

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
vs.)
)
MICHELLE THOMAS EGGLESTON,)
JOHN THOMAS, and DEBRA SETTLES,)
)
 Defendants.)

No. 02-20428BV

ORDER DENYING THE GOVERNMENT'S MOTION TO SEVER

Before the court is the motion of the plaintiff, the United States, filed September 17, 2004, to sever¹ the trial of John Thomas from that of his co-defendants, Michelle Thomas-Eggleston and Debra Parrish. The motion to sever was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is denied.

As its only ground for severance, the government submits that John Thomas has made several inculpatory statements to law enforcement officials regarding the involvement of his co-defendants which statements the government wishes to introduce at

¹ The government styles its motion as a 'Motion to Bifurcate'. After a careful reading of the motion, this court has determined that the government intended a 'Motion to Sever' pursuant to FED R. CRIM P. 14(a), and this court will treat it as such.

trial in its case in chief. The government argues that the use of these statements at a joint trial would violate the co-defendants' Sixth Amendment right of confrontation as announced in *Bruton v. United States*, 391 U.S. 123 (1968). In response, Thomas asserts that there is no *Bruton* issue to resolve because he will be testifying at the joint trial.

In *Bruton*, the Supreme Court reversed the conviction of the defendant on the grounds that his Sixth Amendment right of confrontation of witnesses had been violated because the trial court allowed the confession of his co-defendant to be considered by the jury, without the co-defendant having to take the witness stand. *Bruton v. United States*, 391 U.S. 123, 127 (1968). The court found that the co-defendant's "confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination" (*Id.*) Accordingly, *Bruton's* right of confrontation would not have been violated had his co-defendant been subject to cross-examination. (*Id.*)

In the present case, counsel for Thomas has emphatically stated that Thomas will take the witness stand at the joint trial. Thus, any possible *Bruton* problems of which the government complains are rendered moot by virtue of Thomas' testimony and his availability to be cross-examined at trial. If, for some reason, Thomas changes his mind and fails to take the stand, the government

could renew its motion at that time.

Furthermore, even if the court were to sever the trial, the government would still not be able to use the statements made by Thomas to law enforcement officials in its case in chief against the co-defendants as is suggested in its motion.² "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and prior opportunity for cross-examination." *Crawford v. Washington*, 124 S.Ct. 1354, 1374 (2004). The Court in *Crawford* declined to comprehensively define 'testimonial evidence', but it stated that "it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial, and to police interrogations." (*Id.*) In the present case, the statements the government proposes to use are testimonial evidence because they were made by Thomas during a law enforcement investigation. The government could show the unavailability of Thomas to testify; however, the co-defendants have not had prior opportunities for cross-examination of Thomas or his statements. Thus, pursuant to *Crawford*, the governments use of

² The government's brief is not clear as to which trial it would use Thomas's statement - the trial of Thomas or of the co-defendants. The government suggests in its brief that Thomas's statement is needed in the government's case in chief because "[a]dmission of the statement during the presentation of the defendant's proof increases the co-defendants' chances during their motion for judgment of acquittal." (Mot. for Bifurcated Trial at 2.)

Thomas's statements at a separate trial of the co-defendants would still violate the co-defendants' Sixth Amendment right of confrontation.

Accordingly, the motion of the government is denied.

IT IS SO ORDERED this 1st day of October, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE