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

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.) CR. NO. 2:10cr186-MHT
)
MILTON E. McGREGOR,)
)
Defendant.)

MEMORANDUM REGARDING *BRUTON* AND RELATED ISSUES RAISED BY TESTIMONY OF AGENT GLASER (RESPONSE TO DOC. 1476)

Milton McGregor respectfully submits this memorandum, responding to Doc. 1476, about the *Bruton* and related issues implicated in the testimony of Agent Glaser. The Court should strike all testimony of Agent Glaser, or (only in the alternative) should issue lesser remedies such as striking part of his testimony or giving limiting instructions.

1. How the issue arose: the Government indicated that Agent Glaser would be testifying regarding allegedly false statements, but went beyond that into introducing other statements by Senator Preuitt for their truth.

Senator Preuitt, and only Senator Preuitt, is charged in Count 38 [Doc. 3, pp. 61-62] with having made false statements in an interview with the FBI on April 1, 2011: "that, during the 2010 Alabama legislative session, he was never offered anything of value in exchange for his vote to pass pro-gambling legislation, and that he was unaware of private individuals, lobbyists, or legislators being involved in the offer or acceptance of things of value in exchange for votes to pass pro-gambling legislation."

Pursuant to the Government's representations, it had been expected that Agent Glaser's testimony would be about the allegedly false statements. (From the July 15 realtime transcript, page 8: "MR. FEAGA: We have one witness -- it's Glaser. I don't know how much cross have he's the agent that's going to testify about [Senator Preuitt's] statements. It's the basis of the false statement charge.")

However, the Government also sought to have Agent Glaser testify about other statements allegedly made by Senator Preuitt, which the Government was not contending were false statements (and were not charged as such in the Indictment), but which instead the Government was attempting to introduce for the truth of the matters asserted. Once it became clear that the Government was doing this, the questioning was interrupted by objections raising hearsay objections and Sixth Amendment objections including both *Crawford* and *Bruton* concerns.

The Government made clear in its response to the objections that the Government was seeking to introduce these statements allegedly made by Senator Preuitt as substantive evidence for the truth of the matters asserted by Senator Preuitt, to "corroborate" other testimony.

2. The Government does not contend that any *further* testimony from Agent Glaser would be admissible under *Bruton.*

The Court can begin by noting that the Government, in Doc. 1476, does not contend that it can introduce any further testimony from Agent Glaser on direct examination that will survive a *Bruton* objection (or, for that matter, a hearsay objection or a *Crawford* Confrontation Clause objection).

Instead, the Government only argues that the evidence introduced so far does not rise to the level of *Bruton* error, or that if it does it was harmless. The Government's argument is all in the past tense, about what the evidence *was*. If the Government intended to introduce any further evidence from Agent Glaser about any other statements allegedly made by Senator Preuitt, it would have been incumbent on the Government to show the Court that those additional statements would survive a *Bruton* challenge. As the Government has not done that, the Court should understand, and should rule, that the direct testimony of Agent Glaser has concluded – or at least that he may not give any further testimony about any other statement allegedly made by Senator Preuitt (or any other defendant).

3. Agent Glaser's testimony about Senator Preuitt's statements are, as to other defendants, hearsay and also in violation of the Confrontation Clause.

Agent Glaser's testimony about Senator Preuitt's statements are clearly hearsay and a Confrontation Clause violation, as to other defendants. That is, they plainly cannot be admitted into evidence against defendants other than Senator Preuitt. (For now, we are talking here about the statements introduced for their truth, not the allegedly false statements; we will turn back to the allegedly false statements later in this brief.)

The Government conceded that these are not 801(d)(2)(E) statements. (From realtime transcript, p. 96: "THE COURT: When Mr. Preuitt made these statements he wasn't [acting in] his capacity as a coconspirator. MR. SHUR: That's correct."). The questioning of Senator Preuitt by two FBI agents, gathering evidence for use in their investigation, was plainly a "testimonial" situation within the meaning of *Crawford v.*

Washington, 541 U.S. 36 (2004). Without an opportunity to cross-examine Senator Preuitt, other defendants' constitutional rights are violated by the admission against them of any statement by Senator Preuitt. Therefore, at the very least, a limiting instruction would be necessary that no such statement can be considered as against any defendant other than Senator Preuitt.

