

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF**

UNITED STATES OF AMERICA,)
)
)
v.)
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)
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)
)
Defendants.)

UNITED STATES OF AMERICA,)
)
)
v.)
)
)
)
)
Defendant.)

ORDER

By:
United States District Judge

The parties have filed and briefed pretrial motions and oral argument was held on the motions on [DATE]. For the reasons previously stated, or as set forth herein, it is **ORDERED** as follows:

Government's Motions

1. The Motion in Limine [____ 645]¹ relating to the admission of a transcript of the state trial testimony of _____ is GRANTED for the reasons stated in the government's memoranda. The court intends to caution the jury as to

¹ The number relates to the docket item and the name relates to the particular case docket. Where no name is referenced, the number refers to the case docket of the defendant whose motion is being considered.

its consideration of this testimony;²

2. The Government's Pre-Trial Motions [_____ 15] are DENIED in that there is no indication at this point that the defendant has failed to comply with Federal Rules of Criminal Procedure 12.2 or 16(b) and in the event there is such a failure, the court has available appropriate sanctions. As to the production of witness statements under Federal Rule of Criminal Procedure 26.2, the court will herein enter an order applicable to all parties in that regard;
3. The Motion for Protective Order, relating to the Bureau of Prisons files as to _____ [_____ 848], is DENIED in that such files have already been produced under seal and parts thereof disclosed to the defendants under the conditions set forth in paragraph 2 of the court's Order of [DATE];
4. The Motion in Limine to Admit Evidence Under Rule 404(b) of the Federal Rules of Evidence [_____ 855], relating to conversations with _____

² The government's written motion in this regard was actually made during _____'s prior trial and granted orally over the defendant's objection for the reasons expressed on the record. (Tr. [DATE], 10-4 to 10-9.) The granting of the motion at that time was not formally noted on the docket. Following the mistrial, _____ filed Defendant's Additional Objections to Government's Motion to Offer State Court Testimony of _____ [710], which again raised the issue of the admissibility of the transcript. At the prior trial, before the transcript was read into evidence, the court cautioned the jury that it should be received with caution because it was not subject to cross examination. (Tr., *supra*, 10-31 to 10-32.)

concerning stolen food stamps, is GRANTED. The court finds for the reasons set forth in the government's memorandum that the evidence at issue is properly admissible under Federal Rule of Evidence 404(b) and that pursuant to Federal Rule of Evidence 403, its probative value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury;

5. The Motion in Limine to Admit the Transcripts of the Testimony of _____ [_____ 855] is GRANTED for the reasons set forth in the government's memorandum;
6. The Motion in Limine to Prevent the Defendant _____ from Mentioning that He Passed Polygraph Tests in Connection with His Involvement in the _____ Family Murders [_____ 855] is GRANTED. *See United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003);
7. The Motion for Production of Witness Statements [_____ 884; _____ 61] is DENIED in that the court will herein enter an order applicable to all parties in that regard;
8. The Motion in Limine to Admit Evidence Under Rule 404(b) of the Federal Rules of Evidence [_____ 899; _____ 65], relating to statements made by defendant (name) to (name), is GRANTED. The court finds for the reasons set forth in the government's memorandum that the evidence at issue is properly admissible under Federal Rule of Evidence 404(b) and that

pursuant to Federal Rule of Evidence 403, its probative value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury;

9. The Motion in Limine to Admit Evidence Under Federal Rule of Evidence 404(b) [_____ 923; _____ 75], relating to statements or conduct by defendants _____ and _____, is RESERVED FOR DECISION in part and DENIED in part;

(a) As to defendant _____, a principal objection by the defendant is that the evidence is insufficiently reliable. *See United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997) (holding that to be admissible, 404(b) evidence must be reliable, among other things). The defendant asserts that some or all of the evidence now proposed by the government was admitted to be not subject to proof at the time of the defendant's sentencing in the United States District Court _____ District on [DATE]. For the reasons stated by the government in its memorandum, the evidence otherwise appears to meet the criteria for proper 404(b) admission and pursuant to Federal Rule of Evidence 403, its probative value is not substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. However, before admitting such evidence as referred to in the government's motion, the court will conduct a hearing out of the presence of the jury during which the government may seek to adequately show the reliability of the evidence within

the meaning of *Queen*. Prior to a ruling by the court on the pending motion by the government, the parties must not disclose to the jury any of the testimony;

(b) As to the conduct of _____ relating to his allegedly having shot toward _____ on [DATE], the motion is DENIED. The court finds that the evidence proposed is not sufficiently related to the issues of intent, opportunity, or plan involved in this case to be admissible;

10. The Objection to Expert Testimony of _____ [_____ 943] is RESERVED FOR DECISION. The court will conduct a hearing pursuant to Federal Rule of Evidence 104(a) at such time as the witness is available for examination by the court and counsel in order to determine whether the testimony of such witness is admissible. Prior to a ruling by the court on the pending objection by the government, the parties must not disclose to the jury any of the expected testimony of such expert;

