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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CR. NO. 2:10cr186-MHT**
	)	
MILTON M. McGREGOR,	)	
RONALD E. GILLEY	)	
THOMAS E. COKER,	)	
ROBERT E. GEDDIE, JR.,	)	
LARRY P. MEANS,	)	
JAMES E. PREUITT,	)	
QUINTON T. ROSS, JR.,	)	
HARRI ANNE H. SMITH,	)	
JARRELL W. WALKER, JR.	)	
and	)	
JOSEPH R. CROSBY	)	

UNITED STATES' RESPONSE TO DEFENDANTS MEANS, GILLEY, COKER, AND ROSS' MOTIONS FOR JAMES HEARING AND FOR DISCLOSURE OF 801(d)(2)(E) EVIDENCE

COMES NOW the United States of America, through undersigned counsel, and hereby files its Response to Defendants Means, Gilley, Coker, and Ross' Motions for, among other things, a James Hearing and disclosure of Rule 801(d)(2)(E) evidence (hereinafter, collectively, the "Motions"). The Motions should be denied. Defendants request broad and sweeping relief, which will only unnecessarily waste the parties' and the Court's resources and complicate the pre-trial proceedings. The requested James pre-trial hearing is an antiquated, clumsy, and time-consuming procedure which, not surprisingly, is no longer practical in this Circuit. To the extent that any relief is necessary (and the United States contends that no requested relief is required or justified), the government proposes a much simpler, efficient, and streamlined approach, which can be accomplished at trial and is now the prevailing practice.

As grounds to support its position, the United States submits the following:

I. The Sweeping Relief that Defendants Seek, Including A Pretrial James Hearing, Is No Longer the Common Practice in this Circuit and Is Not Necessary

Defendants have requested broad pre-trial relief, which should be denied. Collectively, Defendants request that the government be ordered:

- To disclose co-conspirator nonhearsay evidence prior to trial; and
- Prove at a pre-trial hearing the admissibility of that evidence.[1]

In support of these requests, Defendants primarily rely on United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied 442 U.S. 917 (1979), overruled in part by Bourjaily v. United States, 483 U.S. 171, 182 (1987).[2] James, however, does not require the government to do any of the aforementioned requests, nor does it require the Court to hold a pretrial hearing to establish the admissibility of co-conspirator statements at trial.[3]

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[1]Defendant Means ask this Court to conduct the James Hearing after the jury is sworn, but before the introduction of evidence. See Means' Mot. at 1.

[2] Defendants' complaints about a possible Confrontation Clause issue are without merit. See, e.g., Means' Mot. at 4 (alleging a possible violation of "his right to confront witnesses and cross-examine witnesses under the Fifth and Sixth Amendments of the United States Constitution" and citing Crawford v. Washington, 541 U.S. 36 (2004)). The Supreme Court already addressed this issue in Bourjaily v. United States, 483 U.S. 171, 182 (1987) (ruling that the admission of statements of a co-conspirator made during the course and in furtherance of the conspiracy did not violate the confrontation clause because "the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under . . . Roberts, a court need not independently inquire into the reliability of such statements"). Defendant Means' reliance upon Crawford for support of his Motion is completely misplaced since the Supreme Court in that case addressed the admissibility of testimonial statements of witnesses and in no way spoke to the admissibility of, or procedure for reviewing the admissibility of, co-conspirator statements. See Crawford, 541 U.S. at 59.

[3]Indeed, the Eleventh Circuit has noted that parties frequently misunderstand or misconstrue James. See, e.g., United States v. Hewitt, 663 F.2d 1381, 1388 (11th Cir. 1981) ("[The defendant's] legal argument reflects a misconception about our James decision of a type that is becoming disturbingly prevalent in recent criminal cases."); United States v. Hewes, 729

First, it is plain that a pretrial James hearing is not mandatory. See United States v. Allison, 908 F.2d 1531, 1534 n.2 (11th Cir. 1990) reh'g denied 920 F.2d 13, cert. denied, 500 U.S. 904 (1991) (rejecting defendant's claim that he was "entitled to a James hearing prior to admission" of the co-conspirator statement, and holding that a district court "can admit the statements subject to the government later connecting them up 'with sufficient evidence'")(quoting United States v. Barshov, 733 F.2d 842, 850 (11th Cir. 1984), cert. denied, 469 U.S. 1158 (1985)); United States v. Lippner, 676 F.2d 456, 464 (11th Cir. 1982)("We have never mandated such a hearing. . . . "); United States v. Khoury, 901 F.2d 948, 971 (11th Cir. 1990). "A James hearing is a prophylactic procedure fashioned by this circuit to enable a district court to determine in advance of trial, before the jury is sworn and jeopardy attaches, the admissibility of co-conspirator statements to prove the truth of the matter asserted." United States v. Santarelli, 778 F.2d 609, 611 n.3 (11th Cir. 1985)(citations omitted). Furthermore, it is not reversible error to fail to hold a James hearing. United States v. Miller, 664 F.2d 826, 828 (11th Cir.1981)(adopting United States v. Ocanas, 628 F.2d 353, 359-60 (5th Cir.), reh'g denied, 633 F.2d 582 (1980), cert. denied, 451 U.S. 984 (1981)).