The Court inquired this morning whether the statements might be in furtherance of the conspiracy, and admissible under 801(d)(2)(E), on the grounds that they were designed to cover up the conspiracy. The Government, in its supplemental filing (Doc. 1484) still does *not* contend that any true statement by Senator Preuitt is admissible on the basis of 801(d)(2)(E). The Government says just the opposite, in a clear concession. (Doc. 1484, p. 3 n.2, stating that allegedly true statements were "not in furtherance of the conspiracy" and not admissible against other defendants). The Court should accept the concession. At the risk of beating a dead horse, Mr. McGregor offers this further explanation in the next four paragraphs; but if the Court is ready to accept the Government's concession, the Court can skip ahead a couple of pages to Section 4 below.

The allegedly false statements (in summary, that Senator Preuitt received no bribes or offers and knew of none) are not an 801(d)(2)(E) problem in anyone's view, as far as we can tell, because the Government is not trying to introduce those statements for their truth. The Government's reason for offering the allegedly false statements is just the opposite: not to show truth, but to show falsity. Thus a hearsay exclusion or exception is not at issue, as to the allegedly false statements. It is not necessary to decide whether the allegedly false statements were "in the course of and in furtherance of" any conspiracy

(801(d)(2)(E)), because they are not offered for their truth.

The allegedly true statements, by contrast, were not in furtherance of any conspiracy (even if there was a conspiracy between Mr. McGregor and Senator Preuitt, of which there is no evidence). When Senator Preuitt allegedly told Agent Glaser about a conversation that he had with Senator Smith and Mr. Gilley, and when he allegedly told Agent Glaser about BamaJam and his knowledge about Mr. Gilley, this did not remotely "further" any conspiracy in any way at all. *See United States v. Gjerde*, 110 F.3d 595, 603 (8th Cir. 1997) ("Conspirator statements made to a known police agent are admissible under Rule 801(d)(2)(E) only if intended to allow the conspiracy to continue, for example, by misleading law enforcers," *citing United States v. Alonzo*, 991 F.2d 1422, 1426 (8th Cir. 1993)).

When the Government offers these allegedly true statements to show that Senator Preuitt was telling the truth, it is impossible to conclude that Senator Preuitt was acting in furtherance of any conspiracy with Mr. McGregor by making such statements. There is certainly no evidence that there was any intent to "allow the conspiracy to continue," *Gjerde*, when Senator Preuitt spoke to Agent Glaser. There was, furthermore, no evidence that Mr. McGregor and Senator Preuitt had a conspiracy to cover up anything. A conspiracy to cover up cannot be inferred from, and tacked onto, the supposed existence of the substantive conspiracy itself, where the statement did not further the substantive conspiracy's ability to continue.

> In Grunewald v. United States, 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957), the Supreme Court held that: "After the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not

> be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." 353 U.S. at 401-02, 77 S. Ct. at 972. The Court also recognized that "a vital distinction must be made between acts of concealment done in furtherance of the main criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime." Id. at 405, 77 S. Ct. at 974.

United States v. Magluta, 418 F.3d 1166, 1178 (11th Cir. 2005). *See also United States v. Griggs*, 735 F.2d 1318, 1324-25 (11th Cir. 1984) ("Admissibility under Rule 801(d)(2)(E) is conditioned upon a showing by the government that the statement was made by a co-conspirator during and in the furtherance of the conspiracy. Statements made after the cessation of the primary purpose of the conspiracy that served only to conceal the conspiracy are not protected by the Rule."); *United States v. Baker*, 432 F.3d 1189, 1220 n.38 (11th Cir. 2005).

For these reasons, the Court should accept and should agree with the Government's concession (both oral and written as quoted above) that the statements at issue were not 801(d)(2)(E) statements.

4. The testimony admitted so far, regarding statements allegedly made by Senator Preuitt, violate *Bruton* and should be stricken.

Because the statements cannot be admitted against other defendants under *Crawford*, the next and only somewhat harder question is whether they can be admitted against Senator Preuitt alone with a limiting instruction. This is the *Bruton* problem: the problem of identifying the category of Confrontation-violative evidence that cannot be cabined off effectively with a limiting instruction that it can only be considered against one defendant and not others.

The Government, despite the Court's instruction at the close of the day on Tuesday, still has not cited the governing Eleventh Circuit caselaw on the *Bruton* standard. The standard is reflected in *United States v. Schwartz*, 541 F.3d 1331, 1351 (11th Cir. 2008): "We think the proper *Bruton* standard is clear from a close reading of *Bruton*, *Richardson*, *Gray*, and our subsequent *Bruton* decisions: 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."

