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PAUL ANTHONY KOZINA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAUL ANTHONY KOZINA, et. al.,

Defendant.

Case No. CR 08-00083 PJH

**NOTICE OF MOTION AND MOTION TO
SEVER THE TRIALS OF PAUL KOZINA
AND ANGELICA RODRIGUEZ**

Date: May 12, 2010
Time: 1:30 p.m.
Dept: Courtroom 4, 3rd Floor
Judge: Hon. Phyllis J. Hamilton

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on May 12, at 1:30 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Phyllis J. Hamilton of the above-entitled Court, located at 1310 Clay Street, Oakland, California, Defendant Paul Anthony Kozina, through undersigned counsel, will and hereby does move the Court under Federal Rule of Criminal Procedure 14 for Order granting severance of the trials of Mr. Kozina and Angelica Rodriguez.

1 This motion is based on this Notice of Motion and Motion, on the attached Memorandum
2 of Points and Authorities, on the attached Declaration, on the pleadings and papers filed in this
3 matter, and on other such arguments or evidence as the Court shall deem proper.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5
6 Mr. Kozina and Ms. Rodriguez should be tried separately because their trial rights are
7 likely in conflict. According to Ms. Rodriguez's counsel, there is a strong possibility that Ms.
8 Rodriguez will mount a coercion or duress defense based on evidence suggesting that Mr. Kozina
9 abused her verbally and/or physically. Such evidence would be inadmissible against Mr. Kozina
10 under Fed. R. Evid. 401, 402, 403, and 404(b) and the Fifth Amendment Due Process Clause.
11 Moreover, Mr. Kozina would move to exclude any conversations between him and Ms.
12 Rodriguez pursuant to the marital communications privilege. While severance is generally
13 disfavored as an affront to judicial economy, this Court has already expressed its preference to try
14 the seven defendants who remain in this matter in two groups. Mr. Kozina does not request any
15 further division; he asks only to be placed in a different trial group than Ms. Rodriguez.

16 **ARGUMENT**

17 **I. MR. KOZINA AND MS. RODRIGUEZ SHOULD BE TRIED** 18 **SEPARATELY.**

19 Federal Rule of Criminal Procedure 14 (a) provides that "[i]f . . . a consolidation for trial
20 appears to prejudice a defendant or the government, the court may . . . sever the defendants' trials,
21 or provide any other relief that justice requires. Severance is appropriate if "joinder is so
22 manifestly prejudicial that it outweighs the dominant concern of judicial economy and compels
23 the exercise of the court's discretion to sever." *United States v. Kenny*, 645 F.2d 1323, 1345 (9th
24 Cir. 1981) (citations omitted). Manifest prejudice arises when "there is a serious risk that a joint
25 trial would compromise a specific trial right of one of the defendants, or prevent the jury from
26 making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that
27 the jury should not consider against a defendant and that would not be admissible if a defendant
28

1 were tried alone is admitted against a codefendant.” *Zafiro v. United States*, 506 U.S. 534, 539
 2 (1993).

3 Indeed, that risk *would* occur if Mr. Kozina and Ms. Rodriguez were tried together. Ms.
 4 Rodriguez apparently intends to present evidence that Mr. Kozina allegedly coerced her to
 5 purchase methamphetamine through verbal and physical abuse as part of a duress defense. Mr.
 6 Kozina, however, has the right to exclude such evidence as irrelevant under Rules 401 and 402, as
 7 unfairly prejudicial under Rule 403, as inadmissible “other bad act” evidence under Rule 404(b),
 8 and as a violation of his right to a fair trial under the Due Process Clause. Mr. Kozina will also
 9 assert the marital communications privilege to exclude any confidential spousal communications
 10 that Ms. Rodriguez seeks to reveal in a joint trial. By trying Mr. Kozina and Ms. Rodriguez
 11 separately, this Court can ensure that their trial rights are not in conflict.

12 Moreover, the “dominant concern of judicial economy” does not dominate in this
 13 instance. This Court has already expressed its preference to try the seven remaining defendants in
 14 two groups. Decl. of Amanda Ose at ¶ 3. The only question that remains is whether Mr. Kozina
 15 and Ms. Rodriguez are grouped together. To ensure that neither Mr. Kozina nor Ms. Rodriguez
 16 suffers manifest prejudice, this Court should answer that question in the negative.

