No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

LACOYA WASHINGTON,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Pursuant to Supreme Court Rule 39, the Petitioner, LACOYA WASHINGTON, by and through her court-appointed attorney, requests that the Court grant her leave to proceed *in forma pauperis*. In support of this Motion, the Petitioner avers that:

I.

Petitioner is unable to afford the cost of representation in this matter.

II.

Petitioner proceeded below in district court and on appeal with court-appointed counsel appointed pursuant to *18 U.S.C. § 3006A.*

III.

Because of her continuing inability to afford counsel, and pursuant to *18 U.S.C. §3006A*, undersigned counsel represents the Petitioner in her petition before this Court.

WHEREFORE, the Petitioner, LACOYA WASHINGTON, by and through undersigned counsel, respectfully requests that she be allowed to proceed *in forma pauperis* without payment of filing fees or service of notice fees, and for such other relief as the Court deems just and proper.

Respectfully submitted this 8th day of October, 2018.

RESPECTFULLY SUBMITTED,

GREENWALD LAW FIRM, L.L.C.

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ATTORNEY FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

- Whether there was sufficient evidence presented at trial to convict Lacoya Washington of the sex trafficking crime.

- Whether the Honorable Trial Court erred in denying Lacoya's Motion to Sever the Trial.

- Whether Lacoya's sentence was unreasonably excessive.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

District Court:

Honorable S. Maurice Hicks, Jr.
Chief United States District Judge,
Western District of Louisiana
300 Fannin Street
Shreveport, LA 71101

United States Fifth Circuit:

Honorable Barksdale, Southwick and Higginson
United States Court of Appeals, Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Defendants – Appellants:

Ms. Lacoya Washington
Register No. 18075-035
FMC Carswell
Fort Worth, TX 76127

Mr. Tyrone Larry Smith
Register No. 18085-035
United States Penitentiary
Adelanto, CA 92801

Attorneys for Defendants – Appellants:

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FIFTH CIRCUIT JURY INSTRUCTIONS

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is set forth at *Appendix A.*

The Opinion has been designated for publication but is not yet reported.

JURISDICTION

On July 13, 2018, the United States Court of Appeals for the Fifth Circuit issued its Opinion affirming the District Court's Judgment. *Appx. A.*

No Petition for Rehearing was filed.

This Court has jurisdiction pursuant to *28 U.S.C. § 1254(1).*

The Petition for Writ of Certiorari is due by October 11, 2018.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutory provisions listed in Table of Contents.

STATEMENT OF THE CASE

A. Brief overview of the case:

Lacoya Washington (hereinafter referred to as "Lacoya") and Tyrone L. Smith (hereinafter referred to as "Tyrone") were jointly indicted for Sex Trafficking of Children by Means of Force, Fraud or Coercion, in violation of *18 U.S.C. §1591(a)(1) & (b)(1) & (2).* Tyrone was also charged with one count of Coercion and Enticement, in violation of *18 U.S.C. §2422.*

The evidence established that Tyrone met and formed a relationship with B.R., a 15 year-old female, from Converse, Texas. At the time, Tyrone was temporarily residing with Lacoya and her four children, in Shreveport, Louisiana. Tyrone and B.R. met on the social media app "Plenty of Fish."

Sometime in mid-June of 2015, B.R. agreed to travel to Shreveport to meet Tyrone. [There was varying and conflicting testimony on exactly how and when B.R. arrived in Shreveport.] Upon arriving in Shreveport, B.R. and Tyrone both stayed at Lacoya's apartment.

After arriving in Shreveport, B.R. started prostituting herself at the behest of Tyrone. A profile account was created on "Backpage.com", an online classified website, to elicit customers. Over the course of a few weeks, two hotel rooms were rented, where the illegal activity occurred.

On July 7, 2015, law enforcement agents conducted an undercover operation targeting prostitution in the area. Agents made contact with B.R., using the Backpage.com account to set up a "date" at the Moonrider Hotel. Upon arriving at the hotel and discussing the cost of services, the undercover agent identified himself as law enforcement and spoke with B.R. At first, B.R. claimed she was 19 years-old, then admitted to being 15.

Further investigation revealed the room at the Moonrider Hotel was rented by Lacoya.

After obtaining this information, officers went to Lacoya's place of employment, Comfort Inn, and found her, Tyrone and Lacoya's boyfriend (Lawarren Lucious). Lacoya admitted that B.R. had been staying at her apartment, admitted renting two hotel rooms for Tyrone and B.R., and admitted knowing that B.R. was prostituting herself while in Shreveport. Throughout all proceedings, Lacoya denied intentionally aiding in the prostitution of B.R.

B. Lacoya's Motion to Sever:

Prior to trial, Lacoya filed a Motion to Sever, arguing that she would be unfairly prejudiced by being tried with Tyrone. The basis for the Motion was two-fold: 1) the spill-over effect of being tried with her co-defendant, and 2) the volatile and erratic behavior exhibited by Tyrone during the pre-trial proceedings. The Motion was initially granted. Thereafter, both Lacoya and Tyrone waived their right to a jury trial and the Government consented to have the matter heard before the trial court.

The Government then filed a Request for Reconsideration of Severance, arguing since the jury was waived, the risk of prejudice to Lacoya was eliminated. Lacoya filed an Opposition, restating her objections to being tried with Tyrone. Agreeing with the Government, the Trial Court rescinded the Order, finding that in light of the conversion to a bench trial, the severance no longer warranted.

As outlined in detail below, Lacoya submits it was reversible error to rescind the Severance Order in that she was unfairly prejudiced by having to defend herself at trial with Tyrone.

C. Bench Trial:

At trial, the government first called the law enforcement agents who conducted the sting operation. Shreveport Police Officer Frankie Miles explained his role as the undercover agent,

and testified that he made telephone contact with B.R., after locating her on the Backpage website. The two arranged a meeting for later that day and agreed upon a price. After some confusion over which hotel B.R was at, Officer Miles arrived at the Moonrider Hotel, where B.R. told him to she was in room 216. Upon arriving at the hotel, Officer Miles noticed two black males and a child seated in a car in the parking lot. After entering the room and a brief conversation regarding sex, the arrest signal was given and Officer Miles identified himself. Officer Miles then left the Moonrider Hotel and went to the Comfort Inn to interview Lacoya. Upon entering the Comfort Inn, Officer Miles identified Tyrone and Lawarren Lucious as the two men who were previously parked at the Moonrider. All three individuals were arrested and taken into custody.

After a few other law enforcement officers testified, the government called Nathan Yockey, an employee of Backpage.com, who testified that Lacoya's email address (LacoyaWashington@yahoo.com) was used to create the Backpage profile. The profile was created and first posted on Sunday, July 5, 2015, at 7:39 p.m. [The telephone used to create the profile belonged to Tyrone and was in B.R.'s possession at the time of the sting operation.]

Kosha Shah was called by the government, who testified that she was the previous manager at the Plantation Inn and that on July 2, 2015, a room was rented in the name of Lacoya Washington. Norm Shum, the general manager of Moonrider Hotel, testified that on July 6, 2015, room 216 was rented in the name of Lacoya Washington.

B.R. was called to the stand and testified that in the summer of 2015, she met Taz on the "Plenty-of-Fish" social app and ran-away from home to meet him. B.R. suffers from psychological problems, including bipolar and anxiety disorder, and admitted using crystal meth prior to coming to Shreveport. B.R. identified herself as "Allie" and told Taz that she was 19

years-old. B.R. described arriving in Shreveport by Greyhound bus sometime in June with a Walmart bag containing a T-shirt and make-up. She testified that Lacoya picked her up from the bus station in a red Cadillac and took her to the apartment.

B.R. testified that, at the instruction of Tyrone, she immediately started prostitution. B.R. stated that Lacoya was not present when this occurred and did not know about it. B.R. described creating the backpage account on Taz' phone and posting pictures of herself that she took at Taz' command. B.R. did state that Taz texted some pictures of her to Lacoya to see if she (B.R.) looked good. B.R. initially testified that the purpose of the pictures was not communicated to Lacoya, but later stated that Taz and Lacoya conversed regarding the backpage account. B.R. testified that Lacoya was aware of the illegal activity and participated in various ways.