The Government has already violated this *Bruton* standard.[1] Most strikingly, the Government had Agent Glaser recount a statement allegedly made by Senator Preuitt which "directly implicates"[2] Senator Smith, by name, in regard to the alleged bribery of Senator Preuitt. The Government argues that this is not *Bruton* even as to Senator Smith because the statement, standing alone and on its face, is not enough. The Government asks the Court to view the statement in isolation, unconnected to other evidence in the case. [Doc. 1476, p. 6 first paragraph]. This is contrary to *Schwartz*, the binding Eleventh Circuit standard that requires the Court to view the *Bruton* issue by looking at the statement "in light of the Government's whole case." *Schwartz*, 541 F.3d at 1351.

The Government argues that the statement does not mention the other nine

---

[1] As noted above, the Government does not claim that Agent Glaser can testify further without running afoul of *Bruton*. The Court should not entertain any such argument now. If the Court did entertain such late argument, the Court should require the Government to say exactly what it would ask Agent Glaser to testify to, in order to avoid *Bruton* problems before they happen.

[2] *United States v. Turner*, 474 F.3d 1265, 1277 (11th Cir. 2007).

defendants. Even if this is correct, it is irrelevant. The whole point of *Bruton* is that in *Bruton* situations, the evidence simply cannot be introduced because a limiting instruction would not be sufficient. Even if there were a *Bruton* problem only as to one defendant (Senator Smith), it just cannot be introduced, not even with a limiting instruction. It should be stricken.

Moreover, under a fair reading of "the Government's whole case," *Schwartz*, the evidence touches not only Senator Smith. It also touches Mr. McGregor too directly, because Mr. McGregor is charged in Count 1 with conspiring with all defendants, and because he is charged in Count 8 with having bribed Senator Preuitt. The reason the Government wants to introduce the statements in question is in order to help prove its allegations of bribery. If the statements in question are relevant, they are relevant for that reason: they help prove that Senator Preuitt was bribed in regard to SB380. The essence of the *Bruton* problem in this case arises from the fact that bribery, by its very nature and definition, is a multiple-participant offense. There is no such thing as bribing one's self. In cases where there is no *Bruton* problem, there is no *Bruton* problem because the defendant's statement (either in its original form, or as redacted to avoid *Bruton* problems) powerfully incriminates only himself and not co-defendants. But that sort of analysis is inapposite here, by definition: if a statement by Senator Preuitt incriminates *himself* with regard to bribery, then by necessity it also incriminates others (i.e., those who allegedly bribed him). And there is no one in the world who is alleged to have bribed Senator Preuitt, in regard to SB380, other than the alleged co-conspirators in this case. If (as the Government suggests) the statements of Senator Preuitt are relevant to

showing that Senator Preuitt *was bribed*, it is hard to imagine that the jury would not also take it as evidence showing *that he was bribed by the people charged with bribing him*.

The Government's belated argument in favor of *Pinkerton* liability (Doc. 1023) makes it all the more clear that admitting Senator Preuitt's statements at all, even with an attempt at a limiting instruction, would violate Mr. McGregor's Confrontation Clause rights. Mr. McGregor has argued, and still argues, that *Pinkerton* liability has no place in this case under this Indictment. (Doc. 1033). But if the Court were to give a *Pinkerton* instruction, it would tell the jury that Mr. McGregor could be found guilty of substantive crimes because of *Senator Preuitt*'s guilt of such substantive crimes (if the jury also found a conspiracy). With such an instruction, there would be no meaning to a limiting instruction telling the jury that it could consider Senator Preuitt's statements only as evidence of his own guilt. Any guilt of Senator Preuitt could be attributed to Mr. McGregor under a *Pinkerton* instruction; and so Mr. McGregor would have been convicted based on testimonial statements that he could not cross-examine.

The *Bruton* problem is compounded when one considers the prospect of cross-examination of Agent Glaser. Such cross-examination would be a *Bruton* minefield, in which each defendant could step on a *Bruton* mine that would blow up not only on himself but on other defendants, as Agent Glaser may respond to cross-examination by offering more statements allegedly made by Senator Preuitt that may implicate other defendants even further.

