

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CASE NUMBER: CR422-0084
	)	
BERNARD OKOJIE,	)	
Defendant	)	
	)	

**DEFENDANT BERNARD OKOJIE'S
MOTION FOR A PRETRIAL HEARING
TO DETERMINE THE EXISTENCE OF ANY
CONSPIRATORIAL AGREEMENTS**

COMES NOW, BARNARD OKOJIE, Defendant, by and through his undersigned counsel of record, and on information and belief that the government intends to introduce co-conspirator hearsay statements against him at trial, moves this court to conduct a pretrial hearing pursuant to *United States v. James*, 590 F.2d 575(5th Cir. 1979)(en banc) for the purpose of determining whether said co-conspirator hearsay statements are admissible as evidence against the Defendant. Mr. Okojie further moves this court to require the government to submit evidence at the *James* hearing to establish:

- (a) the existence of any conspiratorial agreements; and
- (b) the sufficiency of the evidence against the Defendant to establish his involvement in the alleged conspiracies.

The indictment alleges two conspiracies and various actions by Mr. Okojie and co-conspirators, but never identifies any co-conspirators or what the agreements were.

As a consequence of this vagueness, without pretrial determination as to what conspiracies and agreements are at issue, and the identity of the participants in those agreements, an appropriate determination as to admissible co-conspirator statements cannot be made.

Mr. Okojie further moves that if, at the conclusion of the *James* hearing it appears that as to him there is not sufficient evidence of a conspiracy or the declaration at issue was not in furtherance of that conspiracy, then the court not allow other hearsay evidence to be admitted against him.

Mr. Okojie asserts that the foregoing procedure of law is necessary to avoid denial of his right to due process of law and to overcome abuses of the Defendant's rights which will otherwise occur in the course of the trial herein, and that simply requiring the government to offer its proof at trial, rather than a full and fair pretrial determination, will deprive the Defendant of the protection sought to be afforded by this process.

MEMORANDUM OF LAW

There is a long-recognized exception to the hearsay rule that a statement made by one member of a conspiracy during the course of and in furtherance of the conspiracy may be used against the other members of the conspiracy if certain conditions are met. *Federal Rules of Evidence*, Rule 801(d)(2)(E). While this Rule moves co-conspirator statements from the realm of hearsay, admissibility depends upon proof that there is a conspiracy, that the statement was made during the course of an in furtherance of the conspiracy, and the declarant and the defendant must be members of the conspiracy. *Anderson v. United States*, 417 U.S. 211, 218 n. 6(1974).

The admissibility of a co-conspirator's declarations in a conspiracy trial is a critical question. The evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. *James v. United States*, 590 F.2d 575(5th Cir. 1979)(en banc). As a result, such statements should be evaluated by the trained legal mind of the trial judge.

The *James* Court clearly held that:

“Rule 104(a) requires that the judge alone make the determination of the admissibility of the evidence. The jury is to play no role in determining the admissibility of the statements.” *Id.* at 579-80.

The “prima facie” test which was used when the jury had a role in determining the use of the statements under the ruling of the *United States v. Apollo*, 476 F.2d 156(5th Cir. 1973), is no longer appropriate. See *James*, supra at 580.

The *James* Court held:

“... as stated in the Court in *Nixon*, supra, a declaration by one defendant is admissible against other defendants only when there is sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy; 418 U.S. at 701, 94 S.Ct. At 3104, 41 L.Ed.2d at 1060, and that ‘as a preliminary matter, there must be substantial independent evidence of a conspiracy at least enough to take the question to the jury.’” *Id.* p. 581.

This connection of Rule 104(a) *Federal Rules of Evidence* comports with earlier Supreme Court Pronouncements that admissibility must depend upon independent evidence in order to prevent this statement from “lifting itself by its own bootstraps to the

level of competent evidence.” *Glasser v. United States*, 315 U.S. 60, 75, 86 L.Ed. 680, 701(1942)

While the Supreme Court in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775(1987) held that the trial judge may consider the proffered hearsay statements in determining whether they are admissible under the co-conspirator exception to the hearsay rule, a pretrial hearing can still serve to prevent unfair prejudice to the defendant which cannot be overcome by instruction to the jury. The Court in *Bourjaily* did not change the requirements that the conspiracy involve the declarant and the defendant against whom the statement is offered, or that the statement was made during the course of and in furtherance of the conspiracy. Whether all of these requirements are met is still a preliminary question of fact that under the *Federal Rules of Evidence* 104(a) shall be determined by the court using “preponderance of the evidence” as the standard.

For the court to make these determinations in a hearing prior to the trial will prevent prejudice to the defendant from the jury’s having heard the inadmissible evidence. Further, the court will be better able to determine that the statement was made by a declarant who was a member of the same conspiracy at the same time as this defendant which is required for the statement to be admissible. *United States v. Christopher*, 923 F.2d 1545(11th Cir. 1991); *United States v. Garcia*, 13 F.3d 1464(11th Cir. 1994). This determination became even more involved and critical in a matter as alleged in the present indictment which contains several co-conspirators and numerous objects of the conspiracy over a substantial period of time.

As a consequence, a pretrial determination of the existence of a conspiratorial

agreement among the parties, if any, is absolutely necessary in order to avoid potential prejudice against the Defendant. Should the government be permitted to introduce evidence of alleged co-conspirator hearsay subject to “linking it up” with the Defendant, or simply be required to order its proof, irreparable prejudice necessitating a severance and mistrial might occur. In such unusual circumstances, Mr. Okojie respectfully submits that consideration of substantial fairness and judicial economy dictate that a pretrial determination of this important issue should be made.

WHEREFORE, Mr. Okojie respectfully requests that this Court conduct a pretrial hearing to determine the existence of any conspiratorial agreements and to establish his connection thereto, if any, and for such and further relief as this court deems just and proper.

Respectfully submitted, this 15th day of September, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties in this case in accordance with the directives from the Court Notice of Electronic Filing (“NEF”), which was generated as a result of electronic filing.

This 15th day of September, 2022.

/s/John J. Ossick, Jr.

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