

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

CR 16-50163-04

Plaintiff,

**MEMORANDUM IN SUPPORT
OF DEFENDANT TERRY
FEATHERMAN'S MOTION
TO SEVER DEFENDANTS**

vs.

TERRY FEATHERMAN

Defendant.

Defendant Terry Featherman, by and through his counsel, files this Memorandum in support of his Motion to Sever Defendants.

FACTS

Mr. Featherman and his six co-defendants have been charged (Doc. 23) with aiding and abetting felony child abuse and neglect of two young girls between August 1, 2016 and November 11, 2016, in violation of SDCL § 26-10-1. This statute provides, in part:

Any person who abuses, exposes, tortures, torments, or cruelly punishes a minor in a manner which does not constitute aggravated assault, is guilty of a Class 4 felony. If the victim is less than seven years of age, the person is guilty of a Class 3 felony. ...

The aiding and abetting statute provides:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C.A. § 2.

Co-Defendants Roberta Featherman, Darshan Featherman, and Harold Red Owl, have been charged with two counts of aiding and abetting each other in the assault of the two young girls resulting in serious bodily injury. (Doc. 23).

ANALYSIS

Severance of Mr. Featherman from his co-defendants is appropriate.

1. Standard of Review

“A motion to sever is addressed to the sound discretion of the trial court.” *United States v. Dennis*, 625 F.2d 782, 802 (8th Cir. 1980).

2. Prejudicial Joinder

Federal Rule of Criminal Procedure (“Rule”) 8(b) governs joinder of Defendants:

(b) **Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Rule 14 authorizes the Court to sever Mr. Featherman:

- (a) **Relief.** If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
- (b) **Defendant's Statements.** Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

“A defendant can show real prejudice either by showing that his defense is irreconcilable with the defense of his codefendant ... or that the jury will be unable to compartmentalize the evidence as it relates to separate defendants.” *United States v. Sandstrom*, 594 F.3d 634, 644 (8th Cir. 2010) (citations omitted).

In determining whether severance is appropriate, a district judge should consider, among other things, the number of counts and defendants, disparities in the quantum of proof offered against the various defendants, possible prejudice from the type of evidence (e.g. prior convictions) to be admitted against some of the defendants, and the apparent relative culpability of the defendants. The ultimate question for the district court is whether the jury will be able to “compartmentalize” the evidence presented to it, and distinguish among the various defendants in a multi-defendant suit.

United States v. Abrams, 539 F. Supp. 378, 381 (S.D.N.Y. 1982) (internal citations omitted).

The discovery produced to date indicates, at most, Mr. Featherman had been a short-term, sporadic guest in the basement of the home prior to the discovery of the girls. There is absolutely no evidence Mr. Featherman had

any direct interaction with the girls. He was not charged with or legally responsible for their care. In sum, the theory of the government's case appears to be that since Mr. Featherman had resided in the basement of the home at times he should have known of the alleged violation of SDCL § 26-10-1.

The discovery shows an extremely broad and polarized “quantum of proof” spectrum against the various defendants, with Mr. Featherman being near or at the very lowest end. *Abrams, supra*. Ultimately, it would be nearly impossible for the jury to “compartmentalize” the evidence presented to it, and distinguish among the defendants. *Id.*

Further, the “apparent relative culpability” of the defendants compels severance. *Id.* On one hand, discovery indicates certain defendant(s) were legally responsible for the girls’ care, were with the girls in the same area of the home, knew the girls’ actual ages, and were directly responsible, through their own acts or omissions, for the condition of the girls. Further, apparently some of the residents in the upstairs of the home had food but allegedly hid it from the girls.

Alternatively, as previously stated, Mr. Featherman was not legally responsible for the girls’ care, was a short term and sporadic resident in a different area of the home, did not know the girls’ ages, and was not directly responsible for the girls’ condition. The danger of unfair prejudice against Mr. Featherman is palpable as the jury will consider shocking evidence without consideration of who had access to and legal responsibility for the girls. In short, the jury will not be able to “compartmentalize” the evidence presented to it, and distinguish among the various defendants. *Id.*

The Court must also balance the prejudice to Mr. Featherman against the expense and inconvenience to the government of separate trials. *U.S. v. McGrady*, 508 F2d 13 (8th Cir. 1974), *certiorari denied* 95 S.Ct. 1408, 420 U.S. 979, 43 L.Ed.2d 661. A separate trial in this case would be extremely short considering the dearth of evidence and limited amount of time Mr. Featherman was actually in the home. *Id.*

CONCLUSION

Mr. Featherman respectfully requests his trial be severed so that he may receive a fair trial.

Dated this 21st day of February, 2017.

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 21, 2017, he served a copy of this legal document upon the persons herein designated, all on the date shown, by electronically filing a copy of the same via the ECF filing system.

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