

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

| | | |
|--------------------------|---|---------------------|
| UNITED STATES OF AMERICA |] | |
| |] | No. 16-CR-10124-WGY |
| v. |] | |
| |] | |
| CARLOS RAFAEL and |] | |
| ANTONIO FREITAS |] | |

**GOVERNMENT’S OMNIBUS RESPONSE
TO DEFENDANTS’ MOTIONS TO SEVER**

The government hereby responds to both defendants’ motions to sever defendants for trial (docket nos. 63 and 64). As discussed further below, the government ultimately does not oppose severance.

Introduction

In May 2015, the Internal Revenue Service began a criminal investigation of Carlos Rafael, who owns one of the largest commercial fishing businesses in the United States. Two undercover agents approached Rafael about buying his fishing business and, over time, Rafael told them how he systematically deceives federal authorities about what fish he has caught, sells bulk fish under the table, and smuggles the resulting cash to Portugal to avoid U.S. taxation.

The cash smuggling is where the co-defendant, Antonio Freitas, comes in. On October 14, 2015, in a consensually recorded meeting at a restaurant, Rafael told the undercover agents that he takes cash through Logan International Airport with the help of a local sheriff’s deputy who has airport privileges. This part of the conversation was a bit fragmented, but Rafael essentially told the agents that the sheriff’s deputy works with “immigration” and that Rafael helped the deputy get a promotion at the sheriff’s department; Rafael appeared to misremember Freitas’s rank and certain other details. Rafael explained that he moved money to Portuguese banks to hide it from

U.S. taxation and discussed with the undercover agents whether they would want to do the same thing.¹

Based on the recorded conversation, the case agents soon identified Rafael's likely co-conspirator as co-defendant Freitas, who at that time was one of two Bristol County Sheriff's Deputies who also worked as a Task Force Officer with the Department of Homeland Security (and so had airport security privileges). This surmise was later corroborated by surveillance and phone records.

On February 26, 2016, agents executed a search warrant at Carlos Rafael's office in New Bedford and arrested him and his bookkeeper on a criminal complaint charging them with conspiracy and violations of 18 U.S.C. § 1519. The investigation now overt, that same day the agents called Freitas, who agreed to be interviewed. During the interview, the agents played a portion of the UC recording from October 14, 2015, which made Freitas visibly upset. During this and later discussions with the agents, Freitas admitted to smuggling \$17,500 in cash to Portugal for Rafael on February 5, 2016, telling the agents that Rafael asked him to transport the money and deposit it in Rafael's Santander account in that country. Freitas even gave the agents the Santander deposit slip, which bore Rafael's name as account holder and reflected the deposit amount. Freitas also confirmed that, at Freitas's behest, Rafael had called the Sheriff of Bristol County to suggest that he promote Freitas – an incident Rafael also described to the undercover agents during the recorded meeting in October 2015.

On May 4, 2016, a grand jury indicted Rafael on one count of conspiracy; 25 counts of false statements related to his fishing business; and, with Freitas, on one count of bulk cash

¹ The relevant excerpt from the transcript of the undercover recording (pages 30-37 of Volume I of the transcription pages 2-5 of Volume II) is attached at Tab A, with relevant portions highlighted. "MALE VOICE 3" and "MALE VOICE 4" are the undercover agents.

smuggling. Freitas was charged with one count of bulk cash smuggling and one count of structuring. *See* Dkt. Entry no. 22.

Argument

Both defendants have filed motions for severance: Freitas because of what Rafael told the undercover agents about Freitas's involvement during the recorded meeting on October 14, 2015, and Rafael because of what Freitas told the case agents on February 26, 2016. Freitas's motion is legally incorrect, but the government concedes that Rafael's motion is meritorious.

