FOR PUBLICATION

IN THE SUPERIOR COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, **Plaintiff,** **v.** **XUE TIAN GU and BAO HONG YIN,** **Defendants.**	**CRIMINAL CASE NO. 10-0106** **ORDER DENYING MOTIONS FOR APPOINTMENT OF DEFENSE EXPERTS AND FOR SEVERANCE OF DEFENDANTS**

THIS MATTER came before the Court on August 18, 2010, for a hearing on Defendants' motion for appointment of forensic experts and severance of their trial. The CNMI ("Government") was represented by Assistant Attorney General Elchonon Golob. Defendants Tian Gu Xue ("Xue") and Bao Hong Yin ("Yin") (collectively, "Defendants") appeared with Public Defender Richard Miller and Counsel Robert T. Torres, respectively. Based on the pleadings, the papers on file and arguments of counsel, the Court DENIES both motions.

I. FACTS

Defendants were arrested and charged by Information with two counts of Trafficking of Controlled Substance (crystal methamphetamine) in violation of 6 CMC § 2141(a)(1) and 6 CMC § 2141(d) and one count of Conspiracy to Commit Trafficking of Controlled Substance (crystal methamphetamine) in violation of 6 CMC § 303(a). (Information at 1-2.) Yin was additionally charged

with two counts of Illegal Possession of Controlled Substance (crystal methamphetamine) in violation of 6 CMC § 2142(a). (*Id.*) The alleged controlled substance at issue was initially tested using a Narcotics Identification Test Kit with results being presumptively positive for crystal methamphetamine. (Application and Affidavit for Search and Arrest Warrant.) Currently, the Government is awaiting official test results from the Guam-based crime lab.

The Defendants are requesting the Court to provide them with government paid forensic experts to assist in their defense. (Mot. for Appt. of Defense Experts; Joinder by Def. Yin.) During oral argument, the Defendants claimed that they needed the assistance of an expert to educate the defense counsel as well as conduct an independent analysis of the substance and provide testimony if necessary.

In addition, the Defendants are moving the Court to sever their trial because trying them together would be highly prejudicial to both of them. (Mot. for Severance of Defendants, hereafter "Mot. for Severance.") Defendants claim that a joint trial would deprive them of their Fifth and Sixth Amendment rights as well as their rights to fair trial, confrontation, and effective assistance of counsel.

II. APPOINTMENT OF DEFENSE EXPERTS

A. Standard

At issue is whether it is necessary for the Court to appoint a defense expert to assist an indigent defendant in preparing a defense, to independently perform a drug test, or to refute drug test lab results. Article I, Section 4 of the Constitution of the Commonwealth of the Northern Mariana Islands provides that "[i]n all criminal prosecutions, certain fundamental rights shall obtain." Among these rights is that "[t]he accused has the right to assistance of counsel, and if convicted, has the right to counsel in all appeals." NMI Const. art. I, § 4(a). This section is based on the Sixth Amendment to the United States Constitution. *Commonwealth v. Perez*, 2006 MP 24 ¶ 11 (stating that the "Sixth Amendment to the United States Constitution applies in the Commonwealth"); *see also Commonwealth v. Suda*, 1999 MP 17 ¶ 10. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. Const. amend. VI. "[T]he right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

The effective assistance of counsel guarantee of the due process clause requires, when necessary, the appointment of investigative services for a criminal defendant. *Perez*, 2006 MP 24 ¶ 11(citing *Ake v. Oklahoma*, 470 U.S. 78 (1985)); *see also Williams v. Stewart*, 441 F.3d 1030, 1053 (9th Cir. 2006) (citation omitted).

B. Discussion

In the case of *Commonwealth v. Perez*, our Supreme Court adopted a two-part test a defendant must satisfy for the Court to appoint expert assistance. *Commonwealth v. Perez*, 2006 MP 24 ¶ 14. Under this test, the burden is on the defendant to establish (1) the existence of a reasonable probability that an expert would be of assistance to the defense and (2) the denial of expert assistance would result in a fundamentally unfair trial. *Id.*

At issue in *Perez* was whether the defendant had made an adequate showing for the request of an expert to testify about the Lovaas method of behavior modification to assist in his defense to charges of child abuse. The facts of the case raised issues of whether use of the Lovaas method was unlawful in special education instruction and whether its use was reasonable corporal punishment. *Id.* ¶ 14. The Court emphasized that this is a stringent test and that Perez's request for expert assistance "in almost any other instance could be described as generally deficient." *Id.* ¶ 27.

