IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA

VS. **CRIMINAL NO. 2:16CR3KS-MTP**

KENNETH E. FAIRLEY, SR.
AND ARTIE FLETCHER

MOTION TO CONTINUE TRIAL

COMES NOW the Defendant, Kenneth E. Fairley, Sr., through counsel, and moves this Court to grant a continuance in this cause and Defendant would state unto the Honorable Court the following, to wit:

1. Defendant Kenneth Fairley and Co-Defendant Artie Fletcher are charged with, *inter alia*, conspiracy to defraud the United States government, via the Department of Housing and Urban Development, (hereinafter "HUD") out of personal property in violation of 18 U.S.C. §641. The time alleged in the indictment is between August of 2010 and December 12, 2012 in Forrest County, Mississippi.

2. Fairley was a principal in community housing development organization (CCHPO) (a private non-profit community based service) called Pinebelt Community Services (hereinafter "Pinebelt").

3. The indictment was unsealed and served upon Fairley on March 23, 2014

and trial date set on April 18, 2016.

4. The defense began receiving discovery from the government on the following dates:

A. On March 29, 2016, the prosecution's initial discovery was shipped overnight via Federal Express which included AUSA Jay Golden's proposed plea agreement, plea supplement, along with financial statements which the U.S. Attorney's Office uses to assist in any future debt collections that might result if any monetary penalties were imposed at sentencing. The initial discovery contained 17 discovery CDs containing various bank statements, proposals, and phone conversations which totaled around or about 5,000 pages;

B. On April 25, 2016, the prosecution submitted a hard copy of IRS Special Agent Bradley Luker's case report, HUD Memorandum of Interview of Randy Jordan, and HUD Memorandum of Interview of Clarence Williams;

C. On May 6, 2016, the prosecution submitted the 2/19/2015 HUD Memorandum of Activity Report relating to a meeting with HUD representatives; and

D. On May 12, 2016, the prosecution forwarded to our office supplemental discovery consisting of around or about thousand (1,000) pages of documents.

5. Due to magnitude of the discovery, span of the government's investigation, complexity of the issues, (i.e., involving the vast amount of financial data provided), and loss of documentation due to a tornado that destroyed the office of Pinebelt, Fairley sought to hire additional counsel and experts to assist undersigned in the preparation and trial of this case.

6. Additionally, Fairley, also, sought to continue the trial which was

granted, after a telephonic conference was held on April 5, 2016 with the Court and all parties concerned. During said conference, *inter alia*, counsel for Fairley explained the need for a continuance beyond August, 2016 including, but not limited to counsel attendance at the Mississippi Bar Convention slated for July 11-15, 2016. The Court advised that parties that the federal courthouse was slated to be renovated and even though trial dates beyond August, 2016 were available, it was not inclined to set it that far out as requested by counsel. The Court, then, granted only an extension until July 25, 2016.

7. Within 24 hours, the parties were summoned to appear by telephone again at which time the Court decided, *inter alia*, that due to modified dates for renovations of the federal courthouse and, upon information and belief, a conference that the Judge needed to attend, the trial date would be moved up to June 13, 2016 to, again, accommodate the court's calendar and courthouse renovations.

8. At no time during any conferences with the Court has the prosecution alleged that it would be prejudiced in any way if the continuance was granted beyond August, 2016.

ARGUMENT

A. June 13th Trial Date Violated The Speedy Trial Act

18 U.S.C. 3161 (c)(2) provides as follows: (2) *Unless the defendant consents*

in writing to the contrary, the trial shall not commence less than thirty days from the date on which the defendant first appears through counsel or expressly waives counsel. Fairley, again, first appeared in court with counsel on March 23, 2016 at which time he was served with a copy of his indictment and arraigned. Therefore, the subsequent trial date of April 18, 2016, was prematurely set and, thus, should not be considered as the **first** trial setting. See U.S. v. Storm, 36 F.3d 1289 (5th Cir. 1994). cert. denied, 514 U.S. 1084 (1995). Consequently, the first trial date is the present date: June 13, 2016:

B. 18 U.S.C. §3161 (h)(7) B Factors

1. Miscarriage of Justice

As stated before, there are a vast amount of documents (i.e., thousands of documents) that defense counsel and client must continue to review and analyze as provided by the government. The defense has and continues to assemble documents that it, too, believes are necessary for the defense in this case and should be delivered to prosecution. Fairley has hired experts whose opinions have not been completely formalized and digested by Fairley's attorneys in order for an informed decision to be made as to the best strategy of defense. Justice requires sufficient and adequate time to complete this review process and exchange of discovery.