I. Severance is Justified Based on Freitas's Confession to Federal Agents, Which Expressly Implicated Rafael in Bulk Cash Smuggling

It is well-established that, as a rule, "persons who are indicted together should be tried together." *United States v. O'Bryant*, 998 F.2d 21, 25 (1st Cir. 1993). "There is a preference in the federal system for joint trials of defendants who are indicted together" because joint trials promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (internal quotations and citations omitted).

Rule 14 of the Federal Rules of Criminal Procedure, however, recognizes that in some instances a joint trial can prejudice one of the parties. Rule 14 does not require severance in a given instance; rather, it "leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro*, 506 U.S. 538-39. When defendants properly have been joined "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." *Id.*; *see also O'Bryant*, 998 F.2d at 25.

Since the Supreme Court's decision in *Bruton v. United States*, courts have recognized that a defendant's constitutional right to confrontation can be compromised by admitting a co-

defendant's confession that directly inculcates the defendant by name. *See* 391 U.S. 123, 137 (1968). To require severance, the co-defendant's statement must be "powerfully incriminating" and not curable by redaction and a limiting instruction. *See Richardson v. Marsh*, 481 U.S. 200, 208 (1987); *United States v. Lopez-Lopez*, 282 F.3d 1, 13 (1st Cir. 2002). "Powerfully incriminating" means, at a minimum, that the statement incriminates the defendant on its face, and not just when it is linked to other trial evidence. *See Richardson*, 481 U.S. at 208; *Brown v. Maloney*, 267 F.3d 36, 41 (1st Cir. 2001).

Here, as summarized above, over the course of two interviews and several calls, Freitas not only confessed to the agents about his own role in bulk cash smuggling but expressly implicated Rafael as his co-conspirator and the source of the funds. Because he was talking to people he knew were federal agents actively investigating a crime, Freitas's statements would undoubtedly be considered testimonial for purposes of the Confrontation Clause and fall squarely within *Bruton*. *See, e.g. Bruton*, 391 U.S. at 135; *Davis v. Washington*, 547 U.S. 813, 823-27 (2006) (discussing, in wake of *Crawford v. Washington*, when statements to police should be considered testimonial).

The government intends to introduce Freitas's admissions against Freitas at trial and, beyond Freitas and Rafael, there are no other defendants tied to this conduct. *See, e.g., United States v. Vega-Molina*, 407 F.3d 511, 520 (1st Cir. 2005) (noting, in dicta, that redaction of co-defendant's confession may not be sufficient to avoid *Bruton* problems in a case involving "so few defendants that the statement leaves little doubt" as to defendant's identity). Having re-reviewed Freitas's admissions and the surrounding evidence, the government concedes that it would be difficult to avoid infringing on Rafael's confrontation rights by "redacting" Freitas's admissions.

Consequently, the government does not oppose severance on the grounds stated in Rafael's motion.

Finally, as noted by both defendants' counsel, the bulk of the indictment concerns Rafael's long-term conspiracy to under-report the taking of certain species of fish by lying to federal authorities. The portion addressing Freitas helping Rafael to smuggle the proceeds to Portugal is smaller and, in factual terms, not difficult to separate from the rest of the case. *See Def. (Rafael) Mtn.* at 4 (citing *United States v. Bellomo*, 954 F. Supp. 630, 650-51 (S.D.N.Y. 1997)).

II. In Contrast, Freitas's Severance Motion is Meritless Because the Statements at Issue Were Nontestimonial

In contrast, however, Freitas's motion for severance is legally incorrect. Freitas argues that severance is required because, when explaining his business activities to the undercover agents, Rafael implicated Freitas, by name, in bulk cash smuggling.

Rafael's statements, however, were clearly "nontestimonial" and so, as the First Circuit and other courts have repeatedly held, they are not subject to *Bruton* analysis because they are not covered by the Confrontation Clause. For example, in *United States v. Figueroa-Cartagena*, the First Circuit rejected a *Bruton* challenge to a recorded jail call from a co-conspirator to his mother, which implicated another defendant, because the statements were nontestimonial:

Applying these principles, we conclude that Neliza's confrontation argument is without merit. We considered the character of the phone conversation in the companion opinion, holding that the statements made by Alberto and his mother were not testimonial. *See Castro-Davis*, Nos. 08-2108, 08-2109, 2010 WL 2794360, 612 F.3d 53 (1st Cir. 2010). As a consequence, Neliza has no constitutional right to confront Alberto. Her claim under the Confrontation Clause, whether denominated a *Crawford* challenge or a *Bruton* challenge, must be rejected. [*United States v.*] *Johnson*, 581 F.3d [320], 326 [(6th Cir. 2009)].

612 F.3d 69, 85 (1st Cir. 2010); *see also, e.g., United States v. Pike*, 292 Fed. App'x 108, 112 (2nd Cir. 2008) (non-testifying defendant's earlier admissions to another inmate, implicating co-defendant, found nontestimonial and so not subject to *Bruton*).²

Similarly, the corollary to Rafael's statements to the undercover agents being nontestimonial is that they are admissible against Freitas as co-conspirator statements and statements by Rafael against his own interests. *See* FRE 801(d)(2)(E), 803(b)(3). This is so even in light of the Supreme Court's decision in *Crawford*. *See Davis*, 547 U.S. 813, 823-27 (2006); *see also, e.g., United States v. De La Paz–Rentas*, 613 F.3d 18, 29 (1st Cir. 2010) (*Bruton* "does not bar the use of a co-conspirator statement made in furtherance of the conspiracy"). Courts have followed this precise reasoning in admitting consensual recordings of a non-testifying co-conspirator that implicate the trial defendant. *See, e.g., United States v. Johnson*, 581 F.3d 320, 324-27 (6th Cir. 2009) (because statements were nontestimonial, rejecting *Bruton* and *Crawford* arguments and affirming admission under FRE 804(b)(3) of consensual recording of one defendant that implicated co-defendant).³

² Whether an out-of-court statement is "testimonial" depends principally on whether it was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford v. Washington*, 541 U.S. 36, 52 (2004); *United States v. Castro-Davis*, 612 F.3d 53, 64-66 (1st Cir. 2010) (discussing *Crawford*, finding recorded call from jail nontestimonial and so admissible against co-defendant); *United States v. Brito*, 427 F.3d 53, 58-63 (1st Cir. 2005) (finding anonymous 911 call implicating defendant nontestimonial). Factors include the formality of the interaction and whether the statements could be objectively viewed as intended for use in a later legal proceeding. *See, e.g., Davis*, 547 U.S. at 823-24; *Crawford*, 541 U.S. at 51.

The Court specifically held in *Crawford* that "interrogations by law enforcement officers fall squarely within [the] class" of testimonial hearsay, because of their formality and the obvious implication that the officers are gathering evidence for future use. 541 U.S. at 53. The Court also held that, in contrast, "statements in furtherance of a conspiracy," for example, are "by their nature" nontestimonial. *Id.* at 56.

³ *See also, e.g., United States v. Rodas*, 523 Fed. App'x 731, 732 (1st Cir. 2013) (rejecting *Bruton* and more general Confrontation Clause argument concerning admission of intercepted calls by co-conspirators); *Pike*, 292 Fed. App'x at 112 (rejecting Confrontation Clause argument and affirming admission under FRE 804(b)(3) of jailhouse confession implicating co-defendant); *Figueroa-Cartagena*,

Conclusion

The government does not oppose defendant Rafael's motion for severance. Defendant Freitas's motion for severance is legally incorrect, but likely moot.

Respectfully submitted,

Carmen M. Ortiz
United States Attorney

By: /s/ Andrew Lelling
Andrew E. Lelling
David G. Tobin
Assistant U.S. Attorneys

Date: December 8, 2016

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be sent to those indicated as non-registered participants, on December 8, 2016.

