

1 FOR PUBLICATION

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5 **IN THE SUPERIOR COURT**
6 **OF THE**
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

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8 COMMONWEALTH OF THE
9 NORTHERN MARIANA ISLANDS,

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Plaintiff,

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v.

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MANABU CHIZUWA and IIDA NOBUKO,

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Defendants.

) **CRIMINAL CASE NO. 02-0137C**

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**ORDER GRANTING DEFENDANT
NOBUKO'S MOTION TO SEVER THE
TRIAL**

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I. INTRODUCTION

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THIS MATTER came before the Court on September 25, 2002, in Courtroom 205A at 9:00
16 a.m. on Defendant's Motion for Severance. Bruce Berline, Esq. appeared on behalf of Iida Nobuko
17 ("Nobuko"), and Assistant Public Defender Douglas Hartig appeared on behalf of Manabu Chizuwa
18 ("Chizuwa")(collectively "Defendants"). Assistant Attorney General Kevin Lynch appeared on behalf of
19 the Commonwealth of the Northern Mariana Islands ("Government"). The Court, having reviewed the
20 documents on file, having heard the arguments of counsels, and being fully advised, now renders its
21 written decision.

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II. BACKGROUND

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On May 7, 2002, the Government filed an Information charging Defendants with Count I,
24 Importation of Contraband. *See* Information at 1-2. The Government alleges that on or about May 3,
25 2002, Defendants entered the Commonwealth with the intent to import, or attempt to cause another to
26 import, or conceal for the purpose of importation, a controlled substance: to wit, methamphetamine
27 hydrochloride (approximately 65 grams), in violation of 6 CMC § 2301(a)(1), punishable by 6 CMC §
28 2301(b) and (c).

1 In Count II, the Government charged Defendants with Trafficking of a Controlled Substance. *See*
2 Information at 2. The Government alleges that on or about May 03, 2002, on Saipan, Defendants did
3 knowingly or intentionally deliver, or possess with the intent to deliver, a controlled substance: to wit,
4 methamphetamine hydrochloride (approximately 65 grams), in violation of 6 CMC § 2141(a)(1),
5 punishable by 6 CMC § 2141(b).

6 In Count III, the Government charged Defendants with Illegal Possession of a Controlled
7 Substance. *See* Information at 2. The Government alleges that on or about May 03, 2002, on Saipan,
8 Defendants did knowingly or intentionally possess a controlled substance: to wit methamphetamine
9 hydrochloride (approximately 65 grams), in violation of 6 CMC § 2142(a), punishable by 6 CMC §
10 2142(b) and (d).

11 In Count IV, the Government charged Defendants with Conspiracy. *See* Information at 2. The
12 Government alleges that on or about May 03, 2002, Defendants with the intent to promote and facilitate
13 the commission of the crimes of Importation of Contraband (6 CMC § 2301(a)(1)), Trafficking of a
14 Controlled Substance (6 CMC § 2141(a)(1)), and/or Possession of a Controlled Substance (6 CMC §
15 2142(a)), did unlawfully agree with one or more other persons that they, or one or more of them, would
16 engage in conduct or solicit the conduct which was calculated to become, if completed, the three offenses
17 stated above, and that Defendants, or another person with whom Defendants conspired, committed an
18 overt act in pursuance of such conspiracy, in violation of 6 CMC §§ 303(a), 2301(a)(1) and 2141(a)(1);
19 punishable by 6 CMC §§ 304, 2301(b) and (c), 2141(b) and 2142 (b) and (d).

20 On September 6, 2002, Nobuko filed a Motion to Sever the Trial. On September 20, 2002, the
21 Government filed its Answer. On September 23, 2002, Chizuwa joined in Nobuko's motion to sever.
22 On September 24, 2002, Nobuko filed her Reply to the Government's Answer. A hearing on
23 Defendants' Motion was heard on September 25, 2002.

24 **III. QUESTION PRESENTED**

25 Whether Defendant Nobuko's Motion to Sever the Trial with Co-Defendant Chizuwa should be
26 granted pursuant to Commonwealth Rules of Criminal Procedure 14 where failure to sever would
27 manifestly prejudice Nobuko.

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IV. ANALYSIS

In this case, Nobuko moves this Court to sever her trial with co-defendant Chizuwa because trying the two Defendants together would highly prejudice her. *See* Def. Iida Nobuko’s Mot. for Severance of Trial and Supporting Points & Authorities. (“Nobuko’s Mot.”). Nobuko specifically argues that if this case is not severed, she will be denied access to the exculpatory testimony of Chizuwa, and the jury is likely to find her guilty by association. *See* Nobuko’s Mot. at 3. Nobuko relies heavily on *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980) for the proposition that failure to sever would be manifestly prejudicial to her. Nobuko’s Mot. at 3-6. The Government, on the other hand, does not challenge the admission of the exculpatory testimony. Instead, the Government anticipates the introduction of such exculpatory statements into evidence at trial. *See* Government’s Answer to Mot. for Severance of Trial (“Government’s Answer”). The Government, however, contends that there is no indication, other than speculation, that the jury will consider Nobuko guilty by association. *Id.* at 2. In fact, the Government expects to present facts indicating that Nobuko conspired with Chizuwa to deliver drugs. Accordingly, the Government argues that this case should not be severed. *Id.* at 1.

