IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY WHITEAGLE,
CLARENCE PETTIBONE and
DEBORAH ATHERTON,

Defendants.

ORDER

11-cr-65-wmc

On June 15, 2011, the grand jury returned an indictment charging defendants Timothy Whiteagle, Clarence Pettibone and Deborah Atherton in a fourteen count indictment with ten counts of bribery arising out of the alleged solicitation and receipt of money from companies seeking business contracts with the Ho-Chunk Nation. This indictment included three tax charges against Whiteagle and a false statement charge against Pettibone. *See* dkt. 5. Each defendant timely moved for severance of counts and defendants on a variety of grounds. *See* dkts. 32 (Pettibone), 37 (Atherton) and 39 (Whiteagle). The government filed a brief opposing any severance(s), *see* dkt. 45, but it also sought and obtained a superseding indictment in which it attempted to link the tax charges against Whiteagle more tightly to the bribery charges; the government also added as Count 15 a witness tampering charge against Whiteagle.

For the reasons stated below, I am severing Count 12 from the indictment and denying all other parts of the three motions to sever.

BACKGROUND FACTS

The superseding indictment is the operative charging document now, although it was returned after the parties had finished briefing the motions to sever. The superseding indictment (hereafter just "the indictment") speaks for itself, but by way of synopsis, Count 1 charges all three defendants with violating 18 U.S.C. § 371 by conspiring from September 30, 2002 until September 1, 2009 unlawfully to provide "things of value" and to accept things of value related to government programs of the Ho-Chunk Nation, in violation of 18 U.S.C. §§ 666(a)(2) and 666(a)(1)(B). During the time period covered by Count 1, Pettibone, a Ho-Chunk tribal member, was an elected legislator of the Nation and served in other government posts such as vice president, chair of the Finance Committee and a member of the Development Committee. Whiteagle, a Ho-Chunk tribal member, worked as a business consultant. Atherton sometimes worked with Whiteagle on his projects involving the Nation. Three of Whiteagle's clients were Cash Systems Inc., Trinity Financial Group, and "The Company" (a "John Doe" pseudonym used by the government in the indictment).

Against this backdrop, the indictment alleges a pay-to-play conspiracy: Whiteagle, assisted occasionally by Atherton, would unlawfully solicit his three client companies to provide things of value (cash, a Pontiac Firebird, NFL tickets, *etc.*) to Pettibone and his family, either directly or through Whiteagle and Atherton. Pettibone unlawfully would accept (or allow family members to accept) these valuable things, intending to be influenced in his legislative decisions regarding the companies's attempts to enter into business contracts with the Nation.

Relevant to the severance motions, Count 1 alleges in ¶ 4(h) that all three defendants "took various steps to hide and disguise their actions"; in ¶ 5(a) that Cash Systems paid

Whiteagle about $2 million for his efforts on their behalf, including about $60,000 in 2002, $300,000 in 2003, and $275,000 in 2004. (Also, as defendants point out, the earliest overt act charged in the indictment allegedly occurred on October 19, 2006.)

Counts 2 through 10 charge the three defendants with substantive violations of § 666: Pettibone is charged alone in Counts 5, 7 and 8. Whiteagle is alleged to have aided and abetted Pettibone in Counts 7 and 8, and to have acted with Atherton in Counts 4 and 10, and to have acted alone in Counts 2, 3, and 9. Atherton is not charged alone in any count.

Count 11 charges Pettibone with violating 18 U.S.C. § 1001 by lying to the FBI during an August 5, 2008 investigative interview, falsely claiming that he did not know that Whiteagle had any business relationship with Cash Systems, that he did not know that Whiteagle or Atherton were involved with The Trinity Financial Group, and that Pettibone's Firebird was a birthday gift from a relative.

Counts 12, 13 and 14 are tax charges against Whiteagle alone. Count 12 charges Whiteagle with willful tax evasion related to his 2002 income, based on his original claim that he had gross receipts that year of $80,616, taxable income of $31,758, and a tax liability of $8,616, which he amended in 2003 by claiming a business deduction intending to take his taxes down to zero for the year, and which he corroborated in 2007 with additional lies about interest paid on a business loan. Count 13 charges Whiteagle with willfully submitting a false tax return related to his 2003 income: Whiteagle claimed gross income of $0, "whereas Whiteagle then knew and believed that he had gross income received from Cash Systems, Inc., well in excess of that amount." Count 14 charges that Whiteagle lied on his IRS Schedule C for tax year 2004, claiming gross income of $770, "whereas Whiteagle then knew and believed that he had gross income received from Cash Systems, Inc., well in excess of that amount."

