp. 2d at 384-86. Specifically, Gallagher created a paid position at SOM for Bryant, and Bryant arranged to increase state funding to SOM which, in turn, resulted in an increase in Gallagher's performance bonus. *Id.* at 385-86. The Government also charged Gallagher with honest services fraud and fraud on an organization receiving federal funds as a result of a scheme by which Gallagher distributed income from SOM within the organization in such a way that would ensure he received a yearly performance bonus. *Id.* at 438. The district court found that these two sets of counts were improperly joined. *Id.*

The Government contends that the allegation that both the Bribery Counts and the Conspiracy Counts involved the misappropriation of Local 98 funds for the benefit of the Defendants provides the transactional nexus to render joinder proper under Rule 8(b). Yet the Government fails to square that theory with the outcome of *Bryant*. In *Bryant*, both the creation of a no-show job for Bryant as well as Gallagher's fraudulent distribution of funds within SOM involved the misappropriation of SOM and UMDNJ funds for the benefit of the defendants. As the opinion from the District of New Jersey makes clear, such similarity of conduct is not sufficient for joinder under Rule 8(b). The Government doesn't even attempt to distinguish *Byant*, stating simply that "unlike the six counts in *Brant*, there is significant factual overlap and evidence common to all charges." (Op. Br. at 11.) In truth there is no overlap.

By arguing that a transactional nexus exists because both the Bribery Counts and the Embezzlement Counts were designed to enrich the defendants at the expense of Local 98, the Government attempts to bootstrap the Rule 8(a) joinder standard to the more stringent standard of Rule 8(b). Mr. Burrows respectfully requests that this Court keep with Third Circuit precedent and grant his Motion to sever counts 97 through 116 from the balance of the Indictment and conduct a separate trial on those counts.

II. THE JOINDER OF THE BRIBERY-RELATED COUNTS WITH THE REMAINING EMBEZZELMENT-RELATED COUNTS IS PREJUDICIAL TO MR. BURROWS.

This Court may sever properly joined offenses for a separate trial where "the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant." Fed. R. Crim. P. 14(a). In determining whether counts should be severed for trial, the court must balance the need for judicial economy with the right of the defendant not to be prejudiced by the joinder. *See United States v. Joshua*, 976 F.2d 844, 847 (3d. Cir. 1992). Courts should grant a motion for severance under Rule 14(a) "if there is 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." *United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005) (quoting *United States v. Zafiro*, 506 U.S. 534, 538-39 (1991)). The Supreme Court has observed that such a risk might occur "when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Zafiro*, 506 U.S. at 538-39. Should this Court find that the Bribery Counts are properly joined with the balance of the Indictment, it should nevertheless sever the Bribery Counts under Rule 14(a) of the Federal Rules of Criminal Procedure.

The joinder of the Bribery Counts with the Embezzlement Counts is severely prejudicial to Burrows' defense, and such prejudice far outweighs any benefit to judicial economy that will

be gained by trying the Bribery Counts and the Embezzlement Counts together. A joint trial would result in the inclusion of inflammatory evidence of a bribery scheme which otherwise would not be inadmissible against Burrows. Because a joint trial of the Bribery Counts and the Embezzlement Counts would be unfair to Burrows, this Court should sever the Bribery Counts for a separate trial under Rule 14.

The allegations in the Bribery Counts shock the conscious and paint Mr. Henon as a corrupt tool of Mr. Dougherty. They imply a profound breach of the public trust and involve numerous prejudicial acts that risk being imputed to Mr. Burrows. These include allegations that Mr. Henon and Mr. Dougherty conspired to prevent the installation of critical medical equipment at CHOP and used Mr. Henon's office to target Mr. Dougherty's personal and political rivals. The Government does not dispute that the allegations that make up the Bribery Counts are inflammatory.

Rule 14(a) calls for this court to "balance the need for judicial economy with the right of the defendant not to be prejudiced by the joinder." *Joshua*, 976 F.2d at 847. Because the needs of judicial economy are only marginally advanced—if at all—by the joint trial, and because Mr. Burrows will be prejudiced by the inflammatory evidence on the Bribery Counts that would be inadmissible against him in a separate trial, this Court should grant Mr. Burrows' Motion to Sever pursuant to Rule 14.

CONCLUSION

For the foregoing reasons, Defendant Brian Burrows respectfully requests that this Court sever counts 97 through 116 and order a separate trial on those counts.

Dated: August 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas A. Bergstrom, hereby certify that on this 6th day of August, 2019, I caused to be electronically filed the foregoing document, with the Clerk of Court through the CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing systems. Parties may access the filing through the Court's CM/ECF System.

/s/ Thomas A. Bergstrom
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