IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CR No. 2:10cr186-MHT**
	)	
RONALD E. GILLEY, et al.,	)	**ORAL ARGUMENT REQUESTED**
	)	
Defendants.	)	

DEFENDANT RONALD E. GILLEY'S MOTION FOR A *JAMES* HEARING TO DETERMINE ADMISSIBILITY OF EXTRA JUDICIAL STATEMENTS OF ALLEGED CO-CONSPIRATORS

COMES NOW, Defendant RONALD E. GILLEY ("Mr. Gilley" or "Defendant"), by and through the undersigned counsel and respectfully moves this Honorable 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 extra judicial statements of alleged co-conspirators.[1] As grounds in support of this Motion, Mr. Gilley shows the following:

I. INTRODUCTION.

Mr. Gilley is charged in twenty-two (22) counts of a thirty-nine (39) count Indictment surrounding alleged conspiracy and bribery to influence legislation in the Alabama Legislature pertaining to electronic bingo.[2] The charges against Mr. Gilley 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 Two, Four, Five, Eight, Ten, and Thirteen) (*see* Indictment at 40 – 41, 42 – 44, 45 – 46, 47 – 48, and 50); honest services fraud and aiding and

[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.
[2] The Indictment also gives Mr. Gilley notice of criminal forfeiture. *See* Indictment at 64 (Ct. Doc. 3).

abetting under 18 U.S.C. §§ 1341, 1343, 1346, & 2 (Counts Twenty-Three through Thirty-Three) (*see* Indictment at 57 – 60); money laundering and aiding and abetting under 18 U.S.C. §§ 1956(a)(1)(B)(i) & 2 (Counts Thirty-Four through Thirty-Seven) (*see* Indictment at 60 – 62); and notice of criminal forfeiture under 18 U.S.C. §§ 982(a)(1) in the event of a conviction for money laundering as alleged in Counts Thirty-Four through Thirty-Seven (*see* Indictment at 64 – 65).

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 Mr. Gilley 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.

For a number of reasons, Mr. Gilley believes that 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 co-conspirators known and unknown, the complex nature of the allegations, as well as the voluminous discovery in this case, it is difficult for Mr. Gilley to identify which persons, not to mention which statements, will be offered by the Government, especially in light of the fact that these alleged unnamed co-conspirators whose identities, although known to the Government, have not been disclosed to the Defendants. For these reasons, Mr. Gilley respectfully submits that in order to prepare for trial properly and prevent unnecessary delay at trial, this Honorable 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.

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. Mr. Gilley respectfully submits that there will be numerous occasions at trial where the Court will be required to give such limiting instructions. There are numerous out of court statements likely to be introduced which make no mention of Mr. Gilley. Additionally, there is an entire classification of out of court statements wherein Mr. Gilley'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 engage in illegal conduct knowingly and willingly.

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.

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 statement 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).

Fed. R. Evid. 801(d)(2)(E). "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).

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).

The Government charges 11 Co-Conspirators 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. For example, the Government might rely on Ms. Jennifer Pouncy's testimony to prove that Mr. Gilley offered $2,000,000.00 in campaign contributions to Senator Preuitt. Jennifer Pouncy has said, however, that Mr. Jarrod Massey told her that Mr. Gilley would give Senator Preuitt $2,000,000.00 in campaign contributions.[3] *See* Indictment at ¶84; *see also* Plea Agreement of Jennifer D. Pouncy, September 14, 2010, at 4. This example is illustrative of one of many "preliminary questions of fact that the court must determine before a coconspirator's statement can be admitted." *United States v. West*, 142 F.3d 1408, 1414 (11th Cir. 1998), *vacated on other grounds*, 526 U.S. 1155 (1999). If the Government fails to meet its burden as to any of the elements of proof for admissibility of evidence pursuant to FRE 801(d)(2)(E), then the statement sought to be introduced is impermissible hearsay under Fed. R. Evid. 802.

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.").

[3] The Indictment itself does not state specifically whether Ms. Pouncy is a member of the conspiracy charged in Count One.

