

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

THI HOUNG LE, also known as Kristy Le
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 16-60843

PETITION FOR WRIT OF CERTIORARI

SAMUEL DENNIS JOINER (MB #3176)

Federal Public Defender

JOHN W. WEBER, III (MB #101020)

N. and S. Districts of Mississippi

200 South Lamar Street, Suite 200-N

Jackson, Mississippi 39201

Telephone: 601/948-4284

Facsimile: 601/948-5510

Attorney for Defendant-Petitioner

QUESTIONS PRESENTED FOR REVIEW

Do repeated and specific accusations from a jointly tried pro se codefendant casting himself as victim of the defendant warrant severance of trial due to prejudice to defendant's rights under the Confrontation Clause?

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On September 15, 2015, the Grand Jury for the Southern District of Mississippi returned a 95-count indictment charging Petitioner Thi Houng “Kristy” Le and codefendants Mikal Watts, David Watts, Wynter Lee, Eloy Guerra, Abbie Nguyen and Gregory Warren. The indictment charged defendants with conspiracy to commit mail fraud, wire fraud, identity theft and aggravated identity theft in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, identity theft in violation of 18 U.S.C. § 1028(a)(7), and aggravated identity theft in violation of 18 U.S.C. § 1028A. The case proceeded to a jury trial, at which several of the identity theft counts were dismissed. Ultimately, defendants Mikal Watts, David Watts, Wynter Lee, Eloy Guerra, and Abbie Nguyen were acquitted of all charges. Ms. Le and Mr. Warren were convicted on all outstanding counts. On December 14, 2016, Ms. Le was sentenced to a term of imprisonment of 84 months, to be followed by 3 years of supervised release, and a fine of \$25,000. The district court case number for this case is 1:15-cr-00065-LG-RHW-006. The district court’s Judgment of Conviction is attached hereto as Appendix 1.

Petitioner timely filed her notice of appeal to the Fifth Circuit on January 5, 2017, arguing, *inter alia*, that the district court should have granted her motions for severance. On March 14, 2018, the Fifth Circuit filed an unpublished Opinion

affirming the district court's decision and entered a Judgment on the same day. The Fifth Circuit case number is 16-60843. The Opinion and Judgment are attached hereto as composite Appendix 2. The Opinion was not designated for publication in the Federal Reporter, but appears in the Westlaw electronic database at 2018 WL 1321216. A copy of the Westlaw rendition of the Opinion is attached as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Opinion and its Judgment in this case on March 14, 2018. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case pursuant to the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI (emphasis added)

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance

This case arises out of a 95-count criminal indictment levied against Petitioner Thi Houng “Kristy” Le and six codefendants, for conspiracy to commit mail fraud, wire fraud, identity theft and aggravated identity theft in violation of 18 U.S.C. § 371, mail fraud in violation of 18 U.S.C. § 1341, wire fraud in violation of 18 U.S.C. § 1343, identity theft in violation of 18 U.S.C. § 1028(a)(7), and aggravated identity theft in violation of 18 U.S.C. § 1028A. The court of first instance, the United States District Court for the Southern District of Mississippi, had jurisdiction under 18 U.S.C. § 3231 because the criminal charges levied against Ms. Le arose from the laws of the United States of America.

B. Statement of material facts

The criminal indictment in this case was brought against Petitioner and her codefendants subsequent to the litigation and claims process against British Petroleum (BP) related to the 2010 Deepwater Horizon rig explosion and oil spill, or what is commonly referred to as the “BP oil spill.” Following that disaster, numerous potential plaintiffs sought compensation from BP. Petitioner’s codefendant Mikal Watts, a plaintiffs’ lawyer from Texas, and his law firm (“the Watts Law Firm”) began looking for plaintiffs to represent. They contracted a firm to build up a stable of clients. Indict., ROA.40.

The Watts law firm hired several independent contractors, including Petitioner as well as her co-defendants Eloy Guerra and Gregory Warren, to handle different aspects of putting together a client base. The independent contractors and the client-gathering operation were based on the Mississippi Gulf Coast, and they were funded by the Watts law firm and investors with whom it had partnered for purposes of the oil spill litigation. The Watts law firm wired approximately \$10 million to the independent contractors in the months following the oil spill in a series of transactions, some of which went to Petitioner. *Id.*, ROA.55-64, ROA.68. Petitioner was in charge of the “field team,” a group of people who were charged with developing the client base amongst the local community of commercial fishermen. They were to make contact with potential clients and gather the information necessary for the Watts firm to file claims for damages through the BP administrative fund or MDL 2179. Ms. Le and the field team produced approximately 40,000 names of individuals to the Watts law firm, but there were problems with the client data, including, for example, incomplete Social Security numbers and incorrect dates of birth. Trial Tr., ROA.570-575.