1. *Reasonable Probability of Assistance*

The Court must determine whether the Defendants have adequately demonstrated that the request of an expert would be useful to the preparation of a defense. To be adequate, the defendant must make a "particularized showing of need."[1] *Id.* ¶ 24.

During oral argument, the Defendants claimed that they need the assistance of an expert for two reasons: (1) they need someone to educate the defense attorneys; and (2) they need someone to conduct an analysis and present independent conclusions to a jury.

The request for an expert must be more than a need for information. *See e.g., State v. Edwards*, 868 S.W.2d 682, 698 (Tenn. Crim. App. 1993). The substance at issue was initially tested using a

[1]Our Supreme Court forwarned "Future litigants would do well to examine this standard and make sure they are able to make a particularized showing." *Commonwealth v. Perez*, 2006 MP 24 ¶ 24 n.7.

Narcotics Identification Test Kit with results being presumptively positive for crystal methamphetamine. (Application and Affidavit for Search and Arrest Warrant.) All that the Government is awaiting now are the official test results from the Guam-based crime lab.

Here, Defendants have merely offered the Court generalized assertions of need. The Court recognizes that "defense counsel may be unfamiliar with the specific scientific theories implicated in a case and therefore cannot be expected to provide the court with a detailed analysis of the assistance an appointed expert might provide;" however, "defense counsel is obligated to inform himself about the specific scientific area in question and to provide the court with as much information as possible concerning the usefulness of the requested expert to the defense's case." *Moore v. Kemp*, 809 F.2d 702, 712 (11th Cir. 1987).

The Defendants must establish a particularized showing of need for the expert assistance. Mere assertions that the assistance of the expert would be useful to the defense are inadequate. In addition, it is not reasonable to request a retest on the prosecution's evidence without some showing that a retest is warranted. Thus, Defendants have failed to demonstrate that the proposed expert assistance is reasonably necessary for their proper representation.

2. *Fundamental Fairness*

Under this prong, the Court must determine whether denial of a court appointed expert would result in a fundamentally unfair trial.

The Defendants argue that it is fundamentally unfair for the Government to be able to make use of expert analysis and testimony when Defendants do not have access to the same. However, "[t]he state need not provide indigent defendants all the assistance their wealthier counterparts might buy; rather, fundamental fairness requires that the state not deny them 'an adequate opportunity to present their claims fairly within the adversary system.'" *Id.* at 709 (quoting *Ross v. Moffitt*, 417 U.S. 600, 612 (1974)).

Our rules do not prevent defense counsel from interviewing the Government's expert. Moreover, Defendants will have ample opportunity to cross-examine the Government's expert witness. The provision of a forensics expert, absent an adequate showing of need, would be superfluous and the denial of such does not result in a fundamentally unfair trial.

III. SEVERANCE OF DEFENDANTS

A. Standard

Rule 8(b) of the Commonwealth Rules of Criminal Procedure provides in relevant part that "two or more defendants may be charged in the information 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." NMI R. Crim. P. 8(b). The goal of this rule is to promote judicial economy and efficiency, so long as this can be accomplished without "substantial prejudice" to any of the joined defendants. *Daley v. United States*, 231 F.2d 123, 125 (1st Cir. 1956). If joinder would result in prejudice to a defendant, Rule 14 of the Commonwealth Rules of Criminal Procedure allows the trial judge to sever the trial. NMI R. Crim. P. 14.

The tension between these rules relate to competing constitutional rights. The Fifth and Sixth Amendments can pit one co-defendant's right to remain silent against another's right to explore and produce all exculpatory evidence. This conflict is central to the Defendants' arguments supporting their motion for severance.

B. Discussion

1. *Inaccessible Exculpatory Information*

First, Xue contends that Yin "may have exculpatory information about what happened on the dates of incidents" and that the "exculpatory information is inaccessible to [Xue] where the information is tried jointly." (Mot. For Severance at 2.) Xue claims the inability to call Yin as a witness would be prejudicial to his case. (*Id.* at 3.)