Count 15, new to the superseding indictment, charges Whiteagle with violating 18 U.S.C. § 1512(b)(3) in July 2007 when, after learning that the FBI was investigating Whiteagle, Pettibone, Cash Systems Inc. and its employees, Whiteagle unlawfully tried to persuade a witness who worked for Cash Systems that a kickback from Whiteagle to the employee actually was a loan that the employee was supposed to have repaid.

ANALYSIS

Each of the defendants has filed a motion for severance pursuant to F.Rs. Crim. Pro 8 and 14(a). Rule 8(a) allows joinder at trial of all charges against a defendant that are connected with or constitute parts of a common scheme or plan; Rule 8(b) allows defendants to be charged and tried together if they are alleged to have participated in the same series of acts or transactions constituting an offense or offenses. Rule 14(a) provides that if joinder of defendants or counts in an indictment appears to prejudice a defendant, then the court may provide whatever relief justice requires, including severing counts or defendants for separate trials.

Defendants acknowledge that

> There is a preference in the federal system for joint trials of defendants who are indicted together. Joint trials play a vital role in the criminal justice system. They promote efficiency and serve the interests of justice by avoiding the scandal and iniquity of inconsistent verdicts. For these reasons, we have repeatedly approved of joint trials.

Zafiro v. United States, 506 U.S. 534, 537 (1993).

The Court noted in *Zafiro* that instead of severance, less drastic measures, such as limiting instructions, often suffice to cure any risk of prejudice. So long as counts are properly joined

under Rule 8, "severance is warranted 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." *Id.* at 539; *see also United States v. Warner*, 498 F.3d 666, 699 (7th Cir. 2007).

This segues to each defendant's objection under Rule 8 to joining the tax charges against Whiteagle in Counts 12, 13 and 14 with the other charges in the indictment. Although the government did not explicitly concede the point, after the defendants filed their reply briefs, the grand jury returned a superseding indictment that added allegations intended to establish the connection between the tax charges and the bribery conspiracy. (The government flagged these additions for the court in a March 2, 2012 letter, *see* dkt. 54.) The additions in the superseding indictment suffice to connect Counts 13 and 14 to the bribery scheme; Count 12, however, does not appear to pass muster under Rule 8, even as modified in the superseding indictment.

Counts 13 and 14 charge Whiteagle with violating 26 U.S.C. § 7206(1) by making false statements on income tax forms for the calendar years 2003 and 2004, in that he willfully omitted the substantial payments he had received from Cash Systems in the two years charged. Count 1 of the superseding indictment now breaks out Whiteagle's income from Cash Systems in 2003 ($300,000) and 2004 (($270,000). Counts 13 and 14 charge that Whiteagle reported a gross income of zero dollars for 2003 and $770 in 2004, when he knew that he had gross income from Cash Systems "well in excess" of the amount reported.

This all fits well within the allegation in ¶ 4(h) of Count 1 that "It was part of this conspiracy that: . . . Whiteagle, Pettibone and Atherton . . . took various steps to hide and disguise their actions." Joinder of tax evasion counts is appropriate when they are based on

unreported income flowing directly from the activities that are the subject of the other counts. *United States v. Warner,* 498 F.3d at 699-700.

The new information in the superseding indictment also obviates Whiteagle's argument that these tax charges cannot be related to the conspiracy because they predate the earliest-charged overt act by several years. Apart from this, and as the government noted in its brief filed before the superseding indictment, Count 1 charges that the conspiracy began in 2002, which would encompass the time period of the tax charges. Whiteagle's argument that there are no overt acts charged as part of the conspiracy before 2006 is not a basis to sever the tax charges. First, Whiteagle argues that the government cannot prove that the conspiracy began in 2002, as evidenced by its failure to allege any overt acts during this time period. *see* Reply Brief, dkt. 39 at 1-4. The government had argued that it was not allowed to charge overt acts that predated the statute of limitations, *see* dkt. 45 at 3, but this is incorrect: so long as the charged conspiracy continued into the five-year window before the return of the indictment, the government may prove earlier overt acts taken in furtherance of the conspiracy. *United States v. Mobley*, 193 F.3d 492, 494 (7th Cir. 1999); *United States v. Yashar*, 166 F.3d 873, 876, 880 (7th Cir. 1999)(a § 666 conspiracy case). So, it is not clear if the government actually has evidence of other overt acts predating June 15, 2004, or if Whiteagle is correct that it has no such evidence.[1] In any event, Whiteagle's argument essentially is a claim that the government will not be able to prove at trial the alleged temporal parameters of the conspiracy charged in Count 1. This is not a basis to sever the tax counts charged in Counts 13 and 14 pursuant to Rule 8.

