

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN GRAHAM, a.k.a.
JOHN BOY PATTON, and
VINE RICHARD MARSHALL, a.k.a.
RICHARD VINE MARSHALL, a.k.a.
DICK MARSHALL,
Defendants.

Case No. CR 08-50079

DEFENDANT MARSHALL'S REPLY
MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO SEVER TRIALS

Defendant Richard Marshall's undersigned counsel represents to the Court that Richard Marshall's theory of defense and the evidence he will present in support of that theory of defense will be mutually antagonistic with that of the co-defendant. Counsel requests an *in camera* hearing before the Court in which counsel will have an opportunity to disclose his theory of defense and to show the Court in specific detail how the defense will argue that evidence which the government will offer to prove the guilt of co-defendant John Graham is evidence that is exculpatory for Richard Marshall, thereby making the defenses mutually antagonistic and creating a high risk of prejudice to one or both co-defendants in a joint trial.

Mutually antagonistic defenses exist when the jury must disbelieve the core of one defense in order to believe the core of the other. United States v. Flores, 362 F.3d 1030, 1040 (8th Cir. 2006), citing Hood v. Helling, 141 F.3d 892, 896 (8th Cir. 1997).

Although "[m]utually antagonistic defenses are not prejudicial *per se*," Zafiro v. United

States, 506 US 534, 538, 113 S.Ct. 933 (1993), a defendant is entitled to a severance if he can show 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.

“This high standard could be met when evidence that would be inadmissible against one defendant if he were tried alone is admitted against his co-defendant, when many defendants are tried in a complex case with “markedly different degrees” of culpability, or when a joint trial denies a defendant exculpatory evidence that would be available if he was tried alone.” Flores, at 1041.

Although a defendant moving for severance does not prove likelihood of prejudice merely by showing that there are mutually antagonistic defenses, the danger of real prejudice is more likely in a case where the defenses are mutually antagonistic. “Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each co-defendant into each other’s most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the most guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant.” Zahiro, at 543- 544 (J. Stevens, concurring).

Here, the co-defendants have mutually antagonistic defenses that have the potential to put the co-defendants in essentially adversarial roles against each other. Defendant Marshall does not intend to dispute the government’s contention that Theda Clarke, Anna Mae Aquash, co-

defendant John Graham, and Arlo Looking Cloud went to his home in Allen one night some three decades ago. Nor will he dispute the government's contention that Marshall was asked by someone in the Graham/Looking Cloud/Clarke party if he would keep Anna Mae Aquash at his home; and he will not dispute the government's evidence that he refused to do so. Richard Marshall does deny and dispute the government's contention that Richard Marshall gave a gun to Clarke, Graham or Looking Cloud.

Based on his prior statements, it is anticipated that co-defendant John Graham's theory of defense will be that Anna Mae Aquash was a fugitive, hiding from the FBI; that he drove her, at her request, from Denver to South Dakota; and at her request, he took her to a "safe house" on the Pine Ridge reservation and left her there.

Graham's out of court statements to that effect, viewed in light of the evidence that he and Aquash, along with Clarke and Looking Cloud, went to the Marshall home on the Pine Ridge reservation, constitute accusatory and highly prejudicial evidence against Richard Marshall. The government has given notice that it will offer Graham's out of court statements into evidence. If Graham does not testify, Richard Marshall will be deprived of his right to confront his accuser. This evidence would not be admissible against Marshall in a joint trial. The out of court statements by Graham would result in a denial of the right to confrontation under Bruton, 391 US 123 (1968), and is the type of evidence that constitutes prejudice under Zafiro.

I

DEFENDANT WOULD SUFFER SERIOUS PREJUDICE IN A JOINT TRIAL FROM THE ADMISSION OF EVIDENCE THAT WILL BE ADMITTED AGAINST THE CO-DEFENDANT BUT WHICH WOULD BE INADMISSIBLE AGAINST HIM.

There is a serious risk that defendant Marshall would suffer serious prejudice in a joint

trial because highly prejudicial evidence that would be inadmissible against him is likely to be admitted against co-defendant Graham. This constitutes grounds for severance under Zafiro and Flores.

The government's evidence is that while in Rapid City, before going to the Pine Ridge reservation and the Rosebud reservation, co-defendant Graham raped Aquash. The government has no evidence that Richard Marshall ever had any knowledge of the co-defendant's alleged rape of Aquash. Therefore, the evidence of sexual assault that the government seeks to offer against co-defendant Graham either as *res gestae* evidence or other crimes evidence under Rule 404(b) would have no relevancy to the question of Richard Marshall's guilt; any hypothetical minimal probative value it might have with regard to Marshall would be substantially outweighed by the clear danger of prejudice that such highly emotional evidence would present, and therefore evidence of the co-defendant's alleged rape would be inadmissible against Marshall under Rule 403.