2. Existence of Novel Questions

The defense would point out that there does exist a novel question of law that must be answered and that counsel has been researching as follows: *to what extent can the government prosecute Fairley for theft, laundering, or otherwise misappropriating HUD funds when HUD itself, after its audit of Pinebelt, decided not to initiate a criminal prosecution of Fairley?* Fairley believes that this question may be an issue of first impression given that HUD closed its investigation of Pinebelt even while the prosecution was continuing its investigation.

3. Time For Effective Preparation

Recently, Fairley hired two (2) additional lawyers to assist him in the trial of this case: Betram Marks and Scott Gilbert. However, Attorney Gilbert removed himself from this case as of May 27, 2016, due to an apparent conflict of interest; Gilbert would have played a substantial role as local counsel in the development and prosecution of Fairley's defenses. Mr. Marks, who is still receiving his copies of his discovery, will, inter alia, be analyzing the financial data that is necessary to the defense of the case. Given that Fairley has a right to adequately develop and present his case theory of defense, he is simply asking for the time for his attorneys to assemble the information in which to do so.

4. Lack of Prejudice to the Government or Co-Defendant

So far, no prejudice has been alleged.

5. Waiver of Speedy Trial

Defendant, hereby, waives his right to a speedy trial if a continuance is granted.

6. Diligence of Fairley

Fairley has been diligent in preparing his defense in a way that no other client of undersigned counsel has. Fairley has traveled to various venues seeking experts and competent counsel from Mississippi to Michigan. Fairley, perhaps, has interviewed no less than seven (7) lawyers, has been personally involved in reviewing a plethora of documents, and has requested, if possible, daily updates of progress from counsel. All of this has taken a toll upon his health, the topic of which follows.

7. Fairley's Health

Recently, the Court was informed of significant health issues that Fairley has and the need for continued treatment out of State. The rush of a trial of this magnitude is simply unfair given that stress, without question, compounds and contributes to the deterioration of his health. Medical documentation can be provided if necessary.

CONCLUSION

Given the totality of the circumstances, Fairley prays that the Court will grant him the relief requested herein.

RESPECTFULLY SUBMITTED, this the 31st day of May, 2016.

BY: /s/ Sanford E. Knott
SANFORD E. KNOTT, MSB #8477
ATTORNEY FOR DEFENANT

OF COUNSEL:
SANFORD KNOTT & ASSOCIATES, P.A.
POST OFFICE BOX 1208
JACKSON, MISSISSIPPI 39215-1208
TELEPHONE NUMBER: 601-355-2000
FACSIMILE NUMBER: 601-355-2600

CERTIFICATE OF SERVICE

I, Sanford E. Knott, attorney for Defendant, do, hereby, certify that I have on this date mailed via, United States Postal Services, postage prepaid, a true and correct copy of the foregoing document to the following:

Office of the U.S. Attorney
501 E. Court Street, Suite 4.430
Jackson, Mississippi 39201

This the 31st day of May, 2016.

/s/ Sanford E. Knott
Sanford E. Knott, Esquire

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FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
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KENNETH E. FAIRLEY, SR.
AND ARTIE FLETCHER

MOTION TO SEVER

COMES NOW the Defendant, Kenneth E. Fairley, Sr., through counsel, and files this his motion to sever the trial involving Defendant and his Co-Defendant, Artie Fletcher and for grounds follows:

1. Defendant Kenneth Fairley is the subject of a multi-count indictment filed on March 10, 2016 whose trial, along with Co-Defendant Artie Fletcher, is set for June 13, 2016. The indictment charges the Defendant Fairley with, inter alia, conspiracy to defraud the government of HUD funds from August of 2010 through December 12, 2012. It is alleged, *inter alia*, that Fletcher provided construction services to Pinebelt concerning two properties located in Hattiesburg, Mississippi and that there was a misrepresentation by the parties to HUD when requests for reimbursements were made for renovations of said properties.

2. Pursuant to Fed. R. Crim. P. 14 (a), if the joinder of offenses or defendant

in an indictment...appears to prejudice a defendant...the court may order separate trials of counts, sever the trials, or provide any other relief that justice requires." While there is a preference for joint trials for co-indictees, "a district court should grant severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Zafiro v. U.S., 506 U.S. 534, 539 (1993).

