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**
	)	
LARRY P. MEANS,	)	
	)	
Defendants.	)	

MOTION AND BRIEF OF DEFENDANT LARRY P. MEANS FOR DISCLOSURE OF EVIDENCE PURSUANT TO RULE 801(d)(2)(E) AND FOR A *JAMES* HEARING

Comes now the Defendant, Larry P. Means, in the above-styled cause, and respectfully moves the Court to order the Government to disclose in advance of trial any evidence of alleged coconspirator statements, and to conduct a hearing pursuant to Rule 801(d)(2)(E) and United States v. James, 590 F.2d 575 (5th Cir. 1979), after the jury is sworn, but before the introduction of evidence, to assist the Court in deciding whether the Government will be permitted to offer any alleged coconspirator statements against Defendant, before any such statements are offered by the Government. As grounds for said motion, Defendant would show unto the Court the following:

1. According to Rule 801(d)(2)(E) of the Federal Rules of Evidence, a statement is not hearsay if it is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The Rule further states that "[t]he 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 . . . ." Rule 801(d)(2)(E), Federal Rules of Evidence.

2. In United States v. James, 590 F.2d 575, 580 (5th Cir. 1979), the old Fifth Circuit held that a declaration by one defendant is admissible against other defendants only when there is a "sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." The Court also held that admission of such statements should be evaluated by a judge, not a jury, and that "substantial, independent evidence of a conspiracy" is required for admissibility of the statement of a coconspirator. James, 590 F.2d at 581. The Court noted that the trial judge should, whenever "reasonably practicable" hold a pretrial hearing to determine the admissibility of coconspirator statements. Id. at 582.

3. In Bourjaily v. United States, 483 U.S. 171, 176 (1987), the United States Supreme Court held that the Government must prove the "preliminary facts relevant to Rule 801(d)(2)(E)" by a "preponderance of the evidence."

4. In order for the Government to be able to introduce coconspirator statements into evidence, the Court must find that the Government has proven, by a preponderance of the evidence, that (1) a conspiracy existed; (2) the declarant and defendant were members of the same conspiracy; and (3) the statement was made during the course of and in furtherance of the conspiracy. United States v. Schlei, 122 F.3d 944, 980 (11th Cir. 1997).

5. It is the "preferred practice" in the Eleventh Circuit for courts to conduct a

James hearing outside the presence of the jury, although it is not mandatory. United States v. Espino-Perez, 798 F.2d 439, 441 (11th Cir. 1986); but see United States v. Hewes, 729 F.2d 1302, 1312 (11th Cir. 1984). However, if the Government is to offer coconspirator statements, whether pretrial or during trial, it is still required to prove by a preponderance of the evidence the three-pronged test outlined in Schlei, supra. The Eleventh Circuit in United States v. Walker, 720 F.2d 1527, 1537 (11th Cir. 1983), warned that, although a pretrial or in camera hearing is not required under James, the failure to do so "raises the possibility of 'injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes.'" quoting United States v. Macklin, 573 F.2d 1046, 1049 FN3 (8th Cir. 1978). If the court does not conduct a James hearing but then "determines that the government has not met its burden, it holds the choice of either striking the evidence and giving a cautionary instruction to the jury or declaring a mistrial." Walker, supra; United States v. Gold, 743 F.2d 800, 814 (11th Cir. 1984). Conducting a James hearing outside the presence of the jury is also a practice which has been effectively utilized by the former Chief Judge of the United States District Court for the Northern District of Alabama. See United States v. Don Eugene Siegelman, et. al., 7:04-cr-00200-SLB-RRA-2 (Doc. #294).

6. A James hearing outside the presence of the jury would aid in reducing the risk that the jury will hear inadmissible evidence, as warned by the Eleventh Circuit in Walker, supra. Such a hearing also reduces the risk of a mistrial or the need for striking certain statements and giving cautionary instructions to the jury.

7. With each defendant there is a serious risk that if no pretrial James hearing is conducted it will be next to impossible to sort out which evidence actually should be considered applicable to some defendants and not others.

8. A James hearing outside the presence of the jury would best serve the interests of all parties and would serve the interests of justice as well.

9. A denial of this motion would deny Defendant his rights to due process, to a fair trial and to confront and cross-examine witnesses under the Fifth and Sixth Amendments to the United States Constitution. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004).

Dated this 4th day of February, 2011.

s/ William N. Clark
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following and all counsel of record electronically on this the 4th day of February, 2011.

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