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[1] The government cites *Yashar*, 166 F.3d 873 and *United States v. Useni*, 516, F.3d 634, 655-56 (7th Cir. 2008) for the proposition that it cannot charge in a conspiracy count overt acts that predate the statute of limitations. I do not read these cases as limiting the government in this fashion, but regardless whose gloss is correct, the conspiracy charged in Count 1 of the superseding indictment is broad enough to encompass at least Counts 13 and 14. *See, e.g.,* Paragraphs 5(b), (c) & (h) of Count 1.

Count 12, however, presents a different situation. It is a tax evasion count under 26 U.S.C. § 7201, charging acts of dishonesty against Whiteagle that have no arguable connection to the conspiracy alleged in Count 1. As a starting point, ¶ 5(a) of Count 1 alleges that Cash Systems paid Whiteagle approximately $60,000 in 2002 to peddle influence; Count 12 alleges that Whiteagle reported $81,540 in gross receipts for 2002, with taxable income of $31,758. Thus, it is not at all apparent that Whiteagle was concealing the money he received from Cash Systems that year. Count 12 goes on to allege that Whiteagle amended his 2002 return to claim a business deduction he had forgotten; when the IRS demanded corroboration, Whiteagle caused a false verification letter to be prepared, which he then filed with IRS. There is no suggestion in Count 12 that *these* alleged acts of dishonesty had anything to do with Cash Systems, Clarence Pettibone, or any other topic relevant to the bribery conspiracy charged in Count 1. In short, Count 12 fails the test of Rule 8(a) because there is no showing that the charged conduct is connected with or constitutes part of the common scheme or plan charged in Count 1.

Even if this were a closer call–and it's not very close–the equitable concerns of Rule 14(a) compel the severance of Count 12. I agree with Whiteagle that Count 12 makes it "too easy for the jury to conclude that if Whiteagle committed fraud on his tax returns, then he is generally dishonest in character." Brief in Support, dkt. 40 at 4-5. The allegations of Count 12 portray Whiteagle as an all-purpose rogue, willing to lie and cheat in a variety of fora. This is the sort of evidence against which F.R. Ev. 608(b) protects at trial, and absent a stronger, tighter connection to the alleged conspiracy, the government is not going to slip it in through the side door as a tax count.

But these same arguments are not persuasive as to Counts 13 and 14. As already noted, these two counts each charge one discrete act that now is tied more tightly to the allegations of the bribery conspiracy. These counts do not allege tax "fraud," they allege one false statement (per count) in a return to the IRS in an attempt by Whiteagle to hide income generated as part of the bribery conspiracy. As for Whiteagle's claim of unfair prejudice, compare and contract these allegations with the conduct charged against Whiteagle in Count 1: ¶ 4(a) alleges that Whiteagle kept his involvement with the three named clients hidden from the Ho-Chunk nation. ¶¶ 4(c) & (d) allege that Whiteagle (along with Atherton) "corruptly solicited" the businesses and "corruptly gave" to Pettibone and his family checks, money orders, a car, NFL tickets, golf outings, visits to adult entertainment venues, vacations, and a $50,000/ year job for a relative. According to ¶¶ 4(f), (g) & (h), these payments caused Pettibone, in consultation with Whiteagle, covertly to favor Whiteagle's clients at the expense of the client's competitors and in violation of Pettibone's fiduciary duty to the Nation. Notwithstanding the relatively benign legal definition of "corruptly" for the bribery charges,[2] the allegations against Whiteagle, Pettibone and Atherton in Counts 1 through 10 are at least as alarming as the false statement charges against Whiteagle in Counts 13 and 14. The joinder of these two tax counts to the bribery counts does not appear to prejudice Whiteagle.