3. In this case, Co-Defendant Fletcher has made statements that the government intends to use against Fairley, who will not be able to cross-examine Fletcher if he (Fletcher) chooses not testify. For instance, the government's anticipated proof involves the following statements by Fletcher:

A. That purported invoices (or an invoice) of Fletcher supporting request for HUD funds by Pinebelt were not his and did not contain his signature;

B. That the itemization and costs of work done (supposedly approved by Fletcher) submitted by Fairley to HUD were fictitious and were higher than the actual costs;

C. That Fairley used the excess funds (i.e., the difference between HUD funds paid and actual costs spent) from the projects to subsidize the mortgage of Mount Carmel and its operating expenses;

D. That Fairley requested that Fletcher provides receipts from other projects of Interurban (i.e., Fletcher's company) to support an audit by HUD which had requested receipts for the funds received by Pinebelt; and

E. That a lawsuit was filed in the Circuit Court of Forest County, Mississippi by Fletcher against Fairley making, substantially, the same allegations above.

4. Fairley would state that none of the allegations are true and that Fletcher will be a necessary witness to support his position that invoices submitted by Fairley for Pinebelt were approved by Fletcher; that the costs and request for funds submitted by Pinebelt were reasonable; that alleged statements that there was misuse of funds not authorized by HUD, have no basis in fact; that Fairley's request for receipts from Fletcher concerned the subject properties, not other projects of Interurban; and that the lawsuit filed by Fletcher against Fairley is ongoing and the record does not contain any "admissions against interest" by Fairley or any findings whatsoever by the circuit court judge that any of the allegations contained, therein, are true.

5. However, if the jury accepts Fletcher's statements which are expected to be presented by the government, than a chance of acquittal for Fairley is all but lost. See U.S. v. Sherlock, 962, F.2d 1.

WHEREFORE, PREMISES CONSIDERED, the Defendant prays that the

Court will grant the relief sought herein.

RESPECTFULLY SUBMITTED, this the 31st day of May, 2016.

BY: /s/ Sanford E. Knott
SANFORD E. KNOTT, MSB #8477
ATTORNEY FOR DEFENANT

OF COUNSEL:
SANFORD KNOTT & ASSOCIATES, P.A.
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I, Sanford E. Knott, attorney for Defendant, do, hereby, certify that I have on this date mailed via, United States Postal Services, postage prepaid, a true and correct copy of the foregoing document to the following:

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KENNETH E. FAIRLEY and
ARTIE FLETCHER

GOVERNMENT'S RESPONSE TO MOTION TO SEVER DEFENDANT

The United States of America, by and through its designated representative, submits the following response to the Motion to Sever Defendant [38] filed by defendant Kenneth E. Fairley.

ISSUE

Defendant Kenneth E. Fairley asserts that he should be granted a severance from his codefendant because of the government's intention to introduce certain statements of the two codefendants which implicate Fairley in the offense charged in the indictment. Though not specifically cited the defense argument seems to track the same concerns which gave rise to the rule set forth in Bruton v. United States, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968).

ARGUMENT

1. THE SEVERANCE MOTION SHOULD BE DENIED BECAUSE DEFENDANT HAS NOT IDENTIFIED ANY PREJUDICE OUTWEIGHING THE BENEFITS OF A JOINT TRIAL.

Defendants were properly joined together as "they are alleged to have participated ... in the same series of acts or transactions constituting [the] offense[s]." Fed. R. Crim. P. 8(b); see generally United States v. Lane, 474 U.S. 438 (1986). The leading Supreme Court decision

holds that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only 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." Zafiro v. United States, 506 U.S. 534, 539 (1993); United States v. Owens, 683 F.3d 93, 98 (5th Cir. 2012). Defendants seeking severance bear a "heavy burden" as they must demonstrate that continued joinder would cause "actual prejudice" to their fair trial rights and "not merely a negative spill-over effect." United States v. Wacker, 72 F.3d 1453, 1468 (10th Cir. 1995) (internal quotations omitted); see also United States v. Youngpeter, 986 F.2d 349, 353 (10th Cir. 1993) ("This burden is heavy for the defendant to bear as he must show more than a better chance of acquittal or a hypothesis of prejudice, he must, in fact, show real prejudice").

While prejudice is necessary, it is not sufficient: "Rule 14 does not require severance even if prejudice is shown; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." Zafiro, 506 U.S. at 538-539. The Tenth Circuit has explained that "[b]efore exercising its discretion to grant a motion to sever, ... the trial court must weigh prejudice to the defendant caused by joinder against the 'obviously important considerations of economy and expedition in judicial administration.'" United States v. Dirden, 38 F.3d 1131, 1140 (10th Cir. 1994) (quoting United States v. Petersen, 611 F.2d 1313, 1331 (10th Cir. 1979), cert. denied, 447 U.S. 905 (1980)). "There is a preference in the federal system for joint trials of defendants who are indicted together." Zafiro, 506 U.S. at 537.

