

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA

V.

SERENA KING

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Case Number: 13-CR-063-F

**DEFENDANT SERENA KING'S
MOTION FOR SEVERANCE**

TO THE HONORABLE STEPHEN P. FRIOT,
UNITED STATES DISTRICT JUDGE:

NOW COMES, SERENA KING, Defendant herein, by and through her counsel, Chris Flood, and pursuant to Rule 14 of the Federal Rules of Criminal Procedure, moves to sever her trial from her co-defendant/husband, Bartice King, saying more particularly for cause as follows:

Although the Superseding Indictment ("Indictment") alleges that Defendant Serena Monique King "*was* the spouse of Luke King," Indictment at 4 (emphasis added), they have been in a stable marriage for over 17 years, have successfully raised seven children together, and have established deep marital roots. Despite the strain on their marital relationship caused by the Indictment, their marriage remains strong and its preservation is a dominant concern as they prepare to defend their liberty. The Indictment alleges that together they conspired to conduct and participate in the conduct of the affairs of Legendz Sports through a pattern of racketeering activity and conspired to launder money, in violation of 18 U.S.C §§ 1956 and 1957. Additionally, the Indictment alleges that Starting 5, LLC, a limited liability corporation, presided over by Defendant

Serena King, was utilized by both defendants to further the unlawful enterprise and/or money laundering conspiracy.

Rule 14 of the Federal Rules of Criminal Procedure permits severance where a joint trial "appears to prejudice a defendant." Severance should be granted "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent a jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *see, e.g., United States v. Hall*, 473 F.3d 1295, 1302 (10th Cir. 2007).

Here, a joint trial with her husband would compromise Mrs. King's right to testify on her own behalf and otherwise present a complete defense. First, as set forth in her declaration (submitted ex parte), Mrs. King intends to offer in her defense certain communications she had with her husband. Those communications tend to exculpate Mrs. King. But, as Mr. King's sealed declaration establishes, if Mrs. King were to take the stand in a joint trial and attempt to testify about her communications with him, Mr. King would invoke the marital communications privilege to prevent that testimony. On the other hand, he would not assert the privilege if Mrs. King were to testify about those communications at a separate trial. Second, Mr. King intends to exercise his right not to testify at his own trial. If Mrs. King is tried separately, however, Mr. King will waive his Fifth Amendment privilege and testify on her behalf. Only severance under Rule 14 will permit Mrs. King to testify about her exculpatory communications with Mr. King and to call him as a witness in her defense.

ARGUMENT

I. A JOINT TRIAL WILL COMPROMISE MRS. KING'S RIGHT TO TESTIFY ABOUT HER EXCULPATORY COMMUNICATIONS WITH MR. KING.

A. The Marital Communications Privilege Generally

The marital communications privilege applies to confidential communications between spouses during the marriage. *Wolfe v. United States*, 291 U.S. 7, 14 (1934); *see, e.g., United States v. Jarvison*, 409 F.3d 1221, 1231 (10th Cir. 2005). Conversations between spouses are presumed to be confidential absent the presence of a third party or circumstances that demonstrate a manifest intent not to keep the information confidential.¹ *Wolfe*, 291 U.S. at 14; *see also Pereira v. United States*, 347 U.S. 1, 6 (1954).

The marital communications privilege may be invoked by either the witness-spouse *or* the non-testifying spouse; therefore, even if a witness-spouse is willing to waive the testimonial privilege, the non-testifying spouse may nonetheless limit the scope of testimony by invoking the marital communications privilege. *See, e.g., Trammel v. United States*, 445 U.S. 40, 44-46 (1980); *Jarvison*, 409 F.3d at 1231. The protection of spousal confidences via the marital communications privilege is thought "so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails." *Wolfe*, 291 U.S. at 14. The belief is

¹ The government bears the burden of showing that subject communications between husband and wife were *not* intended to remain confidential. *Blau v. United States*, 340 U.S. 332, 332-33 (1951).

that such a rule encourages full disclosure between husband and wife which, in turn, promotes healthy marriages.

B. Absent Severance the Marital Communications Privilege Will Prevent Mrs. King From Presenting Exculpatory Testimony

Because Bartice King is both husband and co-defendant, he may invoke the marital communications privilege to block his wife from offering testimony that is exculpatory as to her but indirectly harmful to his defense. This results in "prejudice" under Rule 14 because it infringes upon Mrs. King's Fifth and Sixth Amendment right to take the stand and offer exculpatory testimony and, by implication, impedes the jury's ability to reach a reliable decision. *Zafiro*, 506 U.S. at 539; *see, e.g., United States v. Carona*, 2008 U.S. Dist. LEXIS 37432 (C.D. Cal. May 2, 2008).