Ms. Le hired a private investigator to assist in completing the Social Security numbers and locating other information needed for the client forms. That private investigator, Ryan Willis, in turn contacted Denspri, LLC, a company with the ability to run searches for Social Security numbers and other data. The field team

also used an electronic searching company called IRBsearch to gather information for client forms. *Id.* at ROA.3572-3574.

The Watts law firm sent out a series of mass mailings to the individuals in the client lists. Many letters came back as undeliverable, and following these mass mailings, the Watts law firm received a number of communications from individuals who stated they had never agreed to be represented by the Watts law firm. Trial Tr., ROA.2901-2905.

Subsequent to the Watts law firm's claims to BP and the MDL that it represented some 40,000 commercial fishermen and presented client lists in the claims process, a grand jury indicted Mikal Watts, David Watts, Wynter Lee (an employee of the Watts firm), Eloy Guerra, Petitioner Thi Huong Le, Gregory Warren, and Abbie Nguyen (a field worker under Ms. Le). The indictment alleged that many of the Social Security numbers listed for the clients were stolen or inaccurate, and that many of the purported "clients" were not actually victims of the BP oil spill, and had never agreed to representation by the Watts law firm. The indictment further alleged that, in reliance on Mikal Watts's false representations about his client base, BP had agreed to place over \$2 billion into a compensation fund for a class of oil spill victims that included commercial fishermen. Indict., ROA.54-85.

The case proceeded to trial, and the government sought to prove that Mikal

Watts and the Watts law firm had led a conspiracy to defraud BP by presenting false claims for damages. The government also alleged that Ms. Le had participated in the creation of a fraudulent list of client names that was presented to BP for payment. Trial Tr., ROA.537-540, 543.

At trial, Mikal Watts, an experienced attorney who represented himself in this case, argued repeatedly that he was not a participant in a conspiracy with Ms. Le, but rather her victim. *See, e.g.*, Trial Tr. ROA.586-589. Mr. Mikal, along with several of the other represented defendants, alleged that instead of gathering real victims to become legitimate clients, Ms. Le fraudulently generated lists of names, many of which were pulled out of a phone book. *See id.* at ROA.3977-3979. These defendants further alleged that instead of using the wired funds to set up the client-gathering operation and complete the project, Ms. Le and her codefendant Gregory Warren misused the money and spent most of it on themselves. Beginning with statements made in jury selection, and continuing through opening arguments, witness examination, and culminating in closing arguments, Mr. Mikal based his defense on Ms. Le and Mr. Warren's culpability.

When it became clear that several of Ms. Le's co-defendants were presenting antagonistic defenses, trial counsel filed a motion for severance. The trial court denied the motion. Trial Tr., ROA.2707-2716. Ms. Le's trial counsel subsequently renewed the motion for severance on two separate occasions, but both of those

motions were denied as well.

The case proceeded to the jury, and ultimately, Mikal Watts, David Watts, Wynter Lee, Eloy Guerra, and Abbie Nguyen were acquitted of all charges. Ms. Le and Gregory Warren were convicted on all charges except for those dismissed at trial. On December 14, 2016, Ms. Le was sentenced to a term of imprisonment of 84 months, to be followed by 3 years of supervised release, and a fine of \$25,000. Judgment, ROA.15169-15177. Petitioner timely filed her notice of appeal on January 5, 2017, arguing, *inter alia*, that the district court should have granted her motions to sever her trial. On March 14, 2018, the Fifth Circuit affirmed the district court's decision. Ms. Le now brings this petition for writ of certiorari on the issue of severance.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

As stated in Rule 10 of the Supreme Court Rules, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.” Rule 10(a) provides that certiorari may be granted when “a United States court of appeals has ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for this Court’s supervisory power[.]” In this case, the Fifth Circuit sanctioned a violation of Petitioner’s rights under the Confrontation Clause by affirming the district court’s decision to deny Petitioner’s repeated, timely motions to sever her trial from a pro se codefendant who, without making himself available for cross examination, made repeated statements at trial directly alleging that Petitioner and another codefendant were solely responsible for any wrongdoing, and that he, the pro se codefendant, was a victim of their criminal activity.

Based on the arguments presented below, this Court should grant certiorari to correct the error made by the district court, and affirmed by the Fifth Circuit. This issue should be addressed because the Court has not previously considered a case in which the rights of a pro se codefendant so clearly impinge on the rights of the other defendants in the same case. However, because of the frequency of pro se

representation in criminal cases, this situation is likely to reoccur. For these reasons, Ms. Le prays for this Court to grant her Petition for Writ of Certiorari.

