**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 93-3028
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

WILLIAM MICHAEL FURMAN, COMMONWEALTH CHARTERED TRUST COMPANY, LTD.,

Defendants-Appellants.

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

(CR 90 427 I)

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(December 22, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:[*]

BACKGROUND

William Furman was named in a two-count superseding indictment on October 3, 1991. The indictment charged Furman, the Commonwealth Chartered Trust Company (CCTC), and Herbert Watkins with conspiring to commit bank fraud, conspiring to bribe a bank official, and conspiring to launder money (count I). The

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

indictment also charged the three defendants with attempted bank fraud (count II). Furman was convicted by a jury on both counts of the indictment and sentenced at the low end of the guideline range to 78 months in prison. He was also sentenced to a three-year term of supervised release and a $100.00 special assessment. CCTC received a $1,500,000.00 fine.

The indictments arose after the defendants were arrested in conjunction with a complex scheme to defraud the First National Bank of Commerce (FNBC) in New Orleans, Louisiana. Furman originally purchased a bankrupt shell corporation in Oklahoma, CCTC, and moved it to Texas, though it was not allowed to conduct business there. He and several of his associates -- Randy Renken, William Straughan and Watkins -- devised a scheme whereby they would represent that CCTC was holding assets in trust. This was accomplished with the assistance of Charles Shook, a certified public accountant, who represented on CCTC's financial statement that the corporation held in trust as an asset $50.5 million worth of Government National Mortgage Association (GNMAs) guaranteed mortgage-backed securities. In reality, the corporation held no GNMAs, and actually had only $878 in assets.

Watkins furnished additional information and documentation establishing that CCTC held the GNMAs. The fraudulent "audited" financial report prepared by Furman, Watkins, Renken, Straughan, and Shook also reported that CCTC owned several million dollars in stock and another $5 million in cash. The group then created fraudulent trust receipts in order to demonstrate that CCTC

actually held the GNMAs in trust for others, and created false agreements and trust documents between CCTC and the entities ostensibly placing the GNMAs in trust with CCTC.

In addition to verifying that CCTC actually held the GNMAs in trust, these false agreements also contained a provision stating that the GNMAs could not be encumbered or pledged as collateral without the authority of CCTC. This particular provision was designed to act as a potential defense to any future foreclosure action against one of the companies using the non-existent GNMAs as collateral -- CCTC could claim that the company pledged the GNMAs without CCTC's approval and in violation of the trust agreement between CCTC and the company. With such a defense, CCTC could avoid having to actually produce the GNMAs, thus shielding the conspirators from scrutiny.

After meeting Renken in connection with Renken's attempts to solicit business for CCTC, Ed L. became interested in using CCTC and the fraudulent GNMAs to obtain loans from FNBC in New Orleans. Ed L. and his son, Ed I., had already executed a similar scheme in New York using bogus Federal National Mortgage Association securities (FNMAs) and a trust corporation. In July, 1990, Ed L. was introduced to a vice president at FNBC. Ed L. believed the banker was inclined to make questionable loans in exchange for kickbacks in the form of a percentage of the loans. The "banker" was actually a special agent of the FBI acting in an undercover capacity.

Renken then approached Straughan, Furman, and Watkins with Ed L.'s plan to use CCTC and the bogus GNMAs as collateral to obtain loans from the "banker" at FNBC. Over the course of the summer and fall, Ed L. and the others created three Louisiana corporations using false information and names. The companies would serve as the borrowers, using trust receipts issued by CCTC to pledge the non-existent GNMAs as collateral for the loans. The "banker" was offered one third of the loans as an inducement to issue the loans, with the proceeds of the loans to be wired into accounts established in the Cayman Islands. The "banker's" share was to be wired to a Swiss account.

After explaining the plan to Furman, Watkins, and Straughan, Ed L., Ed I., Renken, and Shook met with the "banker" on several different occasions and created false documents to be placed in the bank's files in order to create an air of legitimacy around the borrowing companies and GNMAs. Three loans were contemplated at first, each for the "banker's" loan limit of $500,000, totalling $1.5 million. On October 24, 1990, the date the loans were to be executed, Ed L. and Renken were arrested. The first indictment was issued against Ed L., Ed I., Shook, Renken, Straughan, and CCTC on November 2, 1990. Furman, Watkins, and CCTC were indicted by superseding indictment on October 3, 1991.

OPINION

Furman argues that the proof adduced by the Government at trial allowed the jury to convict him of conspiring to launder money based upon a statutory provision not alleged in the

indictment. This, he contends, constitutes a constructive amendment to the indictment and mandates per se reversal of his conviction.

Once an indictment has been returned, its charges may not be amended or altered except by the grand jury. Stirone v. United States, 361 U.S. 212, 215-16, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); United States v. Baytank (Houston), Inc., 934 F.2d 599, 606 (5th Cir. 1991). An amendment to the indictment need not be explicit, but may be implicit or constructive. Id. A constructive amendment constitutes reversible error, and occurs when the jury is permitted to convict the defendant upon a factual basis that effectively modifies an essential element of the crime charged in the indictment. Baytank, 934 F.2d at 606. In United States v. Doucet, 994 F.2d 169, 172 (5th Cir. 1993), this Court held that an indictment may be constructively amended by the actions of either the court or the prosecution.

