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

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CRIMINAL NO. 2:10cr-186-MHT**
	)	
MILTON E. MCGREGOR, ET AL.	)	

UNITED STATES' RESPONSE TO QUESTIONS POSED BY THE COURT ON JUNE 24, 2011, REGARDING EVIDENTIARY ISSUES RAISED BY THE TESTIMONY OF COOPERATING DEFENDANT RONALD GILLEY

The United States of America, through undersigned counsel, hereby responds to evidentiary questions posed by the Court on June 24, 2011, regarding the testimony of cooperating defendant Ronald Gilley.

On June 23, 2011, defendant Gilley testified that in June 2008, less than a year before the beginning of the conspiracy charged in Count One of the Indictment, he had provided defendant Harri Anne Smith with campaign contributions through cooperating defendant Jarrod Massey.[1] Gilley further testified regarding out-of-court statements by defendants Smith and Massey relating to the campaign contributions. On June 24, 2011, during an in camera hearing, the Court rejected defense objections that these statements were hearsay. The Court requested briefing from the United

[1] Only a rough unpaginated transcript is currently available.

States, however, regarding the following three questions: (1) whether the statements qualify as co-conspirator statements despite having been made outside the time period of the alleged conspiracy; (2) whether the statements implicate Confrontation Clause issues under Crawford v. Washington, 541 U.S. 36, 68 (2004); and (3) whether the statements introduce problems under Bruton v. United States, 391 U.S. 123 (1968), for defendant Smith's co-defendants by helping to establish the existence of the conspiracy.

As explained below, the statements are highly probative with respect to the conspiracy because they help establish the co-conspirators' motivations and interrelationship, as well as provide substantive evidence of the charged offenses. Furthermore, because they are non-testimonial, they do not implicate Crawford and Bruton concerns. Defendant Gilley's testimony regarding Defendant Smith's statements should therefore be admitted.

ARGUMENT

I. Defendant Gilley's Testimony Regarding the Statements Is Highly Relevant to the Charged Conspiracy.

As an initial matter, defendant Gilley's testimony constitutes permissible evidence of the motives and intentions undergirding defendant Gilley, Smith, and Massey's conspiratorial relationship, as well as direct and substantive evidence of charged offenses.

When a conspiracy, like the conspiracy at issue, is alleged, it is within the Court's discretion to admit evidence that informs the jury of the association between the conspirators, even if such background evidence falls outside of the conspiracy's charged time-frame. United States v. Hall,

314 F.3d 565, 566 n.1 (11th Cir. 2002) ("It is hornbook law that the admission or exclusion of evidence is committed to the trial judge's sound discretion.").

Here, defendant Gilley's testimony should be admitted because it serves as probative evidence of the relationship between at least three of the alleged co-conspirators—defendants Gilley, Massey, and Smith. The testimony helps explain the genesis of the corrupt arrangement whereby defendant Gilley, with defendant Massey's assistance, provided defendant Smith with campaign funds in return for defendant Smith's role in using her position as an Alabama State Senator to support the passage of pro-gambling legislation. As such, the testimony shows the nature of the three defendants' relationship, including their willingness to share information and assist one another. As defendant Gilley's testimony explains, this willingness is central to the development of what would ultimately become, months later, the charged conspiracy. Such evidence is therefore directly relevant to the Indictment's allegations.

In particular, the testimony is relevant to defendant Gilley's motive for giving things of value to defendant Smith, as well as defendant Smith's reciprocal intent in accepting those things of value. Both showings are central to the indicted charges: To prove a bribe, the government must demonstrate that a thing of value was provided in return for an official act. Thus, in determining whether the government has met its burden of proof, the jury will be asked to assess the mental state of both defendant Smith (the bribe's recipient) and defendant Gilley (one of the bribe-givers). The testimony in question will assist the jury in determining whether it was the intent of defendant

Gilley, as well as others, to provide things of value to defendant Smith in return for official acts. The testimony will likewise help the jury assess whether defendant Smith accepted such things of value knowing that they were offered in exchange for that corrupt purpose. In sum, the testimony regarding defendant Smith's statements should be admitted.

