UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, v. JULIA BEATRICE KELEHER, et al., Defendants.	CRIMINAL NO. 19-431 (PAD)

CONSOLIDATED RESPONSE TO DEFENDANTS' MOTIONS TO SEVER
[Docket Nos. 418, 434, 440, 441]

In response to the severance motions which Defendants Julia Beatrice Keleher, Fernando Scherrer-Caillet, Angela Avila-Marrero, and Aníbal Jover-Pages have respectively filed, the United States does not object to severing the defendants as follows:

- **Group A**: Defendant Keleher (Counts 1 to 24);
- **Group B**: Defendants Velazquez and Scherrer (Counts 25 to 71);
- **Group C**: Defendants Avila and Velazquez (Counts 72 to 84); and
- **Group D**: Defendants Avila, Velazquez, and Jover (Counts 85 to 98).

Should the Court agree with this proposal, the respective motions of Defendants Scherrer (Docket No. 418), Avila (Docket No. 440), and Jover (Docket No. 441) should be denied as moot. Defendant Keleher's motion should also be denied as moot inasmuch as she requests not to be tried with the defendants charged in Counts 25-98.[1] For the reasons that follow, however, the United States opposes the severance of the three schemes in which only Defendant Keleher is charged.

[1] The United States will not respond to unsubstantiated allegations that: it "improperly aimed to benefit from the known and indisputable public aversion that some conduct and some defendants cause in the public opinion," Docket No. 441 at 4, or that it "decided to earn a win in the public eye by joining Mrs. Avila and Ms. Keleher . . . solely because they were both public officials and it would attract more media attention to their investigative and prosecutorial 'victory,'" Docket No. 440 at 3. Such *ad hominem* attacks do not constitute legal analysis, and are not helpful to the Court in resolving the pending motions. Thus, the United States will not address them.

III. DISCUSSION

If the Court adopts the United States' proposed grouping of defendants, the concerns raised in the respective severance motions of Defendants Scherrer,[2] Avila, and Jover will have been addressed to their satisfaction. The same is true with respect to Defendant Keleher's concerns about being tried with other defendants charged in counts in which she does not appear. The United States, therefore, will address only Defendant Keleher's arguments pertaining to the requested severance of the three schemes in which she is charged.

A. Counts 1-24 are properly joined under Federal Rule of Criminal Procedure 8(a)

Federal Rule of Criminal Procedure 8(a) provides that an "indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged ... are of the same or *similar character*, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." (emphasis added). Notably, "similar does not mean identical" for purposes of Federal Rule of Criminal Procedure 8(a). *United States v. Sabean*, 885 F.3d 27, 42 (1st Cir. 2018); *see also United States v. Sabean*, No. 2:15-cr-175-GZS, 2016 U.S. Dist. LEXIS 134132 (D. Me. Sept. 29, 2016) (healthcare fraud, tax evasion, and prescription fraud

[2] To the extent Defendant Scherrer seeks to sever his trial from that of Defendant Velazquez (something which is not apparent from the arguments he has raised), the motion should be denied. *See, e.g.*, *Zafiro v. United States*, 506 U.S. 534, 536 (1993) ("There is a preference in the federal system for joint trials of defendants who are indicted together."); *United States v. Molina*, 407 F.3d 511, 531 (1st Cir. 2005) ("The default rule is that defendants who are indicted together should be tried together."). To facilitate the proposed grouping of the defendants into four trial groups, the United States respectfully requests the dismissal of Counts 82-84 as to Defendant Scherrer. If the Court grants the United States' request, Defendant Scherrer will be charged in only two schemes with only one other defendant—Defendant Velazquez. Both schemes involve the same cast of characters. Furthermore, the evidence pertinent to each overlaps as the superseding indictment makes clear; to illustrate, the allegations concerning the subcontracting scheme incorporate by reference those concerning the lobbying services fee scheme. *See* Docket No. 368 at ¶ 25.

counts properly joined); *United States v. Osman*, 697 F. Supp. 2d 161, 163 (D. Me. 2010) (healthcare fraud and social security fraud charges properly joined).

"In determining whether counts are properly joined," courts should "consider[] such factors as 'whether the charges are laid under the same statute, whether they involve similar victims, locations, or modes of operation, and the time frame in which the charged conduct occurred.'" *United States v. Edgar*, 82 F.3d 499, 503 (1st Cir. 1996) (quoting *United States v. Taylor*, 54 F.3d 967, 973 (1st Cir. 1995)). "Rule 8(a)'s joinder provision is generously construed in favor of joinder." *United States v. Randazzo*, 80 F.3d 623, 627 (1st Cir. 1996).