Furman argues that he was indicted for conspiring to launder money under 18 U.S.C. § 1956(a)(2)(A), which makes it a crime to export money from the United States "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(2)(A). He contends that the Government's proof, however, allowed for his conviction under either 18 U.S.C. § 1956(a)(2)(B)(i) (transferring money out of the United States knowing that the money was obtained through unlawful activity and intending to conceal that unlawful activity), or 18 U.S.C. § 1956(a)(2)(B)(ii) (transferring money out of the United States

knowing that the money was obtained through unlawful means and intending to avoid transaction reporting requirements).

Furman does not contest that he transferred money out of the United States. Rather, he challenges the Government's proof regarding the intent of the conspirators. He contends that the Government's proof established that the fraud was completed after the first three loans, although the statute in the indictment alleged that the money was laundered in order to further a continuing fraud -- a separate crime under the money laundering statute. Furman is mistaken. First, there was sufficient proof adduced by the Government at trial to establish that the money was laundered in order to continue the fraud, rather than solely to conceal the completed fraud. Testimony of several of the conspirators, as well as taped conversations, raised a reasonable inference that the conspirators intended to repeat the fraudulent loan transactions.

For example, the "banker" was "at first" interested in small loans only -- loans which would not raise suspicion with his "superiors" at the bank. The conspirators' taped conversations with the undercover agent are replete with attempts to convince the "banker" that even if they defaulted on the loans, the loans were "defensible" and, "at worst," would appear to his superiors to be no more than a bad credit risk on his part. He would therefore be allowed to keep his position at the bank.

The loans also contained a provision establishing that ten percent of the loans would be placed in an escrow account for the

purpose of paying the interest on the loans for one year in order to avoid any default proceedings. This would buy the conspirators time and insulate them from any questions for at least a year. Based upon these assurances that he would be protected at the bank, the "banker" indicated his willingness to participate in a long-term relationship with the conspirators, and, in one conversation, Renken noted that the CCTC group was pleased that the "banker" was willing to contemplate additional loans beyond the initial three.

The conspirators were all interested in arranging larger loans in addition to the first three $500,000 loans. In one conversation between Straughan and Ed L. after the details of the first three $500,000 loans had been worked out, Ed L. indicated that he and Renken were preparing to do more loans quickly. Straughan responded to Ed L. that the CCTC group could issue trust agreement documentation "all day long," and was prepared to issue another $10 million in bogus trust receipts. There is no evidence that the conspirators intended to cease operations once the three loans had been completed. This is no more than an inference that Furman attempts to draw from the evidence at trial.

Even assuming, arguendo, that the jury could have drawn this inference from the evidence adduced at trial, the complexity of the scheme itself, in addition to the statements of the conspirators, raises an equally reasonable inference that the conspirators intended to continue defrauding the bank. As the jury is entitled to choose from among reasonable constructions of evidence, see United States v. Bell, 678 F.2d 547, 549 (5th Cir. 1982) (en banc),

aff'd, 462 U.S. 356 (1983), it was therefore entitled to conclude that the conspirators intended to continue defrauding the bank. See also United States v. Johnson, 971 F.2d 562, 566 (10th Cir. 1992) (money laundering actions taken to make fraud appear legitimate raised reasonable inference that defendant intended to continue illegal activities).

Moreover, the district court's instructions tracked the statutory provision alleged in the indictment, and did not permit a conviction on a theory not alleged in the indictment. See also Zafiro v. United States, ____ U.S. ____, 113 S.Ct. 933, 939, 122 L.Ed.2d 317 (1993) ("`juries are presumed to follow their instructions'") (quoting Richardson v. Marsh, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987)). The district court also provided the jurors with copies of the indictment to take into the jury room. See also United States v. Stone, 960 F.2d 426, 432 (5th Cir. 1992). In Doucet, where this Court reversed a conviction based upon a constructive amendment, we based our decision on the fact that the Government changed its theory on the last day of trial in order to "urge the jury to convict on a basis broader than that charged in the indictment." Doucet, 994 F.2d at 172. In the instant case, however, the Government's theory, as reflected by its opening and closing statements, tracked the language in the indictment and remained consistent throughout the trial. There was no constructive amendment to the indictment.

Furman also contends that the district court abused its discretion by denying his motion to sever the trial with defendant

CCTC because the evidence against CCTC would accumulate and spillover against Furman and that such spillover would be more prejudicial because the corporation was unrepresented at trial.

A defendant seeking severance bears the burden of showing the specific and compelling prejudice that the trial court was unable to protect against and that resulted in an unfair trial. United States v. Kane, 887 F.2d 568, 571 (5th Cir. 1989), cert. denied, 493 U.S. 1090 (1990). Fed. R. Crim. P. 8 provides for the joinder of defendants and offenses, and the general rule is that defendants who are indicted together should be tried together. Zafiro, 113 S.Ct. at 937. Decisions on Fed. R. Crim. P. 14 motions for severance are committed to the sound discretion of the district court. Id. at 938. Motions for severance under Rule 14 should be granted "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.