In such a circumstance--where one defendant may have a right to admit an item of evidence, and the other defendant has a right to exclude that evidence--severance is necessary under Rule 14. *See, e.g., Zafiro*, 506 U.S. at 539; *see also, e.g., United States v. Breinig*, 70 F.3d 850, 852-53 (6th Cir. 1995) (severance required where husband and wife are charged together, wife introduces evidence of abuse by the husband in support of a diminished capacity defense, and that evidence was inadmissible against the husband); *United States v. Sampol*, 636 F.2d 621, 649-50 (D.C. Cir. 1980) (severance required in part because one defendant sought to introduce "other crimes" evidence inadmissible against co-defendant); *United States v. Meacham*, 626 F.2d 503, 510-12 (5th Cir. 1980) (severance required where defendant cross-examines prosecution witness about telephone

calls implicating, but not admissible against, co-defendants); *United States v. Fields*, 458 F.2d 1194, 1199 (3d Cir. 1972) (severance required where defendant calls wife of co-defendant as witness over co-defendant's assertion of marital privilege); *United States v. Lopez*, 915 F. Supp. 891, 900-01 (E.D. Mich. 1996) (severance granted under circumstances similar to *Breinig*); *United States v. Ditizio*, 530 F. Supp. 175, 176-79 (E.D. Pa. 1982) (severance required where one defendant seeks to introduce statement given by co-defendant under grant of immunity); *United States v. Thoresen*, 281 F. Supp. 598, 600-02 (N.D. Cal. 1967) (severance of spouse-defendants required where wife's marital privilege conflicts with husband's right to testify).

The district court's decision in *Carona* is directly on point. In that case, as here, a husband and wife were indicted together. The wife sought to testify in her own defense about confidential marital communications with her husband. The husband declared his intention to prevent the wife's testimony by invoking the marital communications privilege. The district court found that the husband's invocation of the privilege would infringe the wife's "fundamental" right to testify on her own behalf. It therefore severed the wife's trial from the husband's. *See Carona*, 2008 U.S. Dist. LEXIS 37432 at *11-*12. Under the *Carona* analysis, and under the other cases cited above, the Court should sever Mrs. King's trial from Mr. King's trial.

II. A JOINT TRIAL WILL COMPROMISE MRS. KING'S ABILITY TO CALL MR. KING AS A DEFENSE WITNESS.

The Court should sever Mrs. King from Mr. King for a second reason: at a separate trial, Mr. King will waive his Fifth Amendment privilege and testify on Mrs. King's behalf, while at a joint trial he will not take the stand and thus Mrs. King will not have the benefit of his exculpatory testimony.

In determining whether to grant a severance on this basis, the Tenth Circuit directs the Court to consider seven factors:

"1) the likelihood that the co-defendant would in fact testify at the movant's severed trial and waive his Fifth Amendment privilege; 2) the significance of the testimony in relation to the defendant's theory of defense; 3) the exculpatory nature and effect of such testimony; 4) the likelihood that the co-defendant's testimony would be impeached; 5) the extent of prejudice caused by the absence of the testimony; 6) the effect of a severance on judicial administration and economy; 7) the timeliness of the motion."

Hall, 473 F.3d at 1302 (quoting *United States v. McConnell*, 749 F.2d 1441, 1445 (10th Cir. 1984)). Each of these factors favors severance here.

First, as Mr. King's ex parte declaration makes clear, he will waive his Fifth Amendment privilege and testify at Mrs. King's separate trial. Second, Mr. King's testimony is central to Mrs. King's defense, as the ex parte declarations demonstrate. Third, Mr. King's proposed testimony is highly exculpatory of Mrs. King. Fourth, Mr. King has no prior convictions and has made no prior inconsistent statements, so it is unlikely that his testimony--as outlined in his ex parte declaration--will be impeached. Fifth, Mrs. King will be significantly prejudiced by the absence of Mr. King's testimony; other than Mrs. King herself, he knows more than anyone about her involvement (or lack

of involvement) in the matters alleged in the indictment. Sixth, a severance will have little or no effect on judicial administration and economy. The Court has already indicated that the defendants must be tried in several groups; severing Mrs. King from Mr. King merely means moving her from his group of defendants to a different group for trial. Finally, the motion is timely.

CONCLUSION

For all of these reasons, as further illuminated by the ex parte declarations of Mr. and Mrs. King, severance should be granted to enable Mrs. King to testify about her exculpatory communications with Mr. King and to present Mr. King's exculpatory testimony in her defense.

Respectfully submitted,

FLOOD & FLOOD

/s/ Chris Flood

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**ATTORNEY FOR DEFENDANT,
SERENA KING**

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with Assistant U.S. Attorney Susan Cox regarding this motion. Ms. Cox stated the United States is opposed to the relief sought in the Motion for Severance.

/s/ Chris Flood

Chris Flood

CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2014, I filed the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing which will send such notice of filing to all filing users.

/s/ Chris Flood

Chris Flood