In order for the defendant to prove that a motion to sever is proper, a defendant must show that: (1) the joint trial will prejudice him to such an extent that the district court could not provide adequate protection; and (2) that the prejudice outweighs the government's interest in

economy of judicial administration. United States v. Snarr, 704 F.3d 368 (5th Cir. 2013). There is no showing of such in this case.

Fairley must establish (1) a bona fide need for the codefendant's testimony; (2) provide the substance of the testimony; (3) the exculpatory effect of the testimony; and (4) that the codefendant actually would testify if the trial were severed. United States v. Owens, 683 F.3d 93 (5th Cir. 2012).

2. THE INTERESTS IN ADMINISTRATIVE EFFICIENCY PROMOTED BY JOINT TRIALS ARE ESPECIALLY COMPELLING HERE.

Even in routine criminal cases, joint trials "promote efficiency" (Zafiro, 506 U.S. at 537) by "conserv[ing] state funds, diminish[ing] inconvenience to witnesses and public authorities, and avoid[ing] delays in bringing those accused of crime to trial." United States v. Lane, 474 U.S. 438, 449 (1986) (internal quotations omitted). Conducting two trials rather than one would delay substantially the final resolution of these defendants' guilt or innocence.

3. THE INTERESTS OF VICTIMS AND WITNESSES FAVOR A JOINT TRIAL HERE.

Another factor cited by the Supreme Court in favor of joint trials is the interest in sparing "victims and witnesses [from] repeat[ing] the inconvenience (and sometimes trauma) of testifying." Richardson, 481 U.S. at 210. The recognized concern in sparing victims from repeated trials -- and the "trauma" of repeatedly reliving a crime and its aftermath -- is present under the circumstances of this case.

4. A JOINT TRIAL IS THE FAIREST MEANS OF ACHIEVING A CORRECT RESOLUTION OF THE CRIMINAL CHARGES.

All the interests strongly favoring a joint trial -- the legal presumption that alleged coconspirators and aiders/abettors should be tried together, the administrative efficiency, and the

concern for victims and witnesses -- must give way if "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." Zafiro, 506 U.S. at 539. But, far from undercutting fairness and reliability, a joint trial typically allows "the jury [to] obtain[] a more complete view of all the acts underlying the charges than would be possible in separate trials." Buchanan v. Kentucky, 483 U.S. 402, 418 (1987). This broader "perspective," which allows the jury "to arrive more reliably at its conclusions regarding the guilt or innocence of a particular defendant," is "particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events...." Id. Accord United States v. Darden, 70 F.3d 1507, 1527-1528 (8th Cir. 1995) ("justice is best served by trying" coconspirators together "because a joint trial 'gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome'"; quoting United States v. Buljubasic, 808 F.2d 1260, 1263 (7th Cir.), cert. denied, 484 U.S. 815 (1987)), cert. denied, 116 S. Ct. 1449 (1996); Jackson, 850 F. Supp. at 1491 ("Joint trials 'reduce the chance that each defendant will try to create a reasonable doubt by blaming an absent colleague' and provide 'the jury the best perspective on all of the evidence'"; quoting Buljubasic).

A joint trial is fairest not because it offers defendants their best chance for acquittal -- a consideration entitled to no weight under Zafiro, 506 U.S. at 540 -- but rather because it offers the best prospect for a just resolution. The Supreme Court has stressed that joint trials "'serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.'" Id. at 537 (quoting Richardson, 481 U.S. at 210). Not only would separate trials risk inconsistent verdicts, they also would "randomly favor[] the last-tried defendant[] who [would] have the advantage of knowing the prosecution's case beforehand." Richardson, 481 U.S. at 210.

5. FAIRLEY'S RIGHT TO A FAIR TRIAL WILL BE FULLY PROTECTED BY A LIMITING INSTRUCTION.

The "almost invariable assumption of the law [is] that jurors follow their instructions," including limiting instructions that evidence may only be considered against another defendant. Richardson, 481 U.S. at 206-207; United States v. Lane, 883 F.2d 1484, 1498-1499 (10th Cir. 1989), cert. denied, 493 U.S. 1059 (1990). This is a "pragmatic [rule], rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Richardson, 481 U.S. at 211, quoted in Lane, 883 F.2d at 1498. Severance is required only where out-of-court statements so powerfully incriminate a codefendant that they come within the rule announced in Bruton v. United States, 391 U.S. 123 (1968).

