IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARY HELEN QUAINTANCE, et al.,

Defendants.

Cause No. CR-06-538 JH

MOTION TO SEVER DEFENDANTS

COMES NOW the Defendant, MARY HELEN QUAINTANCE, by and through her attorney of record, Mario A. Esparza, and respectfully moves this Honorable Court, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, to sever her case from that of the other two co-defendants.

AS GROUNDS THEREFOR, Ms. Quaintance would show the Court the following facts and circumstances:

Statement of Relevant Facts

Upon information and belief of defense counsel, the weight of the evidence against both of the other co-defendants in this case is much greater than the weight of the evidence against Ms. Quaintance. In fact, insofar as Ms. Quaintance is concerned, the only inculpatory evidence the government has is the circumstance of her driving one of the two vehicles, and statements by her co-defendants. Aside from this, the facts would support a mere-presence defense and failure of proof for Ms. Quaintance.

Based on disclosures made to defense counsel on behalf of the Government in the

general course of discovery, on Febriary 22. 2006, at approximately 1:50 in the afternoon, Border Patrol Agent Bernardo M. Ramirez was putting gas in his patrol vehicle at a Diamond Shamrock gas station in Lordsburg, New Mexico. At this same time, he noticed two vehicles that for some reason caught his attention: a Chrysler 300 sedan, and a green Pontiac mini-van. It was later determined that Timothy Jason Kripner was the driver and sole occupant of the Chrysler, and Ms. Quaintance and her husband, Danuel Dean Quaintance, occupied the green Pontiac mini-van – Ms. Quaintance was the driver and Danuel Quaintance was the passenger.

Agent Ramirez became suspicious when Mr. Kripner placed a large quantity of food into his vehicle that had just been purchased from an adjacent Kentucky Fried Chicken. He figured that the Quaintances and Kripner were traveling together because he saw them talking, yet Kripner had purchased much more food than could be readily consumed by only three people. In his police experience, alien smugglers often buy food for the aliens they are smuggling, and drug smugglers often buy food for the back-packers who deliver their drugs to them. For this reason, when the two vehicles pulled away from the Diamond Shamrock station, Agent Ramirez decided to tail them.

The green Pontiac mini-van driven by Ms. Quaintance was in the lead and was followed by the Chrysler 300 driven by Mr. Kripner. Both vehicles headed south on New Mexico Highway 113 which the Government will identify as "a notorious area of travel for both alien and narcotic smugglers." Agent Ramirez continued to follow the vehicles

for about five miles with the use of binoculars until he lost sight of them. He caught up with them about 13 miles later when they had turned around and were heading north. Because of his previous observations, and the direction and area of their travel, Agent Ramirez felt certain they were involved in some sort of smuggling activity. For this reason, he requested the assistance of Border Patrol Agent Jose Portillo.

According to Agent Portillo, as he pulled behind the Chrysler 300, the driver began to swerve off onto the shoulder of the road making it appear to Agent Portillo that he (the driver) was nervous. In addition, he noticed that the trunk area of the vehicle was coated with dust, and he could detect numerous hand prints on it. For all of these reasons, as well as the information provided to him by Agent Ramirez, he decided to conduct an "immigration inspection." He pulled the vehicle over and a subsequent search resulted in the discovery of approximately 172 pounds of marijuana hidden in the trunk of the vehicle. At about this same time, Border Patrol Agent Jackson Lara pulled over the green Pontiac mini-van.

After the marijuana was discovered in the Chrysler, Mr. Kripner made a full confession and implicated principally Danuel Quaintance. The only inculpatory physical evidence seized from the green mini-van that Ms. Quaintance was driving was a two-way radio set to channel 6 which was identical to a two-way radio found in the Chrysler 300 also set to channel 6. Both of the Quaintances invoked their right to counsel and declined to be interviewed. However, Mr. Quaintance continued to blurt out inculpatory

admissions which were not in response to police questioning. For example, he admitted that he belonged to a religion that allowed him to transport and use "that marijuana." In fact, he blathered on and on about this while Ms. Quaintance remained silent.

Because Mr. Kripner was actually transporting the marijuana, and because he confessed and indicated his willingness to cooperate, it is unlikely that he will appear as a defendant at trial. Rather, he will more likely appear as a Government witness against the Quaintances. Upon information and belief of defense counsel, almost all of his dealings in this case were with Danuel Quaintance and not with Ms. Quaintance. Moreover, evidence will show that Danuel Quaintance is the minister and founder of an organization called "the Church of Cognizance." This organization promotes and counsels the use of marijuana as a spiritual substance. Mr. Quaintance refers to this organization as his religion. He has established a website for the Church of Cognizance where he extols the virtue of marijuana usage and encourages people to use all kinds of drugs. On this website, he refers to marijuana as "Holy Marijuana; the righteous teacher of our faith." While the website is entitled "Dan and Mary's HEMP-porium," Danuel Quaintance authors all of the entries into the website. Upon information and belief of defense counsel, all of this evidence will be introduced by the Government at trial.

Argument in Support of Severence

Clearly, the bulk of the evidence in this case will inculpate Mr. Kripner and Mr. Quaintance. As such, Ms. Quaintance is prejudiced by the current joinder in that she risks

being found guilty as a result of a "spill over" effect, or being found guilty merely by the fact of her association with Mr. Quaintance and Mr. Kripner. *United States v. Herring*, 582 F.2d 535 (10th Cir. 1978). In fact, so prejudicial is the current joinder that the prejudice cannot adequately be cured by jury instructions.

