

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

UNITED STATES OF AMERICA,)	
)	
)	
v.)	
)	CRIM. No. 2:13-CR-205-DBH-02
RENEE THOMES,)	
)	
DEFENDANT)	

ORDER ON MOTION TO SEVER

I heard oral argument on July 23, 2014 on the defendant Renee Thomes’ motion to sever. Mot. to Sever (ECF No. 81). Although the defendant Renee Thomes has asked for more time to “comb the discovery materials” to look for additional grounds for her motion. Mot. to Extend Deadline for Filing Motions in Limine at 2 (ECF No. 111). I conclude that she has had enough time, leading up to the filing of the written motion, during the time before oral argument, and then during the extra time I allowed following the hearing for filing motions in limine. The other parties are entitled to a ruling now in order to be able to prepare their cases accordingly.

The co-defendants Theodore Thomes and Renee Thomes are husband and wife, both charged in one count with knowingly possessing stolen firearms on June 28, 2012. Superseding Indictment, Count Four (ECF No. 87). Theodore Thomes is also charged with being a felon in possession on that date and an additional date, December 23, 2011, Superseding Indictment, Counts One and Three, and with knowingly possessing the stolen firearms on that additional date

as well, Superseding Indictment, Count Two. Joinder of the two defendants is proper under Fed. R. Crim. P. 8. The question is whether severance is appropriate under Rule 14 because of prejudice in a joint trial.

Renee Thomes argues that a joint trial will prejudice her case in the following ways.

- a. Introduction of Theodore Thomes' felony convictions will lead to spill-over prejudice against her.
- b. If she takes the stand in her own defense, she will end up surrendering her marital privilege and testifying against her husband, whereas she could refuse to testify at his separate trial on the basis of marital privilege.
- c. If Theodore Thomes' out-of-court statements are admitted against him at a joint trial and he exercises his 5th amendment right not to testify, she will be unable to cross-examine him even though his statements may well implicate her. If that were to happen, it would require severance or some other relief. Bruton v. United States, 391 U.S. 123 (1968).

I conclude that none of these arguments, alone or in combination, justifies severance.

Introduction of Theodore Thomes' felony convictions at a joint trial where he is charged with being a felon in possession does not justify severance. First, to establish that Theodore Thomes was prohibited from possessing firearms, under Old Chief v. United States, 519 U.S. 172, 177 (1997), it will be sufficient for the government to establish that Theodore Thomes is a convicted felon. The government need not be permitted to establish the nature of the crime (beyond the fact that it is a felony) or the number of convictions. The government and Theodore Thomes expect to reach a stipulation on this element. Second, I can instruct the jury about the limited relevance of his conviction and that it has no

bearing on the jury's consideration of whether the government can prove its case that Renee Thomes knew that the firearms were stolen. (Her lawyer says that she does not contest the element of possession, only whether she had the necessary mens rea.) Third, the feared spill-over prejudice is highly unlikely. A jury is unlikely to use Theodore Thomes' criminal background in determining whether Renee Thomes knew that the firearms were stolen.

With respect to the marital privilege argument, the government may not call Renee Thomes as a witness at a joint trial. If she chooses to exercise her constitutional right to testify at the joint trial, however, then she will surrender her marital privilege. The cases generally hold that result is acceptable. Rene Thomes has a constitutional right to testify in her own behalf, but only a privilege not to testify against her husband, and it is not improper to allow the exercise of her right to void her privilege. United States v. Artates, 2012 WL 6597752, *2-*3 (D. Hawai'i Dec. 18, 2012); United States v. Manfredi, 628 F. Supp. 2d 608, 648-49 (W. D. Pa. 2009); United States v. Ferrer, 2008 WL 4890034, *3 (M.D. Pa. Nov. 12, 2008); United States v. Freeman, 694 F. Supp. 190, 191 (E.D. Va. 1988); United States v. Sasso, 78 F.R.D. 292 (S.D.N.Y. 1977). I also observe that neither defendant is contending that a joint trial somehow prevents exculpatory testimony from the other. Renee Thomes is not entitled to severance merely because she would rather not testify against her husband at a joint trial.