The Government next called Shelley Anderson, Chief Deputy with the Bossier City Marshal's Office, as an expert in the area of computer forensics. Chief Deputy Anderson verified that some of the pictures of B.R. had been sent to Lacoya, then explained her cooperation with defense expert D. Wesley Attaway.

Lastly, the Government called Chris Plants, Special Agent with the FBI, who testified to first meeting B.R. at the Moonrider Hotel on July 7, 2015. After interviewing Tyrone, Agent Plants talked with Lacoya, who told him that Tyrone had been staying at her apartment for about one month. Lacoya further told Plants that approximately two weeks prior, a young female showed up at her house and had been staying there with Tyrone. Lacoya admitted that she knew the young female was prostituting while in Shreveport. Lacoya further admitted that she had purchased rooms for Tyrone and B.R. on two separate occasions.

After verifying all exhibits were in evidence, the Government rested and Lacoya orally moved for a judgment of acquittal, which was denied by the Court.

During Tyrone's case-in-chief, it was established that the cellular telephone found on B.R. at the Moonrider Hotel on July 7th was confiscated at approximately 9:40 a.m., and thereafter remained in the custody of law enforcement.

Tyrone next called Wesley Attaway, a certified computer forensic examiner, who testified regarding information found on the cellular telephone after it was seized by law enforcement on the day of Tyrone's arrest. Mr. Attaway testified that his inspection of the subject phone revealed multiple telephone calls, text message exchanges and web activity occurring on the phone from 8:40 a.m., until 8-9 p.m., on July 7th. Mr. Attaway found incoming calls, missed calls, and outgoing calls on the phone.

Lastly, Tyrone recalled Chief Deputy Anderson to the stand, who confirmed that it appeared the cellular telephone had been used throughout the day of July 7th, after being placed in police custody.

In her case-in-chief, Lacoya took the stand in her defense. At the time of trial, Lacoya was thirty-three years old, with four children, ranging in age from 2 to 17. She described leaving high school after the tenth grade and working in hotels and casinos most of her adult life.

Lacoya testified that B.R. was at her apartment the first time they met. At the time, Lacoya was working six days a week at the Comfort Inn. Lacoya was told that B.R. was there visiting Tyrone for a few days. Because B.R. had no clothes to wear, Lacoya shared her wardrobe with her. Lacoya described her relationship with B.R. as distant and denied having any involvement with creating the backpage account.

Lacoya admitted renting the room for Tyrone and B.R. at the Plantation Inn, so the couple could be alone. No illegal activity occurred in Lacoya's presence. She further admitted to renting the room at the Moonrider Inn because she was the only person with an identification

card, a hotel requirement. Lacoya described requesting a room next to the pool, so her children could swim. There is no evidence of prostitution occurring during this time period.

Lacoya admitted that at some point she became aware that B.R. was prostituting, but denied participating or facilitating the illegal activity.

After the Government's cross-examination, Lacoya faced questioning from Tyrone. Lacoya reiterated that she was not present and did not facilitate the prostitution and Tyrone essentially confirmed that Lacoya was not involved.

The Court next directed questions to Lacoya, mainly about her interactions with B.R.

Shetrara Washington was last called. She is Lacoya's sister and testified that she had never seen Lacoya in a red Cadillac, the car B.R. claimed Lacoya was driving when she [Lacoya] picked her [B.R.] up from the bus station. She also confirmed that the room at the Moonrider Hotel was rented so the kids could swim.

D. The Verdict:

After the close of evidence, a Post-Trial Motion for Acquittal was orally made and denied by the Court. Thereafter, with reasons stated on the record, the Trial Court found Lacoya guilty as charged. Specifically, Lacoya was found guilty of Sex Trafficking of a Child by Means of Force, Fraud or Coercion, in violation of *18 U.S.C. §1591(b)(1).*

E. The Sentence:

On January 9, 2017, the Court convened for sentencing. The Pre-Sentence Report made the following findings which were addressed by the Court:

26. **Base Offense Level**: 34 (Defendant did not object)

27. **Specific Offense Characteristics**: Pursuant to *USSG §2G1.3(b)(2)(B),* as the defendant otherwise unduly influenced the minor to engage in prohibited sexual conduct, 2 levels are added. (Objection overruled)

28. **Specific Offense Characteristics**: Pursuant to *USSG §2G1.3(b)(3)(B),* as a computer was used in the instant offense to solicit a person to engage in prohibited sexual conduct with the minor, 2 levels are added. (Objection overruled)

29. **Specific Offense Characteristics**: Pursuant to *USSG §2G1.3(b)(4)(A),* as the offense involved the commission of a sex act or sexual contact, 2 levels are added. (Defendant did not object)

The Court adopted the findings of the Pre-Sentence Report, which stated the statutory imprisonment of fifteen years to life, and calculated Lacoya's Offense Level at 40 and Criminal History at I (292 to 365).

The Court thereafter sentenced Lacoya to a term of imprisonment of 292 months.

REASONS FOR GRANTING THE WRIT

Washington asserts there are compelling reasons for the United States Supreme Court to grant her Petition for Writ of Certiorari.

The evidence presented at trial was insufficient to support the verdict;

The Motion to Sever should have been granted; and

The sentence is unconstitutionally excessive.

SUMMARY OF THE ARGUMENT

A. The evidence presented at trial was insufficient to support the verdict.

The evidence at trial established that Lacoya associated herself with Tyrone and interacted with B.R. The group spent time together, did things together and interacted with one another. However, Lacoya submits that her actions were legal in nature, that her "otherwise innocent conduct" has been used to prove that she "knowingly" participated in a crime. Lacoya submits that her actions were legal in nature and that the evidenced failed to prove that she had the "shared criminal intent" with Tyrone to prostitute B.R.

B. Lacoya's Motion to Sever should have been granted.

Because of the Defendants' varying levels of involvement and differing culpability, and because of Tyrone's erratic behavior, their cases should have remained severed for trial. At trial, there was damaging evidence of Tyrone's abusive treatment of B.R. There was testimony of "car dates" and other illegal activity that did not include Lacoya. There was testimony of physical and verbal abuse that did not involve Lacoya. Despite this being a bench trial, it was unfairly prejudicial for Lacoya to be tried with Tyrone.

C. Lacoya's sentence is unreasonably excessive and constitutes cruel and unusual punishment.

Lacoya's sentence of 292 months imprisonment, almost ten years over the statutory minimum, is unreasonable and should be reduced. In light of all the circumstances, such a sentence constitutes cruel and unusual punishment.

ARGUMENT

A. The evidence presented at trial was insufficient to support the verdict.

i. Standard of Review:

Lacoya moved for acquittal at the close of the Government's case and at the close of evidence. This Court reviews the District Court's denial of Defendant's motions for acquittal *de novo*, applying the same standard as the district court in reviewing the sufficiency of evidence. *United States v. Payne*, 99 F.3d 1273 (5th Cir. 1996). The standard of review for a sufficiency claim is "whether any reasonable trier of fact could have found that the evidence established the appellant's guilt beyond a reasonable doubt." *United States v. Jaramillo*, 42 F.3d 920 (5th Cir. 1995)(citing *Jackson v. Virginia*, 443 U.S. 307 (1979)). This Court considers "the evidence in the light most favorable to the [G]overnment with all reasonable inferences and credibility choices made in support of the verdict." *United States v. Jones*, 133 F.3d 358 (5th Cir. 1998).

ii. Lacoya did not "knowingly" or "intentionally" assist in the prostitution of B.R.

Lacoya respectfully submits the evidence as to her involvement with the crime was insufficient to support the guilty verdict.

