

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

VS.

CRIMINAL NO. 3:08-cr-00107-DPJ-LRA-2

**FRANK E. MELTON,
MICHAEL RECIO and
MARCUS WRIGHT**

DEFENDANTS

**MOTION FOR SEVERANCE AND/OR
RELIEF FROM PREJUDICIAL JOINDER
AND SUPPORTING MEMORANDUM OF LAW**

The Defendant, Michael Recio, moves this Court for a separate trial, pursuant to Rules 8 and 14 of the Federal Rules of Criminal Procedure, the Fifth and Sixth Amendments to the U. S. Constitution and other applicable authorities, and in support thereof would show:

1. Defendant, Michael Recio, is charged in a three count indictment with conspiracy against rights of citizens, deprivation of civil rights and violent crime/drugs/machine gun. The first two counts charge extortion in violation of Title 18 U.S.C. §1951. Count three charges extortion in violation of Title 18 U.S.C. §666(a)(1)(b).

2. Based upon information from the United States Attorney's office, Counsel for the Defendant Michael Recio believes that the government intends to introduce at a joint trial a statement or statements made by co-defendants, which implicate him in the offenses charged in the indictment.

3. The prejudice to the defendants of a joint trial outweighs any interest in judicial economy and efficiency because the jury will not be able to segregate the evidence

applicable to each defendant and to follow the instructions as they apply to each defendant which would deny each defendant a fair trial.

4. The defendants have mutually antagonistic defenses which would compromise a specific trial right of the other and/or would prevent the jury from making a reliable judgment about guilt or innocence. Specifically, Defendant Recio intends to rely on a defense that, if any offense was committed, it was committed by his co-defendants acting alone. Such a defense would prejudice the defendant Recio. The antagonistic defenses are in fact evident from the face of the indictment.

5. Should it become necessary for one of the defendants to comment on the other's failure to testify, such comment would hurt that defendant's defense and violate the nontestifying defendant's Fifth Amendment right against comments on his silence.

6. If granted a separate trial, the Defendant Recio intends to call his co-defendants, as witnesses to provide exculpatory testimony. If called at a separate trial, they would testify. His testimony would be substantially exculpatory and would be against Recio's penal interests. If not granted a separate trial, co-defendants would refuse to testify on behalf of the Defendant, Recio.

7. There may be evidence admissible against Melton and the other co-defendant pursuant to Rule 404(b) of the Federal Rules of Evidence which could prejudice Recio. Because such information is not presently available, undersigned counsel requests an opportunity to supplement this motion when such information is available regarding Melton and the other co-defendant.

MEMORANDUM OF LAW

“[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him’ secured by the Sixth Amendment.” *Bruton v. United States*, 391 U.S. 123, 126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) [quoting *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965)]. Where an out-of court statement by a non-testifying co-defendant is admitted at trial, the defendant inculpated by that statement is denied the opportunity to cross-examine the co-defendant about the confession. This inability to cross-examine the co-defendant means that the reliability of his statement cannot be effectively challenged by the inculpated defendant. When this occurs, that defendant is denied his Sixth Amendment right to confront the witnesses against him. *Bruton v. United States*, 391 U.S. at 127.

In *Bruton*, the United States Supreme Court held that a curative instruction telling the jury to consider the inculpatory statement only to determine the co-defendant’s guilt does not cure the constitutional violation. *Id.*, 391 U.S. at 131. Furthermore, in *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151, 140 L.Ed.2d 294 (1998), the Supreme Court held that not only does *Bruton* error occur when the statements directly implicate the defendant, such error occurs even where the non-testifying co-defendant’s confession has been redacted to delete the name of the defendant. *Accord*, *United States v. Hickman*, 151 F.3d 446 (5th Cir. 1998) [*Bruton* error where the jury could infer the defendant’s identity from the redacted confession and the evidence, overruling prior Fifth Circuit cases to the contrary].

Because, therefore, the prosecution has indicated in this case that it intends to use statements made by co-defendants which implicate Recio, this Court must under *Bruton*

and its progeny grant a severance. This is particularly true, where as here, the jury can infer Recio's identity from a redacted statement.