_____’s **Motions**

11. The Response to Government’s Motion for a Protective Order and Motion [852], relating to the prison file of _____, is DENIED in that such files have already been produced under seal and parts thereof disclosed to the defendants under the conditions set forth in paragraph 2 of the court’s Order of [DATE];
12. The Motions for Notice and Disclosure of Evidence as Required by Rule 404(b) of the Rules of Evidence [888], for Production of Witness Statements [889]; for Exculpatory Evidence [890], for Discovery [891], and for Disclosure of Expert

Evidence [892] are DENIED in that there is no indication at this point that the government has failed to comply with its obligations in this regard and in the event there is such a failure, the court has available appropriate sanctions. As to the production of witness statements under Federal Rule of Criminal Procedure 26.2, the court will herein enter an order applicable to all parties in that regard;

13. The Motion of Defendant to Adopt by Silence All Relevant Pretrial Motions and Trial Objections of All Co-Defendants [893] is GRANTED;
14. The Motion to Dismiss Counts One through Four of the Indictment on the Grounds of Double Jeopardy [911] remains under consideration;
15. The Motion for Funds to Pay for Daily Transcripts [913] is GRANTED in that the official court reporter is directed to provide each side upon request with computer discs of uncertified transcripts for each day of trial, prior to the beginning of the next trial day;
16. The Motion for Leave to Review Federal Presentence Reports and State Presentence Investigations of Government Witnesses [914] remains under consideration;
17. The Motion for Leave to Cross-Examine Government Witnesses and Present Defense Evidence out of Order [915] is GRANTED in part and DENIED in part. The court provided in paragraph 5 of Order Re: General Trial Procedures entered [DATE], that the defendants may agree otherwise as to the prescribed

order of cross examination and presentation of defense evidence. The court further grants the defendants leave to vary the order of cross examination as to each witness, so that if the defendants so agree, government witness A may be examined in one order by the defendants, while government witness B may be examined in some other order. As to the presentation of defense evidence, however, the court will require that each defense case be presented in its entirety in the order prescribed or as agreed to by the defendants, unless good cause be shown as to a particular witness for scheduling or other reasons. In addition, while not set forth in the (date), Order, opening statements and closing arguments must be made in the prescribed order of (defendant #1), (defendant #2), (defendant #3) unless otherwise agreed to by the defendants;

18. The Motion to Allow Counsel to Ask Questions During Voir Dire [917] is DENIED. The parties will be permitted, in accord with Federal Rule of Criminal Procedure 24(a)(2)(B), to submit further questions for the court's consideration;
19. The Motion to Permit Defendant, _____, to Present Evidence of Polygraph Results at the Guilt Phase of Trial, or, in the Alternative to Present Such Evidence at the Sentencing Phase of Trial [918] is DENIED for the reasons set forth by the government in its memorandum;
20. The Motion to Strike Government's Notice of Intent to Seek the Death Penalty

and to Bar the Death Penalty Based Upon the Unconstitutionality of the Death Penalty Provisions in 21 U.S.C. Section 848 [920] is DENIED. The court has previously ruled on a similar motion made by the defendant _____ and that opinion is adopted as to the present motion.

22. The Motion to Allow Defendants Extra Peremptory Challenges [933] remains under consideration;
22. The Motion to Alter the Court's Order Regarding Alternates [934] is DENIED. *See United States v. Johnson*, 223 F.3d 665, 669-671 (7th Cir. 2000), *cert. denied*, 534 U.S. 829 (2001);
23. The Motion for Leave to File Motion to Dismiss Counts Five and Seven as Time-Barred Under the Applicable Statute of Limitations [957] is GRANTED;
24. The Motion to Dismiss Counts Five, Six and Seven as Time-Barred Under the Applicable Statute of Limitations [958] is DENIED. The court has previously ruled on a similar motion made by the defendant _____ and that opinion is adopted as to the present motion.
25. The Motion Regarding Witnesses [959] is GRANTED in part and DENIED in part. The court will permit potential penalty phase witnesses of all parties to remain in the courtroom during the guilt-innocence phase if they are not witnesses in the guilt-innocence phase, or have already testified and will not be

recalled to testify in the guilt-innocence phase. The portion of the motion relating to expert witnesses remaining in the courtroom during the entire trial is DENIED, subject to reconsideration upon cause being shown for any particular expert witness;

_____’s **Motions**

26. The Motion in Limine to Prevent _____ from Being Cross-Examined with Hearsay Statements Allegedly Made by Defendant’s Brother, _____ [711] is GRANTED, subject to any motion for reconsideration being made by the government outside of the presence of the jury during trial;
27. The Motion in Limine to Exclude Testimony from _____ Referencing Anything Connected to the (name) Crime Family [712] is GRANTED;
28. The Motion in Limine to Exclude Irrelevant Prejudicial Portions of the _____ Tapes [713] is DENIED, as withdrawn;
29. The Motion to Introduce into Evidence Portions of the _____ Audio Tapes [714] is DENIED. The court earlier denied a similar motion by the defendant and that opinion is adopted as to this motion.
30. The Motion Requesting Disclosure from the Attorney General the [sic] Witness Protection File of _____ [858] is DENIED, based on the representations made by counsel for the government;.
31. The Motion to Compel [863], relating to disclosure of other investigations in