In order to convict Lacoya as a principal to the crime of Sex Trafficking, the Government needed to prove the following elements:

1) That Lacoya knowingly recruited, harbored, transported, provided, obtained or maintained B.R., by any means;

2) That Lacoya committed the acts knowing or in reckless disregard of the fact that means of force, threats of force, fraud, coercion, or any combination of such means, would be used to cause B.R. to engage in a commercial sex act; and

3) Lacoya's acts were in or affected interstate commerce. *18 U.S.C. §1591; 2.68 Fifth Circuit Criminal Jury Instructions.*

The Government's theory was that Lacoya "aided and abetted" Tyrone in the prostitution of B.R. Therefore, to sustain a conviction, the Government needed to prove, *inter alia*, that Lacoya deliberately associated herself in some way with the crime and participated in the criminal venture, with the intent to bring about the crime. *18 U.S.C. §2; 2.04 Jury Instructions.*

The *Fifth Circuit Jury Instructions* explain the terms as such:

> "To associate with the criminal venture" means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal's criminal venture.
>
> "To participate in the criminal venture" means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

In the present matter, the lacking element in the Government's case is Lacoya's criminal intent. From the time of her arrest to the present, Lacoya has been open and candid about her involvement in this matter. As discussed below, she did deliberately associate herself with Tyrone and (unknowingly) participate in a criminal venture. However, she did not do so with the intent to commit a crime. She did not have the required shared criminal intent.

At trial, the testimony proved and Lacoya admitted to allowing Tyrone and B.R. to stay at her apartment and that she did interact with them socially. She rented the hotel rooms, drove Tyrone and B.R. around town, socialized with them, all normal acts which are not criminal in nature. At trial, the Government used Lacoya's "otherwise innocent conduct" to prove that she "knowingly" participated in the criminal venture. Lacoya did not commit these acts with the intent to commit a crime, she did not intentionally assist or participate in the prostitution of B.R.

Lacoya admitted that at some point she became aware of what was going on and did nothing to stop it. However, her failure to protect B.R. is not equivalent to intentionally assisting in the

crime. Lacoya submits that the actions she took in this matter were done for legal purposes and that she did not intentionally assist in the commission of this crime.

B. Lacoya's Motion to Sever should have been granted.

i. Standard of Review:

The denial of a motion to sever is reviewed for abuse of discretion. *United States v. Thomas*, 627 F.3d 146 (5th Cir. 2010). To demonstrate the district court abused its discretion, "the defendant bears the burden of showing specific and compelling prejudice that resulted in an unfair trial..." *Id.*, 157. Reversal is warranted only if the defendant "identifies specific events during trial and demonstrates that these events caused him substantial prejudice." *Id.*

ii. Lacoya was unfairly prejudiced by being tried with Tyrone.

Rule 14 of the Federal Rules of Criminal Procedure provides that a court may grant a severance of defendants when it appears that a defendant will be prejudiced by a joint trial. *Fed. R. Crim. P. 14.* To justify severance of co-defendants, the movant must show that he would suffer specific and compelling prejudice against which the court is unable to provide protection, such as through a limiting instruction, and that this prejudice would result in an unfair trial. *U.S. v. Kaufman*, 858 F.Ed 994, 1003 (5th Cir. 1988)(*citing U.S. v. Toro*, 840 F.2d 1221, 1238 (5th Cir. 1988)); see also *U.S. v. Lewis*, 476 F.3d 369, 383 (5th Cir. 2007)(*citing U.S. v. Sudeen*, 434 F.3d 384, 387 (5th Cir. 2005). "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*, 506 U.S. at 539, 113 S.Ct. 933.

In the present case, Lacoya was unfairly prejudiced by being tried with Tyrone. Throughout the whole proceeding, Tyrone displayed disruptive and erratic behavior. He fired two lawyers

and represented himself at trial. He was disrespectful to the Court and witnesses. He made constant objections and argued with the Court. The acrimonious environment he created made it impossible for Lacoya to get a fair trial. She was placed in a disadvantageous position because of his bad behavior.

Because Lacoya was unfairly prejudiced by having to defend herself throughout the proceedings, including trial, with Tyrone, a severance was warranted.

C. Lacoya's sentence is unreasonably excessive and constitutes cruel and unusual punishment.

i. Standard of Review:

The question presented is whether the District Court's sentencing decisions were reasonable under a plain error standard of review. This Court may correct the sentencing determination if (1) there is error (and in light of *Booker*, an "unreasonable" sentence equates to a finding of error); (2) it is plain; and (3) it affects substantial rights. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "Moreover, *Rule 52(b)* leaves the decision to correct the forfeited error within the sound discretion of the court of appeals, and the court should not exercise that discretion unless the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Peltier,* 505 F.3d 389 (5th Cir. 2007).

ii. Lacoya's sentence is unreasonable and should be reduced.

Lacoya's sentence of 292 months imprisonment is procedurally and substantively unreasonable, and constitutes cruel and unusual punishment under the *Eighth Amendment*. This Court will review constitutional challenges *de novo*. *United States v. Whaley*, 577 F.3d 254 (5th Cir. 2009). "The *Eighth Amendment* has been read to preclude a sentence that is greatly disproportionate to the offense, because such sentences are cruel and unusual." *United States v. Thomas*, 627 F.3d 146 (5th Cir. 2010).

Lacoya submits procedural error occurred when the District Court accepted the specific offense characteristics of (1) undue influence and (2) use of a computer, to increase her offense level. Lacoya submits that the evidenced failed to prove that she unduly influenced B.R. to engage in prostitution. At trial, B.R. testified that Tyrone forced her into prostitution in a scheme to make money; Lacoya was not a part of that plan. Likewise, the evidence failed to establish that Lacoya used a computer to entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with a minor. At trial, there was testimony of two social media apps: (1) "Plenty of Fish", which was used by Tyrone to meet B.R.; and (2) the "Backpage" account, the classified ad website used to solicit customers. B.R. testified that the Backpage account was set up without Lacoya's knowledge. Because Lacoya had no involvement with a computer or computer service, the specific offense characteristic was not warranted. Assuming it was error to apply the two specific offense characteristics, Lacoya's offense level decreased to a 36, making her sentencing range 188-235.

Lacoya further submits the sentence is substantively unreasonable because it is greater than necessary to affect the purposes of sentencing. *See 18 U.S.C. §3553(a)*(advising sentencing courts to "impose a sentence sufficient, but not greater than necessary to comply with the specific purposes" of *18 U.S.C. §3553(a)(2))*. The sentence is likewise substantively unreasonable in light of her offense conduct. While not on the same level or to the same extent, Lacoya was a victim of Tyrone as well.

Based on the foregoing, Lacoya respectfully submits the sentence is unreasonably excessive and, under the circumstances, constitutes cruel and unusual punishment.

CONCLUSION

Based on the foregoing, Lacoya respectfully submits:

(1) That the evidence was insufficient to sustain the verdict;

(2) That the Motion to Sever should have been granted; and

(3) That the sentence is unreasonably excessive.

For the above-enumerated reasons, Lacoya prays this Honorable Court grant the Petition for Writ of Certiorari, and ultimately vacate her conviction and/or sentence, and remand the case for trial, or in the alternative, for such relief as to which she may justly be entitled.

RESPECTFULLY SUBMITTED,

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ATTORNEY FOR PETITIONER

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

HALSTON M. SMITH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Joseph W. Greenwald, Jr., the undersigned counsel, hereby certify that on this 8th day of October, 2018, one copy of the Petition for Writ of Certiorari and Motion for Leave To Proceed *In Forma Pauperis* in the above-entitled case was delivered to FedEx for next day delivery to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001 and was e-mailed to the Office of the Solicitor General at SupremeCtBriefs@usdoj.gov and one copy was hand delivered to Assistant U.S. Attorney, C. Mignonne Griffing, 300 Fannin Street, Ste. 3201, Shreveport, LA 71101 and was e-mailed to Griffing.Mignonne@usdoj.gov.

I further certify that all parties required to be served have been served.

RESPECTFULLY SUBMITTED,

GREENWALD LAW FIRM, L.L.C.