/s/ Andrew Lelling
Andrew E. Lelling

612 F.3d at 85 n. 23 (noting that district court admitted statement under FRE 804(b)(3), a ruling properly analyzed by determining whether the statement was against the interest of the declarant, not against the interest of the defendant herself).

**INTERNAL REVENUE SERVICE -
WARWICK, RI**

**CASE # 1000273609-3: Recorded Telephone
Conversations
Oct142015121430EDT**

1
2 MALE VOICE 4: Yep.

3 MALE VOICE 3: So you do charities over
4 there, you don't do it over here?

5 CARLOS: No, because I end up in the wrong
6 place. But I do, sometimes, you know, if I see
7 a family who is - - I'll go buy a carriage of
8 food, I tell my wife go buy a carriage of food -
9 - and I'll bring the food, I won't give them
10 money because - - but I'll put food on their
11 table. That I can do. Money I will not do.

12 MALE VOICE 4: Well, it helps, you know
13 people in the government over there too. That
14 is a big, you know what to trust.

15 CARLOS: The captain this is - - the guy is
16 the captain at the prison and the sheriff.

17 MALE VOICE 4: Here or there?

18 CARLOS: - - county sheriff.

19 MALE VOICE 4: Here?

20 CARLOS: Here, he is involved in this too.
21 He was - - election.

22 MALE VOICE 4: Why?

23 CARLOS: Because when I told the cameras to
24 get the fuck out, I said if you want to do this
25 for political gain between you and these jerk

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1
2 offs - - I'm out. If you want to do it because
3 you feel good with yourself, I'm on board. I do
4 whatever I can as long as you feel good with
5 yourself. For political gains don't count me
6 in.

7 MALE VOICE 3: How much money do you leave
8 behind there?

9 CARLOS: 30,000, 40,000.

10 MALE VOICE 4: To the charity.

11 MALE VOICE 3: I would give 10,000 to the
12 charity as long as they - - . Going to be a
13 write off. You see what I'm saying?

14 MALE VOICE 4: Uh-huh.

15 MALE VOICE 3: - - can you?

16 MALE VOICE 4: Maybe.

17 MALE VOICE 3: How much cash you can bring
18 there?

19 CARLOS: I always take a lot, my own, I take
20 40, 50, 60,000 every time I travel, I put it all
21 in there because sometimes I buy this, I buy
22 that, now I'm - - or whatever.

23 MALE VOICE 3: Let me ask you a question,
24 the guys you give the money too, they give you
25 the - - right?

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CARLOS: The 502.

MALE VOICE 3: The 502. Did they ask you want amount you want to be there or they give you like the paper?

CARLOS: No.

MALE VOICE 3: They don't care.

CARLOS: Just to make sure I'm not talking shit. When I say shit, I want to make sure.

MALE VOICE 4: Yeah, if you want to take 50, 60,000 like him and put it over there, why not?

MALE VOICE 3: For the charity.

MALE VOICE 4: For the charity yeah.

MALE VOICE 3: Do you see what I'm saying, and go with him or give him, I don't care.

MALE VOICE 4: Yeah.

MALE VOICE 3: Who controls the banks there?

CARLOS: The government, yes, the government did secure it, but this year they fucked up. They wanted me to - - like this they said, oh you have to fill the 209. It's a thing from the IRS in the states because they want to know if you have got money overseas. I tell them, look at me, I said do I look stupid to you? She said, well, if you file it, you can put the

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money in here as an immigrant and you get more interest. I said, yeah, but then fuckin' Obama knows I've got the money in here. She says yes, I said no, I - - I'll take the interest it's only 3/4 of a percent. I - - but I don't have to be - - . I won't sign the sheet because around - - you're a foreigner, and you can get - - , but if you want to put it just, the mother fucker - - you get three-quarters - - because the rates are down - - to 100,000 that was there now, at 0.48 I don't give a fuck if they don't give me anything. I just leave the money there so if I want to build a fish market, I needed money over there.

