UNPUBLISHED

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

UNITED STATES OF AMERICA	)	
	)	
	)	Case No. 1:00CR00104
	)	
v.	)	**OPINION AND ORDER**
	)	
CHARLES WESLEY GILMORE AND WALTER LEFIGHT CHURCH,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Thomas J. Bondurant, Jr. and Anthony P. Giorno, Assistant United States Attorneys, Roanoke, Virginia, for United States of America; Anthony F. Anderson, Roanoke, Virginia, and Stephen J. Kalista, Big Stone Gap, Virginia, for Defendant Charles Wesley Gilmore; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant Walter Lefight Church.

This opinion resolves two pretrial motions. A motion in limine by the government to permit it to introduce certain hearsay statements as admissions against penal interest by unavailable declarants is granted and a motion by one of the defendants for a separate trial is denied.

I

The defendants, Charles Wesley Gilmore and Walter Lefight Church, are charged with various federal crimes arising out of the murders of Robert Davis, Una Davis, and Robert Hopewell on April 16, 1989, in Pocahontas, Virginia.[1] The original indictment, returned December 13, 2000, charged defendant Church and Samuel Stephen Ealy with the killings. At the request of the defendants and without objection by the government, the cases were severed for trial. Ealy was tried first and convicted and has been sentenced to life imprisonment. Church was thereafter tried but the jury could not reach a unanimous verdict and a mistrial was declared on October 4, 2002. Before Church's second trial was to begin, the government obtained a Sixth Superceding Indictment adding Gilmore as a defendant and at the defendants' request, I continued their joint trial, which is now set to begin on October 27, 2003.

The government's theory of the case is that Gilmore, a drug king-pin, hired Ealy and Church to murder Robert Davis because Gilmore understood that Davis, a

[1] Specifically, the defendants are charged with conspiracy to murder Robert Davis in furtherance of a continuing criminal enterprise (Count One) (21 U.S.C.A. § 848(e)(1)(A) (West 1999)). Gilmore is charged with killing Mr. and Mrs. Davis and Robert Hopewell in furtherance of a continuing criminal enterprise (Counts Two, Three and Four). Both defendants are charged with killing Robert Davis with the intent to prevent him from communicating with federal authorities (Count Five) (18 U.S.C.A. § 1512(a)(1)(C) (West 2000 & Supp. 2003)) and Church is charged with killing Una Davis and Robert Hopewell to prevent their communication with federal authorities (Counts Six and Seven).

member of Gilmore's drug ring, was about to inform on him to federal authorities. According to the government, Ealy and Church killed Davis at his home in the early morning hours of April 16, 1989, and immediately thereafter murdered his wife Una and her fourteen-year-old son Robert because they had witnessed the murder of Davis.[2]

The government has filed a Notice of Intent to Seek the Death Penalty [3] as to Church and the Attorney General is presently considering whether to authorize such a notice as to Gilmore.[4] Gilmore has filed a Motion to Sever seeking a separate trial from Church, which the government opposes. In addition, the government has filed a Motion in Limine to allow the introduction at a joint trial of hearsay statements allegedly made by Ealy, Church, and Gilmore which implicate each other in the murders. The government concedes that severance depends in part at least on the admissibility of these statements at a joint trial. Accordingly, I will take up first the

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[2] According to the evidence in Ealy's and Church's trials, Gilmore had received a "target letter" from federal authorities investigating drug trafficking shortly before the murders. Gilmore was subsequently convicted of drug trafficking and served a term in federal prison. Ealy was tried alone in state court in 1991 for the murders and was acquitted.

[3] *See* 21 U.S.C.A. § 848(h) (West 1999).

[4] Under Justice Department policy, all government requests to seek the death penalty must be approved in writing by the Attorney General. *See Nichols v. Reno*, 931 F. Supp. 748, 750-51 (D. Colo. 1996) (describing policy), *aff'd*, 124 F.3d 1376 (10th Cir. 1997).

Motion in Limine by the government to admit the hearsay statements. Both defendants object to the admissibility of the evidence in question.[5]

The government has supplied the particulars of the testimony that it wishes to introduce. Some of these witnesses have previously testified in the prior trials in this case. All of the proposed witnesses were acquaintances of Ealy, Church, or Gilmore, and claim that the various statements were made to them while they were fellow inmates with the declarants in federal or state prisons or jails.[6] The following is a summary of the anticipated testimony in question.