The Government argues [Doc. 1476, pp. 6-7] that the statement regarding the conversation with Senator Smith and Mr. Gilley was merely "cumulative" and was

therefore harmless error even if it violated *Bruton*. The response is twofold: (1) This Court's task, in deciding whether to admit evidence or to strike it, is not the appellate-level task of deciding whether error is harmless. This Court's task in this instance is to avoid error, to exclude inadmissible evidence – not to admit evidence even though it is error on the grounds that it is not too much error. (2) The Government's argument that the evidence is "cumulative" is all the more reason to strike it. *See* Rule 403. If (as the Government says) Agent Glaser's testimony barely makes a difference, the Court should feel more comfortable in striking it in order to avoid any *Bruton* problem and (even if the Court deems *Bruton* inapplicable) in order to avoid confusing the jury with a hard-to-obey limiting instruction that this cumulative evidence can be considered only against Senator Preuitt.

The statements of Senator Preuitt that the Government brought in through Agent Glaser also included the following definition of bribery:

> Q. And what, if anything, during the course of the interview did Mr. Preuitt tell you about what he believed constituted a bribe?
>
> A. We asked Mr. Preuitt what put a question to him, what would you say, how would you define a bribe, and he said that if you were offered or given anything of value in exchange for an official act in his office as a Senator, that he would consider that a bribe. And he elaborated further that accepting money [for] his campaign in exchange for an official act, a quid pro quo, would likewise be considered a bribe.

(July 19 realtime transcript, pp. 84-85). The purported relevance of the testimony – if there is any – would have to be that it shows guilty knowledge on Senator Preuitt's part. This, in turn, would powerfully and directly inculpate other defendants, including Mr. McGregor. As with other statements, cross-examination of Senator Preuitt on this point

is impossible. Therefore, the Sixth Amendment prohibits introduction of this evidence against Mr. McGregor or other defendants. At the very least, if the Court does not strike the testimony as requested herein, the Court should instruct the jury that this statement is not admissible against any other defendant, and that it does not constitute legal guidance for the jury about what constitutes bribery.

5. The Court should not strike only the testimony about statements offered for their truth; the Court should strike all testimony of Agent Glaser, as anything less would risk complete jury confusion and prejudicial highlighting of the "false statement' evidence.

Finally, the Court should strike and exclude not only Agent Glaser's testimony about allegedly true statements made by Senator Preuitt, which the Government offers for their truth. Beyond that, the Court should strike and exclude all of Agent Glaser's testimony, because any attempt to instruct the jury about what it could consider and what it could not would carry too much risk of confusion and prejudice. It would unfairly highlight for the jury the alleged "false statements," and other inappropriate parts of Agent Glaser's testimony, if the Court told the jury that it could consider *them* but not some other parts of his testimony. *See United States v. Chance*, 306 F.3d 356, 388 (6th Cir. 2002) ("a contemporaneous limiting instruction may unduly emphasize the evidence in the minds of the jury.")

At this point, the jury has heard Agent Glaser's testimony without having been knocked over the head with legal argument that some parts of it are (in the Government's view) false while other parts are true. The jury should not be told about this distinction, by the Court. It would unfairly prejudice both Senator Preuitt and other defendants, by

having the Court instruct the jury in a way that facilitated the Government's theory. The Court should avoid this problem by striking all of Agent Glaser's testimony under Rule 403, to avoid jury confusion and prejudice.

The Government's proposed limiting instruction (Doc. 1484 p. 4) is plainly inappropriate if the Court agrees with the defendants on the *Bruton* issue. The Government has not proposed that there is any way to instruct the jury, fairly and non-prejudicially, that it can consider the "false statement" evidence if any other part of Agent Glaser's testimony is struck under *Bruton*.

Even if the Court agreed with the Government about the applicability of *Bruton*, still the Government's proposed limiting instruction would carry too much risk of jury confusion and prejudice; still the best path for the Court to take is to strike all the testimony rather than giving this limiting instruction. It is unrealistic to expect that the jury could remember, and give effect to, a limiting instruction that came two days after the testimony in question, that allowed the jury to consider *some* statements only against one defendant but *other* statements against all defendants. Moreover, the Government has not shown any way in which Senator Preuitt's allegedly false statements – if believed to be false – are even relevant evidence against other defendants, including Mr. McGregor. There is no evidence that any other defendant was complicit, in any way, in the giving of any false statement (if there was one). Therefore, to tell the jury that such evidence is relevant to all defendants would be misleading and prejudicial.

