IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. **CRIMINAL NO. 1:98CR34**
(Judge Keeley)

RICKY LEE BROWN,
BARBARA M. BROWN, and
JANETTE A. ABLES,

Defendants.

MEMORANDUM OPINION AND ORDER
(Re-joining cases for trial)

Pending before the Court are the Government's December 1999 motion for reconsideration of the Court's prior order of severance [Docket No. 649], and the Government's May 2000 motion [Docket No. 739] in which it argues that, in light of the Supreme Court's decision in Jones v. United States, __ U.S. __, 120 S.Ct. 1904 (2000), this Court should now re-consider its prior order and join Janette Ables for trial with Barbara and Ricky Brown. The Government asserts that with the removal of the death penalty and the lack of evidentiary issues as demonstrated by the Government's case in chief in the trial of Ricky Lee Brown, these cases should now be re-joined.

In its original severance order, the Court considered five reasons that, according to the defendants, justified severing the cases for trial: (1) Bruton problems with various statements; (2) mutually antagonistic defenses; (3) the need for individualized sentencing hearings; (4) Barbara Brown's expressed intent to comment on Ricky Brown's silence; and (5) the marital privilege. The Court justified severance based on the need for individualized sentencings in a death penalty case and on the evidentiary problems presented by the multiple statements made by the defendants to investigators, friends, neighbors, and fellow prison inmates. See Bruton and its progeny.[1]

The defendants have now renewed their earlier arguments in favor of severance, and have raised additional arguments in their several responses to the Government's motions to re-join the cases for trial. These arguments can be briefly summarized as follows:

(1) There are many statements that raise Bruton problems in the context of a joint trial;

(2) The defendants have mutually exclusive defenses;

[1] Bruton v. United States, 391 U.S. 123 (1968), Richardson v. Marsh, 481 U.S. 200 (1987), and Gray v. Maryland, 523 U.S. 185 (1998).

(3) If she testifies, Barbara Brown intends to comment on Ricky Brown's silence;

(4) Either Barbara or Ricky Brown could raise the marital communication privilege to prevent the other from testifying, thereby denying the spouse's constitutional right to testify on his/her own behalf;

(5) Ricky Brown is prejudiced in being joined with two defendants who are named in fourteen counts in the indictment, whereas he is named in only seven;

(6) The inconvenience and expense of separate trials is not that great;

(7) Trial preparation and budgeting have been premised on the basis of severed trials; and

(8) One of Janette Ables' attorneys will be in trial in another case in September 2000.

The Government has responded to the defendants' Bruton concerns by stating that, if there is a joint trial, it does not intend to call those witnesses to whom Janette Ables made post-

arrest statements to testify at a joint trial.[2] Furthermore, while the Government disagrees that certain other witnesses identified by Janette Ables would present Bruton problems, the Government notes that these witnesses are not necessary and need not be called to testify in the Government's case-in-chief.[3] The Government further notes that of the twenty-seven witnesses identified by Ricky Brown as presenting Bruton problems, six of them testified at his previous trial without difficulty.[4] The Court curtailed the testimony of a seventh witness whose testimony raised Bruton concerns.[5] The Government states that it intends to call the same seven witnesses, and Jimmy Lee Ables, whose statements do not reveal any Bruton issues, to testify at a joint trial. It anticipates that the testimony will be unobjectionable but indicates that, should an objection arise, it can be handled in the normal course of the trial.

---

[2] These witnesses are Tim Miller, Michelle Lee Fisher, Colleen Roath, Torina Jo Moore and Patricia Moore.

[3] These witnesses are Carol Cowgar, Loretta Curtis and Tracie Greenlief. The Government notes that Mary Stalnaker's testimony may present a Bruton problem.

[4] These witnesses were William Baugh, Wavah Blake, David Brown, Melissa Brown, Steven Grogg and Theresa James.

[5] The witness was Margaret Mayo.

