No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2019

JOSEPH SIGNORE

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

JOSEPH SIGNORE respectfully petitions the Supreme Court of the United States for a writ of certiorari to issue to the United States Court of Appeals for the Eleventh Circuit to review the Judgment of that court entered in case number 16-11344-G on June 24, 2019, *United States v. Joseph Signore*, affirming Petitioner's conviction and sentence.

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QUESTION PRESENTED FOR REVIEW

Whether, in a joint criminal trial, where counsel for one co-defendant will act as a "second prosecutor," and who will do everything in his or her power to convict another defendant, necesarily increase the likelihood that there will exist a serious risk of prejudice to another defendant, requiring severance or less drastic measures be taken by the district court to reduce the prejudice created by counsel, under circumstances where co-defendants will present defenses at trial which are mutually antagonistic, mutually exclusive, and irreconcilable.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

None.

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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 AND ORDERS BELOW

The opinion of the court of appeals, U.S. v. Signore, 2019 WL 2577417 (11th Cir., June 24, 2019) (Case No. 18-11344), appears in the Appendix, and is unpublished.

The orders of the district court denying Petitioner's pre-trial Motions to Sever, and renewed motions to sever, or for mistrial during trial, were not committed to paper by the district court judge, but are only referenced in the district court's docket available in the ECM/CF filing system as "paperless" entries, which indicate only that the motions were denied. Undersigned counsel certifies that this has been confirmed by the Clerk's Office, the Records Office, and the Appellate Office of the U.S. District Court for the Southern District of Florida on September 19, 2019. Therefore, the orders denying the aforementioned motions are not referenced or reproduced in the Appendix.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on June 24, 2019, affirming Petitioner's conviction and sentence in the United States District Court for the Southern District of Florida, Case No. 9:14-cr-80081-DTKH. No petition for rehearing was filed in this case in the Court of Appeals. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are involved in this case:

None.

STATEMENT OF THE CASE

1. Introduction.

Joseph Signore was president and founder of JCS, Inc., a Palm Beach County, Florida, company which manufactured virtual concierge machines (VCMs), stand-alone kiosks similar to ATM machines. The machines were intended to provide a variety of services allowing users to do everything from ordering and paying for concessions from their seats at sporting events, to buying products and services using their mobile phones, to paying utility and other bills, to informing them about goods and services available from local merchants. Merchants would pay for advertising displayed on the machines, which would even be able to dispense discount coupons. Later on, a mobile phone application, called GeeBo, went into development. GeeBo would expand the capabilities and functionality of the VCMs. The VCMs also had practical applications for hospitals, where patients could order prescriptions and myriad other goods and services from their hospital rooms. Beginning in 2012, first-generation demo machines were placed in a few commercial establishments in Palm Beach County, including some in Roger Dean Stadium in Jupiter, Florida, a facility used in spring training by Major League Baseball teams. The concept was so popular, an infomercial starring Barbara Corcoran, a star of NBC's Think Tank, was produced.

Co-defendant Paul Schumack was the founder and president of TBTI, Inc., a company which sold and serviced ATM machines in thousands of locations throughout the United States. In 2011, Schumack was introduced to Signore by a mutual acquaintance, and the two agreed that Schumack's company would begin selling Signore's VCMs to the investing public.

An investor would pay between $ 3,500-$ 4,000 per machine, which would be placed in a location by Signore's company and serviced by Signore. In return, the investor would receive a payment of $ 300.00 per month for between 36-48 months. Payments to investors were to come from the sale of advertising placed in the machines. Schumack's company would receive a $ 500.00 commission for each sale.

Funds from the sales to investors in the machines went directly to JCS, which paid TBTI its commissions, and which also paid TBTI what was due to the investors. Investor payments made by credit card went through a credit processing company which had contracted with JCS. TBTI received its commissions, and investors were paid, as promised, until approximately November of 2013. Signore spent millions on computer software development, advertising the investment program, and machine production. But things went terribly wrong. Schumack's sales apparatus and investor contacts far outstripped JCS' ability to manufacture and place working machines, in large part because Signore and JCS became bogged down with the process of adding

services to be provided in the machines, and in making and installing the necessary changes to the software to make the machines work.

Lost in the selling frenzy was the fact that because there were few working machines in the field, and because virtually no advertising was being sold, older investors were being paid with newer investors' money. As a result, people within JCS began asking questions; one of whom contacted the FBI. Machines were not being built and delivered to keep pace with sales, and investors also started asking questions, some requesting the return of their investment payments. A credit processor started holding back payments to be made to JCS when it had to return credit card payments to investors, and JCS became unable to pay TBTI or the investors. Eventually, the government had JCS and TBTI ordered into receivership, and both were shut down in April of 2014.

A multi-count indictment in federal court charged Signore, Schumack, Signore's wife, Laura, who worked for JCS, and another JCS employee, Craig Hipp, with conspiracy to defraud and substantive counts of wire and mail fraud, and money laundering. Hipp was severed from the trial of the others on an uncontested Bruton issue. The government alleged that Signore and the others operated a Ponzi scheme, selling between 22,000 and 26,000 VCMs with total receipts of more than $ 70 million, and that they committed various types of money laundering, through their

purchases of houses, cars, vacations, etc.