Arguing that the Court should sever various counts in which she appears as the *sole* defendant, Defendant Keleher requests that the Court preside over three separate trials, and group the schemes as follows:

- Counts 1-11, wire-fraud and aggravated identity theft counts in relation to a scheme to deprive PRDE of the exclusive use of its confidential information;
- Counts 12-15, wire fraud counts in relation to a sham selection process scheme involving PRDE contracting the services of Colón & Ponce; and
- Counts 16-24: wire fraud and bribery charges in relation to a subcontracting scheme involving Individual C.

In making this request, Defendant Keleher inaccurately argues that she is "the only common thread" among the three schemes. *Id.* at 434. She is wrong.

All three schemes relating to Defendant Keleher include charges laid under the same wire fraud and conspiracy statutes, and involve: (1) the deprivation of property of the same victim, that is, the Puerto Rico Department of Education ("PRDE"); (2) the use of interstate emails; (3) Defendant Keleher's conduct as the Secretary of Education; (4) Defendant Keleher's breach of a fiduciary duty to the PRDE; and (5) Defendant Keleher's use of her position as Secretary of Education to obtain contracts for third parties.

Additionally, contrary to what Defendant Keleher claims, the sham selection process and the subcontracting schemes *do* involve many of the same entities and individuals—Mayra Ponce, Glenda Ponce, and Colón & Ponce, just to name a few. What is more, the schemes occurred within close temporal proximity to each other. By way of example, the confidential information scheme occurred in February 2017; the sham selection process scheme involving Colón & Ponce began one month later, in March 2017 and continued through July 2017; and the subcontracting scheme which also involved Colón & Ponce began in October 2017, only three months after the conclusion of the sham selection process scheme.[3]

In short, a consideration of the totality of the circumstances—namely, "the similarity of counts, mode of operation, and time period"—should compel the Court to conclude that joinder of the three schemes involving Defendant Keleher is proper under Rule 8(a). *See United States v. Chambers*, 964 F.2d 1250, 1251 (1st Cir. 1992) (holding that six different robberies, each of which involved a similar institutional victim, were properly joined under Rule 8(a)); *see also Sabean*, 885 F.3d at 42-43 (holding that tax evasion, drug distribution, and healthcare fraud counts were properly joined under Rule 8(a), and that the defendant "neither rebutted the strong

[3] As alleged in the superseding indictment, and as the evidence at trial will show, the subcontracting scheme involving Individual C could not have occurred as it did without the sham selection process by which Colón & Ponce received a PRDE contract. That is, the sham selection process involving Colón & Ponce is inextricably intertwined with, and is relevant to, the subcontracting scheme also involving Colón & Ponce. *See, e.g.*, *United States v. Mangual-Santiago*, 562 F.3d 411, 428 (1st Cir. 2020) ("To be relevant, evidence need only tend to prove the government's case, and evidence that adds context and dimension to the government's proof of the charges can have that tendency. Relevant evidence is not confined to that which directly establishes an element of the crime) (citation omitted); *see also United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988) ("The trial court may admit evidence that does not directly establish an element of the offense charged, in order to provide background for the events alleged in the indictment.") (quoted in *United States v. Flemmi*, 402 F.3d 79, 87 (1st Cir. 2005)).

presumption in favor of joinder nor mounted a compelling showing of undue prejudice.").[4]

B. There is no basis to sever Counts 1-24 under Federal Rule of Criminal Procedure 14(a)

Under Federal Rule of Criminal Procedure 14(a), a court may sever properly joined counts if, in relevant part, "a consolidation for trial appears to prejudice a defendant or the government." "When joinder is proper, as it [is] here, a defendant must make a *strong showing* of prejudice likely to result from a joint trial." *United States v. Azor*, 881 F.3d 1, 12 (1st Cir. 2018) (internal quotation marks and citations omitted) (emphasis added). "Garden variety prejudice … will not, in and of itself, warrant severance." *Id.* The defendant must show that evidentiary spillover would cause "prejudice *so pervasive* that a miscarriage of justice looms." *United States v. Trainor*, 477 F.3d 24, 36 (1st Cir. 2007) (affirming denial of severance motion under Rule 14(a) in light of "close relationship of the two [fraudulent] transactions, appellant's acknowledgement that the evidence at trial differentiated between them, and the court's careful instructions"). That is, a defendant must show that a joining of counts "will *likely* deprive[] him of a fair trial." *United States v. Burgos*, 254 F.3d 8, 14 (1st Cir. 2001).