Respectfully submitted,

_*s/ Benjamin J. Espy*________________
Benjamin J. Espy (ASB-0699-A64E)
One of the Attorneys for Milton E. McGregor

OF COUNSEL:

Joe Espy, III (ASB-6591-S82J)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
P.O. Drawer 5130
Montgomery, AL 36103
Telephone: 334-263-6621
Facsimile: 334-263-7252
jespy@mewlegal.com
bespy@mewlegal.com
wespy@mewlegal.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP
McGOWAN, GRAY, GRAY
& NATHANSON, P.C.
P.O. Box 830239
Tuskegee, AL 36083-0239
Telephone: 334-727-4830
Fax: 334-727-5877
fgray@glsmgn.com
wem@glsmgn.com

Robert D. Segall (ASB-7354-E68R)
David Martin (ASB-7387-A54J)
Shannon Holliday (ASB-5440-Y77S)
COPELAND, FRANCO, SCREWS & GILL, P.A.
P.O. Box 347
Montgomery, Alabama 36101-0347
Telephone: 334-834-1180
Fax: 334-834-3172
segall@copelandfranco.com
martin@copelandfranco.com
holliday@copelandfranco.com

Sam Heldman (ASB 3794 N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, DC 20008
Telephone: (202) 965-8884
Fax: (202) 318-2445
sam@heldman.net

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 S. Shackleford Road
Little Rock, AR 72212
Telephone: (501) 954-7878
rwhitney@inveritasinfo.com

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2011, I filed the foregoing with the Clerk of the Court using the CM/ECF filing system, and that a copy of same will be served on the below listed counsel of record via such system:

Justin V. Shur
Eric Olshan
Barak Cohen
Brenda K. Morris
Emily Rae Woods
John L. Smith
Edward T. Kang
US Department of Justice
1400 New York Avenue
Washington, DC 20005
justin.shur@usdoj.gov
eric.olshan@usdoj.gov
barak.cohen@usdoj.gov
brenda.morris@usdoj.gov
rae.woods@usdoj.gov
edward.kang3@usdoj.gov

Louis V. Franklin, Sr.
Stephen P. Feaga
US Attorney's Office
Post Office Box 197
Montgomery, AL 36101-0197
steve.feaga@usdoj.gov
louis.franklin@udsoj.gov

David McKnight
William J. Baxley
Joel E. Dillard
Stewart D. McKnight, III
Baxley, Dillard, Dauphin, McKnight & James
2008 Third Avenue South
Birmingham, AL 35233
bbaxley@bddmc.com
jdillard@bddmc.com
dmcknight@baxleydillard.com

Jackson R. Sharman, III
Jeffrey P. Doss
Samuel H. Franklin
Lightfoot, Franklin & White
400 20th Street North
Birmingham, AL 35203
jsharman@lightfootlaw.com
jdoss@lightfootlaw.com
sfranklin@lightfootlaw.com

James P. Judkins
Larry D. Simpson
Judkins, Simpson, High & Schulte
1102 North Gadsden Street
Tallahassee, Florida 32303
jjudkins@readyfortrial.com
lsimpson@readyfortrial.com

William N. Clark
William H. Mills
Stephen W. Shaw
Glory R. McLaughlin
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203
wnc@rmclaw.com
whm@rmclaw.com
sws@rmclaw.com
grm@rmclaw.com

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109
ronwwise@aol.com

H. Lewis Gillis
Tyrone C. Means
Thomas Means Gillis & Seay
P.O. Drawer 5058

Montgomery, AL 36103
hlgillis@tmgslaw.com
tcmeans@tmgslaw.com

Mark Englehart
Englehart Law Offices
9457 Alysbury Place
Montgomery, AL 36103
jmenglehart@gmail.com

J. W. Parkman, III
Richard M. Adams
Joshua L. McKeown
William C. White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203
parkman@parkmanlawfirm.com
adams@parkmanlawfirm.com
jmckeown@parkmanlawfirm.com
wwhite@parkmanlawfirm.com

Susan G. James
Denise A. Simmons
Attorney at Law
600 South McDonough Street
Montgomery, AL 36104
sgjamesandassoc@aol.com
dsimlaw@aol.com

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106
tgoggans@tgoggans.com

Jeffrey C. Duffey
Law Office of Jeffrey C. Duffey
600 South McDonough Street
Montgomery, AL 36104
jcduffey@aol.com

__*s/ Benjamin J. Espy*______________________
Of Counsel