The Government further notes that the defendants' own statements are co-conspirator statements, admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence,[6] and argues that the similarity of the statements made by the defendants indicates that they were made in the course of and with the intent of furthering the conspiracy. In addition, the Government contends that the defendants' statements to investigators were not confessions but, rather, false exculpatory statements that the physical evidence belied. Such statements would not be admitted for the truth of the matter asserted but rather for their falsity.

In responding to the defendants' argument that their defenses are mutually exclusive, the Government characterizes their defenses as contradictory rather than mutually exclusive. Its position is that all three defendants are guilty, the acts alleged are encompassed by a common conspiracy, and the defendants do not have markedly different degrees of culpability.

The Government disagrees that the defendants have a right to comment on a co-defendant's silence, and believes that this

[6] With the agreement of the parties, certain redactions have previously been made to the statements of Janette Ables.

argument is purely academic, as it is unlikely that one of the defendants will testify contrary to his or her pre-arrest statements because this would be tantamount to admitting that the prior statement was false when made. The Government also disagrees that the marital communications privilege would be applicable in this case.

The Court will address each of these issues in turn.

ANALYSIS

1. Preference for Joint Trials.

As the Fourth Circuit has repeatedly made clear, barring special circumstances "the general rule is that defendants indicted together should be tried together for the sake of judicial economy." United States v. Rusher, 966 F.2d 868, 877 (4th Cir. 1992). See also United States v. Ford, 88 F.3d 1350, 1361 (4th Cir. 1996) ("For reasons of efficiency and judicial economy, courts prefer to try co-conspirators together."); Zafiro v. United States, 506 U.S. 534, 537 (1993) (Joint trials "promote efficiency and

serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.")

2. Antagonistic and Mutually Exclusive Defenses.

Contradictory or antagonistic defenses standing alone do not suffice to justify severing trials of co-defendants.

> Primarily due to the need for efficiency in judicial administration, generally, where the indictment charges a conspiracy, or a crime having a principal and aider-abettors, the rule is that the persons jointly indicted should be tried together. Nevertheless, if it appears that a defendant is prejudiced by a joinder of defendants in an indictment or for trial, together, the district court may grant a severance of defendants or provide whatever relief justice requires. The mere presence of hostility among defendants, however, or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials, and thus, antagonistic defenses do not per se require severance even if the defendants attempt to cast the blame on each other. Accordingly to be entitled to a severance, a defendant must show more than merely a separate trial would offer him a better chance at acquittal.

United States v. Spitler, 800 F.2d 1267, 1271 (4th Cir. 1986) (omitting internal quotations and citations). See generally United States v. Akinoye, 185 F.3d 192 (4th Cir. 1999); United States v. Reavis, 48 F.3d 763 (4th Cir. 1995); United States v. Brooks, 957 F.2d 1138 (4th Cir. 1992). See also Zafiro, 506 U.S. at 538

(declining to adopt a bright line rule mandating severance whenever co-defendants have conflicting defenses, and holding that "mutually antagonistic defenses are not prejudicial per se.")

Rule 8(b) and Rule 14 of the Federal Rules of Criminal Procedure are designed to achieve the objectives of economy and efficiency by avoiding multiple trials, but without substantially prejudicing the rights of defendants to a fair trial. Zafiro, 506 U.S. at 540. The Supreme Court in Zafiro indicated that severance might be appropriate in a situation where evidence, that would be inadmissible against one defendant being tried alone, would be admissible against a co-defendant in a joint trial, or where several defendants with markedly different degrees of culpability are tried together in a complex case.

In order to establish that defendants have mutually exclusive defenses requiring severance, such defenses must require that, in order for the jury to believe the core of one defense, it must necessarily disbelieve the core of a co-defendant's defense. United States v. Linn, 31 F.3d 987, 992 (10th Cir. 1994). See also Zafiro, 506 U.S. at 542 (Stevens, J., concurring). In Linn, the Tenth Circuit found that the "mutual antagonism" alleged by the

defendants amounted to nothing more than finger-pointing and did not justify severance, where each defendant argued it had nothing to do with the fire and that it was either accidental or the work of an unknown arsonist.