II. Pre-trial Motions for Severance.

Signore defended on the basis that the business and investment opportunity was legitimate, and that he lacked intent to defraud. Schumack's defense was that Signore had committed fraud against him and others, and that he (Schumack) had no knowledge of Signore's fraud. Laura Grande-Signore maintained that she lacked fraudulent intent, and that she believed that attorneys and accountants hired by her husband had properly advised him about the business's legality.

Signore filed three pre-trial motions to sever himself from a trial with the others. In his first motion to sever, Signore asserted that based on discovery, communication with Schumack's counsel, and Schumack's own motion to sever, Schumack's defense would be mutually exclusive and antagonistic to that of Signore. Signore further asserted that there was a substantial likelihood that each defendant would introduce evidence of specific criminal acts committed by the other defendants which could potentially be admissible against one defendant, but not against another.

Signore's renewed motion for severance, again citing information provided by Schumack's counsel, asserted that Schumack would introduce evidence, among other things, of Signore's prior bankruptcy filings and Signore's fraudulent use of the social

security numbers of other individuals in order to hide his true identity in order to obtain credit, Signore's attempt to prevent discovery of his prior wrongdoings, including his criminal history and credit history, Signore's prior failed businesses, negative character witnesses who would testify to Signore's reputation for dishonesty, Signore's fraudulent statements made through counsel in an investigation of JCS and GeeBo in Texas, false statements made by Signore to JCS investors and TBTI investors, the deletion of JCS emails, the participation of Signore and his criminal and civil attorneys in a fraudulent press release when things began to go south, and Signore's use of Laura Grande-Signore's social security number to apply for casino permits.

Signore also asserted that Schumack's counsel intended to introduce evidence that Signore's attorneys engaged in fraudulent activity, which would place those attorneys in a position where they would be witnesses in the case, and that they would be disqualified from representing him, thus depriving him of his right to assert an advice of counsel defense and to have counsel of his choice. Finally, Signore asserted that his right to remain silent would be compromised if confronted with evidence of prior bad acts, many of which had nothing to do with the charges against him. Signore argued that no limiting instructions could be given to cure the potential prejudice to Signore presented by this evidence.

Signore's Third Renewed Motion for Severance[1] reiterated the portion of his previous motion concerning the press release published by Signore and his attorneys when the credit card payments to JCS were withheld in late 2013-early 2014, causing payments to investors to cease. Signore again asserted that Schumack would present information showing that the press release contained fraudulent information, and that it was prepared in part by Signore's criminal attorney. Signore argued that allowing Schumack's counsel to disparage counsel in front of the jury would undermine Signore's right to counsel, and that it would cast Signore's legal team as being involved in Signore's own wrongdoing.

In response to Schumack's Motion to Discuss Certain Events in Opening, Signore filed a "Fourth Renewed Motion to Sever." Schumack had requested leave to discuss in opening Signore's two prior felony fraud convictions, his prior bankruptcy judgments, and evidence that Signore attempted to conceal this information from Schumack. Signore argued that permitting evidence of this nature, including evidence of Signore's past crimes, wrongdoing and other bad conduct, which Schumack's counsel believed was vital to Schumack's defense, would be

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[1] As there doesn't appear to have been a Second Renewed Motion for Severance filed, the Third Renewed Motion for Severance would appear to have been Signore's actual third such motion, and it was so characterized in the docket sheet.

highly prejudicial to Signore. Signore argued that in order to believe Schumack's defense, the jury would have to disbelieve Signore's, and that in addition, Signore would not be able to confront Schumack to rebut the offered evidence. Schumack's counsel had given the district court more than adequate notice that he would assume the role of a second prosecutor, and that he would do anything he could to ensure that Signore was convicted, including introducing otherwise inadmissible evidence. The district court should have severed Signore from the others. Signore clearly articulated that his Sixth Amendment right to confront witnesses against him would be infringed upon, and that in the end, the jury would not be able to make a reliable judgment about his guilt or innocence.

III. The Trial.

The trial, consisting of 29 days in court, lasted approximately six weeks. Schumack's counsel kept to his promise throughout the trial; he premised his cross-examinations of witnesses by labeling everything Signore had done or said as fraudulent and false. He asked ex-JCS employee Melissa Kuper, who arranged for a refund for VCMs purchased by friends of hers, whether she was doing it because she was trying to convince the head of JCS (Signore), "who she knew was committing a fraud," to return her friends' money. Signore's objection was sustained. On cross,

however, Kuper admitted she had not discussed anything with Signore about his business; she could not have "known" that he was committing fraud. He cross-examined a credit salesman about information he obtained from SIGNORE to support a $ 35,000.00 credit transaction, which the salesman then forwarded to the credit card processor, asking the salesman whether he was knowingly and intentionally conspiring with Signore to perpetrate a fraud when he forwarded the information to the processor. The government's objection was sustained, but Schumack's counsel continued by asking whether the salesman intended to be passing on fraudulent information. He asked the same question again, and in response to Signore's objection to the characterization of the information as fraudulent, Schumack's counsel argued he was inquiring into the salesman's state of mind. This brought a strong rebuke from the court that the salesman's state of mind was not at issue. Schumack's counsel repeatedly invited government witnesses to agree that SIGNORE's actions and words were fraudulent, and even when objections to his questioning were sustained, the result was prejudicial to SIGNORE, and not cured by limiting instructions when they were given.