"The 'great mass' of cases refuse to grant a severance despite the anticipated exculpatory testimony of a codefendant." *United States v. Gay*, 567 F.2d 916, 919 (9th Cir.), cert. denied, 435 U.S. 999 (1978). Nevertheless, where courts grant severance based on this argument, the defendant must show that he would call the co-defendant at a separate trial, and that such testimony would be exculpatory. *United States v. Crumley*, 528 F.3d 1053, 1064 (8th Cir. 2008); *United States v. Haro-Espinosa*, 619 F.2d 789, 793 (9th Cir. 1979). This is a stringent standard requiring that the testimony be "substantially exculpatory." *United States v. Pitner*, 307 F.3d 1178, 1181-1182 (9th Cir. 2002).

The Court is not convinced that the Defendants have met this standard. While Yin claims that she would call Xue as a witness in a separate trial, Xue has made no such assertion. In addition, the moving papers as well as arguments from their counsel are devoid of any showing of need for the testimony. Finally, neither of the Defendants have explained the substance of the purported testimony. The Court will not grant a severance based on this argument absent a specific showing of need and substance.[2]

2. *Commenting on Co-defendant's Failure to Testify*

Second, Xue argues that if Yin decides to testify in her own defense, this would force Xue to "either testify on his own behalf or have the trier of fact make an adverse inference from his non-testimony." (Mot. For Severance at 3.) Xue claims that this situation would deprive him of his right not to testify and due process of law. (*Id.*)

Xue cites *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962) for the proposition that "[w]here a co-defendant's attorney has a duty to comment or comments on Defendant's failure to testify, a severance should be granted." (*Id.*) The *DeLuna* court, in dictum, noted that the right to confrontation permits and may even require counsel "to draw all rational inferences from the failure of a co-defendant to testify," and that when this right conflicts with the nontestifying co-defendant's right to remain silent, the trial judge should order separate trials. *DeLuna v. United States*, 308 F.2d 140, 143 (5th Cir. 1962). However, the court's suggestion in *DeLuna* is in the minority. Typically, courts do not allow a defendant's attorney to comment on the failure of a co-defendant to testify; and cases where it is allowed occur where the defendant would suffer "real prejudice" if prohibited from doing so.[3]

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[2]The Court finds *United States v. Butler* instructive in analyzing this issue. The *Butler* court put the burden on the moving defendant to show: (1) a bona-fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will testify if the case were to be severed. *United States v. Butler*, 611 F.2d 1066, 1071 (5th Cir. 1980). *See also United States v. Pitner*, 307 F.3d 1178, 1181-82 (9th Cir. 2002) (requiring the testimony to be "substantially exculpatory").

[3]*See, e.g., Griffin v. California*, 380 U.S. 609, 615 (1965) (holding "that the Fifth Amendment, in its direct application to the Federal Government, and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."); *United States v. McClure*, 734 F.2d 484, 491 (10th Cir. 1984) (rejecting "the dictum of the *DeLuna* majority and [holding] that under no circumstances can it be said that a defendant's attorney is obligated to comment upon a codefendant's failure to testify."); *United States v. Kahn*, 381 F.2d 824, 840 (7th Cir. 1966) (requiring that "[t]here must be a showing that real prejudice will result from the defendant's inability to comment.").

In the case at bar, should either of the Defendants invoke their right not to testify, it is the primary responsibility of the Court to properly instruct the jury so that no adverse inferences be drawn from the exercise of this right. Accordingly, the Defendants' concerns raised in this issue are not compelling enough to grant severance.

3. *Inconsistent and Antagonistic Defenses Between Co-defendants*

Finally, Xue argues that Yin "may have defenses which are inconsistent with and antagonistic to [Xue's] defense," and that a "single trial would be fundamentally unfair[.]" (Mot. for Severance at 3.) To support this assertion, Defendants cite to *United States v. Massa* where the Eighth Circuit Court of Appeals analyzed a lower court's decision not to sever. (*Id.*) In *Massa*, the court found that the defendants were properly tried together and stated that "[s]everance is proper where a defendant demonstrates that a jury could not reasonably be expected to compartmentalize the evidence as it relates to separate defendants." *United States v. Massa*, 740 F.2d 629, 644 (8th Cir. 1984).[4]

The Supreme Court has found that mutually antagonistic defenses are not prejudicial per se, and without more, do not require mandatory severance. *Zafiro v. United States*, 506 U.S. 534, 539-540 (1993). For a court to grant severance, the defendant must "articulate any specific instances of prejudice" or show "a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539.