The prejudice showing required by Rule 14 "may be shown only where there is a serious risk that a joint trial would severely compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." United States v. Smith, 44 F.3d 1259 (4th Cir. 1995). In Smith, the defendant argued that his two co-defendants had painted a picture of him at trial in which they were the victims of his criminal influence and were misled or hooked into joining his scheme to defraud. The Fourth Circuit rejected this argument and affirmed the district court's denial of the defendants' motion for severance, noting that:

> Because joint participants in a scheme often will point the finger at each other to deflect guilt from themselves or will attempt to lessen the importance of their role, a certain amount of conflict among defendants is inherent in most multi-defendant trials. In order to justify a severance, however, joined defendants must show that the conflict is of such magnitude that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.

44 F.3d at 1266-67.

The court went on to find that, while the co-defendants sought to cast blame on Smith as the architect of the scheme, there was adequate evidence of their willing participation in the scheme for the jury to assess independently the guilt of each defendant. See also United States v. Brooks, 957 F.2d 1138, 1145 (4th Cir. 1992)(rejecting defendant's argument in favor of severance on the ground that the evidence against him was significantly weaker than against the other defendants and that he may consequently have been convicted on the strength of "spillover evidence"); United States v. Riley, 991 F.2d 120 (4th Cir. 1993) (severance not required where there was less evidence against defendant than others but there was sufficient evidence to implicate defendant in conspiracy); United States v. Chorman, 910 F.2d 102, 114 (4th Cir. 1990) ("The relative strength of the government's case against individual defendants is no basis for severance in the absence of a strong showing of prejudice."); United States v. Roberts, 881 F.2d 95, 102 (4th Cir. 1989) (rejecting defendant's argument that his trial should have been severed because he was such a minor player and was only named in 3 of the 11 counts of the indictment).

> Once the scope of a conspiracy is established, one's having come late to it or having varied his level of participation in it from time to time puts him in a position no different from that of any other co-conspirator who claims to be prejudiced by evidence that goes to the activities of co-conspirators. The Government may not properly be deprived of its right to detail the full scope of the conspiracy and to present its case in proper context simply because particular co-conspirators were not involved in the full scope of its activities.

United States v. Tipton, 90 F.3d 861, 883 (4th Cir. 1996), citing, United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988).

Ricky Brown has relied on a recent unpublished order[7] in the case of United States v. Stephens, 1:99CR164 (E.D.Tex. Nov. 24, 1999), in which the district court ordered separate trials for three co-defendants. In Stephens, the district court identified three factors weighing in favor of severance – a defendant's right to comment on a co-defendant's silence, not all of the defendants were named in each of the three counts of the indictment, and the complexity of the case.

Stephens, however, is readily distinguishable from the case at bar for several reasons, primarily the lack of complexity in this

[7] The district court's unpublished severance order is attached to Ricky Brown's Third Supplemental Response to the Government's Motions for Reconsideration of Severance [Docket No. 750].

case, given that Ricky Brown, Barbara Brown and Janette Ables were each named in every count of the original fifteen count indictment filed.[8] Based on the Supreme Court's decision in Jones, Count Fifteen has now been dismissed. The jury in Ricky Brown's trial acquitted him on seven of the mail fraud counts and dead-locked on the remaining counts. Other than Ricky Brown's acquittal on some of the mail fraud counts, each of the defendants presently stands accused of the same acts. By contrast, the Stephens indictment alleged: (1) armed robbery and murder; (2) murder in relation to violent crime; and (3) attempted bank robbery resulting in death -- 3 separate murders on three separate occasions, where only one of the defendants was named in all three counts.

