

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

**UNITED STATES OF AMERICA,**

**v.**

**MITESH PATEL, ANTHONY VETRI,  
MICHAEL VANDERGRIFT,**

*Defendants.*

**CRIMINAL ACTION**

**NO. 15-157**

**PAPPERT, J.**

**November 9, 2017**

**MEMORANDUM**

On May 31, 2017 Mitesh Patel, Anthony Vetri and Michael Vandergrift were charged by a Second Superseding Indictment with conspiracy to distribute Oxycodone. Patel was also charged with one count of conspiracy to launder money and three counts of filing false tax returns. Vetri and Vandergrift were charged with using firearms to murder, in relation to the drug trafficking conspiracy, Patel's business partner Gbolahan Olabode.

Trial begins on November 29 and the defendants have filed various pretrial motions. Specifically, Patel moves to sever the murder charge against Vetri and Vandergrift as well as to preclude testimony pertaining to the quantities of Oxycodone sold by pharmacies Patel owned as compared to the lesser quantities of the drug sold by other area pharmacies. (ECF No. 106.) Vetri seeks to sever his case from those against Patel and Vandergrift. (ECF No. 107, 117.)

After considering the motions and the Government's responses, (ECF No. 125), and holding oral argument, (ECF No. 133), the Court denies the motions for the reasons that follow.

## I

Patel was a licensed pharmacist who owned and operated three pharmacies, two of which were co-owned by Olabode. The Government alleges that beginning in 2008, Patel used his pharmacist license and pharmacies to order large quantities of Oxycodone from pharmaceutical wholesalers, which he then supplied to Obadobe, Vetri and others for redistribution, all without legitimate prescriptions. (ECF No. 82.) Vandergrift also sold Oxycodone pills provided to him by Vetri. The drug wholesalers came to suspect that Patel was illegally diverting the medication and supplied him with fewer pills, reducing what he could sell to Olabode and Vetri—who each demanded that Patel stop selling to the other. When Patel favored Olabode, Vetri asked Vandergrift to kill Olabode so that Vetri could get the share of pills that Olabode was receiving from Patel. Vandergrift then recruited Michael Mangold and the two of them killed Olabode.

Patel argues that Count Six, charging Vetri and Vandergrift with causing Olabode's death, should be severed because it was misjoined or because a joint trial will prejudice him, contrary to Federal Rules of Criminal Procedure 8(b) and 14(a). Patel claims that the decision to charge Vetri and Vandergrift in Count Six is precluded by Rule 8(b). He argues that he did not know about or participate in Olabode's murder, that killing Olabode was a separate conspiracy between Vetri and Vandergrift and that it did not further the conspiracy to distribute Oxycodone. (ECF No. 106.) Alternatively, Patel contends that even if all counts in the indictment were properly

joined, the Court should order, pursuant to Rule 14(a), a separate trial on Count Six for three reasons. First, he is concerned that trying Count Six with the rest of the charges in the Second Superseding Indictment will prejudice Patel in the eyes of the jury by lumping him in with two violent murderers, even though Patel is not alleged to have participated in the killing or for that matter even known about it. Second, Vandergrift met with the Government for numerous proffer sessions and Patel believes the possible introduction of some of Vandergrift's proffered statements will violate his rights under the Confrontation Clause. Finally, Patel himself proffered numerous times and he will, as a result of those extensive statements, be far more limited in arguing his innocence than Vetri, who never proffered. Transcript of Oral Argument ("Tr.") at 18, 20–21, 92, *United States v. Patel* (No. 15-157).

#### A

When multiple defendants are charged in a single case, Rule 8(b) governs both the proper joinder of defendants and the proper joinder of offenses. *United States v. Adens*, No. 12-616, 2015 WL 894205, at \*1 (E.D. Pa. Feb. 27, 2015) (citing *United States v. Irizarry*, 341 F.3d 273, 287 (3d Cir. 2003)). Rule 8(b) provides:

The indictment or information may charge 2 or more defendants 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. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Fed. R. Crim. P. 8.

