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

UNITED STATES, **Plaintiff,** **v.** **JARRELL W. WALKER, JR.,** **Defendants.**	**CASE NO. 2:10-cr-00186-MHT-WC**

DEFENDANT JARRELL W. WALKER, JR.'S MEMORANDUM OF LAW IN SUPPORT OF ORAL OBJECTIONS TO THE TESTIMONY OF SPECIAL AGENT GEORGE E. GLASER AND RESPONSE TO THE UNITED STATES' MEMORANDUM OF LAW REGARDING APPLICABILITY OF BRUTON TO GLASER TESTIMONY

Defendant Jarrell W. Walker, Jr. respectfully submits this memorandum of law in support of his oral objections to the testimony of FBI Special Agent George E. Glaser during the United States' direct examination on July 19, 2011, in response to the United States' *Memorandum of Law Regarding Applicability of* Bruton *to Testimony of FBI Special Agent Glaser* (Doc. No. 1476), and pursuant to the Court's direction that the parties address the application of Federal Rule of Evidence 801(d)(2)(E) to Special Agent Glaser's testimony on July 20, 2011.

I. THE ADMISSION OF SPECIAL AGENT GLASER'S TESTIMONY REGARDING SENATOR PREUITT'S ALLEGED STATEMENTS TO FBI PERSONNEL INVESTIGATING SENATE BILL 380'S LEGISLATIVE HISTORY CONSTITUTES A *BRUTON* VIOLATION IN THE ELEVENTH CIRCUIT.

The admission of "powerfully incriminating extrajudicial statements of a codefendant" whom the defendant cannot cross-examine violates the Sixth Amendment's Confrontation Clause, even if the court issues an instruction to the jury not to consider the statement as evidence against the defendant. *Bruton v. United States*, 391 U.S. 123, 126 (1968). The

Government's contention that "[t]he *Bruton* rule. . .is not violated where the co-defendant's out-of-court statements do not *facially* incriminate any of the other defendants" misstates controlling Eleventh Circuit decisions construing *Bruton* and its progeny. The "proper *Bruton* standard" enunciated by the Eleventh Circuit in *United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008), provides that "a defendant's confrontation right is violated when the court admits a codefendant statement, that, in light of the Government's whole case, compels a reasonable person to infer the defendant's guilt." *Id*. (standard "is clear from a close reading of *Bruton*, *Richardson, Gray*, and our subsequent *Bruton* decisions").

The Supreme Court's decisions in *Richardson v. Marsh*, 481 U.S. 200, 107 S. Ct. 1702 (1987), and *Gray v. Maryland*, 523 U.S. 185, 118 S.Ct. 1151 (1998), indeed limit *Bruton*'s scope with respect to "statements that incriminate inferentially." *Schwartz*, 541 F.3d at 1349. *Richardson* and *Gray* do not, however, categorically place statements inferentially implicating the defendant beyond *Bruton*'s scope based on the *fact* of the inference. *Schwartz*, 541 F.3d at 1350. Indeed, in *Schwartz*, the Eleventh Circuit held that the admission of a co-defendant's affidavit against a defendant not harmless error "even though the statements '[were] not incriminating on [their] face, and became so only when linked' with other evidence," because the statement compelled an inference that the defendant directed a company he owned and controlled to use investor monies to "line the coffers of his personal business enterprises." The statements at issue in *Schwartz* "powerfully incriminated" the defendant by "summarizing the loans [the company] made to [other companies] [the defendant] controlled." *Schwartz*, 541 F.3d at 1351; *cf. United States v. Ramirez-Perez*, 166 F.3d 1106 (11th Cir. 1999) (in drug conspiracy prosecution, admission of co-defendant's post-arrest statement that passively referred to some actor who brought a pistol to the alleged drug transaction inculpated the defendant in violation of

Bruton and was not harmless error).[1] Because the United State's Memorandum of Law proceeds from a fundamentally erroneous construction of the applicable law, its argument in support of the inapplicability of *Bruton* to Special Agent Glaser's testimony effectively constructs a "straw man" argument that does not establish that the explicit and implicit references to Senator Preuitt's co-defendants are constitutionally permissible.

The alleged statements made by Senator Preuitt to Special Agent Glaser on April 1, 2010 give rise to an impermissible inference of the guilt of Mr. Walker in violation of *Bruton* despite the fact that the statements about which Special Agent Glazer has testified do not specifically reference Mr. Walker. Mr. Walker is alleged to have been an employee of Ronnie Gilley, the developer of Country Crossing and its spokesman. *See* Indictment (Doc. No. 3). Ronnie Gilley and Jarrod Massey further testified – though equivocally – that Mr. Walker acted on behalf of Country Crossing in connection with the legislature's deliberation and vote on Senate Bill 380. Moreover, the fact that Senator Preuitt was both with and spoke to Mr. Gilley and Ms. Smith (telephonically) immediately following the vote supports an inference that he was responding to a *quid pro quo* agreement consistent with the conspiracy alleged. *See* Tr. 87-88. That Senator Preuitt could reasonably be inferred to have been responding as such impermissibly implicates Mr. Walker as a factual and legal matter. Mr. Walker was purportedly acting on Mr. Gilley's and Country Crossing's behalf in seeking to secure Senator Preuitt's vote in favor of Senate Bill 380. Moreover, as a legal matter, even in the absence of an explicit reference to Mr. Walker in the statements about which Special Agent Glaser has testified, the jury would be compelled to infer Mr. Walker's guilt based on "overt acts" recounted in Senator Preuitt's statements as an

[11] The Eleventh Circuit's determination that the admission of a co-defendant's affidavit resulted in a *Bruton* violation partly due to the strength of the testimony of other witnesses that transformed the affidavit's references to the corporation into an impermissible reference to the defendant. *Schwartz*, 541 F.3d at 1354.

alleged member of the conspiracy who may be found vicariously liable for all acts committed during the course of the conspiracy under *Pinkerton v. United States*, 328 U.S. 640 (1946), and its progeny. Based on the totality of the evidence in the record, the acts by Senator Preuitt – which involve Mr. Gilley, a defendant that pled guilty – are likely to have an overwhelmingly prejudicial effect on the jury's evaluation of the evidence properly admitted against Mr. Walker.

