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

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

UNITED STATES' MEMORANDUM OF LAW REGARDING APPLICABILITY OF *BRUTON* TO TESTIMONY OF FBI SPECIAL AGENT GLASER

The government submits this memorandum of law in answer to objections raised by defense counsel regarding whether FBI Special Agent George Glaser's testimony has run afoul of the defendants' Sixth Amendment right to confrontation, as articulated in United States v. Bruton, 391 U.S. 123 (1968). For the reasons that follow, the government submits that no Bruton violation occurred during Special Agent Glaser's abbreviated testimony this afternoon and, as such, the defendant's objections should be overruled.

I. LEGAL STANDARDS

In Bruton, the Supreme Court held that in a joint trial, the admission of out-of-court statements made by one co-defendant to law enforcement officers violated the accused's Sixth Amendment right of confrontation. There, the co-defendant confessed to the police that he and the petitioner had committed an armed robbery together. 391 U.S. at 123. Because the co-defendant

never took the witness stand, the Court held that the admission of the co-defendant's statement at trial violated the petitioner's constitutional right to cross-examine his accuser. Id. at 126.

The Bruton rule, however, is not violated where the co-defendant's out-of-court statements do not facially incriminate any of the other defendants. Although the Confrontation Clause guarantees a defendant the right "to be confronted with the witnesses against him," the defendants' Sixth Amendment rights would not be affected if the out-of-court statements were not directed against them. Cf. Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("[T]he Confrontation Clause is not violated by the admission of a nontestifying co-defendant's confession with a proper limiting instruction when . . . the confession [omits] any reference to [the defendant's] existence.").

In other words, only the admission of a "powerfully incriminating extrajudicial statement" of a non-testifying co-defendant would offend a defendant's Sixth Amendment right to confront and cross-examine an adverse witness. Bruton, 391 U.S. at 135-36. This Circuit has recently held that "[a] statement is 'powerfully incriminating' under Bruton if it directly implicates the defendant." United States v. Turner, 474 F.3d 1265, 1277 (11th Cir. 2007) (citing United States v. Beale, 921 F.2d 1412, 1425 (11th Cir. 1991)).

Appellate courts – including the Supreme Court – have consistently held that any alleged Bruton error is harmless where the erroneously admitted evidence "is merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury. Brown v. United States, 411 U.S. 223, 231 (1973); see also United States v. Lage, 183 F.3d 374, 388 (5th Cir. 1999); United States v. Wilson, 116 F.3d 1066, 1083-84 (5th Cir. 1997) (finding Bruton violation harmless beyond a reasonable doubt because the erroneously admitted evidence was "merely cumulative"); United States v. Gillam, 167 F.3d 1273, 1277 (9th Cir. 1999) (same); United States v. Smith, 46 F.3d

1223, 1229 (1st Cir. 1995) (concluding that a statement cumulative of other evidence "could not have produced Bruton error.").

In United States v. Celestin, 612 F.3d 14 (1st Cir. 2010), appellant Jude Celestin appealed his conviction for bank fraud and conspiracy to commit bank fraud. Celestin had been tried jointly with another co-conspirator, Ducarmel Edouard. Edouard did not testify, but his confession to law enforcement officers was read to the jury, stating in full that:

> I met [co-conspirator] Burdley Jean at the 3C Nightclub on Blue Hill Ave. BJ asked if were interested in cashing counterfeit checks, to which I agreed. In 2003, I cashed four checks and remember cashing a counterfeit check in Tewksbury. I remember visiting Burdley at his address on Ashmont Street in Dorchester. Burdley accompanied me during the cashing of the counterfeit checks. In 2004, I again agreed to cash counterfeit checks for Burdley. Burdley proceeded to give me the checks and I went on to cash them on my own and after each bank withdrawal, I would meet Bradley, relinquish the money, and receive up to 20 percent of the funds. I accept full responsibility for counterfeit checks in viewed surveillance pictures of me.

Id. at 19-20.

The First Circuit noted that the confession did not make explicit reference to Appellant Celestin, nor did it "implicate Celestin directly, nor did it suggest any connection between Celestin and the conspiracy or even that others beyond Jean and Edouard were involved." Id. at 20. Celestin argued, nonetheless, as the defendants argue here, "that the confession was powerfully incriminating insofar as its admission demonstrated the existence of a conspiracy to commit bank fraud, effectively lowering the government's standard of proof." Id.

The First Circuit rejected that argument, concluding that "Edouard's confession is incriminatory as to Celestin, if at all, 'only when linked to other evidence' of Celestin's participation in the conspiracy and, therefore, Bruton is not implicated." Id. (citing United States v. Vega Molina, 407 F.3d 511, 520 (1st Cir. 2005)).

Similarly, in United States v. Rodriguez-Duran, 507 F.3d 749 (1st Cir. 2007), the appellate court, in rejecting a Bruton claim, held that:

> Bruton, however, applies only to a statement that is inculpatory on its face. Statements that are incriminating only when linked to other evidence in the case do not trigger application of Bruton's preclusionary rule.

Id. at 769 (internal citations and quotations omitted).