Schumack's counsel called witnesses, purportedly in Schumack's defense, whose only role was to inform the jury of Signore's fraudulent and criminal conduct. He called Zondrus Webb for the purpose of establishing that Webb was used by

SIGNORE to clean up SIGNORE's credit, and he called Robert Ray to testify that a Social Security number used by SIGNORE in a credit application actually belonged to Ray. Webb's testimony was irrelevant, and there was no evidence that Signore had used Ray's SSN on the credit application. Additionally, there had already been voluminous testimony as to SIGNORE's misdeeds in providing fraudulent information to the credit processors. There was no need for additional, cumulative evidence labeling SIGNORE a criminal and raising the possibility that the jury would convict him for the wrong reasons. Schumack introduced numerous statements attributable to Signore which were otherwise hearsay, but which were admitted for a variety of reasons; for the fact the statements were uttered, and not for the truth, but for the falsity of the matter asserted.

Schumack's counsel called Sally Perez, an investigator with the Office of the Federal Public Defender to testify about emails between Schumack and Signore containing statements by Signore which Schumack claimed were fraudulent. The government's objections on hearsay grounds were first sustained, but after counsel for Schumack told the court at sidebar that the statements were being offered not for the truth of the matter asserted, but for the effect on the listener, Schumack, who repeated the statements to investors, the district court allowed them in.

There was no way that investigator Perez could testify as to what effect

SIGNORE's statement had on Schumack. And there was no later showing of the effect on Schumack or of Schumack's actions as a result. Schumack, through his attorney's skillful defense, essentially allowed Schumack to testify without ever taking the stand, at SIGNORE's expense, and in violation of his right to confront witnesses.

SIGNORE again moved for mistrial during a break in Schumack's closing argument, after Schumack's counsel stated unequivocally that SIGNORE had criminal intent and committed fraud when he instructed an employee to put ads on the VCMs which had not been authorized by the companies, such as T-Mobile:

> Just like I believe it was Mr. Alexios. He's told by the head of JCS, Make it look good. Okay. T-Mobile is a sponsor. No authorization. That is criminal intent. That is a fraud. You know you don't have the authority to, right? You put it on there anyway. And you remember when I cross-examined him? I said, You didn't put anything on it there that said, Hey, by the way, this is just a sample. No. So anyone looking at it, what would they think? They would think that it was offered, right? Because they didn't say it wasn't. And that is the sort of thing that they showed to Paul as well.

Michael Alexios, the JCS employee, testified that either under the direction of SIGNORE, Craig Hipp, or Laura, or on his own, he placed ads and coupons on the machines; he also, on his own, placed information about commercial restaurants and other companies on the machines to keep the machines from looking completely empty. He testified he uploaded information about Comcast at the direction of

SIGNORE or Hipp, but it was never clear who it was. There was nothing inherently criminal about this, and no testimony that anyone relied on the fact of these placements of information in deciding whether to invest, but the jury was again pounded with accusations that SIGNORE had committed fraud and a crime. No limiting instruction was given, and as SIGNORE's closing had already been given, there was no way for him to respond.

To a lesser extent, Signore's ex-wife, Laura, who had married Signore during the course of the alleged conspiracy, and who divorced him after the criminal charges were brought, participated in convicting Signore with statements she made to the owner of a local gym they frequented, admitting when a Ponzi scheme was defined for her by the gym owner that that was what was going on. All three were convicted; the jury found Laura not guilty on only one of the counts against her, and both Signore and Schumack were convicted on all counts. Signore was sentenced to 240 months imprisonment; Schumack received a sentence of 144 months; and Laura Grande-Signore was sentenced to 84 months.

REASONS FOR GRANTING THE PETITION

I. The Opinion Below Again Demonstrates that the Eleventh Circuit's Interpretation and Application of Rule 14 and of this Court's Opinion in Zafiro v. U.S. is in Conflict With At Least One Other Court of Appeals.

This case presents the Court with the opportunity to resolve a conflict with at least one other Circuit concerning the interpretation and application of Rule 14 of the Federal Rules of Criminal Procedure, as held in this Court's opinion in Zafiro v. U.S., 506 U.S. 534 (1993), particularly where counsel for a co-defendant makes clear that he will act as a second prosecutor and will do everything in his or her power to convict another co-defendant. Specifically, the Eleventh Circuit has categorically precluded the "second prosecutor" theory from being relevant in assessing whether there exists a serious risk of prejudice requiring severance or less drastic measures in a multi-defendant trial. This case is important because the question presented implicates many cases in which multiple defendants assert that their defenses are mutually exclusive, antagonistic and irreconcilable, and where one defendant's counsel will do everything in his or her power to convict another defendant.

Rule 14 of the Federal Rules of Criminal Procedure provides: "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."