The same analysis holds true for Atherton and Pettibone's objections under Rule 14(a) to the inclusion of Counts 13 and 14 at any joint trial with Whiteagle. Given the nature and scope of the allegations against them (and Whiteagle) in Counts 1 through 10, the jury's

[2] "A person acts corruptly when that person acts with the understanding that something of value is to be offered or given to reward or influence [another] in connection with [the other's] official duties." Seventh Circuit Pattern Criminal Jury Instructions (1999 ed.) at 216.

additional consideration of two separate tax counts involving Whiteagle's failure to report a fraction of the $2 million he allegedly received in two of the seven years of the charged conspiracy does not appear to prejudice either of the codefendants. The tax charges are just two drops in a bucketful of allegations of deceit, subterfuge and corruption.

The new allegations in the superseding indictment also dispose of Atherton and Pettibone's Rule 8(b) concerns. The rule is satisfied if the defendants are charged with crimes that well up out of the same series of acts, but they need not be the same crimes and all defendants need not be charged in each count. *United States v. Warner,* 498 F.3d at 699. That now is the situation here. The fact that neither Atherton nor Pettibone knew that Whiteagle had failed to report income to the IRS is of no moment: it would be surprising if either of them knew how much money Cash Systems actually paid Whiteagle for his services, or whether he even was filing tax returns. Atherton and Pettibone's concern that the jury will hold Whiteagle's false statements to the IRS against the two of them are unpersuasive. Certainly they each are entitled to limiting instructions on this point, during trial, during the post-trial reading of the instructions, or perhaps both, just as Whiteagle and Atherton are entitled to limiting instructions regarding the false statement and obstruction charges against Pettibone. *See United States v. Williams*, 553 F.3d 1073, 1079 (7th Cir. 2009)

This segues to Pettibone's argument that he should not be tried with Whiteagle, because the nature and scope of the allegations against Whiteagle are so vast as to be prejudicial to Pettibone. Pettibone argues that he is alleged to have received only saw a fraction of the money that Whiteagle allegedly wheedled out of Cash Systems. Reply Br., dkt. 48 at 4-5. It is uncompelling–perhaps even a tad disingenuous–for Pettibone to complain that *he* is the victim

of prejudicial joinder when he was the elected official who was the *sine qua non* of the alleged bribery conspiracy. A pay-to-play scheme isn't going to work without a player. Neither is it persuasive for Pettibone to suggest that the jury will unfairly assume that he must have gotten some money from Whiteagle simply because Whiteagle got so much money from Cash Systems. The allegations in the indictment suggest that the government has much more specific evidence about particular things of value that Pettibone and his relatives received (in addition to cash) that will establish the corrupt relationship between the two men.

Finally, the court should look at whether the addition of Count 15 to the superseding indictment militates toward severance, since Pettibone (and Atherton) didn't have a chance to argue this point. A conspiracy and its cover-up are considered parts of a common plan. *United States v. Warner*, 498 F.3d at 699; *United States v. Curry*, 977 F.2d 1042, 1049-50 (7th Cir. 1992). Whiteagle's alleged effort, within the time frame of the alleged conspiracy, to persuade a Cash Systems employee to lie to the FBI about a kickback, is properly joined to the other charges. Certainly Pettibone is in no position to complain that another defendant has been charged with a specific crime of dishonesty, given that Pettibone is charged in Count 11 with lying to the FBI during its investigation of this alleged bribery conspiracy.

But what about Atherton? Unlike Pettibone and Atherton, she faces no charges of false statements or coverup, and she is named in only two substantive counts beyond the conspiracy charge. "However, the existence of a disparity in weight of evidence against a moving defendant and co-defendants does not itself amount to grounds for severance." *United States v. Del Valle*, ___ F.3d ___, 2012 WL 919593 at *7 (7th Cir. March 20, 20120). Many conspiracies have hierarchies, with a potentially great disparity in the evidence between those at the apex and

those at the base; this is not a ground for severance. *United States v. Moore*, 363 F.3d 631, 642 (7th Cir. 2004), *partially reversed on other grounds in Young v. United States,* 543 U.S. 1100 (2005); *United States v. Goines*, 988 F.2d 750, 781 (7th Cir. 1993)(not error for court to deny five defendants' motions for severance as minor players in a fifteen–defendant, seven week conspiracy trial). Here, the heart of the charged conspiracy involves three people who were friends and business associates. Atherton allegedly worked directly with both of them, performing hands-on work as part of the bribery scheme.