Neither scenario is presented by the instant case. Both CCTC and Furman were named in the same indictment and charged with conspiring to commit the same crimes. As a result, the same evidence would be admissible against both defendants. Furman has neither alleged nor established that there was any evidence adduced at trial which was admissible against CCTC but not against Furman. The Government adduced the same evidence against both Furman and CCTC, and argued that both Furman and CCTC were guilty of the crimes alleged in the superseding indictment. The jury found both

Furman and CCTC guilty of each count alleged in the superseding indictment. See Zafiro, 113 S.Ct. at 939.

The only specific pieces of evidence cited by Furman concern those facts relating to CCTC's fraudulent inception, which he contends prejudiced him because they had nothing to do with his alleged involvement in the instant conspiracy. His contention is that the corporation's fraudulent inception was unrelated to the instant conspiracy. On the contrary, the creation of CCTC, whose assets were artificially and fraudulently inflated by Furman, was clearly part of the conspiracy at issue. Furman, CCTC, the phony GNMAs, and bogus trust receipts, were all part of the same conspiracy from beginning to end.

Furman also contends that the joinder of defendants prejudiced him because the district court made his counsel remove a sign from a chair indicating that CCTC was in the courtroom but that it had no representation. He contends that the purpose of the sign was to preserve the distinction between himself and CCTC and that its removal blurred that distinction. Again, however, Furman has not pointed to any evidence presented which related only to CCTC's guilt, but was admitted and allowed to spillover onto him. Even if CCTC had been tried separately, virtually the same evidence would have been admitted. Furman has not established that he was prejudiced by CCTC's presence as a defendant. See Zafiro, 113 S.Ct. at 938-39.

Finally, any potential prejudice was cured by the instructions given to the jury. The district court instructed the jury that the

Government had the burden of proving each defendant guilty beyond a reasonable doubt.

The court then instructed the jury that "[a] separate crime is charged against both of these Defendants in each count of the Indictment. Each count and the evidence pertaining to it should be considered separately. Also, the case of each Defendant should be considered separately and individually." The court further instructed the jury: "The fact that you may find one or more of the accused guilty or not guilty of any of the crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant."

Furman argues that such instructions were merely "boiler plate," and "could not have aided in eliminating the prejudice which had resulted during the trial." Such instructions, not objected to by Furman, were sufficient to cure any potential prejudice resulting from the joint trial of Furman and CCTC. Zafiro, 113 S.Ct. at 939.

Furman challenges the sufficiency of the evidence used by the district court to determine that, under U.S.S.G. § 1B1.2(d), if it were sitting as trier of fact, the Court would have convicted Furman of money laundering. The jury convicted Furman of count one of the superseding indictment, which charged him with conspiring to commit bank fraud, conspiring to bribe a bank official, and conspiring to commit money laundering. When, as here, the jury's verdict does not specify which object offense of the conspiracy the

guilty verdict relates to, the district court must make that finding. § 1B1.2(d) comment. (n.5); see United States v. Cooper, 966 F.2d 936, 941 (5th Cir.), cert. denied, 113 S.Ct. 481 (1992). The district court found that, if it were sitting as trier of fact, it would have found Furman guilty of conspiring to launder money.

Furman contends that the evidence is insufficient to support this finding. In particular, he contends that there was no evidence establishing that the money was laundered in order to facilitate a continuing fraud as alleged in the indictment. As noted in the preceding discussion, however, the evidence was sufficient to raise a reasonable inference that the conspirators transferred the money out of the United States as part of a continuing scheme to defraud the bank. The district court did not err by sentencing Furman under the money laundering provisions of the guidelines.

Furman also argues that the district court incorrectly calculated the offense level by including the undercover agent's "share" of the proceeds. The district court's finding under § 2S1.1(b) concerning the amount of funds involved in the money laundering transaction is reviewed for clear error. United States v. Tansley, 986 F.2d 880, 884 (5th Cir. 1993). Furman contends that an accused cannot conspire with a government agent and, as such, the undercover agent's one-third "share" of the loan proceeds should not be included in the calculation of his base offense level. In calculating a base offense level for sentencing purposes

in a money laundering conspiracy, however, the relevant inquiry is how much money the conspirators intended to launder. Tansley, 986 F.2d at 884. As the conspirators in the instant case clearly intended to launder the "banker's" one-third share of the proceeds, the district court's inclusion of that amount in the calculation of Furman's base offense level was not clearly erroneous.

As part of his appeal, Furman has submitted a pro se motion on behalf of CCTC, entitled "Motion to Certify Question or in the Alternative to Order Clerk to File First Amendment Rights to Petition to Government to Redress Grievances." In an earlier order, this Court dismissed an appeal, filed by Furman on behalf of CCTC, from a magistrate judge's order denying CCTC leave to proceed in forma pauperis and an order by the district court stating that Furman could not represent CCTC or file motions on its behalf. As this Court has already held that Furman may not file motions on CCTC's behalf, the instant petition must be dismissed and stricken.

The judgment of the trial court is AFFIRMED.