Here, Defendant Keleher argues that the Court should sever the three schemes in which

[4] Defendant Keleher cites two inapposite cases to support the proposition that the three schemes are misjoined. Docket No. 434 at 10-11 (citing *United States v. Rivera-Fuentes*, 979 F. Supp. 2d 224 (D.P.R. 2013) (Besosa, J.) and *United States v. Ramallo-Diaz*, 455 F. Supp. 2d 22, 25-26 (D.P.R. 2006) (Pérez-Giménez, J.)). *Rivera-Fuentes* is distinguishable because the Court's decision to sever was guided by Federal Rule of Criminal Procedure 8(b), which governs the joinder of *defendants*, *Rivera-Fuentes*, 979 F. Supp. 2d at 226-27; Rule 8(b) should have no bearing on the Court's analysis inasmuch as the United States has agreed to try Defendant Keleher alone. *Ramallo-Diaz* is also distinguishable for the same reason. In *Ramallo-Diaz*, Judge Pérez-Giménez granted a severance under Rule 8(b) because the indictment alleged "two separate conspiracies with, at most, two common participants," and failed to include "any allegation that the participants of the [one] conspiracy knew of the methods, goals, members, or even the existence of the [other] scheme." 455 F. Supp. 2d at 30. Again, in this case the Court need not invoke Rule 8(b) for any purpose in evaluating the merits of Defendant Keleher's motion in light of the United States' non-opposition to trying her alone.

she is charged because there is a danger that "if the jury is convinced that Ms. Keleher is guilty of any one of them, they will surely be more inclined to believe that she is guilty of all of them, despite the fact that almost none of the evidence admissible as to one count would be admissible as to the others."[5] Docket No. 434 at 16. Defendant Keleher goes on to speculate that a trial involving all three schemes will affect her "decision to testify" despite not being prepared to "commit Ms. Keleher to testify in her own defense," Docket No. 434 at 15 n.4, and may cause a jury to infer her guilt as to the scheme unrelated to the Ponce sisters if either Glenda or Mayra Ponce, who have entered guilty pleas, testify, *id.* at 434. These arguments fall woefully short of the *strong showing* of prejudice which Defendant Keleher is required to make to warrant severance under Rule 14(a).

The dangers of prejudice which Defendant Keleher has identified are both conclusory, and of the garden variety type that are inherent in any trial in which a defendant is charged with multiple crimes. *See United States v. Richardson*, 515 F.3d 74, 81 (1st Cir. 2008) (observing that "[s]ome prejudice results in almost every trial in which the court tries more than one offense together"); *see also United States v. Baltas*, 236 F.3d 27, 33 (1st Cir. 2001) (conclusory allegations of prejudice "do not suffice to overcome the presumption in favor of joinder."). By her logic, separate offenses could never be joined in a single indictment because there is always risk that a jury may draw some improper inferences. But the Court may adequately "prevent potential spillover prejudice by instructing the jury, both during the preliminary and closing charges, to

[5] The United States respectfully disagrees with Defendant Keleher's view as to the admissibility of evidence regarding the schemes that implicate her, and her suggestion that evidence that may be relevant as to one scheme would be irrelevant as to another if that other scheme were tried separately. To provide but one example, evidence of how Colón & Ponce obtained a contract with the PRDE would be relevant not only to prove the sham selection process scheme, but also to prove the subcontracting scheme which also involves Colón & Ponce. The United States will not belabor this point, however, as it anticipates that the Court may wish to consider arguments pertaining to evidentiary disputes at a later date.

consider the evidence separately as to each count of the indictment…to determine guilt on an individual basis," and to consider any evidence admitted for its proper purpose. *See Baltas*, 236 F.3d at 34; *see also United States v. Gentles*, 619 F.3d 75, 82 (1st Cir. 2010) ("It is a well established tenet of our judicial system that juries are presumed to follow…instructions."); *United States v. Padilla-Galarza*, No 18-2078, 2021 U.S. App. LEXIS 6483 (1st Cir. Mar. 5, 2021) ("As with all jury instructions, we must presume—in the absence of any evidence to the contrary—that the jurors heeded it.") (citing cases).

IV. CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court: (1) adopt its proposal for severing the defendants into four trial groups; (2) deny the respective severance motions of Defendants Scherrer, Avila, and Jover as moot; (3) dismiss Counts 82-84 as to Defendant Scherrer; and (4) deny Defendant Keleher's severance motion as moot to the extent she seeks to be tried separately, and on the merits to the extent she seeks severance of the counts comprising the three schemes in which she alone is charged.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this 26th day of March, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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