Among other examples of these limitations are the following: (1) the contents of the statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated, *Hasner*, 340 F.3d at 1274 (internal citations omitted); (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). Accordingly, Mr. Gilley makes the instant request for a pretrial *James* hearing.

WHEREFORE, premises considered, Mr. Gilley respectfully requests that this Honorable 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/ G. Douglas Jones
G. Douglas Jones
ASB-3880-s82g

OF COUNSEL:
Thomas J. Butler (ASB-7790-T75T)
Anil A. Mujumdar (ASB-2004-l65m)
Haskell Slaughter Young & Rediker, LLC
1400 Park Place Tower
2001 Park Place
Birmingham, AL 35203
Phone: (205) 251-1000
gdj@hsy.com

Sandra Payne Hagood (ASB-0360-S73H)
7660 Fay Avenue
Suite H-526
LaJolla, CA 92307
Phone: 858-245-5741
sandra@hagoodappellate.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this the 4th day of February, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

Louis V. Franklin, Sr.
Assistant U. S. Attorney
131 Clayton Street
Montgomery, Alabama 36104
Louis.franklin@usdoj.gov

Stephen P. Feaga
U.S. Attorney's Office
P.O. Box 197
Montgomery, AL 36101-0197
Steve.feaga@usdoj.gov

Peter J. Ainsworth
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Peter.Ainsworth@usdoj.gov

Eric Olshan
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Eric.olshan@usdoj.gov

Barak Cohen
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Barak.cohen@usdoj.gov

Brenda Morris
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Brenda.Morris@usdoj.gov

Emily Rae Woods
U.S. Department of Justice
Public Integrity Section
1400 New York Avenue-NW 12th Floor
Washington, DC 20005
Rae.woods@usdoj.gov

Joe Espy, III
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
jespy@mewlegal.com

William M. Espy
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
wespy@mewlegal.com

Benjamin J. Espy
MELTON, ESPY & WILLIAMS, PC
P.O. Box Drawer 5130
Montgomery, AL 36103
bespy@mewlegal.com

Fred D. Gray
Waiter E. McGowan
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 3610 1-0347
segall@copelandfranco.com

David Martin
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 3610 1-0347
martin@copelandfranco.com

Shannon Holliday
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 3610 1-0347
holliday@copelandfranco.com

Sam Heldman
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
sam@heldman.net

Stewart D. McKnight
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233
dmcknight@bddmc.com

Joel E. Dillard
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233
jdillard@bddmc.com

William J. Baxley
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 3523
bbaxley@bddmc.com

Brett M. Bloomston
Attorney at Law
1330 21st Way South, Ste 120
Birmingham, AL 35205
brettbloomston@hotmail.com

William N. Clark
Stephen W. Shaw
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
sws@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwise@aol.com

H. Lewis Gillis
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
hlgillis@tmgslaw.com

Latasha M. Nickle
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
lameadows@tmgslaw.com

Tyrone C. Means
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103
tcmeans@tmgslaw.com

J. W. Parkrnan, III
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com

Richard M. Adams
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
adams@parkmanlawfirm.com

William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Susan G. James & Associates
600 S. McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Samuel H. Franklin
Jackson R. Sharman, III
LIGHTFOOT, FRANKLIN
& WHITE, L.L.C.
The Clark Building
400 North 20th Street
Birmingham, AL 35203
sfranklin@lightfootlaw.com
jsharman@lightfootlaw.com

Joseph J. Basgier, III
Bloomston & Basgier
1330 21st Way South, Suite 120
Birmingham, AL 35235
joebasgier@gmail.com

John M. Englehart
Englehart Law Office
9457 Alysbury Place
Montgomery, AL 36117-6005
jmenglehart@gmail.com

Joshua L. McKeown
The Cochran Firm Criminal Defense-
Birmingham LLC
505 20th Street North
Suite 825
Birmingham, AL 35203
jmckeown@parkmanlawfirm.com

Jeffery Clyde Duffey
Law Office of Jeffery C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

/s/ G. Douglas Jones_____
OF COUNSEL