B. Severance Is Appropriate When a Defendant's Rights Under the Confrontation Clause Are Prejudiced

Federal Rule of Criminal Procedure 8(b) provides that defendants may be charged together “if they are alleged to have participated ... in the same series of acts or transactions constituting ... offenses.” However, Rule 14(a) permits a district court to grant a severance of trial if “it appears that a defendant or the government is prejudiced by a joinder.” The default rule for criminal trials has long been that “persons indicted together should be tried together, especially in conspiracy cases.” *United States v. Pofahl*, 990 F.2d 1456, 1483 (5th Cir. 1993).

This Court has previously held that, when considering motions to sever, the assertion of mutually antagonistic defenses from a codefendant is not *per se* grounds for severance. *Zafiro v. United States*, 506 U.S. 534, 538 (1993). In *Zafiro*, this Court instructed that a district court should grant severance “only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Id.* at 539. Further, the mere identification of potential prejudice is not enough under *Zafiro* to justify severance, since “less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice.” *Id.* A

defendant seeking severance must therefore demonstrate both prejudice and the inability to cure such prejudice through other means.

One potential source of prejudice arising from joint trials is when one or more codefendants proceeds *pro se*. At least one circuit court has recognized that, while not prejudicial *per se*, “[a] trial involving a *pro se* defendant and codefendants who are assisted by counsel is pregnant with the possibility of prejudice.” *United States v. Veteto*, 701 F.2d 136, 139 (11th Cir.), *cert. denied*, 464 U.S. 839 (1983). Other Circuits have also considered this issue, but none so far have found incurable prejudice that would warrant severance. *See United States v. DeMasi*, 40 F.3d 1306, 1313 n.7 (1st Cir. 1994) (refusing to find prejudice from *pro se* codefendant’s statements made outside of the courtroom and after the close of evidence); *United States v. Sacco*, 563 F.2d 552, 555 (2d Cir. 1977) (*pro se* codefendant’s statements were “if anything exculpatory, not inculpatory” as to defendant); *Pers. v. Miller*, 854 F.2d 656, 666 (4th Cir. 1988) (*pro se* codefendant’s arguments were neither antagonistic nor inconsistent with the defendant’s arguments); *United States v. Daly*, 756 F.2d 1076, 1080 (5th Cir. 1985) (*pro* codefendant’s statements either “did not relate to the other defendants, or were simply irrelevant”); *United States v. Kincaide*, 145 F.3d 771, 780 (6th Cir. 1998) (*pro se* codefendant’s “rather bizarre cross-examination” of a government witness was not harmful to any other defendant); *United States v. Oglesby*, 764

F.2d 1273, 1276 (7th Cir. 1985) (pro se codefendant's conduct at trial may have elicited some material inculpatory as to defendant, but was not intentionally antagonistic); *United States v. Jarrett*, 684 F.3d 800, 804 (8th Cir. 2012) (pro se codefendant's conduct may have tried the patience of jurors, but was not antagonistic toward defendant); *United States v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996), *as amended on denial of reh'g* (Oct. 3, 1996) (pro se codefendant tended only to incriminate himself, not defendant); *United States v. Espinosa*, 771 F.2d 1382, 1399 (10th Cir. 1985) (pro se codefendant, seeking to shift blame to other defendants, made only "generalized and brief references" to the other defendants in openings statements). However, in none of the above cases have courts had opportunity to consider a pro se codefendant who, at trial and before a jury, portrayed himself as a victim of other defendants and based his defense primarily on inculping those defendants.

The risk of allowing such a case to proceed jointly is that the pro se codefendant is afforded the opportunity to make accusations against a defendant that are not subject to cross-examination. During voir dire and opening and closing arguments, a pro se defendant can make statements inculping other defendants, but since statements are not made as a witness, they are not subject to cross-examination. However, this Court has previously noted how important it is that accusations in a criminal case not go unanswered. "When one person accuses

another of a crime under circumstances in which the declarant stands to gain by inculcating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.” *Lee v. Illinois*, 476 U.S. 530, 541 (1986). *See also Lilly v. Virginia*, 527 U.S. 116, 132 (1999) (quoting from and reaffirming *Lee*). Allowing a pro se defendant to make accusations directed at another defendant without providing an opportunity for cross-examination is therefore squarely in conflict with the spirit of the Sixth Amendment’s Confrontation Clause, whose “main and essential purpose ... is to secure for the opponent the opportunity of cross-examination.” *Davis v. Alaska*, 415 U.S. 308, 315-316 (1974).