In construing this rule, the Third Circuit Court of Appeals has recognized the fundamental principle that the "federal system prefers '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.” *United States v. Walker*, 657 F.3d 160, 168 (3d Cir. 2011) (citing *Irizarry*, 341 F.3d at 287). The preference for joint trials “is particularly true in cases in which defendants have been charged with engaging in a conspiracy.” *United States v. Chalker*, No 12-0367, 2013 WL 4551193, at \*2 (E.D. Pa. Aug. 28, 2013). The Third Circuit has stated that Rule 8(b) permits the

joinder of defendants charged with participating in the same...conspiracy, even when different defendants are charged with different acts, so long as indictments indicate all the acts charged against each joined defendant (even separately charged substantive counts) are charged as...acts undertaken in furtherance of, or in association with, a commonly charged...conspiracy.

*United States v. Eufrazio*, 935 F.2d 553, 567 (3d Cir. 1991).

Under Rule 8(b), “[i]t is not enough that defendants are involved in offenses of the same or similar character; there must exist a transactional nexus in that the defendants must have participated in ‘the same act or transaction, or in the same series of acts or transactions.’” *United States v. Jimenez*, 513 F.3d 62, 82–83 (3d Cir. 2008) (quoting Fed. R. Crim. P. 8(b)). “Rule 8(b)’s terms are broadly construed so that a ‘transactional nexus,’ or a logical relationship between charges, is all that is required for them to be considered part of the same ‘transaction.’” *Adens*, 2015 WL 894205, at \*1 (quoting *Irizarry*, 341 F.3d at 241). “To determine whether there is a logical relationship between charges, trial judges may look at pre-trial documents, including but not limited to the indictment.” *Adens*, 2015 WL 894205, at \*1 (citing *United States v. McGill*, 964 F.2d 222, 242 (3d Cir. 1992)).

Counts One and Six share a “transactional nexus” and were properly joined under Rule 8(b). Patel, Vetri and Vandergrift were indicted together in the Second Superseding Indictment. (ECF No. 82.) In Count One, the Government alleges that the murder of Olabode was an act in association with the Oxycodone distribution conspiracy. Count Six charges Vetri and Vandergrift with the murder of Olabode in violation of 18 U.S.C. § 924(j), which prescribes the penalty for “[a] person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm....” Subsection 924(c)(1)(A), in turn, provides that “any person who, *during and in relation to any ... drug trafficking crime*...uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm,” shall be subject to various penalties depending on how the firearm is used. 18 U.S.C. § 924(c)(1)(A) (emphasis added). Under the statute, § 924(j) makes it a crime to violate § 924(c), and § 924(c) criminalizes the use of a firearm during and in relation to any drug trafficking crime. The statutory text alone provides the requisite “transactional nexus” because Count One is the basis for charging Vetri and Vandergrift in Count Six. Alternatively, to prove Count Six, the Government will have to prove the conspiracy alleged in Count One to show that a drug trafficking crime occurred, and that Vetri and Vandergrift used or carried a firearm during or in relation to that crime. *See, e.g., Adens*, 2015 WL 894205, at \*6 (finding sufficient nexus between drug distribution conspiracy and money laundering charge because proving money laundering charge would incorporate by reference the drug distribution conspiracy).

Additionally, Counts One and Six share a transactional nexus because both share common actors, evidence and temporal proximity. Vetri and Vandergrift are common defendants in both Counts. The Government alleges that after Patel's pharmaceutical distributors restricted his supply, he was forced to choose between Olabode and Vetri. Patel chose Olabode and Vetri then needed Olabode out of the way. By murdering Olabode, Vetri monopolized Patel's supply, and Vandergrift received a larger supply of Oxycodone at a discounted price. Without their connection to the drug distribution conspiracy, neither Vetri nor Vandergrift would have the circumstance or motivation to murder Olabode. *See United States v. Saferstein*, No. 07-557, 2009 WL 1046128, at \*4 (E.D. Pa. April 17, 2009) (finding sufficient "transactional nexus" where acts leading to charges of wire and mail fraud provided motive to commit perjury). After Olabode was killed, the drug distribution conspiracy continued, with Patel supplying the drugs and Vetri and Vandergrift enjoying access to a larger portion of the Oxycodone pills. Although Patel was not charged in Count Six, the murder of Olabode was an act undertaken in association with the commonly charged drug distribution conspiracy. *See Eufrazio*, 935 F.2d at 567.

