

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

Case: 3:07CR00192-NBB-SAA

RICHARD F. "DICKIE" SCRUGGS
DAVID ZACHARY SCRUGGS
SIDNEY A. BACKSTROM

**RESPONSE AND MEMORANDUM BRIEF IN
OPPOSITION TO DEFENDANT'S MOTION IN LIMINE**

Comes now the United States by and through the United States Attorney's Office and submits this its Response and Memorandum in Opposition to the Defendant's renewal of its Motion in Limine to exclude prior and similar bad acts pursuant to Rule 404(b) of the Federal Rules of Evidence.

Background

Defendant Zachary Scruggs has previously joined in a Motion in Limine filed by other defendants asking the Court to exclude evidence of prior similar bad acts pursuant to Rule 404(b) of the Federal Rules of Evidence. This Court held a hearing on February 21, 2008, and thereafter issued an order denying defendants' Motion in Limine [Document 134]. This Court found that the probative value is indeed not substantially outweighed by undue prejudice and found that the two-part test promulgated by United States v. Beecham, 582 F.2d 898, 911 (5th Cir. 1978) (en banc) was met in this case. Further, it is noted that since Zachary Scruggs is the only defendant remaining for trial, it would not be necessary for limiting the instructions with respect to any other potential defendants to whom the evidence would not apply.

Argument

The United States incorporates by reference its previously submitted Memorandum and Brief in Opposition to the Original Motion in Limine filed in this case with respect to the 404(b) evidence. [Document 114]. The only additional authority that we bring to the Court's attention is that of United States v. Arthur Anderson, LLP, 374 F.3d 281, 288-89 (5th Cir. 2004), (reversed on other grounds) 544 U.S. 696 (2005). With respect to prior similar bad acts evidence, the Fifth Circuit said "Rule 404(b) is a rule of inclusion allowing proof of prior bad acts of a defendant when the acts are relevant to an issue other than defendant's character, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Arthur Anderson, supra at 288-89. In order to exclude clearly relevant and probative evidence, "there must be a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk must be disproportionate to the probative value of the offered evidence. Arthur Anderson, supra at 289. As is the case with other trial court decisions with respect to the admissibility of evidence, the trial court has wide discretion on such admissibility and will be reversed only on a clear showing of a prejudicial abuse of discretion. United States v. Davis, 546 F.2d 583, 592 (5th Cir. 1977).

Conclusion

There have been no substantial changes in the instant case that would require a reevaluation of the court's previous ruling that the proffered 404(b) evidence is admissible against Zachary Scruggs. For the foregoing reasons and authorities, the defendants' motion renewing his objection to the 404(b) evidence is not well taken and should be denied.

Respectfully submitted,

JIM M. GREENLEE
United States Attorney

/s/ Thomas W. Dawson

By
THOMAS W. DAWSON
First Assistant United States Attorney

/s/ Robert H. Norman

By
ROBERT H. NORMAN
Assistant United States Attorney

/s/ David A. Sanders

By
DAVID A. SANDERS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I, THOMAS W. DAWSON, First Assistant United States Attorney, hereby certify that I electronically filed the foregoing **RESPONSE AND MEMORANDUM BRIEF IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

ngarrett@gbmkc.com

todd.graves@pobox.com

mm@mikemoorelawfirm.com

chrisrobertson@scruggsfirm.com

and I hereby certify that I have mailed to United States Postal Service the document to the following non-ECF participants:

Honorable Edward D. Robertson, Jr.
11150 Overbrook Road, Suite 200
Leawood, KS 66211

Honorable Mary D. Winter
11150 Overbrook Road, Suite 200
Leawood, KS 66211

This the 21st day of March, 2008.

/s/ Thomas W. Dawson
THOMAS W. DAWSON
First Assistant United States Attorney