As a general rule, defendants jointly charged are to be jointly tried. *See United States v. Gay*, 567 F.2d 916, 919 (9th Cir. 1978). This is also the rule in conspiracy cases. *See United States v. Kelly*, 569 F.2d 928, 938 (5th Cir. 1978); *see also Haggard v. United States*, 369 F.2d 968, 975 n.16 (8th Cir. 1966). However, Commonwealth Rules of Criminal Procedure 14 provides that if it appears that a defendant is prejudiced by joinder for trial together, the court may order separate trials of counts or grant a severance of defendants. *See* Com. R. Crim. P. 14;¹ *see also United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980). Similarly, under the Federal Rules of Criminal Procedure 14, the court may sever the trial of one defendant from another to prevent prejudice, even where joinder was appropriate

¹ Com. R. Crim. P. 14 provides that:

[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an information or by such joinder for trial together, the court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

1 under Federal Rule of Criminal Procedure 8(b). *See United States v. Cruz*, 127 F.3d 791 (9th Cir.
2 1997). A motion for severance is addressed at the trial court's discretion. *See United States v. Lutz*, 621
3 F.2d 940, 945 (9th Cir. 1980). Severance should be granted only if a serious risk exists that a joint trial
4 would compromise a particular trial right of a properly joined defendant or prevent the jury from reliably
5 determining guilt or innocence. *Zafiro v. United States*, 506 U.S. 534, 538, 113 S. Ct. 933, 937, 122
6 L. Ed. 2d 317, 324 (1993).

7 The Court finds Defendant Nobuko's reliance on *Seifert* instructive. In *Seifert*, defendant's
8 counsel made an offer of proof specifically outlining the expected testimony of the coconspirator, Ehrlich,
9 that would exculpate defendant, and the offer of proof was supported by Ehrlich's affidavit. 648 F.2d at
10 563. The Court held that defendants must demonstrate that a failure to sever would be so manifestly
11 prejudicial that it outweighed the dominant judicial concern with judicial economy and compelled the
12 exercise of the trial court's discretion to sever. *Id.* To make a showing of such "manifest prejudice" a
13 defendant must show a violation of one of his substantive rights such as his right to present an individual
14 defense. *Id.* "When the reason for severance is the asserted need for a co-defendant's testimony, the
15 defendant must show that he would call the co-defendant at a severed trial, that the co-defendant would
16 in fact testify and that the testimony would be favorable to the moving defendant." *Id.* (*quoting United*
17 *States v. Vigil*, 561 F.2d 1316, 1317 (9th Cir. 1977)). The trial court must also consider the possible
18 weight and credibility of the testimony and the economy of severance at the point the motion was made.
19 *Id.* at 564; *see also United States v. Kaplan*, 554 F.2d 958, 996 (9th Cir. 1977).

20 In *United States v. Vigil*, 561 F.2d 1316 (9th Cir. 1977), the Ninth Circuit's holding is consistent
21 with *Seifert*. In *Vigil*, an affidavit of defendant's counsel, filed with the motion to sever, specified that the
22 coconspirator Vigil would exculpate Baca, and at trial, when told that Vigil would not testify, defendant's
23 counsel sought to make an offer of proof as to Vigil's testimony. *Id.* at 1317. The offer was denied,
24 defendant was forced to call Vigil to the stand, and Vigil refused to give testimony that would exculpate
25 defendant and incriminate himself. The defendants in *Seifert* and *Vigil* presented a specific showing of
26 evidence that would exculpate defendant.

27 Applying these principles to the case at bar, it is clear from the offer of proofs made by both
28 defense counsels that Nobuko plans to produce evidence that would exculpate her at her trial. Nobuko's

1 counsel, Bruce Berline, Esq. stated on the record that he fully intends to call co-defendant Chizuwa as a
2 witness for Nobuko at trial. *See* Decl. of Bruce Berline in Supp. of Reply to Government’s Answer to
3 Def. Iida Nobuko’s Mot. for Severance of Trial (“Decl. of Berline”) at 2. Chizuwa’s attorney also stated
4 on the record that Chizuwa would be willing to offer exculpatory testimony for Nobuko at a separate trial,
5 but will not testify at a joint trial because he will likely assert his Fifth Amendment right to remain silent.
6 *See* Decl. of Berline, Ex. A; Nobuko’s Mot. at 5. In addition, Nobuko intends to offer Chizuwa’s
7 statement to the police that: “[yes], regarding Iida Nobuko, I know she does not know anything about
8 this and even you’re going to ask her, she won’t be able to answer because she does not know, so I
9 would like to see her cleared as soon as possible.” *See* Decl. of Berline at 2. The importance of
10 Chizuwa’s testimony is obviously the graveman of Nobuko’s defense. If Chizuwa testifies that the
11 methamphetamine hydrochloride is his alone, this testimony would very possibly lead to Nobuko’s
12 acquittal entirely. Failure to allow Nobuko to provide such exculpatory testimony would manifestly
13 prejudice Nobuko. Consequently, considerations of judicial economy do not outweigh the seriousness
14 of the possible prejudice to Nobuko.

15 **V. CONCLUSION**

16 For the foregoing reasons, this Court finds that failure to sever Nobuko’s trial from Co-Defendant
17 Chizuwa would manifestly prejudice Nobuko. The Court, therefore, orders separate trials for each
18 Defendant. As such, Nobuko’s Motion to Sever the Trial is hereby **GRANTED**.

19 **SO ORDERED** this 2nd day of October 2002.

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21 /s/ Virginia S. Sablan-Onerheim
22 VIRGINIA S. SABLÁN-ONERHEIM, Associate Judge
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