In Zafiro, this Court held that "when defendants properly have been joined under Rule 8(b), a district court should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." 506 U.S. at 539. The Court noted the federal system's preference for joint trials of defendants who are indicted together, as promoting efficiency and avoiding the "scandal of inconsistent jury verdicts." 506 U.S. at 534. In discussing the risk to be avoided, the Court also stated:

> 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**. See *Kotteakos* v. *United States*, 328 U.S. 750, 774-775 (1946). Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See *Bruton* v. *United States*, 391 U.S. 123 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, *e.g., Tifford* v. *Wainwright*, 588 F.2d 954 (CA5 1979) (*per curiam*). **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, as we indicated in *Richardson* v. *Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice. See 481 U.S., at 211

506 U.S. at 539 (emphasis in boldface type supplied).

Justice Stevens, in a concurring opinion, expressed his inability to share the majority's stated preference for joint trials of defendants who had been indicted together. Id. at 543-44. He also explained the problems inherent in "cases in which mutually exclusive defenses transform a trial into 'more of a contest between the defendants than between the people and the defendants'":

> The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor. Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor in two general ways. First, joinder may introduce what is, in effect, a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary.
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> * * *
>
> Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. *United States* v. *Tootick*, 952 F.2d 1078, 1082 (CA9 1991). See also *United States* v. *Romanello*, 726 F.2d 173, 179 (CA5 1984).

Id. at 543-44 & n.3.

On appeal, Signore pressed several issues, but he focused on the district court's denial of his myriad severance and mistrial motions. The Court of Appeals stated, "[w]e are reluctant to reverse a district court's refusal to sever, particularly in conspiracy cases" (App., *infra*, at 12a). But as Justice Stevens, and Justice Jackson before him, noted, "[A]nd in all cases, the Court should be mindful of the serious risks of prejudice and overreaching that are characteristic of joint trials, *particularly* when a conspiracy count is included in the indictment." Zafiro, 506 U.S., at 545 (emphasis supplied) (citing Justice Jackson's separate opinion in Krulewitch v. U.S., 336 U.S. 440, 454 (1949), discussing his concerns about multi-defendant trials).

The appellate court also noted that Zafiro held that co-defendants do not suffer prejudice "simply because one co-defendant's defense directly inculpates another, or it is logically impossible for a jury to believe both co-defendants defenses" (App., *infra*, at 12a). The panel went on to explain, in a footnote, that the Eleventh Circuit had not previously articulated, in some post-Zafiro cases, "whether 'mutually exclusive' defenses are sufficient by themselves to warrant severance" (App., *infra*, at 12a-13a & n.4) (citing U.S. v. Garcia, 405 F.3d 1260, 1272 (11th Cir. 2005) and U.S. v. Knowles, 66 F.3d 1146, 1159 (11th Cir. 1995)) ("[T]o compel severance, the defenses of co-defendants must be more than merely antagonistic, they 'must be antagonistic to the point of being mutually exclusive'").

It certainly sounded as if the panel was admitting that the opinions in Garcia and in Knowles misstated the law as announced in Zafiro, but more importantly, the panel failed to admit that the Circuit had previously expressed its utter rejection of the possibility that a second prosecutor scenario could ever be relevant to the assessment of risk of prejudice to a defendant to warrant severance, or at the very least, to warrant that lesser measures than severance were needed. See Hardy v. Commissioner, Alabama Dept. of Corrections, 684 F.3d 1066 (11th Cir. 2012), cert. denied, 133 S.Ct. 2768 (2013) (stating that the "second-prosecutor, finger-pointing situation is not one of those circumstances the Zafiro Court identified as presenting a risk of prejudice sufficient to warrant severance). Of course, the statement in Hardy completely ignores the Zafiro opinion's cautionary statement, that "[T]he risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here." Zafiro, 506 U.S., at 539.

The Zafiro Court, in both its main opinion and in Justice Stevens' concurrence, identified factors which would increase the risk of prejudice to a defendant in a joint trial. The main opinion stated that "[W]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened." Id. That was certainly the case in the case at bar. While undoubtedly Signor would be deemed the most culpable, co-defendant Schumack was

less so, and Signore's ex-wife, Laura, was clearly a minor player, who did little more than follow her husband's instructions. The Zafiro Court also stated, "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." Id. Such spillover effect was also present in the instant case. There was substantial evidence of co-defendant Schumack's guilt of fraud, in the form of statements he made to potential investors and others, quite independent of any evidence introduced against Signore. It would be quite natural for the jury to assume that because the two were working together, that Signore had made the statements or had otherwise caused Schumack to repeat them. The case was also quite complex, made more so by the thousands of pages of documents, much of it financial in nature, that was involved.

In U.S. v. Mayfield, 189 F.3d 895, 897 (9th Cir. 1999) the Ninth Circuit was confronted with the second prosecutor scenario, when co-defendants Mayfield and Gilbert were tried together in a drug possession with intent to distribute case. Id. at 897. Both claimed that the cocaine found in an apartment belonged to the other. Mayfield argued that the district court abused its discretion by denying severance despite Gilbert's mutually exclusive defense, and despite prejudicial evidence that was elicited by Gilbert's counsel. Id. The Ninth Circuit agreed, stating in the first paragraph of its opinion, "[although the district court's initial denial of Mayfield's

severance motion was understandable, based on pretrial representations made by the government about the evidence that would be admitted, the district court abused its discretion when at trial *it gave Gilbert's counsel free rein to introduce evidence against Mayfield and act as a second prosecutor*. Gilbert's counsel's trial tactics necessitated severance or some alternative means of mitigating the substantial risk of prejudice") (emphasis supplied). Id. The Court went on to find that Mayfield's constitutional rights had been violated, not only by testimony elicited by Gilbert's counsel, but also in combination with errors by the district court and by the government. Id. at 904-906).