(STATE), is DENIED, based on the representations made by counsel for the government;

32. The Motions for Notice and Disclosure of Evidence as Required by Rule 404(b) of the Rules of Evidence [885], for Production of Witness Statements [886], and for Disclosure of Expert Evidence [887] are DENIED, in that there is no indication at this point that the government has failed to comply with its obligations in this regard and in the event there is such a failure, the court has available appropriate sanctions. As to the production of witness statements under Federal Rule of Evidence 26.2, the court will herein enter an order applicable to all parties in that regard;
33. The Motion in Limine to Exclude the Testimony of _____ [901] is GRANTED, subject to any motion for reconsideration being made by the government outside of the presence of the jury during trial;
34. The Motion for Government to Provide Defense Photographs of (NAME) Facility in Which _____ is Being Held [904] is DENIED for the reasons stated on the record as to the prior motion of the defendant requesting viewing by counsel of such facility;
35. The Motion to Suppress [907] is GRANTED in part, DECISION RESERVED in part, and DENIED in part. It is granted as to any evidence of the defendant being connected to (name) or the (name) crime family and as to any reference to payment of jurors for a hung jury in the defendant's first trial.

DECISION IS RESERVED as to any evidence of an attempted murder by defendant _____ in the so-called _____ bar fight, pending further development of the evidence at trial. In the meantime, no reference to any such evidence must be made to the jury. The motion is denied as to the other evidence referred to in the motion for the reasons stated by the government in its Response filed (date);

36. The Motion for View by Jury [908] is DENIED. Based on the defendant's prior trial, the court finds that the descriptions and photographs adequately presented the relevant facts to the jury or that any deficiencies in such evidence as now asserted by the defendant can reasonably be remedied without a view by the jury;
37. The Motion for Prosecutorial Misconduct [909] is RESERVED FOR DECISION. The government is directed to promptly file copies of the grand jury testimony of its witness _____ and any other statements by her. The court will conduct a separate hearing on this motion and on the Motion to Dismiss by defendant _____;
38. The Motion to Exclude Jailhouse Informant Testimony [910] remains under consideration;
39. The Motion to Reinstate Original Questionnaire [936] is GRANTED in part and DENIED in part. The court will include the questions relating to mental retardation, but will not include the other questions requested. The final

- questionnaire contains sufficient inquiry into the attitudes of the jury venire concerning members' attitudes towards crime and the criminal justice system;
40. The Motion to Allow Counsel to Ask Questions During Voir Dire [937] is DENIED. The parties will be permitted, in accord with Federal Rule of Criminal Procedure 24(a)(2)(B), to submit further questions for the court's consideration;
 41. The Motion for the Appointment of a Footprint Expert [953] is DENIED, provided that if requested the court will instruct the jury or allow a stipulation by the government as to the lack of evidence establishing any connection between any footprint at the crime scene and those attributable to the defendant.

_____ 's **Motions**

42. The Motion to Dismiss [66] is RESERVED FOR DECISION for the reasons set forth above in paragraph 37;
43. The Motion [67] relating to Bureau of Prison records is DENIED, based on the government's representation that it will attempt to obtain such files, to be disclosed in the manner set forth in paragraph 2 of the court's Order of [DATE];
44. The Motion to Compel the Government to Provide Discovery Materials [68] is DENIED on the ground that the court finds that the government has not at this point failed to comply with its discovery and disclosure obligations to the defendant;

45. The Motion in Limine [69] relating to other statements of the defendant is DENIED, subject to reconsideration as to any particular statement sought to be introduced by the government if prior objection be made thereto;
46. The Motion for Introduction of Expert Opinions [80], relating to polygraph examinations, is DENIED. *See United States v. Prince-Oyibo*, 320 F.3d 494 (4th Cir. 2003). As requested, the defendant is granted leave to file a written proffer of evidence as to the alleged reliability of polygraph examinations no later than (date);
47. The Motions relating to the issuance of pretrial subpoenas duces tecum to the _____ County Sheriff [81], to the _____ County Commonwealth's Attorney [82], and to the _____ State Police [96] are GRANTED, without objection;
48. The Motion [83] relating to the production by the government of presentence reports remains under consideration;
49. The Motion relating to the issuance of a pretrial subpoena duces tecum to the _____ Department of Corrections [84] remains under consideration;

Order Pursuant to Rule 26.2

50. The attorneys are directed pursuant to Federal Rule of Criminal Procedure 26.2 to produce, for examination and use by opposing parties, any statement (as defined in said rule) of a witness (other than a defendant) after the witness has testified on direct examination at trial or at any other proceeding described in

said rule, if such statement has not been earlier produced.

Government Witness List

51. In accord with 18 U.S.C.A. § 3432 (West 2000), the government must furnish to the defendants no later than [DATE], a list of all witnesses (including addresses) to be called in its case in chief, and must also provide the list by such date to the court for its use in disclosing it during jury voir dire.

ENTER: [DATE]

United States District Judge