MALE VOICE 3: Are you telling me - - and they don't ask you?

CARLOS: For what?

MALE VOICE 3: They don't ask here, right, - - .

CARLOS: I never sold - - .

MALE VOICE 3: Obviously.

MALE VOICE 4: Over here you put in more than 10 grand they ask a bunch of questions. There - - .

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CASE# 1000273609-3

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MALE VOICE 3: That is what he is saying, -

3

- .

4

CARLOS: But I guess - - I can get the money

5

through. I have one of those guys in Boston, he

6

is one of those fuckin' agents who is my friend,

7

and I give him the money before I go through

8

security. Then I go to the bathroom.

9

MALE VOICE 3: And he gives you the money.

10

MALE VOICE 4: Nice.

11

CARLOS: Even if he is not in your port,

12

he'll - - I call him, hey I'm flying out tonight

13

- - because I've got like 60,000 in my - - I

14

ain't going through the - - he doesn't go

15

through security because he has got one of those

16

fuckin' badges.

17

MALE VOICE 3: They go through, right

18

through the doors.

19

CARLOS: Then we go take a fuckin' piss - - .

20

MALE VOICE 3: - - Russians, I know one guy

21

- - .

22

CARLOS: We - - if you want to - - over to

23

the other side.

24

MALE VOICE 4: Absolutely.

25

CARLOS: I'll be your carrier, I'll be doing

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CASE# 1000273609-3

2

a lot of traffic.

3

[laughter]

4

CARLOS: - - the other side, then it is your

5

problem what you want to do with it. - - that

6

is your problem from there. But over there you

7

can control it.

8

MALE VOICE 3: Just put it in a safe

9

deposit.

10

CARLOS: In my home town regular security

11

deposit boxes, that is the best part of it.

12

MALE VOICE 4: Nothing right.

13

CARLOS: It was like a little check, so what

14

do you do, deposit it and put it in the bank.

15

MALE VOICE 4: It doesn't report anything

16

back?

17

CARLOS: Huh?

18

MALE VOICE 4: They don't report anything

19

back?

20

CARLOS: No, because you would never want,

21

you don't want to send it to - - . So you don't

22

care about the address?

23

MALE VOICE 4: No, no, we don't care about

24

the interest.

25

CARLOS: What you want to do you want your

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money you get - - it's safe, you don't report it because you won't sign the paper, if you don't sign the paper, they can't be audited.

5

MALE VOICE 4: How much cash can we usually

6

move over there, what do you think, roughly? A

7

cap?

8

CARLOS: It can be a - - slow, like I told

9

you 60, 80, 70, no more than that.

10

MALE VOICE 3: But you go over twice a year.

11

CARLOS: Huh?

12

MALE VOICE 3: You go twice a year.

13

CARLOS: I can send me, I go in one time, -

14

- I send the wife the next trip, and then my

15

daughters would love that they go on vacation,

16

so we could put everybody, 7, 8 a day, you go to

17

St. Michael, you have to take this, you don't

18

have to worry about it because I've got my

19

friend in the airport who will let you through.

20

MALE VOICE 4: He'll let all of them

21

through.

22

MALE VOICE 3: He knows him.

23

CARLOS: - - buddies.

24

MALE VOICE 4: I'd make you my buddy too.

25

That's a good buddy to have. Portuguese, even

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1 better.

2 CARLOS: St. Michael, he's - - .

3 [crosstalk]

4 MALE VOICE 4: He works for the Sheriff's
5 Department.

6 MALE VOICE 3: Oh sweet.

7 CARLOS: I got him the job, I got him the
8 raises, so he'll do what the fuck I tell him to
9 do, call me he says, what the fuck is going on,
10 everybody got a promotion in this fuckin' place
11 but me, so I'm like this chill. I called the -
12 - and I said what the fuck are you doing with -
13 - , fuckin - - has been there for so many
14 fuckin' years, you're not going to give him a
15 fuckin' promotion - - not enough money in the
16 budget. I said fuck off, find a way, give the
17 kid a raise. He got his promotion, right, so he
18 called me and said I want to thank you very
19 much, I finally got my fuckin' promotion and a
20 raise. So it's - - .

