

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

-against- : DECLARATION

JOHN WON, : 18 CR 184 (RJD)

Defendant. :

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MICHAEL K. SCHNEIDER, ESQ. declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

This declaration is submitted in support of the defendant's motion for an order:

I. Granting a trial separate from his co-defendant pursuant to Fed.R.Crim.P. 14 and the Confrontation Clause of the Sixth Amendment; and

III. Granting such other and further relief as the Court may deem just and proper, including the opportunity for defendant to submit additional briefing after any hearing on this motion.

This declaration is based upon information and belief, the sources of which are conversations with the prosecution and counsel for the co-defendant, discovery documents, and independent investigation.

FACTUAL BACKGROUND

On April 11, 2018, the government filed an indictment alleging that Mr. Won committed crimes related to frauds involving foreign exchange trading and securities. These frauds were allegedly committed while Mr. Won was associated with two businesses, Safety Capital and GNS. Mr. Won is charged in five of the indictment's six counts. In each of those five counts, he is charged along with his co-defendant, Tae Hung Kang. Four of the five counts charging Mr. Won are conspiracy counts.

On September 27, 2017, co-defendant Kang testified at a deposition related to a lawsuit brought by the U.S. Commodity Futures Trading Commission ("CFTC"). Mr. Kang was uncounseled during this deposition, which lasted for several hours over the course of a day. At the deposition, the CFTC was represented by two attorneys, an investigator, and an intern. A Korean language interpreter was present at the deposition, but Mr. Kang sometimes spoke to the CFTC lawyers in English. The allegations in the suit brought by the CFTC and the focus of the deposition were substantially the same as the charges in the instant indictment.

At his deposition, Mr. Kang admitted to running both Safety Capital and GNS. He also made many statements that can fairly be described as inculpatory. During his testimony, Mr. Kang was questioned several times about Mr. Won. Mr. Kang answered these

questions. In doing so he tied Mr. Won to GNS and made certain statements that could be seen as inculcating Mr. Won in the charged frauds.

ARGUMENT

1. **Because a joint trial of the defendants will result in prejudice to Mr. Won, the Court should order that he be tried separately from Mr. Kang.**

The testimony given by Mr. Kang at the deposition is inadmissible hearsay as to Mr. Won. See Fed. R. Evid. 801 and 802. Further, the nature of Mr. Kang's statements—taken under oath and in response to questions posed by government lawyers—is clearly "testimonial" as defined in *Crawford v. Washington*, 541 U.S. 36, 51-52 (2004). Therefore, because Mr. Won did not have an opportunity to cross-examine Mr. Kang, admission of Mr. Kang's deposition testimony against Mr. Won would also violate the Confrontation Clause of the Sixth Amendment. *Id.* at 59.

Under the rule announced in *Bruton v. United States*, 391 U.S. 123 (1968), the appropriate remedy for the Confrontation Clause problem caused by Mr. Kang's deposition testimony is to try Mr. Won separately. The *Bruton* court acknowledged that even a properly instructed jury cannot be expected to ignore a defendant's statement implicating another defendant. "A jury cannot 'segregate evidence into separate intellectual boxes.'" * * * It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same

time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A.'" *Id.* at 131 (citation omitted).

In some cases, it may be possible to redact a defendant's statements to avoid unwarranted prejudice to a jointly-tried co-defendant. *See, e.g., Richardson v. Marsh*, 481 U.S. 200, 211 (1987). This is not one of those cases. Introduction of Mr. Kang's deposition testimony would necessarily be used by the jury to establish the existence of conspiracies in the four counts that charge both defendants with conspiratorial crimes. Thus, a joint trial runs the very real risk that Mr. Won could be convicted based on testimony that he never had the chance to cross-examine and which is inadmissible against him under both the Confrontation Clause and the Federal Rules of Evidence.

The obvious prejudice of a joint trial in this case is only worsened by the circumstances of Mr. Kang's deposition, where he was questioned without counsel by government lawyers whose goal was exactly the same as a prosecutor's. To allow Mr. Kang's deposition testimony into evidence at Mr. Won's trial would be the equivalent of allowing the prosecutor to directly examine a witness at trial and then precluding any cross-examination.

CONCLUSION

For the foregoing reasons, the defendant respectfully requests that the Court issue an order: (I) granting a trial

separate from his co-defendant pursuant to Fed.R.Crim.P. 14 and the Confrontation Clause of the Sixth Amendment; and (II) granting such other and further relief as the Court may deem just and proper, including the opportunity for defendant to submit additional briefing after any hearing on this motion.

Dated: Brooklyn, New York
February 28, 2019

Respectfully submitted,

_____/s/_____
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