True, Atherton is not charged with lying to the FBI, like Pettibone is, and she is not charged with false statements on a tax form and witness tampering, like Whiteagle is, but these allegations all are part of the alleged conspiracy of which she is charged with being an active and integral member. Count 1 alleges specific overt acts by Atherton personally in furtherance of the conspiracy. *See* ¶ 19, Overt Acts (2), (4), (17), (23), (24) and (28). Atherton is entitled to careful limiting instructions, but she is not entitled to a separate trial. There is no serious risk that a joint trial would compromise a specific trial right of Atherton's or that it would prevent the jury from making a reliable judgment about Atherton's guilt or innocence. *Zafiro*, 506 U.S. at 539; *Del Valle*, 2012 WL 919593 at *8..

Finally, Atherton and Pettibone have raised concerns that a joint trial will infringe their rights under the Sixth Amendment's Confrontation Clause. Pettibone generally predicts that the government will attempt to admit at trial some unspecified statements by Atherton and Whiteagle which he will not be allowed to cross-examine, thus violating his Confrontation Clause right. This concern is too hypothetical to be a ground for severance; if it vests in some concrete way during trial, then Pettibone should ask for relief at that time.

Atherton contends that Pettibone's blanket denial of culpability to the FBI (charged against Pettibone in Count 11) could be viewed as incriminating *her* because Pettibone disavowed knowledge of Atherton's ties to Trinity and Whiteagle's ties to Cash Systems, when he clearly knew about both. Atherton asserts a right to cross-examine Pettibone about why he made these false disavowals lest the jury consider Pettibone's statements as evidence of Pettibone's consciousness of Atherton's guilt. Dkt. 37 at 3-4; dkt. 47 at 5. Atherton further disputes the government's characterization of Pettibone's allegedly false denials as coconspirator statements in support of the conspiracy, which would not hearsay under F.R. Ev. 801(d)(2)(E).

As for Atherton's concern over Pettibone's false assertion that he did not know of Atherton's connection to Trinity, the government correctly argues that it is not even hearsay under F.R. Ev. 801(c) because the government is not offering this statement for the truth of the matter asserted: to the contrary, it is being offered because it is false. This simply is not hearsay. *Anderson v. United States*, 417 U.S. 211, 219-20 (1974). As a result, the primary rationale for excluding hearsay–the inability of the adversary to cross-examine the absent declarant as to the truth of the statement–is lacking. Additionally, there is no need for the government to prove that the false statement was made during the alleged conspiracy, so long as it was relevant in some way to prove the charged conspiracy. *Id. See also United States v. Warner*, 498 F.3d at 701 (statements not admitted for the truth of the matter asserted are not hearsay and do not implicate the Confrontation Clause). Further–and again correctly–the government argues that Pettibone's statements to the agents do not present a *Bruton* problem[3] because Pettibone's statements are not inculpatory and do not amount to a confession. *Warner*, 498 F.3d at 701.

[3] *Bruton v. United States*, 391 U.S. 123, 127 (1968)

Atherton takes issue with these positions in her reply brief but does not articulate any specifics that would establish potential prejudice sufficient to justify severing her trial from Pettibone's. It is difficult to envision how Atherton might cross-examine Pettibone in a useful way about his allegedly false claims regarding her connection to Trinity, but again we are veering into hypotheticals. The bottom line is that Atherton does not appear to be prejudiced by a joint trial with Pettibone at which the government presents its evidence against him in support of Count 11.

Which is, with the exception of Count 12, the bottom line for all three defendants: neither Rule 8 nor Rule 14 provides a basis to sever the trials of the defendants from each other or any of the counts except for Count 12.

ORDER

It is ORDERED that:

(1) Defendant Clarence Pettibone's motion for severance, dkt. 32, is DENIED.

(2) Defendant Deborah Atherton's motion for severance, dkt. 37, is DENIED.

(3) Defendant Timothy Whiteagle's motion for severance, dkt. 39 is GRANTED IN PART, and Count 12 is severed from the other counts in the indictment and shall be tried separately. The remainder of defendant Whiteagle's motion for severance is DENIED.

Entered this 27th day of March, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge