

**UNPUBLISHED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION**

**UNITED STATES OF AMERICA**

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v.

**WALTER LEFIGHT CHURCH,**

Defendant.

Case No. 1:00CR00104

**OPINION AND ORDER**

By: James P. Jones

United States District Judge

*Thomas J. Bondurant, Jr. and Anthony P. Giorno, Office of the United States Attorney, Roanoke, Virginia, for United States of America; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant.*

The defendant has moved to exclude certain evidence that the government intends to present at trial on the ground that its introduction would allow the government to proceed on inconsistent theories from that used in prosecuting his co-defendant. Because I find the government has not changed its theory of the case, I will deny the motion.

I

The defendants Walter “Pete” Church and Sam Ealy are charged with various federal crimes arising out of the murders of Robert Davis, his wife Una Davis, and

her fourteen-year-old son, Robert Hopewell, on April 16, 1989. Ealy was tried in state court in 1991 for the murders and acquitted. By agreement of the parties, the defendants' trials in this court were severed and Ealy was tried first and convicted by a jury.

Prior to Ealy's trial, the government moved in limine to exclude statements allegedly made by Church exculpating Ealy on the ground that they did not fall within the "statement against interest" exception to the hearsay rule as set forth in Federal Rule of Evidence 804(b)(3). At Ealy's state trial, Ronald Kretzer, a former cellmate of Church, testified that Church had admitted he had been present when the Davis family was murdered, and that "Sam Ealy did not, indeed, do the murders." (State Ct. Tr. at 984-85.) Ruby Powers similarly testified at Ealy's state trial that she had overheard Church say that "he [Church] does the crime, somebody else does the time," (*Id.* at 931) and "we had to go back in and kill the little retard, because he would know who we were." (*Id.*) According to Powers, Church never mentioned Sam Ealy in the conversation, but did implicate Sam's brother, John Mark Ealy. (*Id.* at 931-32, 933, 935.) Ronnie Pennington testified at that trial that he had heard Church implicate himself in the crime along with a person named Danny. (*Id.* at 975.)

Rule 804(b)(3) requires that “a statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Fed. R. Evid. 804(b)(3).<sup>1</sup> After considering the circumstances, I granted the motion to exclude these witnesses’ hearsay testimony, primarily on the ground that there was no evidence that the alleged statements by Church were consistent with other statements by him. *See United States v. Ealy*, No. 1:00CR00104, 2002 WL 273317, at \*4 (W.D. Va. Feb. 26, 2002). As I noted, hearsay statements introduced by an accused in which the unavailable declarant implicates himself and exculpates the defendant are “inherently suspect.” *Id.*

Now, at Church’s trial, the government has intended that it may offer the same statements by these witnesses as admissions of a party, admissible under Federal Rule of Evidence 801(d)(2). The defendant Church does not argue that the statements are inadmissible under that rule, but contends that it violates due process for the government to offer them, because they are inconsistent with the government’s claim

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<sup>1</sup> The parties stipulated that Church would refuse to testify at Ealy’s trial and thus was “unavailable” as also required by the rule.

that Ealy is responsible, along with Church, for the murders. I have orally denied the defense motion, and this opinion more fully sets forth my reasons for doing so.<sup>2</sup>

## II

There are situations where the prosecution is prohibited from asserting inconsistent positions in separate criminal proceedings, based on the defendant's right to due process of law. See Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423, 1425 (2001). However, "[t]o violate due process, an inconsistency must exist at the core of the prosecutor's cases against defendants for the same crime." *Smith v. Groose*, 205 F.3d 1045, 1052 (8th Cir. 2000). No such inconsistency exists in the present case.

From the beginning of this prosecution, during Ealy's trial, and to the present, the government has consistently asserted one theory of the case—that both defendants were hired by the drug kingpin, Charlie Gilmore, to kill Robert Davis because Gilmore feared that Davis might inform on him; that both defendants planned and

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<sup>2</sup> The defendant first moved generally to exclude any evidence inconsistent with the government's theory as to the co-defendant's guilt, but I denied that motion orally without prejudice to resubmitting it with particulars as to the evidence objected to. The defendant thereafter filed the present motion, specifically objecting to the testimony of Kretzer, Powers, and Pennington.

executed the killing of Davis at his home and then killed Mrs. Davis and her son because they were present and witnessed the murder of Robert Davis. The fact that these government witnesses may differ in their testimony does not constitute a core inconsistency. Nor does the fact that the government successfully argued for their exclusion in Ealy's case violate Church's rights. *See United States v. Hozian*, 622 F.2d 439, 442 (9th Cir. 1980) (holding that government could present the testimony of convicted defendant in later trial of accomplice even though the defendant had asserted his innocence at his own trial and his testimony had been impeached by the government).

The government should not be precluded from offering the evidence of these witnesses, simply because their testimony does not in all respects support the government's otherwise consistent theory. Rarely do the witnesses in any trial consistently describe any event. These inconsistencies, of course, are fruitful occasions for cross-examination and will support arguments to the jury as to witnesses' credibility. But they are not the basis for excluding the testimony outright.

### III

For the foregoing reasons, the renewed motion by the defendant to exclude the described testimony (Doc. No. 618) is denied.

ENTER: September 18, 2002

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United States District Judge