21 MALE VOICE 4: Of course not, but if he is
22 down here he doesn't work up in Boston.

23 CARLOS: Oh yes, he does.

24 MS. TAYLOR: Oh he does.

25 Ubiquis

**INTERNAL REVENUE SERVICE -
WARWICK, RI**

**CASE # 1000273609-3: Recorded Telephone
Conversations
Oct142015121431EDT**

1 nothing, everything I would have to pay duty on
2
3 - - .

4 MALE VOICE 4: Well, and there is the
5 principle of it, you are going to cut off your
6 nose to spite your face, just to win a little
7 battle with him, what is the point.

8 CARLOS: I would have gotten - - I know the
9 president - - as well, and when I was over there
10 I had a meeting with them in the café at the - -
11 , and I told them some of the things that needed
12 to be changed.

13 MALE VOICE 4: Did they?

14 CARLOS: I flew with the prick already two
15 or three times, he is good friends with Jeanie
16 [phonetic] the guy who is the captain and goes
17 and does the cooking over there, so he knows me
18 very well, the other president I didn't get
19 along. He - - .

20 MALE VOICE 3: - - is Portuguese?

21 MALE VOICE 4: The captain is Portuguese.

22 CARLOS: Yeah and the guys in immigration,
23 most of the guys who does the fuckin'
24 immigration shit, he is from St. Michaels also.
25 My buddy that I go through.

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1
2 MALE VOICE 4: Oh so you've got three
3 different guys, I thought the Captain, Jimmy was
4 the guy going up to Boston.

5 CARLOS: No, the other guy because Jimmy is
6 the captain at the house, the other guy he is a
7 fuckin' - - immigration.

8 MALE VOICE 4: Immigration guys, yeah, yeah,
9 the guy at the airport, he is Portuguese too.

10 MALE VOICE 3: The guy you got promoted
11 right?

12 CARLOS: Yes, that's the guy that got
13 promoted.

14 MALE VOICE 4: Jimmy got promoted.

15 CARLOS: No, no.

16 MALE VOICE 4: You got the immigration guy
17 promoted.

18 CARLOS: Promoted.

19 MALE VOICE 4: Wow, you got some juice.

20 CARLOS: But he works through the sheriff's
21 department.

22 MALE VOICE 3: It's not immigration, that's
23 what I'm telling you.

24 MALE VOICE 4: He is immigration.

25 MALE VOICE 3: He works for the Sheriff's

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2

Department. He probably works on some--whatever

3

they do in there in the airport.

4

CARLOS: On customs with them, that is why

5

he - - .

6

MALE VOICE 4: Got you, so there is a Jimmy

7

that is here, but then there is a different guy.

8

But they are all Portuguese.

9

CARLOS: No, no, no, they are not all

10

Portuguese. Who, the--

11

MALE VOICE 4: [interposing] The sheriff,

12

but the other two are, Jimmy and what is the

13

other guy?

14

CARLOS: Fradis, Jimmy Fradis [phonetic].

15

MALE VOICE 3: He's not retiring though that

16

guy.

17

MALE VOICE 4: Jimmy Fradis is the captain,

18

but not the immigration.

19

CARLOS: No, no, the other one is not Jimmy

20

Fradis, the other one is Jimmy Nalo.

21

MALE VOICE 4: There are too many Jimmies.

22

MALE VOICE 3: Is that - - .

23

CARLOS: Jime [phonetic] - - not Jimmy, that

24

is the name. Of course I'm not Lenny.

25

MALE VOICE 4: That's true, did you think

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