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ATTORNEY FOR PETITIONER

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-30065

United States Court of Appeals
Fifth Circuit
FILED
July 13, 2018
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TYRONE LARRY SMITH, also known as Marques Stewart, also known as Tyrone Letron Smith, also known as Tyrone Latron Smith, also known as Tyrone L. Smith, also known as Troy Green, also known as Antoine Lavell Franklin, also known as Michael Mummadd, also known as Taz; LACOYA WASHINGTON,

Defendants - Appellants

Appeals from the United States District Court
for the Western District of Louisiana

Before HIGGINBOTHAM, JONES, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Defendants Tyrone Smith and Lacoya Washington were convicted of sex trafficking involving a fourteen-year-old girl. On appeal, Washington challenges the sufficiency of the evidence against her, the denial of her motion for severance, and the reasonableness of her sentence. Finding no error, we AFFIRM her conviction. Smith challenges the sufficiency of the evidence against him, the denial of his motion to suppress, and the denial of his motion to reassert his right to counsel. We find that the district court erred in denying Smith's motion for counsel. We REVERSE his convictions.

I.

In the summer of 2015, Tyrone Smith resided with Lacoya Washington and her four children at Washington's apartment in Shreveport, Louisiana. During this time, Smith met B.R., a fourteen-year-old from Texas, on the dating website Plenty of Fish. The relationship moved to texting and telephone calls. B.R. told Smith that she was nineteen. Smith suggested that B.R. come to Louisiana and live with him, and B.R. agreed.

In June 2015, B.R. took a Greyhound bus to Shreveport. B.R. testified that Washington picked her up at the bus station and the two met Smith at the apartment. Shortly after her arrival, Smith told B.R. "there's someone outside waiting and you pretty much need to go to the car, have sex with him, get money, and come inside." B.R. testified that when she objected, Smith told her that if she refused, she would "get in trouble for it." She said that after the incident Smith told her "[t]his is what you're going to be doing from now on. You better be okay with it." Smith arranged similar "car dates" three or four times.

Smith later instructed B.R. to take photographs on his cell phone, some of which he sent to Washington. Smith used the photographs to create an online advertisement for prostitution on the website Backpage.com. He paid for the ad with a prepaid gift card bought with Washington's money. Smith used Washington's email address and his phone number. B.R. claimed that Smith and Washington collaborated on the text of the ad. The next day, Smith posted a second ad using his own email address.

B.R. testified that when men responded to the ad, Smith or Washington told her what to charge. B.R. estimated that she had sex with six men who responded to the ad. She testified that Washington or Washington's boyfriend drove her to the motels to meet the men. Washington also paid for the motel rooms, using money that Smith gave her from customers. B.R. testified that

after a customer left, they would "keep [the room] for the night" and "drink [and] do coke." Washington provided the cocaine.

On July 6, Smith and B.R. got into a fight because she had locked him out of the hotel room. Smith slapped B.R. and told Washington to leave the room. The fight continued. B.R. said she wanted to leave and locked herself in the bathroom. Smith entered the bathroom and hit B.R. approximately three times with a closed fist. He then got his gun, threatened suicide, and pointed the gun at B.R. The two eventually "calmed down" and went to sleep.

On July 7, Shreveport Police Department Officer Miles discovered the online ads, suspected that B.R. was a minor, and arranged a sting operation. Miles called the listed number to set up a meeting. When they arrived at the hotel, SPD officers detained B.R., who told them that she was a minor, that Smith was her pimp, and that he had beaten her. Officers searched the room and found Smith's telephone, the prepaid gift card, and a loaded gun.

Officers learned that the room was rented under Washington's name, located her, and took her into custody where she made a statement. Washington told the police she believed B.R. continued to engage in prostitution because she was afraid of Smith. Officers also located Smith, who provided a statement where he admitted that he had met B.R. online and that he knew she was having sex with adult men in Shreveport.

Smith and Washington were charged with sex trafficking in violation of 18 U.S.C. § 1591(a)(1) & (b)(1)–(2). Smith was also charged with interstate prostitution by coercion or enticement under 18 U.S.C. § 2242. Smith and Washington were jointly tried in a three-day bench trial. As explained in more detail below, Smith proceeded pro se. Washington was represented by counsel.

Both were convicted as charged. Smith received a 384-month sentence for Count 1 and a concurrent 240-month sentence for Count 2. Washington was sentenced to 292 months.

II.

On appeal, Washington challenges the sufficiency of the evidence against her, the district court's denial of her motion for severance, and the reasonableness and constitutionality of her sentence.

A.

Washington argues that the government provided insufficient evidence that she intentionally assisted or participated in trafficking B.R.[1] She admits that she participated in a series of "otherwise innocent conduct" including renting the hotel rooms, driving Smith and B.R. to hotels, and socializing with them. She further concedes that "at some point she became aware of what was going on and did nothing to stop it," but argues that "failure to protect B.R. is not equivalent to intentionally assisting in the crime."

"When a defendant challenges a bench-trial conviction on sufficiency-of-the-evidence grounds, we focus on 'whether the finding of guilt is supported by substantial evidence, *i.e.*, evidence sufficient to justify the trial judge, as the trier of fact, in concluding beyond a reasonable doubt that the defendant is guilty.'"[2] In doing so, "[w]e 'should not weigh evidence, nor should [we]

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[1] Washington was convicted under 18 U.S.C. § 1591, which criminalizes sex trafficking of a minor and sex trafficking by force, fraud, or coercion. To show a violation of Section 1591, the government must prove the following elements:

> (1) that the defendant knowingly recruited, enticed, harbored, transported, provided, obtained, or maintained by any means [the victim];
> (2) that the defendant committed such act knowing or in reckless disregard of the fact that means of force, threats of force, fraud coercion, or any combination of such means, would be used to cause the person to engage in a commercial sex act [or that] the person had not attained the age of 18 years and would be caused to engage in a commercial sex act;
> (3) that the defendant's acts were in or affected interstate [or] foreign commerce.

FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS (Criminal Cases), Offense Instruction No. 2.86 (2015) (internal punctuation omitted).

[2] *United States v. Tovar*, 719 F.3d 376, 388 (5th Cir. 2013) (quoting *United States v. Esparza*, 678 F.3d 389, 392 (5th Cir. 2012)) (some internal quotation marks omitted).

determine the credibility of witnesses.'"[3] Instead, "we must 'view all evidence in the light most favorable to the government and defer to all reasonable inferences by the trial court.'"[4]

The record is replete with evidence of Washington's involvement. At trial, the government presented evidence that Washington permitted Smith to use her money and email address to post an online prostitution advertisement. Washington allegedly approved the ad's text and some of the photographs. According to B.R., Washington told her how much to charge customers, drove her to meet clients, and obtained the hotel rooms. Washington denied many of these claims at trial; however, the trial court made clear that it found Washington's innocent explanations "noncredible," and there is ample evidence supporting her knowing involvement.

B.

Washington also contends that the district court erred in trying her alongside Smith. We review the denial of a motion to sever for abuse of discretion.[5] "The threshold for finding such discretion to have been abused . . . is especially high when the trial is to be to the court rather than a jury."[6] "[T]he defendant bears the burden of showing specific and compelling prejudice that resulted in an unfair trial, and such prejudice must be of a type against which the trial court was unable to afford protection.'"[7] Washington "is entitled to reversal . . . only if [s]he identifies specific events during trial and demonstrates that these events caused [her] substantial prejudice."[8]

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[3] *Id.* (quoting *United States v. Turner*, 319 F.3d 716, 720 (5th Cir. 2003)) (alterations in original).

[4] *Id.* (quoting *United States v. Mathes*, 151 F.3d 251, 252 (5th Cir. 1998)).

[5] *United States v. Thomas*, 627 F.3d 146, 156 (5th Cir. 2010).

[6] *United States v. Cruz*, 478 F.2d 408, 414 (5th Cir. 1973).

[7] *Thomas*, 627 F.3d at 157 (internal quotation marks omitted).