Xue has not articulated the nature of his defense to the Court. Yin has specified that she may testify and assert affirmative defenses of duress, coercion, or necessity and may implicate her co-defendant Xue. However, the assertion of these defenses alone does not necessitate a severance of the defendants.[5]

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[4]*United States v. Massa* is also one in a string of cases which held that admissibility of a co-conspirator's statements under Rule 801(d)(2)(E) did not necessarily satisfy the Confrontation Clause. However, those decisions were overruled in *United States v. Inadi*, 475 U.S. 387, 391 (1986), where the Supreme Court held that the Confrontation Clause does not require "a showing of unavailability as a condition to admission of the out-of-court statements of a nontestifying co-conspirator, when those statements otherwise satisfy the requirements of Federal Rule of Evidence 801(d)(2)(E)."

[5]Defense of duress: *U.S. v. Paradis*, 802 F.2d 553, 561 (1st Cir. 1986) ("To obtain severance on the grounds of conflicting defenses, a defendant has to demonstrate that the defenses are so irreconcilable as to involve fundamental disagreement over core and basic facts."); *U.S. v. Almeida-Biffi*, 825 F.2d 830, 833 (5th Cir. 1987) (explaining that the jury could have accepted the wife's representations that her husband was engaged in trafficking cocaine yet find that he

First, the Court cannot determine if the asserted defenses are antagonistic without Xue specifying the nature of his defense. Second, assuming arguendo that the Defendants presented, in theory, antagonistic defenses, a review of the record reveals little, if any, risk to a specific trial right. The only trial right articulated was that of a "fair trial." However, "[w]hile 'an important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence,' a fair trial does not include the right to exclude relevant and competent evidence." *Zafiro*, 506 U.S. at 539-540 (internal citations omitted). Likewise, the Court is not convinced that the general assertion of inconsistent and antagonistic defenses between the Defendants requires a severance.

IV. CONCLUSION

For the forgoing reasons the Court hereby DENIES the Defendants' Motion for Appointment of Defense Experts, and DENIES the Defendants' Motion for Severance of Defendants.

SO ORDERED this 31st day of August, 2010.

/s/
PERRY B. INOS, Associate Judge

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did not participate in the particular transaction for which they were indicted).

Defense of coercion: *U.S. v. Villegas*, 899 F.2d 1324, 1346 (2d Cir. 1990) (finding it is insufficient that one defendant contends that another coerced him to engage in the unlawful conduct if the jury could believe both that contention and the co-defendant's defense); *U.S. v. Farmer*, 924 F.2d 647, 653 (7th Cir. 1991) (treating claims of coercion as not antagonistic).

Implicating a co-defendant: *U.S. v. Knowles*, 66 F.3d 1146, 1159-60 (11th Cir. 1995) (noting that since the co-defendants presented no evidence amounting to a defense for the charges against them, prejudice could not be found simply by virtue of the fact that their co-defendant's defense implicated them); *U.S. v. Pipito*, 861 F.2d 1006, 1011 (7th Cir. 1987) (finding that the defendant failed to substantiate how his co-defendant's testimony clearly and convincingly implicated him and only advanced conclusory statements in support of his motion for severance; the court of appeals held that broad allegations and conclusions of prejudice were not sufficient to justify reversal and found that the defendant had "mastered the dubious art of raising boilerplate arguments which could theoretically constitute reversible error, yet provid[ed] no specifics which would lead a court to consider embracing these arguments."); *U.S. v. McClure*, 734 F.2d 484, 489 n.1 (10th Cir. 1984) (finding that neither defendant's abstract assertions of innocence tended to prove the other guilty and held that the record before it did not demonstrate that either were specifically prejudiced by their joint trial).