In addition, even though the Ms. Quaintance is charged as a co-conspirator, a substantial possibility exists that certain statements by her current co-defendants, not otherwise admissible against her, will be admitted at a joint trial. This is so because proof of the conspiracy independent of the alleged co-conspirators' statements is either minimal or altogether lacking. Ms. Quaintance is therefore prejudiced by the current joinder of defendants. *United States v. Dickey*, 736 F.2d 571 (10th Cir. 1984).

As a further consideration, upon information and belief of defense counsel, a substantial probability exists that the co-defendants in this case will each present a mutually inconsistent and antagonistic defense to that of Ms. Quaintance at trial. Based on Mr. Quaintance's post-arrest statements, he will likely opt for a "religious freedom" defense hoping somehow that the Supreme Court will take up his cause and find hid marijuana usage to be constitutionally protected. Ms. Quaintance, on the other hand, will likely argue that she did not know anything about the smuggling operation, or, in the alternative, she may choose to argue a failure of proof on the part of the government, and further, that any co-defendant or confidential informant who provides inculpatory testimony against any of the other defendants is doing so as part of a cooperation

agreement and therefore should not be believed. If this occurs, and Ms. Quaintance submits that it likely will occur, this fact will necessarily prejudice all defendants under the current joinder.

The facts of this case logically preclude the possibility of anything other than a "finger pointing" defense. If, for example, one co-defendant alleges that he or she did not know about the marijuana or cocaine, by implication, this means that one or more of the others did. In *United States v. Gonzalez*, 804 F.2d 691 (11th Cir. 1986), the Court held that severance is required where the defenses of co-defendants are antagonistic and mutually exclusive. A failure to sever under such circumstances denies the defendants a fair trial and allows the co-defendants to become "the government's best witnesses against each other," thus affording the government a windfall benefit of its own decision to join analogous to forum shopping. *Id.* at 695 (citing *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). But there is another more important reason why this Court should grant a severance. As pointed out in *Gonzalez*, "[i]f the jury, in order to believe the core of the testimony offered on behalf of [one defendant] must necessarily disbelieve the testimony offered on behalf of his co-defendant, severance is compelled." *Id.*; *accord*, *United States v. Brown*, 748 F.2d 1033 (10th Cir. 1986).

It is not fair to a defendant if the acceptance by the jury of his co-defendant's defense will necessarily preclude his own acquittal. For example, if in this case one co-defendant accuses another co-defendant, and that co-defendant, in turn, presents a defense

inconsistent with this accusation, then a reasonable jury will be required to convict all of the defendants without regard to whether the government has met its burden of proof. Furthermore, the above-described scenario is unavoidable with antagonistic defenses. If one defendant is faced with an open-court accusation by his co-defendant, his constitutional right to remain silent and not testify will, for all practical purposes, be obviated. That is, the jury will undoubtedly infer guilt from his failure to respond to the accusation even if the prosecutor does not explicitly develop this argument.

Finally, the matter is not resolved even if all of the defendants choose not to testify. This is because antagonistic defenses may also be created simply by accusations of counsel in closing arguments. *Gonzalez*, 804 F.2d at 695. "An accusation by counsel can state the core of his client's defense and cast blame on the co-defendant." *United States v. Romanello*, 726 F.2d 173, 179 (5th Cir. 1984). This situation will necessarily arise in this case. In fact, as noted above, the inference is there even if the lawyers do not actually argue it. The primary danger the severance rule attempts to avoid is confronting a defendant "with two prosecutors -- the government and his co-defendant." *United States v. Sherlock*, 865 F.2d 1069, 1082 (9th Cir. 1989). This is precisely what will occur in Defendant's case if the severance is not granted.

In this regard, Defendant's dilemma is analogous to the situation described in *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989) (conviction reversed where trial court failed to order separate trials when defenses were mutually antagonistic). In this

case, one defendant argued that he was working as a government informant when he became involved in the alleged drug crimes. The second defendant alleged that the first defendant had placed him under duress and that he was held against his will by the first defendant. Both were convicted. The Court found that since the belief in one defendant's defense would necessarily have resulted in the disbelief of the other defendant's defense, the cases should have been severed. 881 F.2d at 585.

Ms. Quaintance recognizes that she has a heavy burden of demonstrating real prejudice as a result of a joint trial. She further understands that this Court's decision to deny the severance is discretionary and will not be disturbed absent a showing of abuse. However, she submits that an abuse of discretion is shown when the joinder of defendants causes the actual or even threatened deprivation of a fair trial. *United States v. Petersen*, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). There is little question that Defendant's defense is a practical impossibility when presented to the jury alongside of the co-defendants' defense.

Opposition of the Government

The United States Attorney's office opposes this Motion.

Prayer

WHEREFORE, for all of the foregoing reasons, Ms. Quaintance prays that this Court will grant her Motion to Sever Defendants and order a separate trial in her case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Sever Defendants was mailed to opposing counsel of record at the Office of the United States Attorney in Las Cruces, New Mexico on this 17th day of April, 2006.

MARIO A. ESPARZA