Given the marked differences between the two cases, the Court finds the severance analysis in Stephens to be unpersuasive here. In this case, a common conspiracy has been alleged, there is no apparent danger of "spillover" evidence, and the Government position is that all of the defendants are guilty and are similarly

[8] Count One of the indictment alleges a conspiracy; counts two through thirteen contain allegations of mail fraud; count fourteen alleges that the defendants used fire to commit a felony; and count fifteen alleged that they committed arson resulting in the death of five children.

culpable. Furthermore, the defendants have failed to establish that their defenses are mutually exclusive, as opposed to being contradictory or inconsistent, or that a conflict of such magnitude exists that the jury will infer from the conflict itself that they are all guilty.

3. Defendant's Right to Comment on the Silence of a Co-Defendant.

In the event that Barbara Brown testifies at a joint trial and Ricky Brown chooses not to do so, the defendants argue that Barbara Brown would have the right to comment upon Ricky Brown's silence and that this would violate Ricky Brown's right to remain silent under the Fifth Amendment. Defendants rely upon the Fifth Circuit's holding in DeLuna v. United States, 308 F.2d 140, 141 (5th Cir. 1962),that "if an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately."

However, subsequent cases in the Fifth Circuit and elsewhere have limited DeLuna to its facts and have noted that severance is only appropriate if "the defenses are antagonistic to the point of

being mutually exclusive or irreconcilable." United States v. Sandoval, 847 F.2d 179, 183 (5th Cir. 1988). Where defendants cannot rationally profit from showing the guilt of co-conspirators because their defenses are "interlocking parts of a whole," rather than mutually exclusive theories of guilt, severance is not warranted. United States v. Hyde, 448 F.2d 815 (5th Cir. 1971).

In United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), the defendant argued that he was unduly prejudiced by his inability to comment upon his co-defendant's failure to testify. The court observed that "it would appear clear, however, that severance is not required simply because one defendant wishes to comment on another's refusal to testify." Id. at 930. The mere presence of hostility among defendants or the desire of one defendant to exculpate himself by inculpating another presents insufficient grounds to require separate trials. Id. at 929.

The defendants have not cited any case law on point from the Fourth Circuit, and the Court has been unable to find any. However, "a district judge is not required to be a mind reader in order to grant or deny a severance motion based on vague and conclusory representations that there might be some conflicting testimony of

defendants." United States v. Spitler, 800 F.2d 1267, 1272 (4th Cir. 1986). In the absence of any particular showing that the defendants intend to offer mutually exclusive and irreconcilable defenses, as opposed to inconsistent or contradictory defenses, the Court finds that the defendants do not have the right to comment upon the decision of a co-defendant not to testify, and, therefore, severance is not required on this ground.

4. Bruton Issues.

The defendants have correctly recalled that this Court's original severance order gave great weight to potential Bruton problems posed by many of the statements in this case, and noted the difficulty that redacting statements and appropriately instructing witnesses presented. However, since Ricky Brown's first trial, the Government has largely resolved these concerns by agreeing not to call witnesses whose testimony presents Bruton problems and by redacting statements where possible. For example, the two statements that the Court attached to its prior order to illustrate the nonsense that would result from redacting certain statements involved statements by two witnesses that the Government

has specifically stated it would not call in a joint trial.[9] As the Government states, it has put on its case once before and the only difficulties that arose were resolved by limiting the witness' testimony and giving the jury an appropriate instruction.

Bruton requires that where the unredacted out-of-court confession of a non-testifying defendant clearly implicates a defendant, severance is required to preserve that defendant's Sixth Amendment right to confront his accusers. United States v. Akinoye, 185 F.3d 192, 197 (4th Cir. 1999). Statements are inadmissible under Bruton if they are facially incriminating, but not if they are only inferentially incriminating. United States v. Brooks, 957 F.2d 1138, 1146 (4th Cir. 1992).

