UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

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

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

By motion filed pursuant to *United States v. James*[1] (doc. no. 507), Quinton T. Ross, Jr., requested a pretrial hearing for the purpose of determining the admissibility as to him of any extrajudicial statements of alleged co-conspirators. In that motion, Senator Ross set forth several grounds upon which he bases his request for (and, we believe, establishes his entitlement to) such a pretrial hearing. Senator Ross respectfully submits this memorandum to expand briefly upon some of those grounds.[2]

As noted in the motion, for an extrajudicial declaration by one defendant to be admissible against other defendants as a co-conspirator statement under Fed. R. Evid. 801(d)(2)(E), the government must establish by a preponderance of the evidence that a conspiracy existed, the conspiracy included the declarant and the defendant against whom the statement is offered, and the statement was made during the course and in furtherance of the conspiracy. *E.g., United States v. Hasner*, 340 F.3d 1261, 1274 (11th Cir. 2003).

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[1] 590 F.2d 575 (5th Cir. 1979) (en banc).

[2] Senator Ross does so without waiving any of the grounds asserted in that motion but not addressed further in this memorandum, and indeed expressly preserves and relies upon all grounds and arguments set forth either in the motion or this supporting memorandum.

Senator Ross does not contend that a pretrial hearing to determine the admissibility as to him of any alleged co-conspirator's statements is required. *James* itself and *James'* progeny clearly establish that such a hearing is ***not*** mandated. *See, e.g., James*, 590 F.2d at 582; *United States v. Van Hemelryck*, 945 F.2d 1493, 1498 (11th Cir. 1991) (determination as to admissibility "need not be made prior to trial"). There is only one absolute requirement regarding the timing of this determination: at the conclusion of all evidence, upon proper motion, the trial court is required to determine as a factual matter whether the Government has shown by a preponderance of evidence the three prerequisites of admissibility. *E.g., James*, 590 F.2d at 582.

The *en banc James* court itself noted procedural options, including allowing the trial court to provisionally admit such a statement "subject to being connected up," i.e., subject to the Government later satisfying its burden of proof as to the three prerequisites to admissibility. 590 F.2d at 582. But, the court advised that such a course ought not be followed unless the trial court determines "it is not reasonably practical to require the showing to be made before admitting the evidence." *Id.*

Instead, the "preferred order of proof" is for the trial court, "whenever reasonably practicable, [to] require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator." *Id.* That "preferred order of proof" was based on concerns that, notwithstanding any asserted undercutting of the *James* opinion[3], remain valid today. Specifically, the *James* court noted "the 'danger' to the defendant if the statement is not connected," more specifically the prejudice the

[3] For example, we acknowledge that *Bourjailly v. United States*, 483 U.S. 171 (1987), and the 1997 amendment to Fed. R. Evid. 801(d)(2)(E) overruled James' holding that the existence of the conspiracy was to be established by evidence independent of the co-conspirator's statement(s). *E.g., Hasner*, 340 F.3d at 1274.

defendant suffered "from the jury's having heard the inadmissible evidence." *Id.* And, acknowledging at least implicitly that limiting or cautionary instructions to the jury to disregard the evidence may be ineffective, the court stressed "the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger" of prejudice to the affected defendant. *Id.*

Senator Ross' counsel certainly acknowledges this Court's expressed misgivings at the most recent in-court proceeding[4] about a pretrial James hearing amounting to a time-consuming , second, "mini-trial," and about the rarity of pretrial James hearings in recent years; and, as a result, the Court's reluctance to order such a hearing.

That said, we respectfully deem at least one circumstance particularly significant here as to be worthy of special consideration in the Court's decision how to exercise his discretion in making the admissibility determination under Rule 801(d)(2)(E), at least as to Senator Ross. In short, as argued in support of Senator Ross' motion to sever, the facts alleged in the indictment actually charge the existence of multiple alleged conspiracies (most of them not alleged to include Senator Ross), not a single overarching conspiracy as asserted in Count 1. The indictment's allegation of multiple alleged conspiracies makes it a virtual certainty that the Government will offer as to Senator Ross the out-of-court statements of co-defendants or other alleged co-conspirators with whom (the Government's own evidence will show) Senator Ross did not conspire, or statements as to a different alleged conspiracy than the single conspiracy (relating, roughly, to the alleged sale of his own, personal vote in favor of "pro-gambling legislation") that the indictment's factual assertions actually claim he participated in.

[4] Specifically, the February 15, 2011 oral argument on defendants' motions to continue the trial.

Absent proof that a given statement was made by someone with whom Senator Ross allegedly conspired, ***and*** that the statement was made in furtherance of a conspiracy in which they both participated (as opposed to a different conspiracy, in which Senator Ross did ***not*** participate), such evidence would not be admissible as a co-conspirator statement as to Senator Ross. *See, e.g., United States v. Magluta*, 418 F.3d 1166, 1177-80 (11th Cir. 2005); *Hasner*, 340 F.3d at 1274. At that point the risks of prejudice to Senator Ross from the offer in front of the jury of such inadmissible evidence, upon which the *James* court based its "minimum standards for the admissibility of coconspirator statements," 590 F.2d at 583, and counseled in favor of a pre-introduction determination of admissibility, *id.* at 582, become fully realized and argue for such a pre-introduction determination..

To expand on the multiple conspiracies theme: The indictment in this case charges, in a single count (Count 1), a sole, massive, overarching conspiracy to corrupt the Alabama ***Legislature***. *See, e.g.,*, Indictment at ¶29 ("It was a purpose of the conspiracy for McGregor and Gilley to corruptly provide and offer to provide payments and campaign contributions, among other things of value, to members and staff of the Alabama Legislature[.]")

The substance of Count 1 tells a different story. Instead of a single, massive conspiracy in which all alleged conspirators, named and unnamed, conspired together to corrupt the Alabama ***Legislature***, there are multiple, distinct conspiracies in which certain groupings of co-conspirators are alleged to have conspired together to corrupt certain individual Alabama ***Legislators*** and staff. To see this, the Court need look no further than the groupings, by individual defendant and the three cooperating witness

legislators, of the overt acts in furtherance of the alleged conspiracy in Count 1. As these groupings evidence – particularly the lack of overlap or interrelationship among the acts, or especially many of the individual defendants – the alleged conduct charged actually consists of separate conspiracies.

If the indictment even arguably alleges an overall scheme, the best bet as a claimed overall scheme would be an agreement between co-defendants Milton McGregor and Ronald Gilley, in grossly oversimplified terms, to buy sufficient votes to pass what the indictment refers to as "pro-gambling legislation" in both houses of the Legislature.[5] The indictment further lumps all nine other defendants into -- and thus as knowingly joining and sharing -- that same, single, broad agreement.

As applied to Senator Ross, though, the indictment's facts show no interrelationship (no corrupt dealings, much less an agreement to pursue an unlawful objective) between Senator Ross and at least five of his alleged defendant co-conspirators (Larry Means, James Preuitt, Harri Anne Smith, Joseph Crosby, and Jarrell Walker). The facts reflect no joint dealing by Senator Ross with McGregor and Gilley together, nor any direct dealing by Senator Ross with Gilley at all (only allegedly indirectly, through defendant Jarrod Massey and "Lobbyist A").

The gravamen, and an essential element, of any conspiracy is an agreement to commit an unlawful act. *E.g., Chandler*, 388 F.3d at 805-06. "[T]he government must prove the existence of an ***agreement*** to achieve an unlawful objective and the defendant's ***knowing*** participation in that agreement." *Id.* at 806 (emphasis in original). "[P]roof of

[5] Or at least the Senate, although the legislation – which actually would simply have put the issue of the regulation and taxation of electronic bingo, in the form of a constitutional amendment, to the Alabama electorate for a vote – would not even be put to a popular vote without the concurrence of three-fifths of both houses.

knowledge of the overall scheme is critical to a finding of conspiratorial intent." *Id.* (emphasis in original). "Proof of a true agreement is the only way to prevent individuals who are not actually members of the group from being swept into the conspiratorial net." *Id.*

To show a single, overarching conspiracy, as opposed to several, similar, even broadly related conspiracies, there must be proof that the alleged conspirators shared the ***overarching common*** goal. And, with a wheel conspiracy as alleged here (where every co-conspirator are not alleged to have worked with all their co-conspirators), *see id.* at 807 (discussing the differences between "hub-and-spoke" and "rimless wheel" conspiracies), there must be proof that each individual defendant knew of the existence of other participants (besides himself and the "hub" or key central conspirators) in such an overall scheme. *Id.* at 808.