The Bruton issue is the most serious.¹ The parties agreed that because the defendant knows the statements that the government will use, it is unnecessary to conduct an in camera inspection under Rule 14(b). At the hearing, the assistant U.S. Attorney went through all the out-of-court statements of Theodore Thomes that Renee Thomes' counsel considers prejudicial to her and, as to most, stated that the government will not use them in its case in chief. For the few statements that it will use, I find that the use is narrow and will not implicate the alleged mens rea criminality of Renee Thomes' possession of the firearms.²

Accordingly, I do not find prejudice to Renee Thomes that justifies severance, and her motion to sever is **DENIED**.³

¹ She also refers to Crawford v. Washington, 541 U.S. 36 (2004), Mot. to Sever at 7-8, in connection with the statements that I discuss, but given the narrowness of the few statements by Theodore Thomes that the government will use against him and their lack of reference to Renee Thomes, there is no Crawford violation.

² The statements that the government plans to use are the following: Theodore Thomes' statement to the victim that Theodore Thomes was a convicted felon; Theodore Thomes' statement to a witness that he possessed the firearms; Theodore Thomes' statements to an investigator that he possessed the firearms and that they were sold to a third party; Theodore Thomes' statements in pleadings in a civil lawsuit that he had a key to the victim's residence, that he had possession of several items of the victim's personal property, and that the firearms were transported to a third party's residence. None of these statements inculcates Renee Thomes or implicates her mens rea, and she concedes that she possessed the firearms.

³ According to her Motion, "Renee Thomes asks for severance for several reasons." Mot. to Sever at 11. I reproduce each of them below and my assessment of the reason.

First, "[s]he will be confounded in pursuing a defense that the firearms were secured as collateral for a loan to Penta by the numerous statements from Mr. Thomes that he inherited the firearms from his father." Mot. to Sever at 11. The government will not introduce the inheritance statements.

"She will also be embarrassed by association with Mr. Thomes in this case, and will be likely to suffer from guilt-by-association because the felony conviction that will be introduced into evidence against Mr. Thomes actually reflects misconduct with a firearm and multiple prior felony convictions." Mot. to Sever at 11. The stipulation of her husband's previous conviction need not show that it was misconduct with a firearm or the number of convictions.

The parties' request to extend deadlines is **GRANTED** in the following respect: motions in limine shall be filed by August 25, 2014.

Renee Thomes and the government both request that the trial be continued from the September trial list, but they have not given reasons for the request. Theodore Thomes objects to further delay. If Renee Thomes and the government have reasons for the requested delay, they shall provide them by August 21, and Theodore Thomes may respond by August 25.

SO ORDERED.

DATED THIS 19TH DAY OF AUGUST, 2014

/s/ D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

“She will also be embarrassed by the evidentiary matters in a joint trial that will reflect a lack of credibility in connection with the defense Mr. Thomes may offer suggesting that he never ‘possessed’ the firearms at any time. His defense implies that it is Renee Thomes who alone possess[ed] the firearms throughout their receipt from Penta, to their delivery to Troy Bowden, to their transfer to Dan LaJoie, and eventually to their transfer to an auctioneer named Charles Ames.” Mot. to Sever at 11-12. Since Renee Thomes concedes that she possessed the firearms, this is not an issue.

“She will also be embarrassed and her defense confounded by the threatening statements Mr. Thomes is alleged to have made to Dan Lajoie and others, including Penta. Her conduct is likely not to be evaluated independently, but in conjunction with the more flagrant and demonstrative conduct of her husband.” Mot. to Sever at 12. The government will not introduce the alleged threats.

“[S]he will likely have [to] forego testifying because the presence of her husband in a joint trial will undercut her anticipated testimony that she acquired the firearms as collateral for a loan to Penta. Such a defense will stand in marked contrast to numerous prior statements by Mr. Thomes to the contrary.” I will instruct the jury, upon request, to consider each defendant separately, and none of Theodore Thomes' statements that the government plans to use deal with the loan claim. See note 2 supra.

Renee Thomes “testimony may tend to incriminate her husband on the first count, and she will be confronted with a Hobson’s choice of foregoing the exercise of her own rights in an effort to avoid providing the government with testimony they would otherwise not have against her spouse of some 27 years.” Mot. to Sever at 12. As discussed supra, although she possesses a constitutional right not to testify, the marital privilege is just that, a privilege, and can properly be surrendered by the decision to testify.

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CRIMINAL DOCKET No. 2:13-CR-205-DBH-02**

United States of America

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