Instead, what the Eleventh Circuit requires is that "for testimony to be admissible under the 'co-conspirator exception' to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), it must appear by the close of the evidence that the government has shown by a preponderance of the evidence . . . that: a conspiracy existed; the defendant and the declarant were members of that conspiracy; and the statements were made during the course and in furtherance of the conspiracy." Hewitt, 663 F.2d at 1388 (emphasis added)(citations and footnote omitted and ellipse omits portion of the James rule

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F.2d 1302, 1312 (11th Cir.), reh'g denied 734 F.2d 1481 (1984) and cert. denied sub. nom., Caldwell v. United States, 469 U.S. 1110 (1985)("The appellants have succumbed to a common misunderstanding of James.").

that has been overruled). The Eleventh Circuit has noted that trial courts may accomplish this objective in one of two ways - either through a pre-trial hearing or by admitting the statement at trial, subject to it being "connected up" later during trial. See, e.g., Hewes, 729 F.2d 1312. For the reasons provided infra, the United States asserts that the latter option is the better method for this case.

A. Due to a Change in the Law, James Pre-Trial Hearings Are Now Antiquated and Unnecessary

While the Court in James suggested that a pre-trial hearing would be an appropriate or "preferred" way for a judge to resolve the issue of the admissibility of co-conspirator statements, such pre-trial hearings are no longer common. Several changes in the law have led to the demise of James pre-trial hearings. When James was decided, controlling precedent prohibited the admission of co-conspirator statements unless the government could prove the existence of the conspiracy via (1) substantial evidence that was (2) independent of the co-conspirator statement itself. See, e.g., United States v. Monaco, 702 F.2d 860, 876 (11th Cir. 1983). The substantial independent evidence standard was considered higher than the general preponderance of the evidence standard. See United States v. Chestang, 849 F.2d 528, 531 n.3 (11th Cir. 1988). In 1987, however, the Supreme Court in Bourjaily v. United States, 483 U.S. 171 (1987), effectively abolished both of these requirements. Now, trial courts (1) "may examine the hearsay statements sought to be admitted" when considering if a conspiracy existed, id. at 177; United States v. Van Hemelryck, 945 F.2d 1493, 1498 (11th Cir. 1991), and (2) only need find that the conspiracy existed by a preponderance of the evidence. Id. at 176; Chestang, 849 F.2d at 531 n.3 (noting that under James "preliminary facts . . . had to be proven by "substantial evidence . . . .", but that after Bourjaily, these "facts need only be proven by a

'preponderance of the evidence.'"). Moreover, the Eleventh Circuit has always applied a liberal standard in deciding if a statement was made in furtherance of a conspiracy. See United States v. Byrom, 910 F.2d 725, 735 (11th Cir. 1990). Cases after Bourjaily have noted that Bourjaily further "amplified this liberal standard." Id.

Because these changes have made it considerably easier to establish a conspiracy prior to admission of a co-conspirator statement, James pre-trial hearings are now unnecessary, rather than the general rule as Defendants appear to suggest. As one commentator predicted, in light of Bourjaily, the James "concern that the jury not be exposed to the content of the co-conspirator's statement lest it ultimately be excluded because of the absence of an adequate evidentiary foundation should all but completely disappear." 30B Michael H. Graham, Federal Practice & Procedure, § 7025, at p. 268 (1997). Thus, while this Court certainly has the discretion to order a James pre-trial hearing, United States v. Padilla-Martinez, 762 F.2d 942, 950 (11th Cir.), cert denied sub. nom. Cardenas-Montilla v. United States, 474 U.S. 952 (1985), the United States submits that such a hearing is not necessary given the change in the law since James was decided. Establishing the existence of a conspiracy and the admissibility of co-conspirator statements is much easier now than pre-Bourjaily resulting in the near extinction of James pre-trial hearings.