However, statements that do not even refer to the existence of a co-defendant are admissible and do not require severance. See Akinoye, 185 F.3d at 198, citing, Richardson v. Marsh, 481 U.S. 200, 211 (1987). Furthermore, "[t]he Bruton rule does not apply if the non-testifying defendant's statement is admissible against the defendant under the co-conspirator exception to the hearsay rule

[9] Exhibit A contained a statement by Torina Jo Moore and Exhibit B contained a statement by Colleen Roath.

set forth in Federal Rule of Evidence 801(d)(2)(E)." United States v. Shores, 33 F.3d 438 (4th Cir. 1994), citing, Folston v. Allsbrook, 691 F.2d 184, 187 (4th Cir. 1982).

Statements made by a co-conspirator to a third party, who is not a member of the conspiracy, are considered to be in furtherance of the conspiracy if the statements are designed to induce the third party either to join the conspiracy or act in some way that will assist it in accomplishing its objectives. Shores, 33 F. 3d at 444. However, statements that are nothing more than "idle chatter or casual conversation about past events" are not admissible as co-conspirator statements. Id.

Given the Government's representation that, if the case proceeds as a joint trial, it will not call certain witnesses whose testimony has known Bruton problems and, given that, with one minor exception, its witnesses were all able to avoid Bruton problems when testifying at Ricky Brown's trial, the Court finds that the policy underlying Bruton does not require the continued severance of the defendants' trials in this case.

5. Marital Privilege.

Both Barbara and Ricky Brown contend that their trials should be severed over concerns that, if they choose to testify, their spouse could prevent them from testifying on the ground of the privilege against confidential marital communications. This assertion, however, is incorrect.

There are two marital privileges. The first is known as the testimonial or adverse spousal privilege and it may be asserted at a criminal trial by the spouse of the criminal defendant to protect him or her from having to testify against a spouse. This privilege would not preclude either Barbara or Ricky Brown from testifying voluntarily as the witness-spouse is the holder of the privilege. Trammel v. United States, 445 U.S. 40 (1980).

The second marital privilege is the marital confidences privilege, also known as the marital communications privilege. "Information that is privately disclosed between husband and wife in the confidence of the marital relationship is privileged." United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987), citing, Blau v. United States, 340 U.S. 332, 333 (1951). Communications made in the presence of third parties are not privileged. Pereira v. United States, 347 U.S. 1, 6 (1954). The privilege does not

cover non-communicative conduct, such as appearance, physical or emotional condition. Parker, 834 F.2d at 411. This privilege may be invoked by the non-testifying spouse. United States v. Hill, 967 F.3d 902, 911 (3rd Cir. 1992), citing, United States v. Marashi, 913 F.2d 724, 729 (9th Cir. 1990). The rationale behind the privilege is to protect the privacy and trust of the marital relationship by permitting spouses to communicate freely.

This is the privilege that the Browns contend requires severance because either spouse could assert it to prevent the other from testifying freely on his or her own behalf. However, there is a well-recognized exception to this privilege that permits a spouse to testify where the defendant spouse is charged with a crime or tort against a child belonging to either spouse. See United States v. White, 974 F.2d 1135, 1138 (9th Cir. 1992).

Furthermore, virtually all circuits now recognize an exception to the marital confidences privilege for testimony that relates to ongoing or future crimes in which the spouses are joint participants at the time of the communication. This exception balances the public policy interest of protecting the integrity of marriage and the public interest in the administration of justice.

See generally United States v. Hill, 976 F.2d 902 (3rd Cir. 1992) (wife was a joint participant in husband's crimes even though she was not prosecuted for her role); United States v. Evans, 966 F.2d 398 (6th Cir. 1992); United States v. Marashi, 913 F.2d 724 (9th Cir. 1990); United States v. Keck, 773 F.2d 759 (7th Cir. 1985); United States v. Estes, 793 F.2d 465, 468 (2nd Cir. 1986) (recognizing that "the partnership in crime exception to the confidential communication privilege [provides] that greater public good will result from permitting the spouse of an accused to testify willingly concerning their joint criminal activities than would come from permitting the accused to erect a roadblock against the search for truth.").