II. The Crawford Rule Does Not Apply Here.

Crawford and its progeny stand for the proposition that the Confrontation Clause prohibits admitting hearsay statements unless the defendant had a previous opportunity to cross-examine the out-of-court declarant regarding the statement. Crawford, 541 U.S. 36, 38 (2004). Notably, the Crawford rule applies only to "testimonial" hearsay. Id. at 68. If the hearsay statement is nontestimonial, the Confrontation Clause does not apply, and the pertinent rules of evidence govern the admission of the out-of-court statement. Id.; see also Whorton v. Bockting, 549 U.S. 406, 413 (2007) (Crawford overruled previous cases applying the Confrontation Clause to testimonial hearsay); United States v. Padron, 527 F.3d 1156, 1161 n.4 (11th Cir. 2008) (Confrontation Clause only applies to testimonial hearsay).

The statements at issue here are neither testimonial nor, as the Court has already determined, hearsay. Regarding the former, testimonial statements include things like: (1) ex parte in-court testimony or its functional equivalent, Crawford, 541 U.S. at 51; (2) formal extrajudicial statements contained in material such as affidavits, depositions, prior testimony, or confessions, id. at 51-52; (3) statement made under circumstances that would lead an objective witness reasonably to believe

that the statement would be available for use at a later trial, id. at 52; and (4) statements taken by police officers in the course of interrogations, id. It is highly unlikely that either defendant Smith or defendant Massey believed that their statements relating to the campaign contributions from defendant Gilley would be used in a later criminal prosecution. Cf. United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) (Crawford rule does not apply to a co-conspirator's unwitting statement to a confidential informant because he did not reasonably believe the statement would be used in a criminal trial); United States v. Udeozor, 515 F.3d 260, 269 (4th Cir. 2008) (Crawford rule does not apply to defendant's recorded statements to victim in part because reasonable person would not expect statements to be used later in criminal prosecution); United States v. Johnson, 495 F.3d 951, 976 (8th Cir. 2007) (Crawford rule does not apply to statements made by prisoner about murder committed by defendant because not formal statements or made in response to government interrogation); United States v. Hendricks, 395 F.3d 173 (3d Cir. 2005) (surreptitiously recorded conversations are not "testimonial" for purposes of Crawford). As for the latter, the Court has already concluded that the statements are not being offered for the truth of the matter asserted, but instead for a non-hearsay purpose. Thus, the Confrontation Clause is simply irrelevant to the admissibility of defendant Gilley's testimony regarding defendant Smith, and the Crawford rule does not apply.

III. The Bruton Rule Does Not Apply Here.

In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that when a defendant and a co-defendant are jointly tried, the admission into evidence of the non-testifying co-defendant's out-of-court confession violates the Confrontation Clause if the confession incriminates the other defendant. Like Crawford, Bruton only pertains to testimonial statements. E.g., United States v. Castro-Davis, 612 F.3d 53, 65 (1st Cir. 2010); United States v. Dale, 614 F.3d 942, 955 (8th Cir. 2010); United States v.Smalls, 605 F.3d 765, 768 n.2 (10th Cir. 2010); United States v. Wilson, 605 F.3d 985, 1018 (D.C. Cir. 2010). Because, as established above, the statements at issue are non-testimonial, defendant Gilley's testimony does not implicate Bruton.

CONCLUSION

For the foregoing reasons, the Court should admit defendant Gilley's testimony regarding statements by defendants Smith and Massey relating to defendant Gilley's campaign contributions.

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 June 27, 2011, I electronically filed the foregoing with the Clerk of the Court through the CM/ECF system, which sent notification of such filing to all attorneys of record.

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