Special Agent Glaser's testimony on direct examination also clearly indicated that FBI personnel sought and conducted the interview at issue because Senator Preuitt – now a defendant in this action – was a potential subject of the investigation being "looked at very closely." *See* Rough Transcript of Jury Trial Before the Honorable Myron H. Thompson ("Tr.") July 19, 2011 81:5-17. Indeed, the timing of Special Agent Glaser's interview of Senator Preuitt on April 1, 2010 – two days after the scheduled vote on Senate Bill 380 – was designed to preclude the preparation of a coherent "story" by the alleged conspirators (as it is reasonable to infer that this is precisely why the FBI adhered to its standard protocol).

The admission of Senator Preuitt's statements implicating Mr. Walker in violation of *Bruton* cannot be dismissed as harmless error as the prejudicial effect of his statements – even if admitted solely against Senator Preuitt – could bind Mr. Walker if he is found to have been a member of the conspiracy. The admission of Special Agent Glaser's testimony concerning Senator Preuitt's alleged statements in violation of *Bruton* will therefore require a new trial unless the error was harmless beyond a reasonable doubt. *Schneble v. Florida*, 405 U.S. 427, 432, 92 S. Ct. 1056, 1060 (1972) (noting that a new trial is required if "there is a reasonable possibility that the improperly admitted evidence contributed to the conviction"); *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969) ("Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the

[codefendant statements] on the minds of an average jury."); *Schwartz*, 541 F.3d at 1353; *United States v. Gonzalez*, 183 F.3d 1315, 1323 (11th Cir. 1999). In the Eleventh Circuit, "[a] *Bruton* error is harmless only if the properly admitted evidence of guilty is so overwhelming, and the prejudicial effect of the co-defendant's statement so insignificant, that beyond any reasonable doubt the improper use of the statement was harmless." *Schwartz*, 541 F.3d at 1353-54 (citing *United States v. Doherty*, 233 F.3d 1275, 1282 (11th Cir. 2000)). It is also crucial, here, that the statements allegedly made by Senator Preuitt would purportedly corroborate statements made by cooperating co-defendants Ronnie Gilley and Jarrod Massey, who have pled guilty. The combined effect of FBI's interview of Senator Preuitt because he was a potential subject of the investigation and the fact that the statements pertain to conversations with those who have admitted their guilt in this action is likely to magnify the perceived guilt of Mr. Walker in the minds of jurors. That prejudice is not "insignificant" beyond a reasonable doubt and warrants exclusion of Special Agent Glaser's testimony.

B. Senator Preuitt's Alleged Statements to FBI Personnel Investigating the Legislative History of Senate Bill 380 Are Not Admissible Under Federal Rule of Evidence 801(d)(2)(E).

Senator Preuitt's statements to FBI agents on April 1, 2011, though within the time period of the charged conspiracy, cannot be deemed to have been made "in furtherance of" the conspiracy as required for admissibility under the co-conspirator exception to the hearsay rule. *See* Fed. R. Evid. 801(d)(2)(E) (statement made by a co-conspirator is not hearsay if there was a conspiracy of which both the declarant and the person against whom the statement is offered were members; the declarant made the statement in the course of that conspiracy; and the declarant made that statement in furtherance of that conspiracy); *see also Bourjaily v. United States*, 483 U.S. 171, 178-79, 107 S. Ct. 2775 (1987). It is the burden of the proponent of the

statement to prove each of the prerequisites to the treatment of a statement of a co-conspirator as a party admission by a preponderance of the evidence, and it is the trial court, not the jury, that determines those preliminary issues. *See Bourjaily*, 483 U.S. at 175-76.

Crucially, the objective of the alleged conspiracy was to secure the passage of Senate Bill 380. Statements made to law enforcement two days after the vote on same could have been made only to further the investigation not the passage of the legislation. *See, e.g., Anderson v. United States*, 417 U.S. 211, 218-19, 94 S. Ct. 2253 (1974) ("The hearsay conspiracy exception applies only to declarations made while the conspiracy was still in progress, a limitation that this Court has 'scrupulously observed.'"). The prosecution's decision to extend the charged time period of the alleged conspiracy does not alter or extend either the objective of the alleged co-conspirators or the time period of their concerted action. The very fact that only Senator Preuitt was charged with making false statements to law enforcement after the date of the vote on Senate Bill 380 suggests, moreover that there was no agreement to prevent the discovery of the alleged conspiracy concerning the passage of Senate Bill 380. Insofar as the prosecution has not previously alleged, let alone established the existence of any subsequent conspiracy to obstruct justice, Senator Preuitt's statements to Special Agent Glaser on April 1, 2010 fall outside the scope of Federal Rule of Evidence 801(d)(2)(E)'s hearsay exclusion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that the foregoing *Memorandum of Law in Support of Oral Objections to the Testimony of FBI Special Agent George E. Glaser and Response to the United States' Memorandum of Law Regarding Applicability of* Bruton was served via ECF Filing on all counsel of record listed below this 20th day of July, 2011.

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