[8] *Id.*

Before trial, Washington filed a motion for severance, arguing that her involvement in the crime was "minimal" and expressing concern that she "risk[ed] being punished for the alleged acts of Mr. Smith." The trial court originally granted this motion, and reconsidered its ruling after the parties later agreed to a bench trial. Upon reconsideration, the district court found that severance was "no longer warranted."[9]

Washington now argues that she was unfairly prejudiced by being tried alongside Smith because "[t]hroughout the whole proceeding, [he] displayed disruptive and erratic behavior" and "[t]he acrimonious environment he created made it impossible for [Washington] to get a fair trial." We find no abuse of discretion here. Washington does not identify "specific events" that caused "substantial prejudice."[10] Instead, she alleges only general "disruptive" and "erratic" behavior. The mere fact that a co-defendant proceeded pro se does not, on its own, create a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the [factfinder] from making a reliable judgment about guilt or innocence."[11] This is particularly true where, as here, the case was tried to a judge, creating an "especially high" threshold for abuse of discretion.

C.

Finally, Washington challenges her sentence as procedurally, substantively, and constitutionally unsound. First, she contends that the court

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[9] The court specifically stated that it was "fully able to control any courtroom outbursts by Smith and the potential for spill-over prejudice is eliminated," that "one trial [would] serve judicial economy and obviate the need for the minor victim to testify in two separate trials," and that *Bruton* is inapplicable to bench trials.

[10] *Thomas*, 627 F.3d at 157.

[11] *United States v. Tarango*, 396 F.3d 666, 672–73 (5th Cir. 2005) (quoting *Zafiro v. United States*, 506 U.S. 534, 537 (1993)). *See, e.g.*, *United States v. Mikolajczyk*, 137 F.3d 237, 241–42 (5th Cir. 1998) (finding no abuse of discretion in refusing to sever where some defendants proceeded pro se).

committed procedural error when it applied two-level enhancements for "undue influence" and "use of a computer." Next, she claims her sentence is substantively unreasonable. Finally, she argues that her sentence is cruel and unusual punishment violative of the Eighth Amendment.

Washington's PSR assigned her a base offense level of 34 with four two-level enhancements, resulting in a total offense level of 42. With a criminal history level I, this resulted in a Guidelines range of 360 months to life. At sentencing, Washington objected to three of the enhancements. The court granted Washington's objection to an obstruction of justice enhancement, but it applied two-level enhancements for undue influence and use of a computer service. These adjustments lowered Washington's offense level to 40 and her Guidelines range to 292 to 365 months. The court then sentenced Washington to 292 months.

"This court reviews a sentencing decision for reasonableness using a two-step process. First, the court determines whether the district court committed any significant procedural error. Under the first step, this court reviews the district court's interpretation or application of the sentencing guidelines *de novo*, and its factual findings for clear error. If there is no procedural error or the error is harmless, this court then reviews the substantive reasonableness of the sentence imposed for abuse of discretion."[12]

1.

The Sentencing Guidelines impose a two-level enhancement when a participant in the criminal activity "unduly influenced a minor to engage in prohibited sexual conduct."[13] This enhancement applies where "a participant's influence over the minor compromised the voluntariness of the minor's

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[12] *United States v. Groce*, 784 F.3d 291, 294 (5th Cir. 2015) (internal citations and quotation marks omitted).

[13] U.S.S.G. § 2G1.3(b)(2)(B).

behavior," and there is a rebuttable presumption that such influence occurs when the participant is at least ten years older than the minor victim.[14] To apply a sentencing enhancement, the court must find facts supporting the enhancement by a preponderance of the evidence.[15]

Washington argues that the evidence failed to prove she unduly influenced B.R. to engage in prostitution. She concedes that Smith did so, but claims she was "not a part of that plan." The district court did not err in applying this enhancement. First, as the court noted, the rebuttable presumption applied due to Washington's age, and she did not offer any evidence to rebut that presumption. Second, the record contains evidence to support the district court's findings that Washington was "actively involved in this entire matter, beginning almost immediately upon [B.R.]'s arrival to Shreveport," and that she exercised undue influence over B.R.

2.

The Guidelines authorize a two-level enhancement when the offense involves "the use of a computer or an interactive computer service to . . . entice, encourage, offer, or solicit a person to engage in prohibited sexual conduct with the minor."[16]

Washington argues that this enhancement should not apply because she personally "had no involvement with a computer or computer service." However, the computer use enhancement can apply even where the defendant was not the one directly soliciting customers.[17] Moreover, the district court

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[14] U.S.S.G. § 2G1.3(b)(2)(B) cmt. n.3(B)

[15] *United States v. Anderson*, 560 F.3d 275, 283 (5th Cir. 2009).

[16] U.S.S.G. § 2G1.3(b)(3)(B).

[17] *See, e.g., United States v. Pringler*, 765 F.3d 445, 455 (5th Cir. 2014) (upholding the computer use enhancement where a defendant purchased a computer, showed his girlfriend how to use the webcam feature, and "knew of [his girlfriend]'s use of the computer for advertising [the victim]'s services").

found that Washington was involved in a "jointly undertaken criminal activity," a finding which is supported by the record. Because of that, Washington is responsible for all reasonably foreseeable "acts and omissions of others" within the scope of the criminal activity taken in furtherance of the criminal activity.[18] As the district court noted at sentencing, the record supports the conclusion that Smith operated a Backpage.com account to entice people to engage in sexual conduct with B.R., a minor. Given Washington's participation in the joint undertaking, the district court did not err in applying the computer use enhancement to Washington's sentence.

3.

Because we find no procedural error in Washington's sentence, we turn next to its substantive reasonableness. [19] Washington argues that her sentence is "substantively unreasonable because it is greater than necessary to [e]ffect the purposes of sentencing" and "in light of her offense conduct." Washington also states that "[she] was a victim of [Smith] as well."

The district court sentenced Washington to 292 months, which was at the bottom of her Guidelines range. A sentence within the properly calculated Guidelines range is presumptively reasonable.[20] To overcome this presumption, Washington must demonstrate that "the district court improperly considered a factor, failed to take into account a factor, or made a clear error in balancing the factors."[21] She has not done so here.

4.

Lastly, Washington claims that her sentence is cruel and unusual punishment, and thus unconstitutional, relying on the same arguments as her

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[18] *See* U.S.S.G. § 1B1.3(a)(1)(B).
[19] *Groce*, 784 F.3d at 294 (internal citations and quotation marks omitted).
[20] *United States v. Tuma*, 738 F.3d 681, 695 (5th Cir. 2013).
[21] *Id.* at 695.

reasonableness claim. Eighth Amendment challenges are generally reviewed de novo, but because Washington raises her Eighth Amendment challenge for the first time on appeal, it reviewed for plain error.[22]

The Eighth Amendment "has been read to preclude a sentence that is greatly disproportionate to the offense, because such sentences are 'cruel and unusual.'"[23] Yet this court has held that it will not "substitute its judgment for that of the legislature nor of the sentencing court as to the appropriateness of a particular sentence," and thus "successful Eighth Amendment challenges to prison-term lengths will be rare."[24]

When faced with an Eighth Amendment challenge, "this court first makes a threshold comparison of the gravity of the offense against the severity of the sentence. Only if we determine that the sentence is 'grossly disproportionate to the offense' will we compare [the defendant's] sentence to sentences for similar crimes in this and other jurisdictions."[25]

Washington's conviction stems from her participation in the sex trafficking of a fourteen-year-old child. The Supreme Court has upheld a forty-year sentence and $20,000 fine for possession and distribution of approximately nine ounces of marijuana.[26] Based on that benchmark, we find that a 292-month sentence for involvement in child sex trafficking does not rise to the level of cruel and unusual punishment.

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[22] *United States v. Helm*, 502 F.3d 366, 367 (5th Cir. 2007). On plain error review, a defendant must show: "(1) there was legal error, (2) the error was plain, (3) the error affected [the defendant's] substantial rights, and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

[23] *United States v. Thomas*, 627 F.3d 146, 160 (5th Cir. 2010).

[24] *Id.* at 160. *See also Solem v. Helm*, 463 U.S. 277, 290–91 (1983) ("[O]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences will be exceedingly rare.") (internal quotation marks omitted).