6. BRUTON APPLIES ONLY TO "FACIALLY INCRIMINATING CONFESSIONS" THAT ARE "DEVASTATING" TO THE CODEFENDANT.

Bruton carved out a "narrow exception" to "the almost invariable assumption" that limiting instructions can be trusted. Richardson, 481 U.S. at 206-207. Bruton held that "a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." Richardson, 481 U.S. at 207. The codefendant's out-of-court statements in Bruton had such a "powerful" and "devastating" effect because they directly and unequivocally linked the defendant to the crime: "A postal inspector testified that [codefendant] Evans orally confessed to him that Evans and [defendant Bruton] committed the armed robbery." Id. at 124. Although full-blown confessions of this type were too "powerful" and "devastating" for limiting instructions, the Bruton Court carefully limited the scope of its holding: "Not every admission of inadmissible hearsay or other

evidence can be considered to be reversible error unavoidable through limiting instructions." Id. at 135.

The Supreme Court since has confirmed that "the precise facts of Bruton involv[ed] a facially incriminating confession" and "we decline to extend it further." Richardson, 481 U.S. at 211; id. at 208-209 (Bruton "limited to facially incriminating confessions"). Accordingly, Bruton does not apply where a statement is "not incriminating on its face, and bec[omes] so only when linked with evidence introduced later at trial." Id. at 208.

Many federal courts of appeals have limited Bruton to codefendant confessions that are facially devastating to the defendant. A good recent example is United States v. Jobe, 77 F.3d 1461, 1477-1479 (5th Cir. 1996), a check kiting prosecution in which defendant Novoa (a bank cashier) raised a Bruton objection to statements by codefendant Taylor (the bank president) to a bank examiner. Codefendant Taylor told the examiner that "Novoa [had] presented the check for him to sign" and that Taylor had not verified whether there were sufficient funds in the account because he "had faith" in Novoa. Id. at 1477-1478. Taylor added that "[w]hen he was told [later] that the transaction was illegal, he asked cashier Fernando ... Novoa what happened, what was the reason for this, and he did not get an answer." Id. at 1478. Although Taylor's hearsay statements to the examiner were a blatant attempt to shift blame to Novoa, the Fifth Circuit found no Bruton violation because "[t]he statements did not directly incriminate Novoa without reference to other admissible evidence." Id. Accordingly, the "limiting instruction [was] adequate to protect Novoa from any potential prejudice" and the "district court acted well within its discretion in denying the motion to sever trials." Id. at 1479 (quotations omitted).

Similarly, in United States v. James, 40 F.3d 850 (7th Cir. 1994), cert. denied, 115 S. Ct. 948 (1995), the court rejected defendant Williams' Bruton challenge where an ATF agent

testified that codefendant James had stated that "Williams was a member of 'the same Crip set, of the 118th Street East Coast Crips.'" Id. at 877. The ATF agent added "in response to questions concerning drug dealing, [that codefendant] James had 'stated that the 118th Street East Coast Crips is not a drug organization, that individual members are merely involved in drug dealing for their individual profit.'" Id. James was a drug trafficking prosecution in which the codefendant's hearsay statements directly linked defendant Williams by name to a "Crips" gang whose members trafficked in drugs. The court nonetheless held that "[t]he facts of Williams' case present at best a weak analogy to Bruton" because the "challenged statement in Williams' case is neither a confession nor otherwise powerfully incriminating." Id. (quotations omitted). The court explained that "[i]f the statement was incriminating at all, it was so only as circumstantial evidence, requiring the jury to infer that anyone who is claimed to be affiliated with the Crips gang is more likely to be a coconspirator in the charged conspiracy and to possess heroin and firearms." Id. at 877-878. The Seventh Circuit concluded that "[t]he district court was therefore correct in ruling that the admission of James' statement did not violate Williams' rights under Bruton and thus did not warrant a severance on that basis." Id. at 878.