The defendants are not charged with conspiracy. Therefore, there will be a great deal of other evidence that the government will offer to prove Graham's guilt that will not be admissible against Marshall.

This is the rare case in which the foreseeable danger of undue prejudice caused by sensational and prejudicial evidence that would be admissible only against a co-defendant should result in severance. As in United States v. Baker, 98 F.3d 330 (8th Cir. 1996), this is a case in which severance should be granted because there is a serious risk that the evidence of a co-defendant's guilt in a joint trial would prevent the jury from making a reliable judgment about Richard Marshall's guilt or innocence. This is so because extremely serious and sensational

evidence, including but not limited to evidence of the co-defendant's rape of the victim, that would not be admissible against Marshall if he were tried alone will be introduced against co-defendant Graham. See: Baker, at 335.

In addition, it is foreseeable that the government will argue in trial that Graham's out of court admissions that he took Anna Mae Aquash to a "safe house" on the Pine Ridge reservation was a reference by Graham to the Marshall home in Allen, which is located on the Pine Ridge reservation. Even without the government's arguing the point, the jury could make such an inference from Graham's out of court statement and the other evidence, and could infer that Graham's statements could be taken to mean that the defendant Marshall's home was a "safe house" where fugitives who were involved in AIM could hide or find assistance. This is a highly prejudicial inculpatory accusation against defendant Marshall. As in Baker, the co-defendant's admission would constitute an out of court accusation that, considered with the evidence that Graham and Aquash did go to Richard Marshall's home, the government would argue, or the jury could infer, constituted inculpatory evidence against Richard Marshall—specifically, evidence of motive and criminal predisposition. Under the rules of evidence, however, Graham's statements, which would be an admission by a party under Rule 801, would only be admissible against Graham. It would not be admissible if Marshall was tried alone. This is analogous to the situation in United States v. Baker, 98 F.3d at 335:

"In addition, Wheeler's inculpatory statement to the FBI was evidence that was probative of Baker's guilt (Wheeler's statement does not incriminate Baker on its face but arguably does so only when linked to other evidence) but was technically admissible only against Wheeler."

As in Baker, the substantial risk of prejudice from the spillover effect of evidence that is only

admissible against the co-defendant is too high to be cured by less drastic measures, such as jury instructions.

II

THERE IS A SERIOUS RISK OF UNDUE PREJUDICE TO DEFENDANT MARSHALL IN A JOINT TRIAL DUE TO THE MARKEDLY DIFFERENT DEGREES OF THE CO-DEFENDANTS' ALLEGED CULPABILITY.

Moreover, there is certainly a great disparity as to evidence of culpability in the government's cases against the two defendants. The government alleges that co-defendant Graham actively took part in kidnaping and abducting the victim in Denver, Colorado; that he held the victim tied up in a car for several hours as he and his accomplices drove her from Denver to South Dakota; that he raped her while they held her prisoner; and that he participated in a meeting in Rosebud where the decision was made to kill Aquash; after which, Graham personally executed her. The evidence comes from a number of sources, including the admissions of Arlo Looking Cloud, alleged out of court admissions by Theda Clarke, and several statements from Graham admitting that he was with Anna Mae Aquash and drove her from Denver to the Pine Ridge reservation. On the other hand, the evidence that the government relies on to prove its case against Marshall comes almost exclusively from Arlo Looking Cloud and it consists of a claim made by Looking Cloud to federal investigators that he saw Richard Marshall hand a gun and shells to Theda Clarke during a brief stop along the way at Marshall's house in Allen.

The markedly different degrees of alleged culpability in the government's cases against John Graham and Richard Marshall constitute further grounds for a severance under Zafiro and Flores.

CONCLUSION

The record before the Court demonstrates a serious risk that a joint trial would compromise the right of defendant Richard Marshall to a fair trial and would prevent the jury from making a reliable judgment about his guilt or innocence. Therefore, the court should exercise its sound judicial discretion to order a severance of trials.

Dated this 22nd day of December, 2008.

VINE RICHARD MARSHALL, Defendant

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CERTIFICATE OF SERVICE

I hereby certify that I a true and correct copy of the foregoing Reply Memorandum of Law in Support of Motion to Sever Trials was electronically served upon the other parties in this case via the electronic mail addresses listed below:

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Dated this 22nd day of December, 2008.

/s/ Dana L. Hanna
Dana L. Hanna