Stated differently, we assume as true for this motion that Senator Ross agreed to accept a "bribe" or "bribes" (as opposed to lawful campaign contributions[6]) from McGregor[7] and separately from Gilley.[8] To show a single conspiracy the indictment still would need to allege (at minimum) that Senator Ross (1) ***knew*** of ***other*** legislators (such as Senators Means, Preuitt, and/or Smith) and/or legislative staff (such as Mr. Crosby) accepting bribes for the ***same overall*** purpose (of buying enough votes to pass the alleged

[6] We have argued in great detail in support of each motion to dismiss that the indictment alleges as to Senator Ross no more than conduct that consists of soliciting and receiving lawful campaign contributions only. That conclusion follows from the absence of any factual allegations that show or support the existence of an explicit *quid pro quo*, i.e., "the payments are made in return for an explicit promise or undertaking by [Senator Ross] to perform or not to perform an official act," as is constitutionally required to make such a contribution ***un***lawful under (we believe) each of the statutes involved in this indictment. *E.g., McCormick v. United States*, 500 U.S. 257, 273 (1991).

[7] Whether directly, or indirectly through defendants Tom Coker or Bob Geddie.

[8] Indirectly through Massey and Lobbyist A.

"pro-gambling legislation"), *e.g., Fernandez*, 892 F.2d at 987; and then (2) ***agreed*** to the ***same overall*** purpose.[9] *E.g., Chandler*, 388 F.3d at 808; *see also, e.g., United States v. Ellis*, 709 .2d 688, 690 (11th Cir. 1983); *United States v. Nettles*, 570 F.2d 547, 551 (5th Cir. 1978); *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977) (all reversing convictions upon finding no agreement to the overall conspiracy).

But, the indictment is devoid of any factual allegations showing that Senator Ross allegedly agreed to anything beyond a conspiracy for sale of his own vote (although actually showing only that he solicited and received lawful campaign contributions). It certainly does not allege facts showing any knowledge of, much less participation in, any broader scheme involving anyone else's votes. The facts as alleged reflect Senator Ross requested each contribution on his own behalf. There are no overt acts or other well-pleaded facts that show otherwise.

Against this backdrop, the great risk that Senator Ross will be profoundly prejudiced by the jury hearing evidence that the Court later deems inadmissible as to ***him*** because not properly "connected up," and the equally great risk that any remedy short of mistrial – specifically including cautionary instructions – could not "un-ring the bell" or undo the jury's exposure to such inadmissible evidence (as to Senator Ross), both weigh

[9] Analogous considerations apply to the "honest services" fraud charges, where Senator Ross is not expressly connected with the specific acts comprising any of the 11 such counts (and may be implicitly connected with at most 1 of those 11 counts), see Indictment, ¶¶235-236, but instead is connected only through his alleged "knowingly devis[ing] and intend[ing] to devise a scheme and artifice to defraud." *Id.* ¶234. As with the conspiracy count, there are no facts alleged that would show his knowledge of, much less his knowing participation in, any such overarching scheme to defraud. Accordingly, Senator Ross would be subjected in a joint trial to admission of at least 11 counts worth of acts of wire or mail fraud by ***other*** defendants for which the Government would seek to hold ***him*** criminally liable, but without any facts showing his knowledge of and joinder in the overall scheme.

in favor of this Court employing some procedure that does not expose the jury to such evidence before a determination as to its admissibility has been made.[10]

To the extent that the Government argues, or the Court is concerned, that a *James* hearing or similar pre-introduction determination would involve duplication of effort or resources, the blame for any such duplication is properly laid at the feet of the Government. That's because the Government misjoined in one indictment and seek to try together defendants (specifically including Senator Ross), many of whom, according to the Government's own specific factual allegations in the indictment, have little or nothing (as least as to any alleged unlawful activity) to do with one another; and for trying to combine and try multiple (alleged) conspiracies as one huge (alleged) conspiracy. Indeed, to the extent the Government may cite efficiency and judicial economy to justify trying these unrelated defendants and separate conspiracies together – and by extension, proposing that all alleged co-conspirator statements ***first*** be offered in front of the jury, as to all defendants, with the Government "connecting up" each statement as to each defendant ***only later*** (as opposed to having a separate, less prejudicial, pretrial determination) -- its true motive is probably better captured by the Fifth Circuit's recognition that "the claimed 'efficiency' of a joint trial can be a surrogate for the reality that a joint trial of multiple defendants is simply to the advantage of the government."