Another illustrative case is United States v. Olano, 62 F.3d 1180 (9th Cir. 1995), a bank fraud prosecution of several defendants for having made several insider loans to each other's financial institutions. The court there rejected Bruton challenges to various pretrial statements (including grand jury and deposition transcripts), admissible only against certain codefendants, describing the deals. See id. at 1195-1196. Among the statements at issue was one by a codefendant, who was chairman of a separate financial institution, that he had 'two loans for Guy Olano to make.'" Id. at 1196. Even though this statement (and others) could be powerfully incriminating when considered with other trial evidence suggesting a pattern of insider loans

among legally distinct financial institutions, the court held that a limiting instruction fully protected Olano's rights because "[n]one of the codefendants' statements incriminated Olano on their face." Id. at 1195. In particular, the court deemed the statements "[u]nlike the full-blown confession that was the subject of Bruton," because they "plainly did not have a sufficiently 'devastating' or 'powerful' inculpatory impact to be incriminatory on [their] face." Id. (emphasis added).

Many other cases reject Bruton challenges to the admission in a joint trial of a codefendant's out-of-court statements regarding dealings with the defendant. The unifying theme of these cases is that Bruton does not apply where the codefendant's statements are not a confession incriminating the defendant on their face. See, e.g., United States v. Adams, 74 F.3d 1093, 1099 (11th Cir. 1996) (codefendant's statement that defendant had account at bank in question did not violate Bruton so as to require severance as statement "was not facially incriminating because the reference to the bank account required linkage to other evidence"); United States v. Escobar, 50 F.3d 1414, 1422 (8th Cir. 1995) (codefendant "Keeper's statement was used only to show that he was acquainted with [defendants] Escobar and Duarte and he lied about this fact; this statement by itself does not implicate Escobar or Duarte in any wrongdoing"); United States v. Smith, 46 F.3d 1223, 1229 (1st Cir.) ("Admittedly, [codefendant] Cohen's statement might tend to incriminate [defendants] Smith and Devaney by showing that the coconspirators met to discuss damage control" but "[i]n this sense, however, the statement falls far outside the pale of 'powerfully incriminating' evidence that produces Bruton errors"), cert. denied, 116 S. Ct. 176 (1995).

The line drawn by all these courts is consistent not only with Richardson but also with the Supreme Court's reasoning in Arizona v. Fulminante, 499 U.S. 279 (1991). Fulminante, which

held that the admission of a coerced confession could be harmless error, carefully distinguished full confessions from other less devastating statements. The Court explained that "confession[s] [are] like no other evidence" in that they have such a "'profound impact on the jury ... that we may justifiably doubt its ability to put them out of mind even if told to do so.'" Id. at 296 (quoting Justice White's Bruton dissent). The Court continued: "While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision." Id. (emphasis added). It is premature for the court to rule on a severance motion at this time because there is every reason to believe that Fairley's codefendant will have entered a plea by the time a trial is held and any Bruton issues will have been mooted.

CONCLUSION

Based on the foregoing, Defendant Fairley has provided no basis upon which a severance of the defendants should be granted. Therefore, his motion for severance should be denied.

Respectfully submitted,

GREGORY K. DAVIS
United States Attorney

By: ***s/ Jay T. Golden***

Jay T. Golden
Assistant U.S. Attorney
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1575 20th Avenue
Gulfport, MS 39501
(228)563-1560
Jay.Golden@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record.

s/ Jay T. Golden
Jay T. Golden
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
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KENNETH E. FAIRLEY and
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GOVERNMENT'S RESPONSE TO DEFENDANT FAIRLEY'S MOTION TO CONTINUE

The United States of America, by and through its designated representative, hereby responds to defendant Fairley's Motion to Continue Trial [37], as follows:

The government notes that defendant Fairley filed a written Motion to Continue Trial the day before the pretrial conference was set and on the last day of a non-dispositive motion deadline extension granted by U.S. Magistrate Judge Parker. The motion refers to arguments counsel for Fairley previously made in the context of telephonic conferences with the Court, and the motion additionally sets out dates on which discovery was provided by the government in its effort to fulfill its continuing duty to disclose discoverable information.

To avoid the need to sift through more than 5,000 pages of discovery provided on March 29, 2016, the government provided hard copy supplemental discovery on May 12, 2016 in an effort to be certain that the defense had received every document to which it was entitled.

The decision whether to grant a continuance is squarely within this Court's sound discretion. United States v. Rounds, 749 F.3d 326, 336 (5th Cir. 2014) ("we consider the decision whether to grant a continuance to be within the sound discretion of the trial court"). This Court's exercise of its discretion is entitled to be upheld unless "the district court has abused its discretion and the defendant can establish that he suffered serious prejudice. Id. (internal

quotes and citation omitted). In assessing whether the court abused its discretion, this court considers the "totality of the circumstances," including

> (a) the amount of time available; (b) the defendant's role in shortening the time needed; (c) the likelihood of prejudice from denial; (d) the availability of discovery from the prosecution; (e) the complexity of the case; (f) the adequacy of the defense actually provided at trial; and (g) the experience of the attorney with the accused.

