UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
QUINTON T. ROSS, JR.	)	

MOTION OF QUINTON T. ROSS, JR., FOR A *JAMES* HEARING TO DETERMINE ADMISSIBILITY OF EXTRAJUDICIAL STATEMENTS OF ALLEGED CO-CONSPIRATORS

Quinton T. Ross, Jr., respectfully moves this Court to enter an Order setting this matter for a hearing pursuant to *United States v. James*, 590 F.2d 575 (5th Cir. 1979) to be held prior to trial for the purpose of determining the admissibility of any extrajudicial statements of alleged co-conspirators.[1] As grounds in support of this Motion, Senator Ross shows the following:

I. INTRODUCTION.

Senator Ross is charged in sixteen (16) counts of a thirty-nine (39) count Indictment surrounding alleged conspiracy and bribery to influence legislation in the Alabama Legislature pertaining to electronic bingo. The charges against Senator Ross include: Conspiracy under 18 U.S.C. § 371 (Count One) (*see* Indictment at 6 – 40); federal programs bribery and aiding and abetting under 18 U.S.C. §§ 666 & 2 (Counts Eleven and Twelve) (*see* Indictment at 48-49); and honest services fraud and aiding and abetting under 18 U.S.C. §§ 1341, 1343,

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

1346, & 2 (Counts Twenty-Three through Thirty-Three) (*see* Indictment at 57 – 60).

The conspiracy count, Count One, charges that all eleven (11) Defendants engaged in a single conspiracy under 18 U.S.C. § 371. Count One alleges 152 overt acts were committed in furtherance of the conspiracy starting in or about February 2009, and continuing through in or about August 2010. Additionally, Count One alleges that Senator Ross and his Co-Defendants conspired "along with co-conspirator Lobbyist A, and other persons known and unknown to the Grand Jury[.]" *See* Indictment at 6.

The pretrial identification and litigation of co-conspirator hearsay statements is appropriate in this case. For example, given the number of Defendants, and/or other coconspirators known and unknown, the complex nature of the allegations, as well as the voluminous discovery in this case, it is difficult for Senator Ross to identify which persons, not to mention which statements, will be offered by the Government at trial. Senator Ross respectfully submits that in order to prepare for trial properly and prevent unnecessary delay at trial, this Court should direct the Government to disclose, well in advance of trial, all statements it intends to offer under Fed. R. Evid. 801(d)(2)(E) ("FRE 801(d)(2)(E)"), and then determine, through a pretrial hearing, whether those statements are admissible.

II. ARGUMENT AND AUTHORITIES.

FRE 801(d)(2) governs the admissibility of co-conspirator statements. The Rule states in part:

> A statement is not hearsay if – …[t]he statement is offered against a party and is…(E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statemen0.t shall be considered but are not alone sufficient to establish…the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

FRE 801(d)(2)(E).[2] "For a declaration by one defendant to be admissible against other defendants under this [rule], the government must establish by a preponderance of the evidence: (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy." *United States v. Harrison*, 246 Fed. Appx. 640, 651 (11th Cir. 2007) (internal citation and quotations omitted); *see also United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003). The trial judge, not the jury, must determine the admissibility of co-conspirator statements. *James*, 599 F.2d at 580.

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[2] There are a number of significant limitations on the permissible reaches of FRE 801(d)(2)(E). *See United States v. Bazemore*, 41 F.3d 1431, 1434 (11th Cir. 1994) ("We do not endorse the proposition that all hearsay statements made by coconspirators are admissible."). Examples include: (1) the contents of the statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated, *United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003); (2) "The court must be satisfied that there was a conspiracy involving the declarant and the nonoffering party and that the statement was made in furtherance of the conspiracy[,]" *United States v. Diaz*, 248 F.3d 1065, 1087 n. 22 (11th Cir. 2001); (3) the statements must actually have been "made in the scope of, or in furtherance of, a conspiracy[,]" *United States v. Trujillo*, 146 F.3d 838, 844 (11th Cir. 1998), and the statements must be made by a co-conspirator, *United States v. Schlei*, 122 F.3d 944, 980 (11th Cir. 1997); and (4) "Statements which simply implicate one coconspirator in an attempt to shift the blame from another, however, cannot be characterized as having been made to advance any objective of the conspiracy. On the contrary, statements that implicate a coconspirator, like statements that 'spill the beans' concerning the conspiracy, are not admissible under Rule 801(d)(2)(E)[,]" *United States v. Blakely*, 960 F.2d 996, 998 (11th Cir. 1992).

In *James*, the predecessor court to the Eleventh Circuit recognized the problems posed by a multi-conspirator case, where at times hearsay from one co-conspirator can prejudice another co-conspirator. It first acknowledged and then fashioned a procedure (the *James* hearing) to deal with the reality that it is virtually impossible to avoid prejudice arising from the constant repetition of inadmissible statements simply by repeatedly instructing the jury that it may be asked to disregard a co-conspirator's statements at the close of the evidence:

> The admissibility of a coconspirator's declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge.

