

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT CROIX

UNITED STATES OF AMERICA,

Plaintiff,

Crim. No. 2002/125

v.

ESBOND DEGRASSE, GEORGE  
OSBORNE, JAY WATSON,  
ANTONIO PETERSEN

Defendants

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ORDER REGARDING DEFENDANT'S MOTION FOR THE DISCLOSURE OF CO-  
CONSPIRATORS' IDENTITY AND STATEMENTS

THIS MATTER is before the Court on defendant George Osborne's ["Defendant/Osborne"] separate motions for disclosure of the identity of co-conspirators and their statements. The government filed responses. The Court will rule on both motions herein.

Defendant requests that the government disclose all statements made by alleged co-conspirators in this matter, in order to determine their admissibility, avoid unfair surprise and to lessen the chance of a mistrial. Defendant seeks this information regardless of whether the statements are to be used at trial. Defendant also seeks disclosure of the identity of all co-conspirators. The government argues that Rule 16 of Federal Rules of Criminal Procedure does not require such disclosure.

DISCUSSION

Rule 16 provides that statements made by the defendant himself are discoverable. However, the general rule is that the

rule does not include statements made by co-conspirators. See *United States v. Percevault*, 490 F.2d 126-130-131 (2d Cir. 1974).

Additionally, if the government intends to call such witnesses at trial, the Jencks Act makes the statements of government witnesses, including co-conspirators, not discoverable until the witness actually testifies.<sup>1</sup> See *United States v. Eisenberg*, 773 F.Supp. 662, 682 (D.N.J. 1991). Some courts have allowed such statements to be discovered if made during the course of and in furtherance of the conspiracy and are attributable to the defendant, *United States v. Konefal*, 566 F.Supp. 698, 706-07 (N.D.N.Y. 1983), and if the co-conspirator is not slated to testify. *Id.*

Defendant states that disclosure of the statements is necessary to determine their admissibility; to prevent unfair surprise; and to avoid the spectre of mistrial. Osborne argues that they should be disclosed whether or not the government intends to use them at trial.

The admissibility of co-conspirators' statements has been committed to the sound discretion of the trial judge. *United States v. Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir.

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<sup>1</sup>. On March 17, 2003, the Court ordered that the government produce all available *Brady* and *Jencks* material (to defendant Petersen) by March 28, 2003. On April 11, 2003, the Government represented that it has produced all *Jencks* information concerning witnesses who the government has determined will testify for it and that it is unlikely any other witnesses will be added (See Order further to Calendar Call d. 4/11/03).

1979). In *Continental Group*, the Court stated that such a determination may be made at any time during the trial. Thus, the issue of admissibility standing alone, does not warrant pretrial disclosure. However, other factors may induce the Court to allow defendant access to such statements. The indictment charges defendant with conspiring with co-defendant "and others" to do certain acts. It is reasonable that knowledge of any statements uttered by these as yet unidentified individuals concerning the defendant would be necessary to prepare his defense. Moreover, the government does not argue that the safety of such individuals will be threatened by disclosure. Thus, the Court will require the government to produce any statements of co-conspirators which the government does not intend to call to testify at trial.

The disclosure of the identity of co-conspirators may be allowed by a court after determining that such identity is necessary to the defendant's preparation for trial. *United States v. McFarlane*, 759 F.Supp. 1163, 1169 (W.D.Pa. 1979) *citing United States v. Barrentine*, 591 F.2d 1069 (5<sup>th</sup> Cir.) *cert denied* 444 U.S. 990 (1979). Defendant argues that such information is essential to his understanding of the nature or the alleged conspiracy. He also argues that the government should disclose whether the co-conspirators are in federal or other custody in order to prevent the prospect of him being charged with another

conspiracy based on their testimony.

The Court in *United States v. Anderson*, 31 F.Supp.2d 933, 938 (D.Kan. 1998) ruled that a defendant charged in a medical fraud conspiracy was entitled to know the names of unindicted co-conspirators in order to avoid surprise and double jeopardy. *Accord, U.S. v. Principato*, 2002 WL 31319931 \*2 (S.D.N.Y. Oct. 16, 2002); *U.S. v. Murgas*, 967 F.Supp. 695, 702 (N.D.N.Y. 1997) (Court orders government to disclose identities of unindicted co-conspirators, and whether in federal, state, or protective custody). Such information may also be withheld if there is danger to the individuals.

In this case, the indictment charges Osborne with conspiring with his co-defendant Jay Watson "and others, both known and unknown", to engage in numerous illegal acts spanning a period of seven years. Osborne makes the argument that such information is needed to determine whether he has an alibi defense; that the information is crucial in deciding the strength of the government's allegations of three "separate, seven year long conspiracies"; and that he needs to search for witnesses who may have left the jurisdiction. The government advances no reason why the statements should not be disclosed except to state that Rule 16 does not require their disclosure.

Accordingly, the Court finds that learning the identity of co-conspirators is necessary for defendant to prepare an

effective defense and there are no compelling reasons to the contrary. Although the cases counsel that the government should not be forced to declare all its evidence or its theory of the case, fairness dictates that the defendant know the identity of the co-conspirators that are known to the government.

Now, therefore, it is hereby ORDERED AS FOLLOWS:

- a. That the government must provide any statements of co-conspirators in its possession by April 30, 2003.
- b. That the government must disclose the identity of any co-conspirators known to it, by April 30, 2003.

DATED: April 25, 2003                      ENTER:

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JEFFREY L. RESNICK  
U.S. MAGISTRATE JUDGE

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*Conspirators*  
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A T T E S T:  
Wilfredo F. Morales  
Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk

cc: Denise Hinds, AUSA  
Asha Colianni, Esq.  
Stephen Bruschi, Esq. (FAX 776-2238)  
District Judge Thomas K. Moore and Law Clerks