B. A James Pre-Trial Hearing Would Be a Time-Consuming and Unnecessary Mini-Trial

A second, more practical reason counsels against this Court ordering a James pre-trial hearing. Given the charges against Defendants and the number of potential exhibits and witnesses that could be introduced or called in this case, a pre-trial hearing of the nature Defendants request would be wasteful, clumsy, cumbersome, and time-consuming. United States v. Hawkins, 661 F.2d

436, 450 (5th Cir. 1981), reh'g denied 673 F.2d 1324 (5th Cir. 1982) ("Given the sheer volume of the evidence as well as the large number of Government witnesses, the trial court reasonably concluded the holding of a separate James hearing was impracticable."); United States v. Marquardt, 695 F.2d 1300, 1304 (11th Cir.), cert. denied 460 U.S. 1300 (1983) (citing Lippner, 676 F.2d at 464) (noting that "the trial court was well within its discretion in refusing to hold a James hearing, which would have been duplicative of the trial itself and would have 'wasted the judicial resources James was designed to conserve'"); United States v. Ricks, 639 F.2d 1305, 1309 (5th Cir. Unit B 1981) (James hearing "can be clumsy."). Based upon the estimates of other courts who have held such hearings in similar cases, a pre-trial James hearing in this case could realistically consume several days – time spent receiving evidence from witnesses and documents that would have to be repeated at trial. See United States v. Pepe, 747 f.2d 632, 647 (11th Cir. 1984)(noting that "James hearing lasted 13 days"); United States v. Barone, 83 F.R.D. 565, 566 (S.D. Fla. 1979) ("Because of the number of defendants charged with conspiracy and the volume of evidence, this procedure consumed between five and six days.").

Instead of a cumbersome and inefficient James pre-trial hearing, this Court should adopt a much simpler, more efficient solution. "A judge may mold to the circumstances of each case the procedures for showing that a conspiracy existed if he finds a hearing not reasonably practical." Miller, 664 F.2d at 828. Rather than holding a mini-trial on this case, the Court should "admit the statements subject to the government later 'connecting them up' with sufficient independent evidence." United States v. Barshov, 733 F.2d 842, 850 (11th Cir. 1984), cert. denied, 733 F.2d 842 (1985)(citing James, 590 F.2d at 582). This simpler approach is permissible under James and may, contrary to Defendants' erroneous contentions, see e.g., Means Mot. at 2-3, certainly be done in the

presence of the jury."

Permitting the United States to establish the admissibility of co-conspirator statements during its case-in-chief is entirely consistent with the anticipated procedure of the upcoming trial. The United States fully expects Defendants to make motions under Rule 29 challenging the sufficiency of the government's evidence to prove their guilt. To respond to Defendants' Rule 29 motions, the United States will have to summarize its evidence and explain why a reasonable juror could find Defendants guilty beyond a reasonable doubt. This stage of the proceedings would also be the optimal opportunity of the United States to connect up, and for the Court to consider, all the testimony and exhibits which establish the admissibility of all co-conspirator statements. See United States v. Correa-Arroyave, 721 F.2d 792, 794 (11th Cir. 1983), reh'g denied, 727 F.2d 1116 (11th Cir. 1984) (permitting the government to make a "proffer" of the evidence establishing the admissibility of the co-conspirator statements at the conclusion of its case-in-chief). The United States also expects that the requirements for the admissibility of any co-conspirator statement, including each Defendant's participation in the conspiracy, will be readily apparent from the evidence presented in its case-in-chief. See Hawkins, 661 F.2d at 449-50 & nn.37-38 (noting that the structure of the government's case-in-chief established the defendant's connection to the conspiracy prior to the offering of any co-conspirator statement).

Further, at the conclusion of the trial, this Court will instruct the jury as to what evidence it may consider as to each Defendant, including the admissibility and applicability of any co-conspirator statement. See United States v. Kopituk, 690 F.2d 1289, 1320 (11th Cir. 1982), cert. denied, 461 U.S. 928, and cert. denied, 463 U.S. 1209 (1983) (citations omitted)(noting the efficacy of "a clear cautionary instruction from the trial court as to the duty of jurors to consider each

defendant and the evidence against him . . . separately"); United States v. Houle, 237 F.3d 71, 76 (1st Cir.)(quotations and citations omitted), cert. denied, 532 U.S. 1074 (2001)(noting that "the district court took adequate measures to safeguard against the possibility of spillover prejudice by repeatedly instructing the jury to consider the evidence separately as to each defendant"). Jurors in this District are presumed to be, and actually are, fully competent to obey this Court's instructions on the admissibility of particular evidence as to a particular Defendant. United States v. Blankenship, 382 F.3d 1110, 1123 (11th Cir. 2004), cert. denied, __ U.S. __, 126 S.Ct. 42 (2005)("[I]n general, the strong presumption is that jurors are able to compartmentalize evidence by respecting limiting instructions specifying the defendants against whom the evidence may be considered."); Zafiro v. United States, 506 U.S. 534, 540-41 (1993)("'[J]uries are presumed to follow their instructions"')(quoting Richardson v. Marsh, 481 U.S. 200, 211 (1987)). A James pre-trial hearing would require this Court to perform many of the same tasks it will be required to do at the conclusion of the case.