[25] *Thomas*, 627 F.3d at 160.

[26] *Hutto v. Davis*, 454 U.S. 370, 370 (1982) (per curiam).

III.

We now turn to Smith's argument that the district court violated his Sixth Amendment right to counsel. At Smith's initial appearance, he was represented by counsel from the Office of the Federal Public Defender. Smith subsequently filed a pro se motion to terminate the representation. The magistrate judge terminated the appointment due to an "irreconcilable conflict" between Smith and his counsel, denied Smith's motion to proceed pro se, and appointed Joseph Woodley, now appellate counsel, as substitute counsel. The magistrate judge held that Smith could refile his motion "[i]f, after spending a reasonable amount of time with Mr. Woodley discussing his case, [he] still insists on representing himself."[27]

Smith later refiled his motion to proceed pro se, and the magistrate judge ordered a *Faretta* hearing. At the hearing, the magistrate judge told Smith that this was "a terrible idea" and warned him: "You can't come in on the morning of trial when a jury is sitting there and go, 'I changed my mind, Judge . . . I decided I can't do it,' because then we'll think you're just doing it for delay purposes." The magistrate judge then granted the motion and appointed Woodley as his standby counsel.

On the morning of trial, Smith filed a Motion to Reassert Right to Counsel, claiming that he could not "adequately defend [him]self in this matter" due to "the complexities of the case" and "the psychological toll that this case has taken on [him]." In support of his motion, Smith argued:

> I have a motion right here to – Defendant's Motion to Reassert Right to Counsel. This situation has become a lot [sic] complex than I actually ever thought it would be, and I don't – I don't – I don't think that I'll be able to adequately represent myself here

[27] In doing so, the court reminded the defendant that "the charges against him in this matter are very serious and . . . he may be subject to an extensive term of imprisonment." Therefore, "the court strongly suggest[ed] that Defendant allow Mr. Woodley to serve as his counsel throughout the remainder of the proceedings."

> today or to even be emotionally detached to put myself in a position to be able to represent me to the point to where I can question people without offending this Court.[28] I don't want to offend the court, and I know that my emotions will pretty much offend the court if I'm directly questioning or anything. I just want to reassert my right to counsel and I want to terminate my pro se motion, you know.

The court asked Smith whether he was asking for "a continuance," and Smith initially responded "if that's what it takes." The district court asked for clarification, saying: "I'm not putting words in your mouth. My question to you: are you asking for a continuance on the basis that you no longer wish to represent yourself, after a full hearing and granting of that motion?" Smith said yes. The government objected "to any continuance."

The court began to rule on the motion, stating:

> At this particular point in time, standby counsel has been appointed for you and is available to you throughout the course of this. Simply because on the day of the trial you attempt to manipulate the judicial process . . . by then telling this court that you no longer wish to represent yourself –

Smith seized on the mention of standby counsel, stating:

> Actually, Your Honor, I mean, I've written several letters to Mr. Woodley. He, I'm pretty sure, can tell you that I've written several letters to him explaining to him that this is becoming overwhelming for me and that it's becoming a real problem because I'm not able to adequately represent myself the way I wanted to represent – that I thought I would be able to. I – I just won't be able to represent myself adequately, and I'm asking to reassert my right to counsel.

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[28] This was after he had been warned about offending the court and the possibility of sanctions.

The court replied, "I understand your reassertion of your right to counsel. It's denied at this time. We will proceed to trial. You have standby counsel who has been appointed and been with you the entire time."

The court later ruled on the written motion, stating that it "believe[d] that [the motion] [was] nothing more than an attempt to delay the trial of this case." The court then read transcripts from Smith's *Faretta* hearing where the magistrate judge had warned about the risks of self-representation. The court concluded that "[i]n this particular instance, the defendant's motion to reassert his right to counsel is considered to be nothing more than an attempted delay tactic, and this matter will proceed to trial."

On appeal, Smith contends that this denial violated his Sixth Amendment right to counsel. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[29] The right to counsel "occupies an elevated status among fundamental constitutional rights."[30] A defendant may waive this right and proceed pro se if he chooses. Once he does so, "our Court has held that ordinarily the waiver can be withdrawn and the right to counsel can be reasserted."[31]

The post-waiver right to counsel is not unqualified.[32] We have held that a defendant is "not entitled to choreograph special appearances by counsel, or repeatedly to alternate his position on counsel in order to delay his trial or otherwise obstruct the orderly administration of justice."[33] At the same time,

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[29] U.S. CONST. amend. VI.

[30] *United States v. Pollani*, 146 F.3d 269, 274 (5th Cir. 1998) (citing *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963); *Powell v. Alabama*, 287 U.S. 45, 68 (1932)).

[31] *Id.* at 273.

[32] "Of necessity, the right to reassert a previously waived right of counsel has its boundaries." *Id.*

[33] *United States v. Taylor*, 933 F.2d 307, 311 (5th Cir. 1991) (internal citations and quotation marks omitted). *See also Pollani*, 146 F.3d at 273 ("[A] pro se litigant may not abuse his right [to counsel] by strategically requesting special appearances by counsel or by

a trial court must have some basis for concluding that a defendant is attempting to delay or obstruct the proceedings.[34] And to be sure, the district court, understandably frustrated, may have had reason to believe that Smith's primary motive was to delay his trial—an outcome that would have affected not only his own trial, but also that of his co-defendant.

But a court must also determine whether appointing counsel will *require* delay. In *United States v. Pollani*, we held that even where a defendant is "vigorously attempting to delay the start of trial," a district court still cannot deny his motion to be represented by counsel without reason to think that the representation would impede the orderly administration of justice.[35] In *Pollani*, we reversed a district court's denial of a pro se defendant's motion to substitute counsel four days before trial.[36] The motion came after Pollani had fired two lawyers, elected to proceed pro se, and then retained counsel and sought a continuance and a substitution of counsel.[37] The district court denied the continuance, and Pollani requested "that [the lawyer] still be available to represent [him] as counsel" and said they would "just have to do a lot of cramming" in the four days until trial.[38] The court denied the motion to substitute counsel. On appeal, we upheld the court's denial of the continuance, but we found that the court erred in denying Pollani's motion to be represented by his chosen counsel.[39] We distinguished Pollani's situation from a scenario

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repeatedly altering his position on counsel to achieve delay or obstruct the orderly administration of justice.").

[34] *Cf. Taylor*, 933 F.2d at 311 (finding "no support" for district court's refusal to allow the defendant to re-assert the right to counsel where there is "no suggestion whatever that [he] was attempting to abuse his rights to achieve some mischief, or that granting his request would have interfered in any way with the calendaring of his sentencing").

[35] *Pollani*, 146 F.3d at 273.

[36] *Id.* at 274.

[37] *Id.*

[38] *Id.* at 271.

[39] *Id.* at 274.

where "the defendant was only deprived of exercising the right to counsel in a particular way which would unjustifiably delay the trial process."[40] In doing so, we specifically held that if "no delay [is] required for [a defendant] to exercise his right" to be represented by counsel rather than himself, then the defendant shall have "the option to be represented by counsel to the extent that he [can] do so without interrupting the orderly processes of the court."[41]

Pollani is plain in its teaching that a district court can deny a motion seeking appointment of counsel—including the elevation of standby counsel to trial counsel—when a defendant's untimely request would result in delay. But there is no showing here that this was the circumstance. The district court focused on Smith's *purpose*, finding that the motion was "nothing more than an attempted delay tactic." Based on that finding, the district court was entitled to deny a continuance to allow counsel to prepare for Smith's defense. But *Pollani* teaches us that when a pro se litigant asks to be represented by counsel, we are to look at the *effect* of the requested appointment or substitution of counsel. A district court should make the appointment absent a finding that it "would impede the orderly administration of justice."