17
 18 **A. Ms. Rodriguez may intend to present exculpatory evidence that Mr.**
 19 **Kozina coerced her into purchasing methamphetamine through physical and/or**
 20 **verbal abuse, and she may have a constitutional right to do so.**

21 Mr. Kozina has attempted to ascertain whether Ms. Rodriguez will assert that he coerced
 22 her involvement in methamphetamine trafficking through abuse. While Ms. Rodriguez’s counsel
 23 has yet to identify his strategy definitively, he has stated that he is “certainly not able to tell [Mr.
 24 Kozina] that we will not be seeking to introduce such evidence at trial.” Ose Decl. at ¶ 4.

25 Ms. Rodriguez may well have the right to present this type of evidence in support of a
 26 coercion or duress defense. The Constitution guarantees a defendant a “meaningful opportunity
 27 to present a complete defense.” *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotation
 28 omitted); see *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). And, as a general matter, duress is
 among the defenses available to a defendant facing drug charges. See, e.g., *United States v.*

1 *Beltran-Rios*, 878 F.2d 1208, 1213-14 (9th Cir. 1989) (approving jury instruction on duress for
 2 defendant accused of importation of and possession with intent to distribute controlled
 3 substances); *United States v. Contento-Pachon*, 723 F.2d 691,694-95 (9th Cir. 1984) (holding that
 4 drug defendant who raised triable issue of fact as to applicability of duress elements could assert
 5 the defense).

6 **B. The exculpatory evidence discussed above is inadmissible against Mr.**
 7 **Kozina.**

8 Just as Ms. Rodriguez may have a right to present evidence of alleged abuse in support of
 9 a coercion or duress defense, Mr. Kozina has a right to exclude that evidence under the rules of
 10 evidence, as a matter of due process, and, to the extent confidential spousal communications are
 11 involved, under the marital communications privilege.

12 **1. Any evidence of Mr. Kozina's alleged verbal and physical abuse**
 13 **against Ms. Rodriguez would have little probative value as to Mr. Kozina's**
 14 **guilt, would present the danger of unfair prejudice, and would constitute**
inadmissible character evidence.

15 Fed. R. Evid. 401 defines relevant evidence; Rule 402 provides that "[e]vidence which is
 16 not relevant is inadmissible"; Rule 403 provides that relevant evidence "may be excluded if its
 17 probative value is substantially outweighed by the danger of unfair prejudice." Under Rule
 18 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a
 19 person in order to show action in conformity therewith."

20 Evidence suggesting that Mr. Kozina committed physical and/or verbal abuse against Ms.
 21 Rodriguez would violate these rules. Thus, if Mr. Kozina and Ms. Rodriguez are tried together
 22 and Ms. Rodriguez presents such evidence, this Court would have to choose between excluding
 23 irrelevant, unfairly prejudicial, inadmissible character evidence against Mr. Kozina and
 24 permitting Ms. Rodriguez to present a coercion/duress defense.

25 At least one Court of Appeals has recognized that severance is appropriate under
 26 circumstances like these. *United States v. Breinig*, 70 F.3d 850 (6th Cir. 1995). In *Breinig*, the
 27 appellant and his ex-wife were charged with tax evasion, but only the appellant was convicted.
 28 *Id.* at 851. Both parties had moved to sever the trials, but the district court denied their motions.

1 *Id.* at 851-52. During the joint trial, the ex-wife claimed that she had lacked the *mens rea* to
 2 evade taxes willfully because the appellant had committed adultery, alienated the couple's
 3 children, and manipulated her throughout their marriage. *Id.* at 852. "Such testimony, of course,
 4 would have been inadmissible against [the appellant] under any theory of the Federal Rules of
 5 Evidence . . .," had he been tried alone. *Id.* at 853. And, while the ex-wife was entitled to
 6 present a complete defense, the appellant had the right to exclude "categorically inadmissible
 7 evidence [that] was manifestly prejudicial, and unfairly so." *Id.* Because the trial court had failed
 8 to observe that right by severing the trials, the Sixth Circuit vacated the appellant's conviction.
 9 *Id.* at 854.