Id. (quoting United States v. Walters, 351 F.3d 159, 170 (5th Cir. 2003)). The balance of these factors weighs against a continuance.

Defendant's motion seeks to shift the burden to the government to demonstrate prejudice if a continuance is granted by the Court. No such duty exists. Clearly, if the government were seeking a continuance, it would have to demonstrate prejudice it would suffer if a continuance was not granted, but demonstrating prejudice is not something the government is required to do at this juncture. It is the defendant and the public which have a right to expect a speedy trial, and it is that expectation by the public which the Court must consider in deciding whether to grant another defense continuance request.

In light of the current trial setting on June 13, 2016, the stated intention of Fairley's counsel to attend the State bar convention in July does not appear to support this motion. Nor should Fairley's alleged health concerns have an impact on the current setting inasmuch as the trial will not interfere with his attendance of out-of-state appointments.

It is not clear how much Fairley's efforts to obtain additional representation have impacted his trial preparation. The fact that attorney Scott Gilbert participated in one telephonic conference with the Court and never made an entry of appearance on Fairley's behalf should not weigh heavily in favor of a continuance.

Wherefore, premises considered, the government respectfully leaves the decision regarding whether to grant a continuance to the considerable discretion of this Court.

Respectfully submitted,

GREGORY K. DAVIS
United States Attorney

By: ***s/ Jay T. Golden***

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to counsel of record.

s/ Jay T. Golden
Jay T. Golden
Assistant U.S. Attorney

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNTIED STATES OF AMERICA	*	
	*	
VERSUS	*	CRIMINAL NO.: 2:16-CR3KS-MTP
	*	
KENNETH E. FAIRLEY, SR.	*	
AND ARTIE FLETCHER	*	
	*	

****

DEFENDANT ARTIE FLETCHER'S RESPONSE IN OPPOSITION TO KENNETH FARILEY'S MOTION TO SEVER

COMES NOW the defendant, Artie Fletcher through undersigned counsel, and files his response to Kenneth Fairley's motion to sever the trial as follows:

1.

Undersigned counsel would oppose a severance. Pursuant to Fed. R. Crim. P. 14(a) joinder is proper in the instant matter and no substantial prejudice will result by trying both defendants in this case.

2.

Undersigned Counsel is not aware of any justifiable legal basis that would justify a severance at this time. A review of the discovery propounded by the government does not establish for a basis severance.

3.

It is in the interest of justice and fairness that both defendants be tried in the instant matter.

WHEREFORE, Defendant, Artie Fletcher prays that court will deny the relief sought by Co-defendant Kenneth Fairley, Sr.

Respectfully submitted,

s/ Clarence Roby, Jr.
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s/ Jennifer Nicaud
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CERTIFICATE OF SERVICE

I hereby certify that I have electronically served the above pleading this 1st day of June, 2016 via, a true copy of the foregoing document to all parties

Clarence Roby, Jr.
CLARENCE ROBY, JR

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED STATES OF AMERICA

V. **CRIMINAL ACTION NO. 2:16-CR-3-KS-MTP**

KENNETH E. FAIRLEY, SR.
and ARTIE FLETCHER

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the Motion to Continue [37], Motion to Sever [38], and Motion to Withdraw Document [44] filed by Defendant Kenneth E. Fairley, Sr ("Fairley"), and the Motion to Continue [40] filed by Defendant Artie Fletcher ("Fletcher"). After considering the submissions of the parties, the record, and the applicable law, the Court finds that Defendant Fairley's Motion to Sever [38] should be withdrawn pursuant to his Motion to Withdraw Document [44]. The Court further finds that Fairley's Motion to Continue [37] is not well taken and should be denied. However, the Court finds that Defendant Fletcher's Motion to Continue [40] is well taken and should be granted.

I. DISCUSSION

A. Fairley's Motion to Sever [38] and Motion to Withdraw Document [44]

Defendant Fairley originally requested the Court to grant a severance in this case. The Court finds that it does not need to rule on this motion, though, as Fairley has subsequently filed his Motion to Withdraw Document [44], requesting that the Motion to Sever [38] be withdrawn. The Motion to Withdraw Document will therefore be **granted** and the Motion to Sever [38] is **withdrawn**.