It is not apparent from this record that elevating standby counsel to counsel would have generated more delay than Smith's unskilled efforts to represent himself, about which Washington complained. As the district court noted, standby counsel was present in the courtroom. The record demonstrates that he was familiar with the case, having been appointed to represent Smith prior to his *Faretta* hearing and having handled some pretrial telephone conferences without Smith. On these facts, standby counsel may have been

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[40] *Id.* at 273.
[41] *Id.* at 273–74.

prepared to take over Smith's defense without delay. We do not know because the district court did not inquire into standby counsel's readiness to step in.[42]

Smith was entitled to representation to the extent that standby counsel could take over representation "without interrupting the orderly processes of the court."[43] Because the record does not demonstrate that the elevation of standby counsel to trial counsel would invariably work a delay and require a continuance, we conclude that Smith was deprived of a fundamental constitutional right, and his convictions must be reversed.[44]

IV.

We AFFIRM Washington's conviction and sentence, and we REVERSE Smith's convictions and REMAND for further proceedings consistent with this opinion.

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[42] Of course, the Sixth Amendment guarantees Smith's right to *effective* assistance of counsel. Here, standby counsel did not remark on his readiness to take on Smith's defense. If standby counsel indicated that he was not sufficiently prepared, this might present a different case, requiring us to decide whether, as seems implicit in *Pollani*, a defendant who files such a motion so close to trial waives any claims based on deficiencies in performance for want of adequate preparation due to standby counsel's elevation to counsel. But that concern is not presented by the record before us.

[43] *Pollani*, 146 F.3d at 273–74.

[44] Because we find that the district court committed reversible error on this issue, we need not address Smith's remaining arguments.

EDITH H. JONES, Circuit Judge, concurring and dissenting:

The majority today reverses and remands Tyrone Smith's convictions for sex trafficking a fourteen-year-old girl and prostitution by coercion or enticement because the district court denied Smith's motion to reassert his right to counsel on the morning his trial was to begin. Because the district court did not abuse its discretion by denying Smith's motion, I respectfully dissent. (I concur in that part of the opinion which affirms the conviction of Smith's codefendant Lacoya Washington.)

As the majority notes, the magistrate judge told Smith, upon granting his motion to proceed pro se: "You can't just come in on the morning of trial when a jury is sitting there and go, 'I changed my mind, Judge . . . I decided I can't do it,' because then we'll think you're doing it just for delay purposes." The district court, presented with this exact situation (in addition to a motion for the judge to recuse that Smith had put together four days earlier), reasonably determined that Smith was merely attempting to delay the orderly administration of justice. It was not an abuse of discretion for the district court, faced with these circumstances, to deny Smith's motion.

The majority cites *Pollani* for the proposition that a district court abuses its discretion if it refuses a defendant's last-minute motion to reassert his right to counsel without a finding that it "would impede the orderly administration of justice." This is at best an overstatement. *Pollani* stated, in the full text of the sentence, that "[t]he district judge did not state-*and there is no reason to think*-that [retained counsel]'s appearance would impede the orderly administration of justice." *United States v. Pollani*, 146 F.3d 269, 273 (5th Cir. 1998) (emphasis added).

Pollani is readily distinguishable from Smith's case. Pollani reasserted his right to counsel four days before trial, not on the morning of, and he

"unequivocally stated . . . that he wished to be represented at trial by [retained counsel], even if the continuance was denied." *Pollani*, 146 F.3d at 273. Smith made no such statement. Indeed, he did not outright request that standby counsel step in as trial counsel. Smith explained that he had written letters to standby counsel in which he complained that he could not adequately represent himself because the process was overwhelming. Further, the district court did have "reason to think" that standby counsel's appearance would impede the orderly administration of justice. Although the district court did not inquire whether standby counsel was ready to proceed immediately, the court had reason to believe that standby counsel would need at least some continuance in order to mount an effective defense.

I also take issue with the majority's opinion to the extent it purports to read *Pollani* as requiring that the district court always state on the record whether appointing new counsel or elevating standby counsel will impede the orderly administration of justice. *Pollani* did not require as much, and we should avoid imposing talismanic phrases on the district court when they are not needed. I would affirm Smith's convictions.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 15-00184-01/02
VERSUS	JUDGE S. MAURICE HICKS, JR.
TYRONE LARRY SMITH (01) LACOYA WASHINGTON (02)	MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

On June 14, 2016, this Court entered a Memorandum Order (Record Document 88) granting Defendant Lacoya Washington's ("Washington") motion to sever trial. At that time, both Washington and her co-defendant Tyrone Larry Smith ("Smith") were to be tried by a jury. After hearings on June 23 and 24, 2016, this Court granted motions to waive jury trial and both defendants are now set for bench trial the week of July 25, 2016. See Record Documents 110 & 114.

In light of the conversion from jury trial to bench trial, the Government has now filed a Motion for Reconsideration of Severance. See Record Document 133. The basis of the motion is that the risk of undue spill-over prejudice against Washington from possible actions by Smith in front of a jury has been eliminated, as the case will be tried by the Court alone. See id. at 1. Washington opposes the motion, arguing that the spill-over effect is not entirely eliminated; Washington will be subjected to cross-examination by Smith; and there is the potential for Bruton violations. See Record Document 134 at 1-2.

The Court finds that the Government has shown that severance in this matter is no longer warranted. The undersigned is fully able to control any courtroom outbursts by Smith and the potential for spill-over prejudice is eliminated. The Court is also sensitive to

the minor victim in this matter and holds that one trial will serve judicial economy and obviate the need for the minor victim to testify in two separate trials. Moreover, the Fifth Circuit has held that Bruton is inapplicable to bench trials. See U.S. v. Cardenas, 9 F.3d 1139, 1155-1156 (5th Cir. 1993). The Court's previous basis for severance under Rule 14 is now without merit and the Government's Motion for Reconsideration of Severance (Record Document 133) is **GRANTED**. The severance order issued on June 14, 2016 (Record Document 88) is **RECALLED** and Defendants Smith and Washington are hereby **REJOINED** for trial.

IT IS SO ORDERED.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 19th day of June, 2016.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

UNITED STATES OF AMERICA	CRIMINAL ACTION NO. 15-00184-02
VERSUS	JUDGE S. MAURICE HICKS, JR.
LACOYA WASHINGTON	MAGISTRATE JUDGE HORNSBY

MEMORANDUM ORDER

Defendants Tyrone Smith ("Smith") and Lacoya Washington ("Washington") were indicted on one count of sex trafficking a minor in violation of 18 U.S.C. § 1591. See Record Document 1. Smith was also indicted on one count of enticing a minor to travel in interstate commerce to engage in illegal sexual activity in violation of 18 U.S.C. § 2422. See id. The matter is set for jury trial on July 11, 2016.

Now before the Court is a Motion to Sever Trial (Record Document 52) filed by Washington. She argues that her level of involvement in the alleged crime is minimal, particularly compared to that of Smith. She believes she is at risk for being punished for the alleged illegal acts of Smith. In the motion, defense counsel also notes that Washington intends to testify at trial, which could provide damaging evidence against Smith and "result in a swearing match between the two defendants." Record Document 52-1 at 3. Washington maintains that the cumulative effect of the circumstances set forth above is unfair prejudice and "to avoid the spillover effect and any [S]ixth [A]mendment challenges," she requests a severance under Federal Rule of Criminal Procedure 14(a). Id.

The Government has opposed the motion, arguing the Washington's claims of

spillover and disparity in evidence lack merit and do not justify severance under Rule 14(a). See Record Document 59. The Government also contends that Washington is not entitled to a severance simply because she may suffer from inconsistent or antagonistic defenses of her codefendant. She must show more than antagonistic defenses, namely that the defenses are mutually exclusive and irreconcilable. Finally, the Government maintains that any argument of unfair prejudice is mere speculation at this stage.

Rule 14(a) Standard

Rule 14(a) provides that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." F.R.Cr.P. 14(a). "Mutually antagonistic defenses are not prejudicial *per se*." Zafiro v. U.S., 506 U.S. 534, 538, 113 S.Ct. 933, 938 (1993). Severance under Rule 14(a) is not required even if prejudice is shown. See id. at 538-539. Instead, "the tailoring of the relief to be granted, if any," is left to the sound discretion of the district court. Id. at 539. "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." Id. The Zafiro court went on to explain:

> Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. . . . The risk of prejudice

> will vary with the facts in each case, and district courts may find prejudice in situations not discussed here. When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but . . . less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.

