

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
PERRY SMITH and	:	
KEVIN CLEVELAND	:	NO. 04-CR-472

**MEMORANDUM**

Gene E.K. Pratter, J.

November 15, 2004

**INTRODUCTION**

Defendant Kevin Cleveland moves the Court to order severance of his trial from the trial of his co-defendant Perry Smith. Cleveland asserts that the statement Smith made to the Philadelphia Police on August 14, 2003, if used at trial, would unfairly prejudice Cleveland's defense. Therefore, Cleveland argues that under Rule 14 of the Federal Rules of Criminal Procedure the Court should exercise its discretion to sever the trials of the defendants.

The Government argues in response that judicial and prosecutorial resources would be better conserved by trying the defendants jointly in accordance with the indictment. The Government contends that any problematic prejudice from use of Smith's statement can be ameliorated by redacting from the statement the specific or suggestive references to Cleveland and by a limiting jury instruction. The Government also suggests that if its final redaction effort does not pass muster, the Government wishes to reserve the option of foregoing use of the statement altogether, thereby eliminating entirely the stated basis for the requested severance.

As discussed below, because judicial and prosecutorial resources would be conserved

with a joint trial in this matter, and because there is a strong preference for joint trials of defendants who are indicted together, particularly where, as here, the indictment includes a conspiracy charge, the Court finds the Motion should be denied without prejudice in order to permit the Government to submit for the Court's review a redacted statement of Perry Smith that eliminates reference or suggested reference to Kevin Cleveland. If Cleveland is unsatisfied with the proposed redactions, he may file a new motion for severance. The government, of course, will have the option to proceed to trial without use of the statement at all.

### **BACKGROUND**

Defendants Perry Smith and Kevin Cleveland both are charged with: (1) conspiring to commit a robbery of Shernoff Salads Company thereby interfering with interstate commerce in violation of 18 U.S.C. § 1951, (2) interference with interstate commerce by robbing Shernoff Salads Company in violation of 18 U.S.C. § 1951, and (3) the use of firearms during a crime of violence in violation of 18 U.S.C. § 924. Defendant Kevin Cleveland is charged individually with: (1) carjacking in violation of 18 U.S.C. § 2119, and (2) use of a firearm during a crime of violence in violation of 18 U.S.C. § 924. The Court held an evidentiary hearing to address this Motion as well as several other motions submitted by the Defendants. The factual substance of the testimony presented during the hearing days is as follows.

On August 14, 2003, the Shernoff Salads Company was robbed by two armed gunmen who brandished firearms and threatened the store owner, Jeffrey Shernoff. During the course of the robbery, another employee, Heidi Shernoff, was shot in the stomach. The gunmen stole approximately \$1,500 from two Company cash boxes and Ms. Shernoff's purse before fleeing. Philadelphia police promptly arrived on the scene and obtained witnesses' descriptions of the

events and of the assailants.

The armed robbers were seen fleeing the scene in a gray Oldsmobile. Within a very short time after the robbery, the Philadelphia police located the car in Roosevelt Park, where witnesses saw three men run from the car to a lake in the Park. The police pursued the individuals and found Defendants Perry Smith and Kevin Cleveland in the lake. The police apprehended the Defendants, and Mr. Shernoff and an employee of Shernoff Salad Company, Robert Robinson, identified Smith and Cleveland as the robbers.

Smith and Cleveland then were taken to the police station. While at the police station, Smith was interviewed by the police and, according to police witnesses, after being given his Miranda warnings, Smith allegedly gave an incriminating statement that also incriminated Cleveland. Cleveland subsequently filed the pending Motion.

## **DISCUSSION**

There is a preference for joint trials of defendants who are indicted together, especially in cases involving a conspiracy count, and to secure severance a defendant must show a serious risk of substantial prejudice to his defense at a joint trial. Zafiro v. United States, 506 U.S. 534, 537-39 (1993). Given the public interest in judicial efficiency and economy, this burden is a significant one, requiring the defendant to demonstrate clear and substantial prejudice that would result in an unfair trial. United States v. McGlory, 968 F.2d 309, 340 (3d Cir. 1992).