Additionally, the Ninth Circuit found that "Gilbert's mutually exclusive defense prevented the jury from making a reliable judgment about [Mayfield's] guilt or innocence." Id. at 899. It cited Justice Stevens' statement in Zafiro, that "the probability of reversible prejudice increases as the defenses move beyond the merely inconsistent to the antagonistic," Id. (see Zafiro, 506 U.S. at 542). It also cited its opinion in U.S. v. Tootick, 952 F.2d 1080, 1082 (9th Cir. 1991), a pre-Zafiro case cited, but not overruled by the Zafiro Court (506 U.S. at 538):

> When defendants present mutually exclusive defenses, the jury often cannot 'assess the guilt or innocence of the defendants on an individual basis." "Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant . . . [c]ross-examination of the government's witnesses becomes an opportunity to

> emphasize the exclusive guilt of the other defendant . . . [c]losing arguments allow a final opening for codefendant's counsel to portray the other defendant as the sole perpetrator of the crime

Id. at 899-900. "Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield, and her closing argument barely even addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client." Id. at 900. "Gilbert's defense and Mayfield's defense were mutually exclusive because "the core of the co-defendant's defense is so irreconcilable with the core of [Mayfield's] own defense that the acceptance of the co-defendant's theory by the jury precludes acquittal of the defendant." Id. at 900 (quoting U.S. v. Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996)). Gilbert's counsel admitted to the district court in camera that she would act as a second prosecutor, rather than assert a mere presence defense, which was contradicted by the evidence at trial:

> This evidence, which established that Gilbert had significant ties to the apartment and was actively involved in the drug transaction, necessitated Gilbert's attempt to pin the blame on Mayfield. In fact, in the words of Gilbert's counsel, "[o]ur defense is that the drugs — Mayfield purchased the drugs, and he owns the drugs, and they're his drugs; and as long as Mayfield is there, Gilbert doesn't really have physical control over the drugs.
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> * * *
>
> The fact that this statement was made in camera is of no relevance. Gilbert's counsel's actions before the jury were wholly consistent with

> her in camera admission. Her admission merely confirms what is apparent from reading the entire record. It also supports our conclusion that the district court abused its discretion. *Gilbert's counsel frankly told the district court that her defense was to prosecute Mayfield, which should have put the district court on notice that it was required to grant Mayfield's severance motions or employ other means of stemming the prejudice flowing from Gilbert's mutually exclusive defense.*

Id. at 900 & n.1 (emphasis supplied).

"Mayfield made and renewed the motions to sever the trials at least six times before, during, and following the trial." Id. He was denied his Sixth Amendment right to confront witnesses against him when a police officer was permitted to testify about what a confidential informant told him. Id. at 905. He was prejudiced when Gilbert's confession, albeit in redacted form, was recounted during the testimony of another police officer. Id. at 901-902. But that wasn't all:

> Further aggravating the prejudice, Gilbert's counsel argued in her closing that Mayfield was the "main man," who by virtue of his status as the drug ringleader had sole control of the drugs and who threatened Gilbert into not testifying.
>
> Although she assiduously avoided actually naming Mayfield, her repeated references to him could not have been more blatant. Only a truly dense juror would not have recognized that Gilbert's counsel devoted her entire closing to discussing the "main man" because Mayfield was the main man and because this inference was necessary to her defense that "when the owner of the drugs is present with his drugs, he shared physical control with no one. Although Gilbert was present, as long as the other was present, he was the one — he was the boss, and he was the one who made the decisions about what would happen with

> the drugs in this case." Mayfield, of course, was the only person physically present in the room with Gilbert, and we have no doubt that the jury realized this

Id. at 902. Similarly, in the instant case, Schumack's counsel's closing arguments, in which he characterized the wrapping of the VCMs with company logos without permission, without any evidence as to whether Signore ordered it done, as proof of Signore's fraudulent intent, and a crime, was highly prejudicial. And to the Mayfield Court, "most importantly, there was no limiting instruction here . . . .The district court should have sternly admonished the jury immediately after Gilbert's inflammatory closing argument. Id. The Ninth Circuit also noted that "the district court had a duty to police the tactics of Gilbert's counsel, whose goal was to secure an acquittal for her client by proving Mayfield's guilt." Id. at 906. The Mayfield Court concluded by stating,

> Even the government recognized the risk of prejudice and accordingly objected to some of Gilbert's counsel's tactics out of a fear of "run[ning] into mistrial territory." Under these circumstances, the district court abused its discretion by failing to sever or use more rigorous and timely jury instructions to mitigate the prejudice

Id. at 906. In the instant case, the government often objected to Schumack's counsel's tactics in questioning its witnesses, perhaps because of the fear, as the government had in Mayfield, that they were running into mistrial territory.