Id.

Analysis

The instant motion was filed in April 2016. Since that time, Smith is proceeding pro se. See Record Document 71. As evidenced by Smith's failure to participate in the pretrial conference, the unruly conduct of Smith is a new issue this Court must consider in the context of Washington's request for a severance. See Record Document 87. In determining whether to sever Washington from Smith, this Court " must balance potential prejudice to [Washington] against the public interest in joint trials where the case against each defendant arises from the same general transaction." U.S. v. Simmons, 374 F.3d 313, 317 (5th Cir. 2004). Here, the Court finds that the grounds set forth in Washington's motion, along with Smith's pro se representation, demonstrate clear, specific and compelling prejudice that necessitates a severance. See id. This Court believes that it will be unable to afford protection to Washington in the absence of severance. See id. The prejudice created by "spill-over" is heightened in this case, as the most incriminating evidence pertains to Smith and his propensity for outbursts and disruption, as evidenced in the May 26, 2016 hearing and the June 9, 2016 pretrial conference, will likely carry over into the trial of this matter. No jury instruction can cure this risk of prejudice. Accordingly, Washington's Motion to Sever Trial (Record Document 52) is **GRANTED**.

IT IS SO ORDERED.

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 14th day of June, 2016.

S. MAURICE HICKS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

****

UNITED STATES OF AMERICA	**CRIMINAL NO. 5:15-CR-00184-02**
VERSUS	**DISTRICT JUDGE HICKS**
LACOYA WASHINGTON	**MAGISTRATE JUDGE HORNSBY**

MOTION TO SEVER TRIAL

NOW INTO COURT, through the undersigned counsel, comes Lacoya Washington, defendant herein, who, pursuant to Rule 14(a) of the Federal Rules of Criminal Procedure and the United States Constitution, respectfully moves this Honorable Court to sever the defendants' trial for the following reasons:

1.

This matter is currently set for trial on July 11, 2016.

2.

Lacoya Washington and Tyrone Smith were indicted together on one count of sex trafficking of a child by force, fraud or coercion. Tyrone Smith was also charged with one count of coercion and enticement. [Doc. 1]

3.

Lacoya Washington submits that her level of involvement in the alleged crime was minimal, particularly compared to that of Tyrone Smith. At trial, Ms. Washington risks being punished for the alleged acts of Mr. Smith. Therefore, Ms. Washington requests that her case be severed from Mr. Smith for trial purposes.

4.

Lacoya Washington intends to testify at trial, which could provide damaging evidence against Tyrone Smith. As such, Ms. Washington submits it would be in both defendants best interest to sever the case for trial.

WHEREFORE, Defendant respectfully prays that the Motion to Sever be granted and that Lacoya Washington be tried separate and apart from Tyrone Smith.

Respectfully Submitted,

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ATTORNEY FOR DEFENDANT

CERTIFICATE

I HEREBY CERTIFY that on this 19th day of April, 2016, a copy of the above and foregoing Motion to Sever Trial was filed electronically with the Clerk of Court using the CM/ECF system. Notice will be sent to counsel of record via the Court's electronic filing system.

s/ Joseph W. Greenwald, Jr.
Joseph W. Greenwald, Jr.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

****

UNITED STATES OF AMERICA	**CRIMINAL NO. 5:15-CR-00184-02**
VERSUS	**DISTRICT JUDGE HICKS**
LACOYA WASHINGTON	**MAGISTRATE JUDGE HORNSBY**

****

MEMORANDUM IN SUPPORT OF MOTION TO SEVER TRIAL

MAY IT PLEASE THE COURT:

I. FACTUAL HISTORY:

Lacoya Washington and Tyrone Smith are charged with sex trafficking of a child by force, fraud or coercion. Mr. Smith is also charged with coercion and enticement. [Doc. 1]. The Government alleges that the two defendants coerced and enticed a minor child to engage in prostitution. Ms. Washington denies any allegation that she knowingly participated in any such activity.

To the extent the minor child was coerced or enticed into prostitution, it was done at the behest of Tyrone Smith and not Lacoya Washington. Ms. Washington knew Mr. Smith and the minor child, who presented herself as Smith's 19 year old girlfriend, but did not participate in any criminal activity.

To the extent Lacoya Washington will be unfairly prejudiced by having to defend herself at trial along with Tyrone Smith, she respectfully moves for a severance of the trial.

II. LAW AND ANALYSIS:

Rule 14, Federal Rules of Criminal Procedure: Relief from Prejudicial Joinder.

> (a) RELIEF. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
>
> (b) DEFENDANT'S STATEMENTS. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statements that the government intends to use as evidence.

Rule 14 of the Federal Rules of Criminal Procedure provides that a court may grant a severance of defendants when it appears that a defendant will be prejudiced by a joint trial. *Fed. R. Crim. P. 14.* To justify severance of co-defendants, the movant must show that he would suffer specific and compelling prejudice against which the court is unable to provide protection, such as through a limiting instruction, and that this prejudice would result in an unfair trial. *U.S. v. Kaufman*, 858 F.Ed 994, 1003 (5th Cir. 1988)(*citing U.S. v. Toro*, 840 F.2d 1221, 1238 (5th Cir. 1988)); see also *U.S. v. Lewis*, 476 F.3d 369, 383 (5th Cir. 2007)(*citing U.S. v. Sudeen*, 434 F.3d 384, 387 (5th Cir. 2005). Defendants in a joint RICO trial "occupy 'an uneasy seat,'" but the mere fact that "[i]t is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather flock together,'' does not justify severance. *U.S. v. DeCologero*, 530 F.3d 36, 53 (1st Cir. 2008)(*quoting Krulewitch v. U.S.*, 336 U.S. 440, 454, 69 S.Ct. 716, 93 L.Ed. 790 (1949)(*Jackson, J., concurring*)). That is, "[a] spillover effect, by itself, is an insufficient predicate for a motion to sever." *U.S. v. Bieganowski*, 313 F.3d 264, 287 (5th Cir. 2002). "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*, 506 U.S. at 539, 113 S.Ct. 933.

An additional factor to consider when evaluating a severance motion is the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) and *Bruton v. U.S.*, 391 U.S. 123, 88 S.Ct. 1620 (1968). The Sixth Amendment Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford*, the Supreme Court held that the Sixth Amendment bars the admission of testimonial hearsay against a criminal defendant unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. 541 U.S., at 68, 124 S.Ct. 1354. For a statement to be "testimonial" within the meaning of *Crawford*, it must have been made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Melendez-Diaz v. Massachusetts*, 556 U.S. 662, 129 S.Ct. 2527, 2532, 174 L.Ed.2d 314 (2009)(*quoting Crawford*, 541 U.S., at 52, 124 S.Ct. 1354).

In the present case, Lacoya Washington will be unfairly prejudiced if tried together with Tyrone Smith. Ms. Washington submits that the incriminating evidence will be directed towards Tyrone Smith; however, as his co-defendant, Ms. Washington runs the risk of being punished for his illegal acts. Additionally, Ms. Washington intends to testify in her own defense, which will be detrimental to Mr. Smith's case and could result in a swearing match between the two defendants. To avoid the spillover effect and any sixth amendment challenges, Ms. Washington requests a severance of the trial.

III. CONCLUSION:

Because of the likelihood that Ms. Washington will be punished for the acts of Mr. Smith and because her testimony will harm Mr. Smith, she respectfully requests a severance of the trial.

WHEREFORE, defendant prays that the Motion to Sever be granted and Lacoya Washington be tried separate and apart from Tyrone Smith.

Respectfully Submitted,

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ATTORNEY FOR DEFENDANT

CERTIFICATE

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s/ Joseph W. Greenwald, Jr.
Joseph W. Greenwald, Jr.