[10] To the extent that the Government cites cases in which the Eleventh Circuit has approved, or at least found no error in, a trial court's provisional admission of alleged co-conspirator statements subject to the prosecution "connecting them up," such cases almost certainly do not involve factual situations in which the Government failed to prove the existence of a single conspiracy rather than multiple conspiracies, or to prove the single conspiracy charged – as happened in each of the cases Senator Ross cites above, each of which resulted on appeal in affirmance of a new trial, an order of a mistrial, or a judgment of acquittal, all of which involve much greater waste of time and resources than a pretrial or pre-introduction determination of admissibility.

United States v. Simmons, 374 F.2d 313, 318 (5th Cir. 2004) (addressing whether district court should have severed defendant for trial).

Perhaps more relevant, even though pretrial *James* hearings admittedly do appear to have become much less common in recent years, some trial courts in *James* jurisdictions continue to use procedures that seek to resolve admissibility issues before allowing introduction of the statements of alleged co-conspirators before the jury, sometimes in ways more streamlined than a full evidentiary hearing. *E.g., United States v. Borrego*, 2003 U.S. Dist. LEXIS 24955 (W.D. Tex. Dec. 11, 2003), at *2 (noting "James is not, however, a dead letter with respect to procedural matters in determining the existence of a conspiracy for purposes of" Fed.R.Evid. 801(d)(2)(E)), *4-5 (giving Government choice among alternate procedures); *United States v. Davis*, 1995 U.S. Dist. LEXIS 15031, *3-4 (E.D.La. Oct. 11, 1995) (ordering alternate procedure); *see, e.g., United States v. Salvatore*, 110 F.3d 1131, 1146 (5th Cir. 1997) (noting district court had required Government to submit evidence linking defendants to the charged conspiracy before the court conditionally ruled pre-trial there was "'at least enough evidence to keep the issue open through trial'"); *United States v Ricks*, 639 F.2d 1305, 1309 (5th Cir. Unit B 1981) (discussing alternate procedures for extra-jury hearing).

On a different point, to the extent that the Government relies on a presumption that a jury will follow a limiting or cautionary instruction, the former Fifth Circuit noted in this specific context of statements of alleged co-conspirators "the teaching of *James* that the improper admission of hearsay to the prejudice of the defendant can rarely be eliminated by curative or cautionary instructions." *Ricks*, 639 F.2d at 1309. Likewise, the Supreme Court, in addressing claims (involving analogous concerns) of prejudicial

joinder from the denial of severance, recognized that a limiting instruction may not suffice to undo prejudice where the risk of prejudice to the defendant from an improper joint trial is high, *Zafiro v. United States*, 506 U.S. 534, 539 (1993) – just as the facts as alleged in the indictment here show a high risk of such prejudice to Senator Ross too. And, in at least some of the "multiple conspiracy" cases cited above in which alleged co-conspirator statements that the district court admitted were later deemed ***in***admissible as to a particular defendant, the jury improperly convicted that defendant notwithstanding being given cautionary or limiting instructions. *See, e.g., Chandler*, 388 F.3d at 813; *Pedrick*, 181 F.3d at 1271-73.

In short, if the Court in this case provisionally allows the Government to introduce in front of the jury statements of alleged co-conspirators, subject to the Government connecting them up later to each defendant (including Senator Ross), Senator Ross faces significant risk in a joint trial that such evidence, even if properly admitted as to ***other*** defendants, will be deemed ***in***admissible as to ***him***; and the jury, after already having heard the evidence, will be asked to "un-ring the bell" as to Senator Ross. In such circumstances, the need for a pretrial or at least pre-introduction determination of admissibility is much more pressing; and an ounce of prevention – in the form of such a determination – is worth a pound of cure.

For these reasons, as well as those set forth in his motion, Senator Ross respectfully requests the Court exercise its discretion to hold a *James* hearing or alternatively adopt another procedure to make a pretrial or pre-introduction determination of the admissibility as to Senator Ross of all extrajudicial statements of alleged co-conspirators.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd 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 the following:

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