The Ninth Circuit's statement that "the district court's initial denial of severance was understandable, based on pretrial representations made by the government about the evidence that would be admitted, 189 F.3d at 897, is significant in analyzing the instant case. In the case at bar, it is not clear what representations were made by the government pre-trial about its evidence. In its response in opposition to Signore's initial motion and renewed motion for severance, the government focused on reciting the law favoring joint trials. The government's lone assertion as to what evidence it would introduce concerned Schumack; that it intended to demonstrate that Schumack and his company made representations "on their own behalf, on their own contracts, outside of any signed representations of JCS or the Signores."

However, the government also noted that much of what Schumack was forecast to introduce against Signore was inadmissible, and that attacking the character of a witness, except attacking a character of a witness for truthfulness, was not permitted, that extrinsic evidence to prove specific instances of a witness's character for truthfulness was also impermissible, and that "Schumack's alleged prospective intent to defend himself by establishing that Joseph Signore was a dishonest person who acted in conformity with his reputation is strictly prohibited by Fed. R. Evid. 404(b)1(1)." And yet, that is exactly what took place at trial. Further, as the Ninth

Circuit concluded, that while the admission of impermissible testimony would not require severance on its own, the combination of an informant's statements, the admission of Gilbert's out-of-court confession . . ., and Gilbert's counsel's inflammatory closing argument warranted severance." Id. at 901.

The Eleventh Circuit and the district court completely lost sight of what was required of the court once either defendant moved for severance. First, the district court must determine whether "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. Next, if there is a serious risk of prejudice, the district court must determine whether less drastic measures than severance, such as limiting instructions, will suffice to cure *any* risk of prejudice. Id.

There is no indication that the district court in the instant case ever made such determinations, either before or during trial. In the case of both Signore's and Schumack's pre-trial motions, the district court never committed his denials of those motions to paper or memorialized them in any way (see OPINIONS AND ORDERS BELOW, p. v, *supra*). During trial, when motions to sever or for mistrial on severance-related grounds were renewed, the district court 's denials were short, terse, seemingly off-the-cuff statements, that severance was not warranted, without

reference to any of the determinations or analyses the district court was required to undertake.

In addition to the district court's duty to police the tactics of a co-defendant's counsel acting as a second prosecutor, as pointed out by the Ninth Circuit in Mayfield, the trial judge also "has a continuing duty at all stages of the trial to grant a severance if prejudice does appear." Schaffer v. U.S., 362 U.S. 511, 515 (1960); see also U.S. v. Johnson, 478 F.2d 1129, 1131-32 (5th Cir. 1973) (citing Schaffer in reversing the district court's denial of Johnson's numerous motions to sever when it appeared at trial he could not receive a fair trial in a joint trial with his co-defendant). This duty is specially relevant to the case at bar, not only to the very numerous instances of prejudice which Schumack's counsel's tactics caused, but especially to two separate occurrences at trial.

To be clear, Signore and his co-defendants were accused of operating a Ponzi scheme. Additionally, however, the government was required to prove he had intent to defraud. Amanda Davis, a forensic account who was, along with her firm, hired by the receiver and the Department of Justice, gave testimony about the work she did in reconstructing the banking activity of JCS and TBTI. The government asked if she had formed an opinion about what was going on with the companies operated by Signore and Schumack. Signore's counsel objected, anticipating that Davis would

give her opinion as to the ultimate issue in the case, which was whether Signore had intent to defraud. The Court responded:

> **THE COURT:** Well, I want to be very clear about this. Our witness -- let me back up for a minute. When you look at the charges in this case, each of the charges alleges that a particular defendant had an intent to deceive somebody. In other words, if you charge fraud, one of the elements of fraud is that a material misrepresentation was made. In other words, a misrepresentation about something that was important, and that it was made with the intent to deceive, with the intent to cheat somebody out of money. An expert witness is not allowed to come into court and give an opinion about the mindset of a particular defendant. That's for the jury to decide based on all of the evidence that is presented. But the expert witness is allowed to speak about looking at the financial transactions, what opinion she has as to what was taking place. That's different from saying what was the mindset of the person who might have been involved in those transactions. Does everybody understand that? So I'm going to overrule the objection. I'll allow the witness to testify and give her opinion about what she views or what her opinion is as to the movement of money but not as to the mental intent of the person who might or people who might have been involved in causing the movement of the money. So with that, you may proceed.

The government repeated the question, and Davis responded: "Yes, I did. I formed an opinion that JCS and TBTI operated a Ponzi scheme." Signore objected again on the same grounds, and requested a sidebar, which was denied. The Court again responded to his objection:

> **THE COURT:** No, I don't think that's necessary. I'm looking at Rule 704, subsection B, and the witness is able to express an opinion about whether this constitutes a Ponzi scheme. That's something the jury is going to have to decide. And I think the jury understands the essence of a Ponzi scheme is that money is being taken from later investors to pay

> earlier investors. That's not talking about what is the mental intent of the people responsible for moving the money. So with that, I'll overrule the objection and allow the witness to go forward.