Moreover, Counts One and Six rely on common evidence because proof of a drug trafficking conspiracy is required for both. If Count Six were severed, the Government would have to again prove the drug trafficking crime charged in Count One to prove the elements of Count Six, creating judicial inefficiencies and redundancy.

Finally, both Counts share a temporal proximity because the facts alleged in Count Six occurred during the ongoing drug distribution conspiracy. The conspiracy

allegedly began in 2008, Vetri and Vandergrift began plotting to murder Olabode in late 2011, Olabode was murdered on or about January 4, 2012, and the conspiracy did not conclude until June 4, 2013. Olabode was murdered during an ongoing drug conspiracy, which continued operating even after his death. *See Adens*, 2015 WL 894205 at \*3 (finding joinder proper, in part, based on temporal proximity between two separate drug conspiracies, the second of which did not begin until five months after the first drug conspiracy concluded).

## B

Patel next claims that even if Count Six was properly joined in the Second Superseding Indictment, the Court should order a separate trial on that Count because its inclusion in the trial on the other charges prejudices him. Rule 14(a) permits courts to sever offenses or defendants that have been properly joined “[i]f the joinder of offenses or defendants in an indictment . . . appears to prejudice a defendant . . . .” Fed. R. Crim. P. 14(a). Motions for severance are “addressed to the sound discretion of the trial judge,” and defendants bear a “heavy burden” in showing prejudice from joinder. *United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978); *see also United States v. Hudgins*, 338 Fed.Appx. 150, 153 (3d Cir. 2009). “[M]ere allegations of prejudice are not enough.” *United States v. Reichert*, 647 F.2d 397, 400 (3d Cir. 1981). Nor should prejudice be found “in a joint trial just because all evidence adduced is not germane to all counts against each defendant or some evidence adduced is more damaging to one defendant than others.” *United States v. Balter*, 91 F.3d 427, 433 (3d Cir. 1996). Moreover, a defendant is not “entitled to severance merely because he may have a better chance of acquittal in a separate trial.” *United States v. Fumo*, No. 06-319, 2008

WL 109667, at 5 (E.D. Pa. Jan. 9, 2008); *see also Zafiro v. United States*, 506 U.S. 534, 540 (1993). Rather, “[s]everance should only be granted ‘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. Riley*, 621 F.3d 312, 335 (3d Cir. 2010) (quoting *Zafiro*, 506 U.S. at 539).

In the context of multiple defendants, the Third Circuit has noted that prejudice sufficient to warrant severance might occur “in a complex case involving many defendants with markedly different degrees of culpability.” *Balter*, 91 F.3d at 432–33 (citing *Zafiro*, 506 U.S. at 539). On the other hand, “[p]articipants in a single conspiracy should ordinarily be tried together for purposes of judicial efficiency and consistency, even if the evidence against one is more damaging than that against another.” *United States v. Ward*, 793 F.2d 551, 556 (3d Cir.1986). Ultimately, the primary consideration when evaluating prejudice is “whether the jury can reasonably be expected to compartmentalize the evidence as it related to separate defendants . . . .” *United States v. DeLarosa*, 450 F.2d 1057, 1065 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972). Even where the risk of prejudice is high, “Rule 14 does not require severance,” instead leaving “the tailoring of the relief to be granted, if any, to the district court’s sound discretion.” *Zafiro*, 506 U.S. at 538–39. Limiting instructions to the jury provide a “less drastic measure” than separate trials, and will often “suffice to cure any risk of prejudice . . . .” *Id.* at 539. In light of judicial economy and appropriate alternative relief, Patel has not met the heavy burden required for severance under Rule 14.

Patel first argues that trying Count Six along with the rest of the charges in the Second Superseding Indictment will lead the jury to view Patel negatively by virtue of his association with two alleged murders. Patel has not been charged in Count Six, and the Government does not link Patel to the firearms offenses and murder charged in that Count. Rather than requiring separate trials, instructing the jurors to separately consider the evidence against each defendant on each offense charged, and to return a separate verdict for each defendant on each offense provides an appropriate remedy. *See* Third Circuit Model Jury Instructions, No. 3.14 (2015). Jurors are presumed to follow their instructions, even more so in a case like this one which is far from complex, and a limiting instruction will ensure that the jury does not draw a contextual inference of Patel's guilt. Ultimately, the interests of judicial economy argue against severance because the federal system favors "joint trials of defendants who are indicted together." *Walker*, 392 F.App'x 919, 925.