B. Motions to Continue [37] [40]

The decision to grant a continuance is "within the sound discretion of the trial court." *United States v. Rounds*, 749 F.3d 326, 337 (5th Cir. 2014) (citing *United States v. Shaw*, 920 F.2d 1225, 123 (5th Cir. 1991)). In guiding this discretion, the Court looks to the Fifth Circuit's "totality of the circumstances" standard, evaluating:

> (a) the amount of time available; (b) the defendant's role in shortening the time needed; (c) the likelihood of prejudice from denial; (d) the availability of discovery from the prosecution; (e) the complexity of the case; (f) the adequacy of the defense actually provided at trial;[1] and (g) the experience of the attorney with the accused.

Rounds, 749 F.3d at 337 (quoting *United States v. Walters*, 351 F.3d 159, 170 (5th Cir. 2003)).

1. Fairley's Motion [37]

Defendant Fairley makes multiple arguments in support of his Motion to Continue [37]. First, Fairley makes the argument that the original trial date of April 18, 2016, violated the Speedy Trial Act because it was less than thirty (30) days after Fairley first made his appearance in court. Because of this, he contends that the current trial date, June 13, 2016, should be considered the first trial setting. The Court does not find that this is a reason for a continuance, and will not grant one on this basis alone.

Fairley next attempts to argue that because of the vast amount of documents the defense must go through, which he estimates to be around 6,000 pages, he would be prejudiced if he were required to go forward as scheduled. The bulk of these documents, 5,000 pages, were shipped overnight via Federal Express on March 29, 2016, giving Fairley and his attorneys over ten weeks to review these documents. The remaining documents were sent on May 12, 2016, giving Fairley and his attorneys over a month to review them. If Fairley and his attorneys have been diligent, as Fairley contends, then they have had ample opportunity to review these documents prior to the trial date.

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[1]The adequacy of the defense provided at trial is obviously only considered on appellate review.

Fairley also argues that there are novel issues of law that must be decided in this case. These issues of law, insomuch as they exist, have existed since the indictment was issued by the grand jury on March 10, 2016, and Fairley and his attorneys have had over three months to research these questions before the start of trial.

Fairley next argues that he has obtained additional counsel that must be brought into his defense team and adequately briefed on the case. The Court would first note that the additional counsel Fairley has hired has yet to enter an appearance in this case and is therefore not a counsel of record. With Fairley's original attorney still lead counsel on the case, the Court does not see how the addition of this new attorney would warrant a continuance, especially when it was Fairley's own decision to wait until two weeks before trial to hire him.

Fairley also contends that he should be granted a continuance because no prejudice has been alleged on the part of the government or his co-defendant. However, the burden is not on the government or Fletcher to prove lack of prejudice, but rather on Fairley to prove prejudice. *See Rounds*, 749 F.3d at 337 (quoting *Walters*, 351 F.3d at 170).

Finally, Fairley alleges that he has been diligent in pursuit of his defense, traveling "from Mississippi to Michigan" in search of experts and counsel, and that such diligence has taken a toll on his health. While it is regretful that the stress of his criminal trial is negatively impacting the defendant's health, the Court does not see how this will result in a prejudice to Fairley at trial, particularly when it does not appear that his health conditions have stopped him from diligently pursuing his defense.

The Court therefore finds that Fairley has not shown that a continuance is necessary, and will therefore **deny** his motion [37].

2. Fletcher's Motion [40]

Defendant Fletcher has also filed a Motion to Continue [40], and argues that the sudden health issues of a critical witness in his case will cause him prejudice if a continuance is not granted. Fletcher's mother, Elaine Fletcher, is expected to testify in this case in his defense, and will be unable to participate in the trial given the current setting, as she is currently hospitalized after suffering a stroke. Because Fletcher has designated his mother as a critical witness in his defense and because the Court finds that a denial of the continuance could prejudice his defense, the Court will **grant** his Motion to Continue [40].

II. CONCLUSION

IT IS THEREFORE ORDERED AND ADJUDGED that Fairley's Motion to Withdraw Document [44] is **granted**.

IT IS FURTHER ORDERED AND ADJUDGED that Fairley's Motion to Sever [38] is **withdrawn**.

IT IS FURTHER ORDERED AND ADJUDGED that Fairley's Motion to Continue [37] is **denied**.

IT IS FURTHER ORDERED AND ADJUDGED that Fletcher's Motion to Continue [40] is **granted**.

SO ORDERED AND ADJUDGED this the 3rd day of June, 2016.

s/ Keith Starrett
UNITED STATES DISTRICT JUDGE