II. DISCUSSION

A. *Bruton* Does Not Bar the Government From Charging a Multi-Defendant Conspiracy In Addition to a Separate, Related False Statement Count

As the Court is aware, in this case, all nine defendants are charged in Count 1 of the Indictment with conspiracy to commit federal programs bribery, in violation of 18 U.S.C. §§ 371 and 666. Defendant James Preuitt is charged alone in Count 38 of the Indictment with making a false statement to the FBI, in violation of 18 U.S.C. § 1001. The fact that the defendants are charged together in a conspiracy in one count and that defendant Preuitt is charged alone in a separate false statements count does not, per se, run afoul of Bruton. There is little question that these charges can be brought together in a single indictment, and that the government is entitled to prove those charges to the jury beyond a reasonable doubt, so long as the limitations articulated in Bruton are adhered.

Indeed, defense counsel knew all along that the government intended to call Special Agent Glaser for the purpose of proving Count 38 of the Indictment, and no objections were lodged prior to Agent Glaser taking the stand. Moreover, counsel for defendant Robert Geddie, in raising his Bruton objection this afternoon, himself acknowledged that there would not be a Bruton issue had Agent Glaser adhered strictly to the false statement count charged in Count 38. See 7/19/11 Tr. at 39 ("The reason that I thought that the witness was called was on the false statement count that's lodged against only Mr. Preuitt they left that point and of course his saying no, nobody offered him

anything of value in exchange nor a vote, that certainly wasn't objectionable to any of the defendants. But they left that.") (emphasis added).

Therefore, the **only** issue that the Court needs to resolve is whether – in the few instances where Agent Glaser's testimony supplemented facts necessary to establish the false statements count – that supplemental testimony ran afoul of Bruton.

B. Special Agent Glaser's Testimony That Supplemented Defendant Preuitt's False Statements Does Not Run Afoul of *Bruton*

The government has identified only **one** instance in which Agent Glaser's testimony went beyond the confines of proving that he had made false statements to the FBI, for purposes of Count 38. That exchange is as follows:

Q: And do you know or did you know at the time whether Mr. Gilley was associated with Bama Jam?

A. My understanding was and is that he's the CEO or organizer of that event.

Q: Did Mr. Preuitt say anything about Bama Jam during the interview?

A: Mr. Preuitt indicated that during the prior year he had attended Bama Jam and specifically noted that he had not met Mr. Gilley at Bama Jam.

Q: During the course of the meeting, did Mr. Preuitt say whether he had talked with Ronnie Gilley about Senate Bill 380?

A: He said that he had had a conversation with Gilley, specifically after the legislation passed. He had spoken to Mr. Gilley on Harri Anne Smith's cell phone. She had been speaking to [not transcribed]. I will after the vote and handed the phone to Mr. Preuitt. Mr. [Preuitt] then talked to Mr. Gilley briefly. Gilley thanks him for his support of the bill.[1]

[1] Agent Glaser's FBI 302 of Senator Preuitt, dated April 1, 2010, notes: "Preuitt also spoke to Gilley just after the senate vote on Tuesday. Gilley thanked Preuitt for his support. Harri Ann Smith was speaking to Gilley on her mobile phone and handed the phone to Preuitt. Preuitt spoke to Gilley for about a minute.

Nothing about this exchange runs afoul of Bruton. Agent Glaser's testimony – regarding (1) Senator Preuitt's attendance at Bama Jam and (2) the fact that Senator Preuitt had spoken to Mr. Gilley on Senator Smith's cell phone after the vote – is not a "powerfully incriminating extrajudicial statement." Bruton, 391 U.S. at 135-36. These statements do not directly implicate any of the defendants, and, in fact, do not even refer by name to eight of the nine defendants. See Turner, 474 F.3d at 1277 ("[a] statement is 'powerfully incriminating' under Bruton if it directly implicates the defendant"); Celestin, 612 F.3d at 20 (rejecting Bruton claim, inter alia, because statement at issue did not make explicit reference to the appellant). The incriminating value of this brief exchange during Agent Glaser's testimony, if any, would be limited to arguments that could be cobbled together through other pieces of evidence presented during this trial. However, federal appellate courts have expressly held that Bruton applies only to a statement that is inculpatory on its face. See Rodriguez-Duran, 507 F.3d at 769. Bruton is not triggered where, as here, statements can be viewed as incriminatory "only when linked to other evidence in the case." Id.; see also Celestin, 612 F.3d at 20.

At best, the only potentially incriminating value of Agent Glaser's testimony would be to corroborate other evidence presented during this trial that there was an exchange after the SB380 vote, in which Harri Anne Smith was talking with Ronnie Gilley, handed her cell phone to Senator Preuitt, and instructed that Gilley thank Senator Preuitt for voting favorably on the bill. However, Agent Glaser's testimony on this point is merely cumulative of a plethora of evidence that the jury has already heard on this fact. For example, Mr. Gilley testified at length about this exchange. And, more importantly, that call was wiretapped and was played for the jury during Mr. Gilley's testimony. Substantial evidence of this call – including the recorded call itself – has already been

introduced in this case. Agent Glaser's testimony on this point would no doubt be cumulative; therefore, Bruton is simply not applicable. See Brown v. United States, 411 U.S. at 231 (Bruton error is harmless where the erroneously admitted evidence "is merely cumulative of other overwhelming and largely uncontroverted evidence properly before the jury."); see also Lage, 183 F.3d at 388; Wilson, 116 F.3d at 1083-84 (finding Bruton violation harmless beyond a reasonable doubt because the erroneously admitted evidence was "merely cumulative"); Gillam, 167 F.3d at 1277 (same); Smith, 46 F.3d at 1229 (concluding that a statement cumulative of other evidence "could not have produced Bruton error.").

III. CONCLUSION

For the foregoing reasons, no Bruton violation occurred, and the Court should overrule the defendant's objections.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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 attorneys of record.

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