Both Patel and Vandergrift proffered numerous times. Patel also wants Count Six severed because he fears that the potential admission into evidence of Vandergrift's proffered statements would violate his Sixth Amendment rights and that his own proffered statements will preclude him from proclaiming his innocence, unlike Vetri—who chose not to confess to Government investigators and prosecutors. Tr. at 20, 92. Specifically, Patel argues that his Confrontation Clause rights will be violated if Vandergrift elects not to testify at trial and evidence from any of his proffers either names or refers to Patel in a way which implicates him, thus presenting a "substantial

risk that the jury, despite instructions to the contrary, [will] look[] to the incriminating extrajudicial statements in determining [Patel's] guilt." *Bruton v. United States*, 391 U.S. 123, 126 (1968).

"[T]he Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when...the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987). The Court has reviewed all of Vandergrift's proffered statements and concluded that a number of them can be revealed to the jury without implicating Patel in any way. Patel accordingly cannot show that he would need to confront Vandergrift.

iii

Patel also complains that he will be unable to assert his innocence because of his own extensive proffered statements. He argues that this will prejudice him because Vetri did not proffer and will not be so limited. The proffer letters each state:

[I]f your client is a witness or party at any trial or other legal proceeding and testifies or makes representations through counsel materially different from statements made or information provided during the "off-the-record" proffer, the government may cross-examine your client, introduce rebuttal evidence and make representations based on statements made or information provided during the "off-the-record" proffer. This provision helps to assure that your client does not abuse the opportunity for an "off-the-record" proffer, make materially false statements to a government agency, commit perjury or offer false evidence at trial or other legal proceedings.

(ECF No. 110, Attachments A and B, p. 2.)

The Government may "introduce a defendant's proffer once he presents a contradictory defense at trial." *United States v. Dales*, 08-289-3, 2009 WL 3806273, at \*4 (E.D. Pa. Nov. 12, 2009), *aff'd*, 425 F. App'x 178 (3d Cir. 2011). A conditional Fifth

Amendment waiver of the kind Patel signed “tends to keep the defendant honest, which makes the proffer device more useful to the both sides. For this strategy to work the conditional waiver must be enforceable; its effect depends on making deceit *costly*.” *United States v. Krilich*, 159 F.3d 1020, 1024–25 (7th Cir. 1998) (emphasis in original). Although Patel has proffered and elected to go to trial, he still retains the ability to “ask questions, make arguments, and present evidence to: attack the credibility of witnesses; emphasize the improbabilities and contradictions in the prosecution’s case; challenge the expertise, competence, and knowledge of experts; impugn the motives of witnesses; and stress the prosecution’s failure to meet its burden of proof beyond a reasonable doubt.” *Dales*, 2009 WL 3806273, at \*4 (citing *United States v. Barrow*, 400 F.3d 109, 113-14 (2d Cir. 2005); *United States v. Dortch*, 5 F.3d 1056, 1069 (7th Cir. 1993)). His decision to proffer fourteen times does not entitle him to severance under Rule 14(a).

## C

Patel also seeks to bar expected testimony from Government witnesses that other pharmacies in the Philadelphia area sold smaller quantities of Oxycodone than did pharmacies owned and operated by Patel. Patel argues that such evidence is irrelevant, more prejudicial than probative, and likely to confuse the jury.

Evidence is relevant under Rule 401 if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.

Fed. R. Evid. 401.

Even if evidence is relevant, it may still be excluded. “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one

or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

The testimony Patel seeks to preclude is highly relevant to the drug distribution conspiracy. The Second Superseding Indictment alleges that during the course of the drug distribution conspiracy, Patel was a licensed pharmacist who ordered large sums of Oxycodone that, once received, were diverted to drug dealers and illegally sold for profit. Evidence of Oxycodone sales at other pharmacies in the area provides jurors context in evaluating the volume of Oxycodone dispersed by Patel’s pharmacies, which the Government alleges were relatively small for the volume of controlled substances being distributed. Tr. at 25–26. The amount of Oxycodone distributed through Patel’s pharmacies compared to that of other local pharmacies is probative of Patel’s intent to conduct and further a drug distribution conspiracy. The significant probative value of this evidence is not substantially outweighed by the danger of any unfair prejudice and it certainly will not confuse the jury.