Cohen then asked Davis to give her definition of what she understood a Ponzi scheme to be, and Davis answered, "a Ponzi scheme is a type of investment fraud." The district court interjected again:

> **THE COURT:** I want to come back one more time. Our witness, the witness today, Ms. Davis, she's not able to talk about what is the mental intent behind the people, whoever is in charge of moving money and making financial decisions. But she is able to testify as to whether this kind of a movement of money constitutes, in her opinion, a Ponzi scheme. But I want to be very clear because she kind of linked two things together. She cannot testify whether this constituted a fraud because, remember, a fraud is something that has the mental intent to deceive. That's something the jury is going to have to decide whether this activity constitutes fraudulent activity. Was this the mental intent to deceive people? Okay. All she can talk about is her opinion regarding what was happening with the money, was later money being used to pay off earlier investors, and is that, in the language of this field, referred to as a Ponzi scheme. But that does not establish whether there was fraudulent intent. Okay? And that's critical to all the charges.

The government might have rested right then and there. How could the jury, any jury, be able to understand the concept of *mens rea* and make a reliable determination of guilt or innocence in this situation? The government had already established that while only about $ 21,000 in advertising revenue had been raised, that millions in payments to earlier investors was paid with later investors' money, a classic Ponzi scheme. And now, the only expert witness in the trial had just told

the jury that a Ponzi scheme was a type of fraud. Case closed. What's more, the district court's rambling "instructions" could have accomplished nothing to dispel the prejudice. The district court denied all defendants' mistrial motions, and, notwithstanding the obvious, the appellate court below found that the curative instructions given by the district court "decreased the possibility of undue prejudice and supported the district court's decision not to grant a mistrial," partially because Davis had not specifically mentioned Signore (App., *infra*, at 6a-10a). Who else might she have been referring to? There was no mention of an analysis of the combination of prejudice caused by the government, court and counsel acting as second prosecutor, as there was in Mayfield, 189 F.3d at 904-906.

The second set of circumstances implicating the district court's duty to sever during trial occurred even before the expert witness fiasco. The Zafiro court stated:

> When the risk of prejudice is high, a district court is more likely to determine that separate trials are necessary, but, as we indicated in *Richardson* v. *Marsh*, less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice

Zafiro, 506 U.S. at 527 (quoting Richardson v. Marsh, 481 U.S. 200, 211 (1987).

On Day 6 of the trial, the Court received a note from Juror 12, telling the judge that prior to her being selected, she and co-workers discussed the case briefly, and that her fiancé and mother were aware of the nature of the case. The juror was

questioned by the Court, and she also told the Court that she told her pharmacy co-workers that the case was about a "potential financial Ponzi trial." She Googled the case and learned the defendants' names and the charges. She told the Court that some of her co-workers started checking out how being a juror could potentially be dangerous, and "it made her nervous." The Court convinced itself that the juror could be impartial and sit on the jury with an open mind, that she wouldn't discuss it with anyone, that she could follow the Court's instructions, and that she would do no more research and tell no one about this. SIGNORE's counsel requested the Court to ask about the nature of the Google article and its information, and Juror 12 was brought back into the courtroom, where she further told the Court that she had initiated a Google search using the words, "Signore Ponzi," not once, but twice; once at work, with co-workers present, and once at home. She learned the names of the defendants involved, the charges, a description of a "virtual concierge," and that a separate case had been concluded. After further prodding about the other case, she admitted that she had learned the result of that case. She told the Court she could put all of this, and her co-workers' comments aside, and that none of it would play a part in her decision.

SIGNORE's counsel had more questions, and he had concerns that she had not been forthcoming about doing two searches when first questioned; that if she had

learned of severed co-defendant Craig Hipp's sentence, that would be prohibited. The Court was concerned as well, that the juror had heard his instructions about not discussing the case with colleagues, and she violated them not only once, but a second time. The Court tried to replicate the juror's Google search, without success, but the courtroom deputy found the article, which the judge read. Counsel for Schumack and Laura objected to striking the juror, but after the government joined SIGNORE's motion, she was excused, and the jury was told about it.

On Day 7, the Court received a note from Juror 3, and read it to the parties and counsel:

> On Tuesday and Wednesday in the jury room before court started for the day and during breaks, several jurors were discussing the defendants, specifically Mr. Schumack. One juror called him, quote, a dirty old man, close quote. Then said, Well, that's what he looks like to me. I mentioned that I didn't think we were supposed to be discussing anything about the case. And she said she wasn't discussing the case, just commenting. This is crossed out, but it says, Then yesterday, Wednesday, the same juror began to discuss with another juror -- and she states this, again, on the next page -- the same juror commented on the witness, Ms. Kuper, and that she was the -- quote, unquote -- star witness and wondered where the attorney was going with the questioning. Another juror made a comment, that's speculation, nothing concrete; just wondering out loud, again said, We probably shouldn't discuss it and walked out of the room. Then she replied, No, we can talk about it in the jury room; just not to anyone outside. Then I walked out.