Furthermore, Rule 8 of the Federal Rules of Criminal Procedure has been interpreted to require a severance where a joint trial results in "actual prejudice" to a defendant. *United States v. Lane*, 474 U.S. 438 (1986). Rule 14 of the Federal Rules of Criminal Procedure provides for severance where joinder is so prejudicial that it outweighs the interests of judicial economy. *United States v. Erwin*, 793 F.2d 656 (5th Cir. 1986), *cert. denied*, *Erwin v. United States*, 479 U.S. 991 (1986).

The Defendant in this case would be prejudiced because the jury could not segregate the evidence as it applied to each defendant; nor would it be able to follow any limiting instructions as they applied to each defendant. Defendant, consequently, would be denied his right to a fair trial because he would be denied the right to fully cross-examine witnesses, present individual defenses and confront witnesses. *United States v. Lane*, *supra*; *United States v. Erwin*, 793 F.2d at 665; *United States v. Vaccaro*, 816 F.2d 443, 449 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987), *overruled on other grounds*, *Huddleston v. United States*, 485 U.S. 681 (1987).

Defendant is also entitled to a severance because he has irreconcilably mutually conflicting defenses which would require the acquittal of one at the expense of the other. *Zafiro v. United States*, 506 U.S. 534 (1993). For example, co-defendants intend to rely on a defense that, if any offense was committed, it was committed by their co-defendant acting alone. Such a defense would prejudice the defendant Recio. This is the sort of conflicting defense which has been held to require a severance. *United States v. Arias-Villaneuva*, 998 F.2d 1491 (9th Cir. 1993).

In addition, a severance is required because it is an attorney's duty to his client to comment on the co-defendants' failure to testify. Such comments would violate the nontestifying defendants' Fifth Amendment right against comments on their silence. *Deluna v. United States*, 308 F.2d 140, 142-32 (5th Cir. 1962). Should either defendant elect to remain silence, the other defendant would suffer probable prejudice because his defense would benefit from commenting on the other's failure to testify. *Id.*

Finally, a severance is required in this case because, if granted a separate trial, Defendant Recio would call the co-defendants; particularly Frank Melton that Recio had nothing to do with committing any crimes charged in the indictment. Melton would so testify at a separate trial, and his testimony would exculpate his son. Recio's son would not testify to exculpate Recio if the two were tried together. *United States v. Erwin*, 793 F.2d 666, n. 14; *United States v. Nichols*, 695 F.2d 86, 92 (5th Cir. 1982); *United States v. Echeles*, 352 F.2d 892, 895 (7th Cir. 1965).

According to the appellant, Thomas Nguyen, he was unable to call his co-defendant at trial because of Fifth Amendment protections; if the trial was severed, Thomas Nguyen would have been able to compel his co-defendant's testimony under the Sixth Amendment. Under these circumstances, severance might be granted to protect the Sixth Amendment right to compulsory process, which is considered a special trial right. *United States v. Barnett*, 197 F.3d 138, 145 (5th Cir. 1999)

United States v. Nguyen, 493 F.3d 613, 625 (5th Cir. 2007).

In order to demonstrate a prima facie case for severance to introduce exculpatory testimony of a co-defendant, a defendant must show: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant would in fact testify if severance were granted.

United States v. Rocha, 916 F.2d 219, 232 (5th Cir. 1990) (citations omitted).

“Under that test, without an affidavit from the co-defendant himself or other similar proof, ‘conclusory allegation[s]’ that a co-defendant would testify and what he or she would testify about is not sufficient. Representations by the defendant’s attorney are not sufficient.” *United States v. Nguyen*, 493 F.3d 613, 625 (5th Cir. 2007) (internal and end citations omitted).

WHEREFORE, the Defendant respectfully requests that this Court set this case for hearing, and that upon hearing, this Court grant a separate trial for the Defendant, Michael Recio.

This the 6th day of October, 2008.

Respectfully submitted,

/s/ Cynthia A. Stewart
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CERTIFICATE OF SERVICE

I, the undersigned attorney for the Defendant herein, do hereby certify that the above and foregoing is being filed with the Clerk of this Court by electronic filing and will be served via e-mail by the Clerk of this Court to the following:

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Further, a copy has been delivered via First Class United States Mail, postage prepaid to:

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This the 6th day of October, 2008.

/s/ Cynthia A. Stewart

Cynthia A. Stewart