David Epperson previously testified at Ealy's federal trial about conversations between himself and Ealy concerning the murders. Epperson met Ealy while they were imprisoned together at the city jail in Bluefield, West Virginia, in 1996. While in jail, Ealy told Epperson the following about the events that had occurred in 1989: Gilmore operated a drug ring in Pocahontas; Ealy and Robert Davis worked for Gilmore; and Davis held most of Gilmore's drugs and money for him. When Gilmore learned of the target letter that had been sent to Davis by federal authorities, he contacted Ealy

[5] Gilmore's Motion to Sever and the government's Motion in Limine have been fully briefed by the parties. I will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not significantly aid the decisional process.

[6] They are, in the colloquial, "jail house snitches."

through Bertha Ealy, Ealy's wife, to have Ealy kill Davis. Church agreed to help Ealy carry out the murders and on the day of the murders, Ealy met Church near the Davis home, later picked Church up at his home, and they waited together for Davis to get off of work in a parking lot across from where Davis worked. When they saw Davis leave, they went to Ealy's mother's home to get Ealy's brother's shotgun. Ealy shot Davis outside of the Davis home after Davis drew a pistol. Una Davis witnessed the murder, and Ealy then shot her while she was running through the yard. Bobby Hopewell came to the door of the Davis home and saw what had happened. Church asked Ealy for the shotgun, went into the house and when Ealy followed him, he found Church standing outside of a closet where Church had shot the boy. Before they left, Ealy and Church took the pistol from Davis and later gave it to Gilmore. Epperson testified that Ealy had also told another version of the story, where Church was not involved and Ealy had acted alone.

The government indicates that it intends to call Chad Sopsher, who also testified at Ealy's federal trial regarding conversations with Ealy. Sopsher has known Ealy since he was a child. The conversations that are the subject of Sopsher's testimony took place in early 2001 at a regional jail in Beaver, West Virginia, where Ealy and Sopsher were housed together. Ealy told Sopsher that in early 1989, Ealy's wife, Bertha Ealy, had found a suitcase of money in Gilmore's house and that Ealy and

Bertha had planned to steal it. When they went to take it, it was missing and Ealy assumed that it was at Davis' home. Ealy told Sopsher that he had been drunk on the day of the murders and didn't remember much, but that "it looked bad" for him because someone had seen him and another person talking to Gilmore at The Cricket, a bar in Pocahontas, on the day of the murders. Ealy further told Sopsher that Gilmore had wanted Davis killed.

Edwin Shomaker is another potential witness for the government who previously testified at Ealy's federal trial regarding conversations with Ealy. Shomaker met Ealy when they were housed together at a jail in Dublin, Virginia, in the fall of 2001. Church was also housed at the same facility at the same time and was present for at least some of the conversations that are the subject of Shomaker's testimony. Ealy told Shomaker that he used to buy drugs from Gilmore, that he had been in debt to Gilmore, that he and Church had killed Davis because Gilmore was afraid that Davis was going to give information to the FBI, that they had killed the boy because he saw their faces, and that they had killed the boy in a closet.

Richard Lasczcynski provided testimony at Church's first trial regarding conversations he had with Church. Lasczcynski met Church at a federal prison in Pennsylvania, when they were housed together in 1996. Lasczcynski testified that Church had told him the following information about the murders during a "bragging

session" at the prison. Gilmore thought Davis was going to cooperate with the federal government in uncovering Gilmore's cocaine distribution ring, so Gilmore sent Church and a man named "Eatley" to kill Davis. Church met up with "Eatley" the night before the murders to drink beer and watch the Davis home. On the night of the murders, Church and "Eatley" pulled into Davis' driveway, sounded the horn, and shot Davis when he exited the home. Davis' wife was later shot outside the home. Church then went inside and shot a fourteen-year-old boy in a closet. The bullet went through the boy's hand and into his face. Before leaving, Church and "Eatley" looked for cash that they expected to find in the Davis home due to his involvement in the drug ring. The gun used to commit the murders was police issued and was provided by a deputy sheriff. Church also told Lasczcynski that he wanted to kill Sherry Howell, his girlfriend, because of her knowledge about Church's involvement.