Of course, a pro se defendant cannot and should not be compelled to testify as a witness, since “[t]he privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). The typical remedy for this situation is not severance, but the “less drastic measures” contemplated in *Zafiro*, which generally include an instruction to the jury that they should not consider the pro se defendant’s statements to be evidence.

Limiting instructions to the jury, like those recommended in *Zafiro*, may be appropriate when pro se defendants make passing comments that present little if any prejudice to another defendant. Such was the finding of each circuit decision on the issue of the prejudice of pro se defendants noted above. However, when the

basis of a pro se defendant's entire case is that another defendant is the actual culpable party, and the pro se party makes statements casting himself as the defendant's victim at multiple points throughout a trial, it is unreasonable to expect a jury to be able to refrain from treating those statements as evidence. "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). A jury confronted with a pro se defendant making direct and repeated accusations against another defendant is bound to either consciously or unconsciously consider those accusations as evidence, especially when the veracity of those accusations is not subject to cross-examination. Where a limiting instruction will not suffice, severance is the only remedy that remains.

C. Petitioner Was Incurably Prejudiced by Her Pro Se Codefendant

Petitioner's case is distinct from those previously considered by circuit courts, and is not amenable to a limiting instruction from the jury. Unlike in *United States v. Veteto* and all the other cases in which this issue has been considered, the pro se codefendant in this case cast himself as the victim of two other defendants, and made the inculcation of those defendants the focus of his defense.

Beginning with voir dire, Mr. Watts told the jury pool that he had been “ripped off.” Trial Tr., ROA.4831. During his opening arguments, he told the jury that “the first words that I gave to you in voir dire, [were] I got robbed. And we’ll demonstrate that to you with the evidence.” Trial Tr., ROA.3960. He left no room for the jury to wonder who was responsible, claiming it was “fairly evident that somebody in Kristy Le’s operation decided to go raid phone books. We didn’t know that at the time.” *Id.* at ROA.3977-3979. He blamed Ms. Le specifically for what he characterized as “stolen” social security numbers, and accused her of deleting information on client spreadsheets before she sent them to the law firm. *Id.* at ROA.3978-3979. Mr. Watts’s accusations were particularly prejudicial because they were personal. He characterized himself as a victim, describing the money spent on the efforts to acquire clients as “\$11 million dollars of *my* money,” *Id.* at ROA.3957 (emphasis added). He left no doubt whom he believed was responsible, stating “[Y]ou see Mr. Warren spending [on] clothing, gentlemen's clubs, cigars, wine, fancy hotels, Ms. Le spending. It wasn't spent on the project, folks.” *Id.* at ROA.3961. These are exactly the sort of accusations that this Court warned about in *Lee v. Illinois* and *Lilly v. Virginia*. Given the very personal, detailed and extensive nature of the accusations, a limiting instruction was inadequate, only through cross-examination could Ms. Le’s rights under the Confrontation Clause be honored.

Of course, compelling testimony from Mr. Watts was impossible, so the court was left with a limiting instruction as its only option to cure the prejudice to Ms. Le. But after sitting through a long trial that involved so many accusations from Mr. Watts, it was unreasonable and unrealistic to expect a jury to be able to neatly categorize all of his statements as argument. It is inevitable that the jury credited at least some of Mr. Watts' statements as evidence. Of course, the fact that none of these allegations could be directly challenged through cross-examination made them more likely to be considered as evidence, because assertions left unchallenged are more naturally assumed to be true.

Further reason to believe the jury considered Mr. Watts' statements as evidence is that it was ultimately Mr. Watts, rather than the government, that the jury agreed with. The government's version of the events is that Mr. Watts and other members of his firm colluded along with Mr. Warren and Mr. Le. But ultimately, none of the defendants except for the latter two were convicted of anything. The jury plainly was unconvinced by the government's evidence, yet still convicted Ms. Le and her codefendant Mr. Warren. This can be attributed at least in part to Mr. Watts' pro se representation, which gave him wide latitude to make accusations against his codefendants, thereby seriously prejudiced Ms. Le's rights under the Confrontation Clause. The Court should therefore grant Ms. Le's Petition so it can rule on this issue.

VI. CONCLUSION

This Court should grant Ms. Le's Petition for Writ of Certiorari. Granting certiorari will give this Court the opportunity to ensure that Petitioner and similarly situated defendants are provided a fair trial.

/s/ John W. Weber III
John W. Weber III (Miss. Bar #101020)
Assistant Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner