

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO. 1:08CR003

BOBBY DELAUGHTER

**RESPONSE IN OPPOSITION TO
DEFENDANT DELAUGHTER'S MOTION FOR PRETRIAL HEARING
CONCERNING CO-CONSPIRATORS' STATEMENTS**

Comes now the United States by and through the United States Attorney for the Northern District of Mississippi and submits this Response in Opposition to the Defendant Delaughter's Motion for Pretrial Hearing Concerning Co-Conspirators' Statements, and would show unto the Court the following:

The defendant has moved the Court for a pretrial evidentiary hearing to determine preliminarily the admissibility of any statements offered by the government pursuant to Federal Rule of Evidence 801(d)(2)(E). In the alternative, defendant demands that a formal written proffer of said co-conspirators' statements be made by the government prior to empaneling the jury or swearing the first witness at the trial of the case. This motion is without merit and should be denied.

At the outset, there is little disagreement with respect to the rules of admissibility regarding co-conspirators' statements pursuant to Federal Rule of Evidence 801(d)(2)(E). However, case law from the United States Supreme Court and Fifth Circuit Court of Appeals as well as the practice in this district have all evolved significantly since United States v. James was decided. Pretrial James hearings are simply no longer required.

In 1979 the Fifth Circuit decided United States v. James, 590 F.2d 575 (5th Cir. 1979), en

banc, cert. denied, 442 U.S. 917 (1979). James required that before out of court statements made by one or more co-conspirators could be admitted into evidence, there had to be a determination by the court that (1) a conspiracy existed, that (2) the defendant against whom the statements were offered was a member of the conspiracy, and (3) that the statements were made during and in furtherance of the conspiracy. Id. at 582. Despite attempts to construe the James decision as requiring a pretrial evidentiary hearing in conspiracy cases, a series of Fifth Circuit cases have made it plain that a “James hearing” is not mandatory. United States v. Ricks, 639 F.2d 1305, 1310 (5th Cir. 1981); United States v. Gonzales, 700 F.2d 196, 203 (5th Cir. 1983); United States v. Whitley, 670 F.2d 617 (5th Cir. 1982). Whitley held that “the trial court has discretion to determine the application of the James ruling and rationale in the specifics of the trial setting encountered.” Id. at 620. Trial courts have the ability and the discretion to “carry the issue” with the case, making the required evidentiary determinations by a preponderance of the evidence during the course of the trial. Id. See United States v. Montemayor, 703 F.2d 109, 117 (5th Cir. 1983), cert. denied, 464 U.S. 822 (1983); see also United States v. Stephenson, 887 F.2d 57, 59 (5th Cir. 1989), cert. denied, 493 U.S.1086 (1990).

In 1997 a sea change occurred with the United States Supreme Court’s decision in Bourjaily v. United States, 483 U.S. 171 (1987). Bourjaily held that the co-conspirators’ statements could themselves be used to determine whether a conspiracy existed and whether the defendant was a member of said conspiracy. Also, Bourjaily stands solidly for the proposition that the court need not hold a James hearing outside the jury’s presence. United States v. Fragoso, 978 F.2d 896, 899 (5th Cir. 1992). See also United States v. West, 58 F.3d 133 at 142 (5th Cir. 1995); United States v. Williams, 264 F.3d 561, 576 (5th Cir. 2001). The holding in

Bourjaily essentially eviscerated the James decision. United States v. Fragoso, supra at 900, citing United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987). Before, and especially after Bourjaily, the Fifth Circuit has approved the district court practice of carrying a James motion with the trial, or at least through the presentation of the government's case until an assessment of Rule 801(d)(2)(E) predicate facts can be appropriately made. United States v. Perez, supra at 855; United States v. Lechuga, 888 F.2d 1472, 1479 (5th Cir. 1989); United States v. Ricks, supra at 310. This is a matter committed to the broad and able discretion of the trial court. United States v. Cantu, 557 F.2d 1173, 1180 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978). The prevailing practice in this district, whether a multi-defendant, complex conspiracy or a "garden variety" conspiracy is the same, and that is to carry a James motion with the case, making the necessary findings at an appropriate juncture, during the course of the trial. This is particularly appropriate here, where the Court already has some familiarity with the facts of the case, having presided over the guilty plea of Richard F. "Dickie" Scruggs, a named co-conspirator. Cf. United States v. Williams, supra at 576.

One other portion of the defendant's motion deserves further comment. At Paragraph 13 the defendant attempts to portray the comments of another judge dealing with another issue in another case (the original corruption case against Richard F. "Dickie" Scruggs and others) as a binding pronouncement that no crime occurred in the case now before this court. (Defendant attached Exhibit "A," a transcript of the arguments of counsel before the court in "Scruggs I.") The defendant has misconstrued the transcript of that hearing. Among the motions being argued on February 21, 2008, before the Honorable Neal B. Biggers, Jr., in United States v. Scruggs, et al, 3:07CR192, were two related motions, one concerning the admissibility of 404(b) evidence

and a second dealing with a motion for severance. During the course of the argument regarding proposed 404(b) evidence, undersigned government counsel, responding to defense counsel's argument for exclusion of the evidence, attempted to make the point that evidence sought to be admitted under Rule 404(b) does not have to rise to the level of a separate crime; that evidence of other bad acts may alone be admissible to show intent or lack of mistake. This apparently caused some confusion, particularly in view of the fact that Joseph C. Langston had by then pled guilty to a criminal conspiracy to corruptly influence Judge Delaughter in the case of Wilson v. Scruggs. However, later in the motions hearing (pages 69-73) government co-counsel explained the 404(b) argument to the apparent satisfaction of the court and noted that other aspects of the "Wilson case" were still under investigation. Thus a motions hearing conducted in a different case over a year ago while the case *sub judice* was still under investigation has no application to the motion *sub judice*.

Conclusion

Clearly the defense would like to preview the government's evidence in a private trial before the jury is empaneled, but a pretrial James hearing is neither necessary nor required. The defendant's motion should be denied and overruled.

Respectfully submitted,

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/s/ Robert H. Norman

By:
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CERTIFICATE OF SERVICE

I, ROBERT H. NORMAN, Assistant United States Attorney, hereby certify that I electronically filed the foregoing **RESPONSE IN OPPOSITION TO DEFENDANT DELAUGHTER'S MOTION FOR PRETRIAL HEARING CONCERNING CO-CONSPIRATORS' STATEMENTS** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 9th day of April, 2009.

/s/ Robert H. Norman
ROBERT H. NORMAN
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