## II

Vetri contends that he should be tried separately from Patel and Vandergrift because their proffered statements, if revealed to the jury, would violate his rights under the Confrontation Clause of the Sixth Amendment. Vetri is also concerned that the Government may introduce out-of-court statements that qualify as testimonial, and thus are inadmissible under the Confrontation Clause unless Vetri is provided the opportunity to cross examine the declarant.

A

Vetri claims that trying him with Patel and Vandergrift prejudices him, requiring severance under Rule 14(a). At oral argument, Vetri's attorney focused on Patel's and Vandergrift's proffered statements, arguing that it would be impossible to properly redact or elicit information from them without implicating him, in violation of *Bruton*. Tr. at 28–30; *see also supra* Part I.B.2 (discussing Patel's Motion based on the possibility of a *Bruton* violation). Again, the Court has reviewed all of Patel's and Vandergrift's proffers and concluded that relevant parts of the statements can be admitted without referring to Vetri's existence or implicating him in any way. As discussed above, the Confrontation Clause is not violated by the admission of a co-defendant's confession when the confession "is redacted to eliminate 'not only the defendant's name, but any reference to his or her existence.'" *Richardson*, 481 U.S. at 211; *see also supra* Part I.B.2. Both Patel's and Vandergrift's proffers could be redacted to omit any reference of Vetri, and Vetri has failed to show a serious risk that a joint trial would compromise his Confrontation Clause rights. *See Zafiro*, 506 U.S. at 539. Redacting any reference to Vetri also eliminates any risk that a joint trial would prevent the jury from making a reliable judgment about his guilt, particularly with the Court's instruction to the jury to disregard Patel's or Vandergrift's statements in deciding Vetri's guilt or innocence. *See Washington*, 801 F.3d at 166.

Vetri has also failed to meet the heavy burden required for severance under Rule 14 because the interests of judicial economy favor a joint trial. Vetri, Patel and Vandergrift were indicted together, and severing Vetri from the joint trial of Patel and Vandergrift would require a wholesale duplication of effort and an unnecessary waste

of judicial resources. The same witnesses and evidence would have to be presented in both cases. A joint trial avoids these inefficiencies and the potential injustice of inconsistent verdicts between defendants. *See Walker*, 657 F.3d at 168.

## B

Vetri also argues that he should be tried separately because the Government may introduce testimonial out-of-court statements, in addition to his co-defendants' proffered statements, against him and that such statements could violate Vetri's Sixth Amendment rights. *See Crawford v. Washington*, 541 U.S. 36 (2004). In this context, the Third Circuit has recognized that the "Confrontation Clause inquiry is twofold. First, a court should determine whether the contested statement by an out-of-court declarant qualifies as testimonial under *Davis v. Washington*, 547 U.S. 813 (2006) and its progeny. Second, the court should apply the appropriate safeguard. If the absent witness's statement is testimonial, then the Confrontation Clause requires 'unavailability and a prior opportunity for cross-examination.' If the statement is nontestimonial, then admissibility is governed *solely* by the rules of evidence." *United States v. Berrios*, 676 F.3d 118, 127 (3d Cir. 2012) (quoting *Crawford*, 541 U.S. at 68).

Whether the Confrontation Clause is implicated depends on whether the statement "as a whole qualifies as testimonial," whether only "portions of the statement...qualify as testimonial, and therefore require redaction of otherwise admissible evidence," and how the rules of evidence influence the admissibility of any such statement. *Id.* at 144 n.3 (citing *Davis*, 547 U.S. at 829). For these reasons, the decision on any out-of-court statement is a factually dependent inquiry that must be made by the Court during trial, and Vetri's argument is too attenuated to establish the

requisite degree of prejudice for severance under Rule 14. Moreover, even if an absent witness's statement qualifies as testimonial, the Court will apply the appropriate constitutional and evidentiary safeguards. *See Crawford*, 541 U.S. at 68.

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert  
GERALD J. PAPPERT, J.