The Fourth Circuit has joined its sister circuits in recognizing a joint participant exception to the marital communications privilege. In United States v. Broome, 732 F.2d 363, 365 (4th Cir. 1984), it held that "where marital communications have to do with the commission of a crime in which both spouses are participants, the conversation does not fall within the marital privilege and, consequently, does not limit the applicability of

the coconspirator exception to the hearsay rule." Subsequently, our Circuit observed that its holding in Broome

> reflects a balancing between the public interests in fostering open and honest communications between husband and wife and according a sufficient degree of privacy to marital relationships, on the one hand, and the revelation of truth and the attainment of justice, that are also in the public interest, on the other.

United States v. Parker, 834 F.2d 408, 411 (4th Cir. 1987). See also United States v. Van Drunen, 501 F.3d 1393, 1396 (7th Cir. 1974) (holding that criminals should not be able to enlist the aid of their spouse in a criminal enterprise without fear that they are creating a potential future witness).

Barbara Brown relies upon the Fourth Circuit's decision in United States v. Acker, 52 F.3d 509 (4th Cir. 1995), in support of her argument that her trial should be severed from that of her husband. However, in Acker, the Fourth Circuit found that the defendant could not prevent her co-defendant, with whom she had lived for twenty-five years, from testifying because she had failed to establish the existence of a valid marriage between herself and the testifying witness. Having concluded that there was no marital privilege at issue, the Fourth Circuit in Acker did not pursue the analysis to point out that under its prevailing law, even had the

defendant and the testifying witness been married, the defendant would have been unable to prevent her co-defendant from testifying under the joint criminal participation exception to the confidential marital privilege. This Court declines to interpret Acker as nullifying the clearly established acceptance of the joint criminal participation exception by the Fourth Circuit in Broome and Parker. Accordingly, the Court concludes that neither Ricky nor Barbara Brown may interpose the confidential marital privilege as a bar to prevent their co-defendant spouse from testifying voluntarily on his or her own behalf.

6. Administrative Concerns.

Defendants' arguments that they have prepared for trial and budgeted on the assumption that the trials would remain severed, and that there are scheduling conflicts among defense counsel, cannot, standing alone, justify the continued severance of the trials in this case in light of the general rule that, absent special circumstances, co-indictees should be tried together for the sake of judicial economy. The Court will address budgeting issues in the usual manner, through individual or joint ex parte

meetings with the legal teams for each defendant. Any scheduling conflicts will be taken up at the final pretrial conference set in this matter.

CONCLUSION

For the reasons discussed, the Court concludes that the initial grounds on which it based its severance order either are no longer applicable or are no longer so compelling in light of the Supreme Court's decision in Jones, the previous trial of Ricky Lee Brown and the Government's decision to not call certain witnesses to testify at a joint trial. The defendants have failed to show anything more than that a separate trial would offer each a better chance of acquittal.

Accordingly, the Government's motions to reconsider this Court's prior order granting the defendants' motions for severance [Docket Nos. 649 and 739] are **GRANTED,** and the Court **ORDERS** the cases against Ricky Lee Brown, Barbara Brown and Janette Ables **RE-JOINED** for trial.

The Court shall hold a final pretrial conference in this matter on **August 15, 2000** at **9:30 a.m.** at the **Clarksburg, West**

Virginia point of holding court. The defendants shall attend the final pretrial conference in person.

Jury selection and trial in this matter are currently set to commence on **Tuesday, September 12, 2000** at **9:30 a.m.** at the **Wheeling, West Virginia** point of holding court.

It is so **ORDERED.**

The Clerk is directed to transmit certified copies of this Order to counsel of record, the defendants, and all appropriate agencies.

DATED: July 28, 2000.

/s/
_____
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE