UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
	:	
v.	:	**Crim. No.: 14-141 (CRC)**
	:	
	:	
AHMED SALIM FARAJ ABU KHATALLAH,	:	
also known as Ahmed Abu Khatallah,	:	
also known as Ahmed Mukatallah,	:	
also known as Ahmed Bukatallah, and	:	
also known as Sheik,	:	
	:	
Defendant.	:	

GOVERNMENT'S OPPOSTION TO DEFENDANT'S
MOTION TO EXCLUDE CO-CONSPIRATOR STATEMENTS

The United States of America hereby opposes the Defendant's Motion to Exclude Co-conspirator Statements. ("Def. Mot." [Dkt. #223]).

I. Introduction.

The defense has asked the Court to hold a pre-trial hearing to determine the admissibility of co-conspirator statements. "[I]n accordance with *the governing practice in this jurisdiction*, the Court [should deny] defendant['s] motion and [] allow the admission of co-conspirator statements at trial subject to proof of connection." *United States v. Brodie*, 326 F. Supp. 2d 83, 90 (D.D.C. 2004) (emphasis added).

II. Background.

The defendant, Ahmed Salim Faraj Abu Khatallah, a Libyan national, has been indicted on charges arising from his participation in the September 11-12, 2012, terrorist attack on United States Special Mission and Annex in Benghazi, Libya (the "Attack"). The Attack resulted in the deaths of four Americans. As charged in the Indictment, the Attack was carried out by members of a conspiracy. *See* Superseding Indictment, at Count One.[1]

In order to admit statements of the defendant's co-conspirators, the government will have to establish the following: "The statement is offered against an opposing party and: was made by the party's coconspirator during and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).[2] The government must establish that the statement was made by a co-conspirator during and in furtherance of the conspiracy by a preponderance of the evidence and may rely – at least in part – on the statements themselves to prove the existence of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

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[1] Additionally, co-conspirator statements do not need to have been made in furtherance of the charged conspiracy to be admissible; they are admissible as long as they were made in furtherance of any conspiracy which the defendant had joined. *See, e.g., United States v. Perholtz*, 842 F.2d 343, 356 (D.C. Cir. 1988) ("The statements of joint venturers may fall within the scope of the Rule [F.R.E. 801(d)(2)(E)], and there is no requirement that a conspiracy be formally charged in the indictment."). Accordingly, the government will be seeking to elicit co-conspirator statements to prove each count of the indictment. *See Pinkerton v. United States*, 328 U.S. 640 (1946).

[2] The defense has requested that the government provide any co-conspirator statements that it intends to elicit. (Def. Mot. at 1). Pursuant to binding D.C. Circuit precedent, the government has declined that request:

> We believe, however, that we are without authority to order such discovery. Nothing in the Federal Rules of Evidence or in the Jencks Act requires such disclosure—we think it clear that as used in Fed.R.Crim.P. 16(a)(1)(A) the phrase "statements made by the defendant" does not include statements made by co-conspirators of the defendant, even if those statements can be attributed to the defendant for purposes of the rule against hearsay.

United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir. 1988); *see also United States v. Roberts*, 811 F.2d 257 (4th Cir. 1987) (*en banc*) (same); *United States v. Orr*, 825 F.2d 1537 (11th Cir. 1987) (same). The defense's reference to "material to preparing the defense" (Def. Mot. at 1, n.1) is misplaced, as the section of Rule 16 relied upon (16(a)(1)(E)(ii)), specifically refers to "tangible objects," and the oral statements at issue are quintessentially intangible.

Here, the government does not plan to rely solely upon co-conspirator declarations to establish the conspiracy; instead, we will introduce independent evidence of the conspiracy in addition to the statements. That evidence includes, *inter alia*, eyewitness testimony, video tapes, defendant's statements, telephone records showing contact among the conspirators, and seizures of evidence related to the conspiracy. This evidence will show meetings, actions, associations, and jointly undertaken conduct among the conspirators which demonstrates that each conspirator was acting in pursuit of a common design and a common goal.[3] Consequently, the Court will not be placed in the position of ruling upon the existence of a conspiracy solely upon reference to a single unsupported co-conspirator declaration. The government, therefore, submits that an evidentiary pre-trial hearing is unnecessary.

III. The Court should not hold a pretrial hearing regarding the admissibility of co-conspirators' statements.

Defendant asks that the Court hold a pretrial hearing to determine the admissibility of co-conspirators' statements. The case law in this and other circuits counsels that such a hearing is unnecessary. The D.C. Circuit has routinely upheld the practice of deferring the determination of a defense motion until the trial if that motion requires "deciding issues of fact that are inevitably bound up with evidence about the alleged offense itself." *See, e.g., United States v. Wilson*, 26 F.3d 142, 159 (D.C. Cir. 1994).[4]

> As a practical matter, to avoid what otherwise would become a separate trial on the issue of admissibility, the court may admit declarations of

[3] Accordingly, the defense's assertion that "the only evidence the government can proffer regarding the existence of the charged conspiracy will be out-of-court statements allegedly made by alleged coconspirators" is baseless. *See* Def. Mot. at 2 [Dkt. #223].

[4] Rule 104(b) of the Federal Rules of Evidence codifies this commonly used judicial practice: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."

> co-conspirators "subject to connection." If substantial evidence of the connection has not been produced at the close of the government's case, the court will instruct the jury to disregard the hearsay statements; or the court may grant a mistrial.

United States v. Gantt, 617 F.2d 831, 845 (D.C. Cir. 1980)[5]; *see also United States v. Jackson*, 627 F.2d 1198, 1218 (D.C. Cir. 1980) (trial courts are not required to hold a "mini trial" on the conspiracy issue before the conditional admission of a co-conspirator's statements); *United States v. Blevins*, 960 F.2d 1252, 1256 (4th Cir. 1992) (there need not be hearing to determine existence of conspiracy before statements can be admitted under Rule 801(d)(2)(E); instead, trial court can conditionally admit co-conspirators' statements subject to subsequent satisfaction of requirements for their admission); *United States v. Monaco*, 702 F.2d 860, 877 n.29 (11th Cir. 1983) (court may admit statements subject to the government's "connecting them up"); *United States v. Jones*, 542 F.2d 186 (4th Cir. 1976) (same); *United States v. Katz*, 535 F.2d 593, 597 (10th Cir. 1976) (same); *United States v. Trotter*, 529 F.2d 806, 811-13 (3rd Cir. 1976) (same).

When confronted with this issue, district courts in this Circuit have consistently rejected such requests from defendants:

> [G]iven the myriad of difficulties that surround the availability of witnesses, it is just impractical in many cases for a court to comply strictly with the preferred order of proof. . . . As a concession to such practical impediments that arise during trial, the court is vested with considerable discretion to admit particular items of evidence 'subject to connection.' The Court agrees largely with the reasons set forth in the Government's opposition, that having a pretrial hearing essentially would create a time consuming mini trial before the trial. The Court therefore denies the motion and will allow the Government to prove the admissibility at trial subject to connection.

United States v. Yeh, 97 F. Supp. 2d 24, 37 (D.D.C. 2000) (*quoting Jackson*, 627 F.2d at 1218);

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[5] An unrelated holding in *Gantt* has been over turned. *In re Sealed Case*, 99 F.3d 1175, 1178 (D.C. Cir. 1996) ("On this question [regarding the preservation of evidence], however, *Bryant* and *Gantt* are no longer good law.")

> If the government is able to present evidence to substantiate its claims—as it asserts that it will—there is a substantial likelihood that the requirements of Rule 801(d)(2)(E) will be met as to any co-conspirator statements made in furtherance of either prong of the overarching conspiracy. At the same time, the Court finds that a pretrial hearing held to establish [defendant's] connection to the DCTC prong would likely be time-consuming and highly duplicative of testimony to be presented during the government's case-in-chief at trial. Furthermore, according to the representations made during oral argument on this motion, the government is confident that it will meet its burden of proving admissibility and is willing to assume the risk that its failure to do so could lead to a mistrial. In light of these considerations, the Court believes that a pretrial hearing is neither necessary nor appropriate.

United States v. Loza, 763 F. Supp. 2d 108, 113 (D.D.C. 2011). Similarly, the district court in *United States v. Cooper*, 91 F. Supp.2d 60, 78 (D.D.C. 2000), declined to conduct a pre-trial hearing: "If substantial evidence of the connection has not been produced at the close of the government's case the court will instruct the jury to disregard the hearsay statements." (*Quoting Gantt*, 617 F.2d at 845); *see also United States v. Edelin*, 128 F.Supp.2d 23, 45–46 (D.D.C. 2001) (finding it unnecessary to conduct an advance determination of conspiracy, which would amount to a time-consuming "mini-trial prior to trial in this case" and would place an unreasonable burden on the government); *United States v. Brodie*, 326 F. Supp. 2d 83, 90 (D.D.C. 2004) (same).

The conspiracy "mini-trial" requested by defendant is not only unnecessary; it would also significantly prolong the proceedings as a whole, inasmuch as a pre-trial ruling on admissibility would eventually have to be revisited at trial. *See United States v. Pepe*, 747 F.2d 632, 653 (11th Cir. 1984) (pretrial ruling in a conspiracy case "is not dispositive on the issue of hearsay, however, because the admissibility of testimony is, ultimately, a trial ruling"); *United States v. Graham*, 548 F.2d 1302, 1308-09 (8th Cir. 1977) (requiring proof of conspiracy first would "compel a fragmented presentation of evidence"). The scheduling of such a pretrial hearing in

this case would accomplish nothing more than a completely unnecessary, very lengthy preview of the government's case against the defendant. *See United States v. Ianniello*, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985).

The defense relies on *Jackson*, 627 F.2d 1198, to support its positon that holding a pretrial hearing is the preferred practice, but a closer reading of *Jackson* actually supports the government's position:

> However, many times witnesses are in possession of both hearsay testimony of co-conspirators and evidence that independently tends to prove the existence of the conspiracy. Given the myriad of difficulties that surround the availability of witnesses, it is just impractical in many cases for a court to comply strictly with the preferred order of proof by taking the testimony of such witnesses piecemeal, waiting until a conspiracy is fully proved by independent evidence, and then recalling from their normal pursuits, those who testify to hearsay declarations of co-conspirators. As a concession to such practical impediments that arise during trial, the court is vested with considerable discretion to admit particular items of evidence "subject to connection."

Id. at 1218 (rejecting appellant's request that a pre-trial hearing be deemed obligatory); *see also United States v. Slade*, 627 F.2d 293, 307 (D.C. Cir. 1980) (finding that the trial court failed to determine the admissibility of co-conspirator statements and noting that "court retains discretion, however, to admit particular co-conspirator statements conditioned on a later showing of substantial independent evidence of the three prerequisites for their admission.").

IV. Conclusion.

For the foregoing reasons and any additional reasons as may be adduced at a hearing on this matter, the government respectfully requests that the Court deny the defendant's request for a pre-trial hearing regarding the admissibility of co-conspirator statements.

Respectfully submitted,

CHANNING D. PHILLIPS
UNITED STATES ATTORNEY
D.C. Bar Number 415793

By: _____/s/_____
Michael C. DiLorenzo
MD Bar No. 931214 0189
Julieanne Himelstein
D.C. Bar No. 417136
Opher Shweiki
D.C. Bar No. 458776
John Crabb Jr.
N.Y. Bar No. 2367670
Assistant United States Attorneys
National Security Section
United States Attorney's Office
555 4th Street, N.W.
Washington, D.C. 20530
(202) 252-7809
michael.dilorenzo@usdoj.gov