Rather than being necessary to ensure proper admission of co-conspirator statements at trial, a James pre-trial hearing in this case would instead serve only to grant Defendants an unfair preview of the government's case-in-chief.[4] Indeed, such a purely tactical advantage appears to be Defendants' aim in filing the instant Motion: Defendants have explicitly argued that they need to

[4]See United States v. Barrentine, 591 F.2d 1069, 1077 (5th Cir.) reh'g denied 599 F.2d 1054, cert. denied 444 U.S.990 (1979) (noting the lack of a requirement that "'the prosecution must reveal before trial the names of all witnesses who will testify unfavorably'") (quoting Weatherford v. Bursey, 429 U.S. 545, 559 (1977)); United States v. Kilrain, 566 F.2d 979, 985 (5th Cir.) reh'g denied 569 F.2d 1155, cert. denied 439 U.S. 819 (1978) (citation omitted) (holding that "defendants are not entitled to discover all the overt acts that might be proved at trial"); United States v. Pena, 542 F.2d 292, 294 (5th Cir. 1976) (citation omitted) (recognizing that a defendant has "no right" to a list of the government's possible witnesses at trial).

know co-conspirator statements in advance of trial. Ross Mot. at 7. The United States has already provided Defendants with much more information than the Constitution and Federal Rules of Criminal Procedure require at this point in the proceedings. For example, the United States has already provided Defendants with consensual recorded conversations obtained during the investigation, pertinent calls intercepted during the wiretap that was utilized during the investigation, as well as Jencks Act material (e.g., transcripts of witnesses that appeared before the grand jury) though the United States is not required to produce such information until a particular witness has testified in the government's case-in-chief. See Fed. R. Crim. P. 26.2; 18 U.S.C. § 3500. For Defendants, such liberal discovery is not enough, they insist on knowing the United States' theories, strategies, and evidence, and are seeking to obtain the same through a James pre-trial hearing.

This Court routinely tries criminal cases involving conspiracy counts and is often confronted with co-conspirator statement issues. On information and belief, the United States is not aware of any criminal case tried in this District in the past ten years in which this Court has held a James hearing. Certainly, no aspect of this case compels this Court to deviate from the standard practice it routinely employs in conspiracy cases which is to receive any co-conspirator statement during the government's case-in-chief and require the government to connect it up prior to the close of its case. See, e.g., United States v. Carmichael, 379 F.Supp.2d 1299, 1301 (M.D.Ala. 2005) (Thompson, J.) (Large, complex drug case in which "the court, in its discretion, admitted the out-of-court statements of co-conspirators before all evidence of the conspiracy had been received.")[5]

[5]In the event that the Court elects to grant Defendants' request for a James hearing, the only appropriate time for having it would be as close to trial as possible, but prior to the empaneling of the jury. Several reasons support such a decision. First, if a James hearing were conducted after the jury was empaneled as Means suggests, Means' Mot. at 1, then jeopardy would attach, and the United States would be precluded from obtaining appellate review of an

III. Conclusion

A James pre-trial hearing is an antiquated, clumsy, and inefficient procedure, that is particularly unnecessary in this case. This Circuit and District have dispensed with James pre-trial hearings in the overwhelming majority of cases because this procedure does not conserve judicial resources, streamline the judicial process, nor assist the Court in ruling on the admissibility of co-conspirator statements. The much more accepted and beneficial practice is to permit the government to conduct its case-in-chief during which it will satisfy the requirements of admissibility under Rule 801(d)(2)(E). At the conclusion of the government's case, this Court will be in the optimal position to rule upon the admissibility of co-conspirator statements and be prepared to instruct the jury as to what evidence it may consider in determining Defendants' guilt.

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adverse ruling. See 18 U.S.C. § 3731. Furthermore, this time frame is also appropriate to prevent the Defendants from obtaining impermissible discovery from a James hearing, including the names of probable prosecution witnesses and substance of their testimony. Cf. United States v. Colson, 662 F.2d 1389, 1391 (11th Cir.1981) (criminal defendant has no absolute right to a list of the government's witnesses in advance of the trial); Fed. R. Crim. P. 15 (requiring "exceptional circumstances" to conduct depositions). Finally, requiring the United States to identify and produce any and all possible Rule 801(d)(2)(E) evidence in this case prior to trial would place an undue burden on the government and unnecessarily hamper its trial preparation.

Respectfully submitted this the 22nd day of February, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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.

Respectfully submitted,

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