Schumack moved immediately for a mistrial, arguing that the jurors had only been empaneled shortly before the incidents; that one juror had already been excused; that

the comment about Schumack was clearly derogatory; that several jurors had been discussing Schumack; that one of the jurors insisted that she was only commenting, not discussing; that some of the jurors had violated the Court's repeated instructions; and that a juror was actively seeking to infect the entire panel, or at least a significant number, all in a case which might result in substantial jail time. Counsel for Schumack added that the same juror commented on witness Kuper, "the star," wondering where the questioning was going.

Counsel for SIGNORE agreed with Schumack, that a mistrial should be granted without the Court becoming an investigative body among jurors, that he had a serious question about the jury's ability to be truthful with the Court, given their history, and that the Court should entertain arguments for mistrial, taking the juror's statements at face value without the Court looking into the truth of what Juror 3 wrote in her note. The government argued that the Court should inquire of the jurors, individually if necessary, to determine the extent of any infection of the rest of the panel. Counsel for Grande-Signore joined in the motion for mistrial.

The Court, believing that it was obliged to determine the truthfulness of what was reported, called Juror 3 to the courtroom. Juror 3 identified Jurors 5 and 16 as having discussed/commented on the case and/or defendants. Juror 3 told the Court that the comments took place in the jury room, where most if not all of the rest of the

jury were, and were said loudly enough for anyone in the room to hear. Other people may have commented. Juror 3 also related that Juror 16 had commented on her observations of Laura Grande-Signore. According to Juror 3, the two jurors involved were generally very chatty, talking to each other about other things, about everything. The Court asked Juror 3 if she could put the comments made by others aside and be impartial. At this point, the Court was alerted to a possible medical issue involving SIGNORE; Juror 3 had not yet left the courtroom. Medical personnel arrived and took SIGNORE away.

The court stated that it had received questions from counsel to pose to the jurors, but that it declined to pose them to Juror 3. The court then confirmed with counsel for Schumack that he had previously filed a motion for severance. SIGNORE's counsel then moved for a mistrial, on the basis that the jury was going to be brought back in to the courtroom, and SIGNORE would not be there; there would be something inherently wrong with his absence, and the jury would wonder. The motions were denied, and the jury returned, with the Court simply telling the jurors that a medical issue had arisen.

When the trial resumed, the Court read a note from Juror 16, who was one of the two jurors mentioned by Juror 3, and was the juror who had allegedly made the comments about Schumack and "star" witness Kuper. The Court stated its intention

to question Juror 16 to determine whether the allegations were true; defense counsel reminded the Court that the same juror allegedly commented upon her perceptions of Laura Grande-Signore's appearance of stoicism and non-reaction. The government voiced its objection to the Court's proposed process, as this was a situation in which there was no evidence of extrinsic influence on the jury, and that a full investigation was not required.

Juror 16 admitted to making the remark about Schumack, but said, "it was very early before we even started," before the jurors were given the instruction not to talk about the case, and denied making the remark about Kuper. She told the Court that all she said about Grande-Signore was that "all she does is stare straight ahead." She then told the judge, without prompting, that she might have a problem with a defendant not testifying. Juror 16 was excused from further service soon afterwards. The Court addressed the jury, reminding them again of their duties and polling them individually as to their ability to remain impartial. The Court did not question Juror 5 as it had Juror 16, nor did it inquire as to who else had violated his instructions about discussing the case, who had heard Juror 16's remarks or what effect they may have had.

While the documented misconduct of the jury may or may not have presented grounds for a mistrial, it is clear that the jury's conduct was clear evidence that the

jury, even without the dismissed jurors, would have difficulty following the district court's instructions. The facts of this case not only rebut "the almost invariable assumption of the law that jurors follow their instructions," Richardson, 481 U.S. at 206, they reduce it to what it is in the real world–a legal fiction.

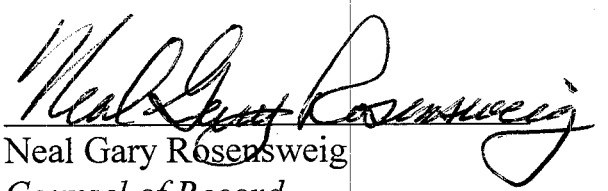
It appears likely that considerations of judicial economy were not served by a joint trial below. It is more likely that the judicial resources expended in this joint trial were greater what would have been expended in separate trials. And of course, considerations of judicial economy should always give way to the fundamental interests of those accused of serious crimes. In the case below, the district court failed to conduct the assessment of risk required by Rule 14, and by Zafiro, and it necessarily failed to consider the impact a second prosecutor had on that assessment, when the defendants presented their initial motions for severance to the court. It also failed to revisit the issue during the trial on the numerous occasions when prejudice to Signore again became an issue. The Court of Appeals failed to even mention the potential implications of a second prosecutor on that assessment, reiterating by its silence that the second prosecutor scenario has no relevance to the severance inquiry. The district court's limiting instructions throughout the trial were, when given, ineffective as a means of policing Schumack's counsel's tactics, and were equally ineffective in reducing the prejudice caused by those tactics. The question presented

is important, both for promoting the consistent administration of justice, and in order to ensure that criminal defendants receive fair trials. Petitioner's motions for severance should have been granted.

CONCLUSION

The petition for a writ of certiorari should be granted, and the parties should be permitted to brief the case on its merits.

Respectfully submitted,



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