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court reversed Bruton's conviction in a joint trial with a co-defendant, Evans, where Evans had implicated Bruton in a confession to the police. The Supreme Court held that the Government's introduction of a co-defendant's confession implicating Bruton without the co-defendant taking the witness stand

violated the accused's right to confront witnesses under the Confrontation Clause of the Sixth Amendment. Id. at 126. The Court noted the significant weight the confession added to the prosecution's case against Bruton, observing that "Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination since Evans did not take the stand. [Bruton] was thus denied his constitutional right of confrontation." Id. at 128.

The Court also expressed doubts regarding the remedial effect of a curative instruction in the Bruton context:

[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect.... The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Id. at 135-36. Therefore, the Supreme Court found the use of a co-defendant's confession in Bruton violated the defendant's Sixth Amendment rights. Id. at 135.

In Richardson v. Marsh, 481 U.S. 200 (1987), the Supreme Court declined to extend Bruton and held that a redacted confession of one defendant, where all references to the other defendant were redacted to eliminate that defendant's name and any other reference to that defendant's existence, together with a limiting instruction for the jury to not consider the confession against the non-confessing defendant, was sufficient protection and did not violate the Confrontation Clause. Id. at 203-5. Specifically, the Supreme Court held "the Confrontation

Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." Id. at 211.

Redaction is not an automatic solution, however. In Gray v. Maryland, 523 U.S. 185 (1998), the Supreme Court held that simply replacing a defendant's name with the word "deleted" (or any other symbol), or merely leaving a blank space, falls within the Bruton rule, rather than within the Richardson limitation, and is a violation of the defendant's Sixth Amendment rights. Id. at 192. The Supreme Court explained that the problem created by such an effort is that a juror would almost invariably link the symbol or blank to the defendant. Id. at 193. In fact, the Supreme Court further explained that the symbol or blank could actually accentuate the redacted portion. Id. Thus, redaction is not necessarily a panacea.

In United States v. Richards, 241 F.3d 335 (3d Cir. 2001), the Court of Appeals for the Third Circuit applied the Bruton line of cases to a case where one defendant had made a confession and made reference to a "friend" who was involved in the robbery. Id. at 338. The Court of Appeals held that the use of "friend" clearly implicated the non-confessing defendant, since the non-confessing defendant was the only other person charged and testimony was presented showing the two defendants were friends. Id. at 341.

Given the foregoing legal landscape, Cleveland argues that the statement by Perry Smith to the Philadelphia police cannot be redacted in such a manner as to eliminate the prejudice to Cleveland's defense. The Court is not convinced of the impossibility of the task. The Government does not deny that a redaction is required if Cleveland and Smith are to be tried together, but has not presented a fully reviewable redacted statement to Cleveland or the Court at

this time.<sup>1</sup> Therefore, the Court is not in a position to determine at this time if a redaction could cure the potential for prejudice.

The Supreme Court decisions discussed *supra* make it clear that redaction, with a proper limiting instruction, may pass constitutional muster. Until the Court is presented with the final proposed redacted statement, and Cleveland is given an opportunity to express any concerns with it, it is premature for the Court to resolve this issue finally. Therefore, the Motion is denied without prejudice, pending the Government's production of a redacted statement that takes account of the limitations and restrictions discussed above.

An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE

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<sup>1</sup> The Government submitted what appears to the Court to be a "rough cut" draft of a proposed redacted version of the Smith statement. Because there appears to have been some word processing difficulty in preparing the proposed draft, the Court is unable to review it for substantive comment. Hence, the Court looks to the government to renew and redouble its effort.

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**ORDER**

Gene E.K. Pratter, J.

November 15, 2004

AND NOW, this 15th day of November, 2004, upon consideration of the Defendant Kevin Cleveland's First Motion to Sever Defendants (Docket No. 33) and the Court's determination that proper redactions in Defendant Perry Smith's statement to the police may cure the prejudicial effect upon Defendant Cleveland's defenses to the charges, it is hereby ORDERED the Motion is DENIED WITHOUT PREJUDICE, pending the Government's submission of a redacted statement that eliminates any reference or suggested reference to Kevin Cleveland.

BY THE COURT:

S/Gene E.K. Pratter  
GENE E.K. PRATTER  
UNITED STATES DISTRICT JUDGE