James, 590 F.2d at 579. Accordingly, *James* instructs trial courts to find predicate facts before admitting out-of-court co-conspirator statements unless there is some identifiable reason as to why such an exercise would be impractical:

> Both because of the "danger" to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a preferred order of proof in such a case. The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

James, 590 F.2d at 582.

Courts in the Eleventh Circuit have consistently acknowledged the efficacy of pretrial *James* hearings to test the government's proof prior to the admission of such evidence. *See e.g.*, *United States v. Pepe*, 747 F.2d 632, 647 (11th Cir. 1984) (In advance of a five (5) week jury trial, the "defendants, prior to the trial, requested that the court hold a *James* hearing, to determine the admissibility of the evidence the government intended to offer at trial. The court acceded to their request and scheduled the hearing…The *James* hearing lasted thirteen days.") (internal citation omitted); *see also United States v. Garcia*, 721 F.2d 721, 724 (11th Cir. 1983) ("[T]he district court held a pretrial *James* hearing [ ], based on the facts the government proposed to prove[.]"); *United States v. Richardson*, 694 F.2d 251, 255 (11th Cir. 1982) ("[I]n this case it would probably have been advisable to have held [a *James*] hearing, especially inasmuch as the trial court did not make a determination that a hearing would have been impractical."); and *United States v. Khoury*, 901 F.2d 948, 971 (11th Cir. 1982) (in which the Eleventh Circuit expressed a preference for a pretrial *James* hearing), citing *United States v. Lippner*, 676 F.2d 456 (11th Cir. 1982).

A *James* hearing is necessary "because of the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger." *James*, 590 F. 2d at 582. Here, the Government charges all 11 Defendants in Count One of the Indictment and also alleges that some unknown number of unindicted co-conspirators conspired with the Defendants charged in

Count One. The procedure requested herein is particularly appropriate in the case at bar for three reasons.

First, the complexity and potential length of trial in this case warrants a cautious approach to avoid the monumental waste of resources that would be occasioned by a mistrial. Second, the danger of inappropriately attributing the alleged statements of co-conspirators to Senator Ross is significant. The Indictment presents a vast conspiracy made up of at least eleven individuals. But, there is no indication in the Indictment or the discovery provided to Senator Ross that an actual conspiracy existed among *all* of the individuals. For instance, there is very little, if anything, that indicates some connection (much less a conspiracy) between Senator Ross, Defendant Jarrell W. Walker, Jr., or Defendant Ray Crosby.[3] A *James* hearing is the proper way to determine not only if a conspiracy existed amongst such individuals, but if the alleged statements were made during the course and in furtherance of the conspiracy and the declarations were made by someone who actually conspired with Senator Ross, instead of another Defendant in this case. Lastly, the prosecution's ability to bear its burden of establishing the overreaching

[3] The danger of inappropriately attributing the statements of alleged co-conspirators to Senator Ross is further heightened by the fact the Government has stated the alleged conspiracy also involved "other persons known and unknown to the Grand Jury." *See, e.g.,* Indictment ¶ 28. This case involves various individuals who have no apparent connection to each other such as a common employer. Instead, we are presented with a conglomeration of, *inter alia,* private business owners, lobbyists, political consultants, state employees and government officials. It can only be assumed the "known and unknown" uncharged co-conspirators are also from a wide-range of occupations and may not have any actual connection to all eleven Defendants.

conspiracy as alleged in the indictment amongst at least eleven individuals – some of whom who appear to have no connection to each other -- is doubtful.

Senator Ross respectfully submits that there will be numerous occasions at trial where the Court will be required to give limiting instructions arising from an alleged co-conspirator's testimony. There are numerous out-of-court statements likely to be introduced which make no mention of Senator Ross. Additionally, there will likely be out-of-court statements wherein Senator Ross's name is mentioned, but there is a wide chasm between the mere mention of his name and any inference of his actual agreement to knowingly and willingly engage in illegal conduct.

A co-conspirator's statements should be disclosed to a defendant if the government intends to use such declarations at trial as admissions attributable to the defendant. A *James* hearing will allow Senator Ross to know such statements that will be attributed to him through Rule 801(d)(2)(E) in advance of trial.

WHEREFORE, PREMISES CONSIDERED, Senator Ross respectfully requests that this Court enter an Order directing the Government to disclose, at a time reasonably in advance of a *James* hearing (if so ordered), any and all statements it intends to offer pursuant to Rule 801(d)(2)(E) during trial, and setting a pretrial *James* hearing to determine the admissibility of any such evidence.

Respectfully submitted,

/s/ H. Lewis Gillis
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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Mark Englehart
OF COUNSEL