The government has indicated that it also intends to call Gary Howell to testify regarding conversations he had with Church. Howell met Church when they were imprisoned together at the Washington County Jail in Abingdon, Virginia, in January of 2001. Howell testified at Church's first trial. Church told Howell that he used to sell cocaine for the mayor of Pocahontas, a man named Charlie, and that the mayor had a man "eliminated" because he was scared the man was going to inform federal authorities of the drug conspiracy. Church, without admitting he had committed the

murders, described them to Howell in great detail—that a man had been killed first with a twelve-gauge shotgun, that a lady who was fleeing the house had then been killed, and that a "defective kid" who had had numerous operations on his legs and feet had been shot in a closet at point blank range, blowing his fingers off. Howell also testified that he had overheard a telephone conversation between Church and Church's mother where Church said, "Tell her the night that happened we spent the night up on the mountain" and that Church had been upset later in the week because his alibi witness had told a different story. Howell testified that he had the same last name as Church's alibi witness.

The final two anticipated witnesses have not previously testified. Alan Barry Crewey met Church when they were imprisoned together in early 1994 at the Huttonsville Correctional Center in Huttonsville, West Virginia. When Church learned that Crewey was a "writ writer" he had Crewey file a habeas petition for him in an unrelated case. The government profers that Crewey will testify that Church told him that he had worked for Gilmore delivering drugs; that the murders had been a "contract hit" for Gilmore because he had feared that three people were going to snitch to the federal authorities about the drug ring; and that Church had received cocaine and marijuana as payment for the hit. Church further told Crewey that in performing

contract hits, "nothing could be left alive," including women and children. Crewey will also testify that Church was receiving money from Gilmore while he was in prison.

The final anticipated witness, Randall J. Browning, will provide testimony about conversations he had with Gilmore while they were housed together in 1990 at a federal prison facility in Springfield, Missouri. The government represents that Browning will testify that Gilmore arranged to have a man "knocked off" when he learned that the man was being questioned by law enforcement about Gilmore's drug activities. Gilmore stated that he "takes care of business" against people who testify against him. He further told Browning that he had hired someone to do the killing and that person had recruited someone to help him, but that the "stupid ass" had killed the whole family. When questioned, Browning recognized "Ealy" as the name of the man Gilmore hired to kill Davis. Browning did not recognize the name "Church."

II

Preliminary rulings on the admissibility of hearsay evidence, as authorized by Federal Rule of Evidence 104, are often made prior to trial in response to motions in limine filed by the parties. *See, e.g., United States v. Shaw*, 69 F.3d 1249, 1252 (4th Cir. 1995) (pretrial ruling of trial judge admitting challenged testimony under Fed. R. Evid. 804(b)(1)); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 539-40

(W.D. Va. 1999) (pretrial ruling admitting hearsay evidence under Fed. R. Evid. 803(3)). Of course, an evidentiary ruling in limine is by necessity advisory and can be modified at trial once all the pertinent circumstances are revealed. *See* Graham C. Lilly, Law of Evidence 551 (3d ed. 1996); *see, e.g., In re Air Crash at Charlotte, N.C. on July 2, 1994*, 982 F. Supp. 1071, 1074 (D.S.C. 1996) (court reserving right to reverse its decision on motion in limine). In its discretion, the court may decline an early ruling on the admissibility of evidence, especially if "it is not certain exactly what form the evidence will take or in what context it might be offered." Lilly, *supra*; *see, e.g., Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765, 773 (E.D. Va. 2000) (reservation of ruling on admissibility of evidence pending presentation at trial of proper foundation).

In its motion, the government contends that the testimony in question is admissible at the joint trial under Federal Rule of Evidence 804(b)(3), the so-called "against penal interest" exception to the hearsay rule.[7] That rule allows the admission of "a [hearsay] statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true,"

[7] Of course, where the out-of-court declarant is one of the defendants, the statement is admissible against that defendant under Federal Rule of Evidence 801(d)(2) ("[t]he statement is offered against a party and is . . . the party's own statement . . . .").

provided that the declarant is unavailable as a witness. Fed. R. Evid. 804(b)(3). "Unavailability is the all-important condition precedent" to admission under this rule, 5 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 804.03[1] (2d ed. 2003), although unavailability expressly includes the exemption of a witness from testifying on the ground of privilege, *see* Fed. R. Evid. 804(a)(1). Where the declarant is a co-defendant, the express assertion of a Fifth Amendment privilege has been held to be unnecessary, since the government could not properly call the co-defendant as a witness. *See United States v. Lieberman*, 637 F.2d 95, 103 (2d Cir. 1980).

"Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true." *Williamson v. United States*, 512 U.S. 594, 599 (1994). For this reason, only truly self-inculpatory statements, viewed in light of all of the circumstances, are admissible. *See id.* at 603-04. The testimony proposed by the government meets this requirement. While the declarants' statements inculpate others in their crimes, they do so only while firmly incriminating themselves.

Admissibility under Rule 804(b)(3) is only part of the answer, however. Since admission against penal interest is not historically a "firmly rooted hearsay exception,"

in order to be admitted under the Confrontation Clause of the Sixth Amendment,[8] the statements must contain "'particularized guarantees of trustworthiness' such that adversarial testing would be expected to add little, if anything, to the statements' reliability." *Lilly v. Virginia*, 527 U.S. 116, 124-25 (1999) (citations omitted). A confession to police made by an accomplice in which the defendant is implicated, such as that involved in *Bruton v. United States*, 391 U.S. 123 (1968), is unlikely to have such guarantees because "an accomplice often has a considerable interest in 'confessing and betraying his cocriminals.'" *Lilly*, 527 U.S. at 131 (citation omitted).

The statements offered by the government in this case do not involve confessions to police. Instead they were made to friends or acquaintances by declarants who had no apparent interest to shift or share blame, as would an accomplice being interrogated by police. Under these circumstances, there are particularized guarantees of trustworthiness. *See United States v. Westmoreland*, 240 F.3d 618, 627-28 (7th Cir. 2001) (upholding admissibility under 804(b)(3) of hearsay

[8] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

statement made to cellmate).[9] The declarants here were admitting their guilt to serious crimes under circumstances in which they would have no apparent motive to lie.

For these reasons, I will grant the government's Motion in Limine and permit the proffered testimony at a joint trial of the defendants. The remaining question is whether to grant the motion by defendant Gilmore to try him separately.

III

The defendants here are properly joined in a single indictment, since "they are alleged to have participated in the same act or transaction . . . ." Fed. R. Crim. P. 8(b). Where defendants are charged in a single indictment, "[t]here is a preference in the Federal System for joint trials," *Zafiro v. United States*, 506 U.S. 534, 537 (1993), and "[b]arring special circumstances, individuals indicted together should be tried together." *United States v. Brugman*, 655 F.2d 540, 542 (4th Cir. 1981).

Under Federal Rule of Criminal Procedure 14, the court may grant a severance "[i]f the joinder of . . . defendants in an indictment . . . appears to prejudice a

[9] Since *Lilly* was decided by the Supreme Court, eighteen appellate decisions have upheld the admission of inculpatory statements made by an absent declarant to family or acquaintances and none have refused such statements. *See* Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 Syracuse L. Rev. 87, 105, 138 (2003). The "strongest theme" among these opinions "was that it was sufficient to demonstrate that a private confession was not like the custodial confession in Lilly." *Id.* at 144.

defendant or the government . . . ." Such prejudice is not lightly assumed, however, and to obtain a severance it normally must be shown that a joint trial would be the occasion of a miscarriage of justice. *See Richardson v. Marsh*, 481 U.S. 200, 206-11 (1987). A miscarriage of justice is not likely merely because under the circumstances of the case a separate trial offers one of the defendants a better chance for acquittal. *See United States v. Spitler*, 800 F.2d 1267, 1271-72 (4th Cir. 1986).

Even assuming that the government elects not to seek the death penalty against Gilmore, I find no special circumstances in this case requiring a severance. The use of a "death qualified" jury in the defendants' joint trial does not violate the non-capital defendant's right to a fair trial. *See Buchanan v. Kentucky*, 483 U.S. 402, 413-14 (1987). Nor do I find that any of the other grounds cited by Gilmore in support of his request to sever are persuasive.[10] To accept his arguments, I must either speculate on events at trial or reject out of hand the ability of the jury to follow its duty to give individualized consideration to each defendant. To the contrary, I believe that a joint trial in this case will allow the jury to more reliably determine the facts and arrive at a just verdict.

[10] In addition to arguing that his right to a fair trial would be compromised by a death qualified jury, Gilmore contends that if in fact the government seeks the death penalty for both defendants and both are convicted, a joint sentencing hearing would prejudice him.

IV

For the reasons stated, it is **ORDERED** that the government's Motion in Limine [Doc. No. 766] is **GRANTED** and the defendant Gilmore's Motion to Sever [Doc. No. 783] is **DENIED**.

ENTER: June 11, 2003

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United States District Judge