10 If Mr. Kozina is tried with Ms. Rodriguez, and if Ms. Rodriguez presents evidence of
 11 alleged abuse, Mr. Kozina will be unfairly prejudiced in the same manner as the appellant in
 12 *Breinig*. Mr. Kozina is charged with offenses related to methamphetamine trafficking, not
 13 domestic violence. In order to keep the jury focused on conduct pertinent to those charges, while
 14 at the same time preserving Ms. Rodriguez's right to present a complete defense, the Court should
 15 try the defendants separately.

16 **2. Conversations between Mr. Kozina and Ms. Rodriguez are**
 17 **protected by the marital communications privilege.**

18 In federal court, the privilege of a witness "shall be governed by the principles of the
 19 common law as they may be interpreted by the courts of the United States in light of reason and
 20 experience." Fed. R. Evid. 501. Federal common law has long recognized the marital
 21 communications privilege. *E.g., Blau v. United States*, 340 U.S. 332 (1951). That privilege
 22 protects confidential communications made between spouses during a valid marriage, and it may
 23 be invoked by either spouse to prevent testimony regarding those communications. *United States*
 24 *v. Montgomery*, 384 F.3d 1050, 1058-59 (9th Cir. 2004). Generally, private communications
 25 between spouses are considered confidential, and the government bears the burden of proving
 26 otherwise. *Id.*

27 If Mr. Kozina and Ms. Rodriguez are tried together, Mr. Kozina will invoke the marital
 28 communications privilege to exclude any private conversations between him and Ms. Rodriguez

1 that she offers to support her coercion defense. The possibility that such conversations may have
2 to be excluded signifies that this Court should sever the trials of Mr. Kozina and Ms. Rodriguez.

3 In *United States v. Carona*, 2008 WL 1970221 (C.D. Cal. May 2, 2008), a district court
4 within this Circuit severed the trials of husband and wife co-defendants under similar facts.
5 There, a wife planned to present private exculpatory conversations that she shared with her
6 husband and moved for severance out of fear that her husband would invoke the marital
7 communications privilege to exclude them. *Id.* at *1. Noting that “the right to testify on one’s
8 own behalf in a criminal trial . . . is ‘essential to due process of law in a fair adversary process,’”
9 the Court found that the wife would be “significantly prejudiced” if her husband prevented her
10 from providing such exculpatory testimony and granted the motion accordingly. *Id.* at *3-4
11 (quoting *Rock v. Arkansas*, 483 U.S. 44, 51 (1987)); *see also United States v. Figueroa-Paz*, 468
12 F.2d 1055, 1057 (9th Cir. 1972) (“The mere joint trial of husband and wife does not require
13 severance where . . . the Government did not introduce the statements of one to incriminate the
14 other.” (citation omitted)).

15 **C. The “dominant concern of judicial economy” should not prevent this**
16 **Court from granting Mr. Kozina’s motion.**

17 As a general matter, severing joint defendants’ trials is disfavored because it frustrates
18 judicial economy. *See, e.g., Kenny*, 645 F.2d at 1345. Here, however, separating Mr. Kozina
19 from Ms. Rodriguez would increase neither the time nor the effort that must be spent to resolve
20 this case. At the hearing on March 25, 2010, this Court expressed its preference to try the
21 defendants in multiple groups. Ose Decl. at ¶ 2. Mr. Kozina merely requests to be placed in a
22 different group than Ms. Rodriguez. Far from frustrating judicial economy, granting this motion
23 would likely increase efficiency because, if Mr. Kozina were tried separately from Ms.
24 Rodriguez, he would have no need and no ability to oppose any evidence that she offered in her
25 defense.

CONCLUSION

For the foregoing reasons, this Court should sever the trials of Paul Kozina and Angelica Rodriguez.

Dated: April 7, 2010

By: /s/ John D. Cline

John D. Cline

Attorneys for Defendant
PAUL ANTHONY KOZINA