

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

**GOVERNMENT'S MEMORANDUM BRIEF AND  
RESPONSE IN OPPOSITION TO DEFENDANT  
ZACHARY SCRUGGS' RENEWED MOTION FOR A JAMES HEARING**

Comes now the United States by and through the United States Attorney's Office and submits this its Memorandum Brief in Opposition to Defendant Zachary Scruggs's Renewed Motion for a James Hearing.

Background

Defendant Zachary Scruggs renews his motion for a James hearing, which was mentioned in passing in his Rebuttal Brief in Support of His Motion for Severance. A "James" hearing refers to the 1979 case of United States v. James, 590 F.2d 575 (5<sup>th</sup> Cir.), cert. denied 442 U.S. 917 (1979) wherein the Fifth Circuit held that there needed to be a finding by the trial court that a conspiracy existed in order for statements of co-conspirators to be admitted into evidence. It is hard to overlook the fact that four of the five named defendants in the instant case have pled guilty to Count One of the Indictment, that is a conspiracy to corruptly influence a state circuit judge and to deprive the citizens of the State of Mississippi of the honest services of an elected official. Moreover, this Court has held an evidentiary hearing in which one of the

co-conspirators testified as well as the FBI case agent with respect to pretrial motions filed by various defendants.

### Argument

It could be seriously argued, in view of the events that have transpired in this case referred to above, that the Court, *sua sponte*, could make a finding that a conspiracy existed and thus find co-conspirator statements admissible under the rule that preliminary questions of admissibility shall be determined by the Court. Federal Rules of Evidence 104(a). However, setting aside this argument, counsel for defendant Zachary Scruggs curiously omits from his brief the watershed case of Bourjaily v. United States, 483 U.S. 171 (1987), which held that in determining the existence of the conspiracy, the co-conspirator statements themselves may be considered by the Court in making its preliminary finding and thus no hearing out of the presence of a jury is necessary. But even before Bourjaily, the Fifth Circuit has held that James never required a hearing outside the presence of the jury. United States v. Gonzalez, 700 F.2d 196, 203 (5<sup>th</sup> Cir. 1983); United States v. Whitley, 670 F.2d 617, 620 (5<sup>th</sup> Cir. 1982); United States v. Ricks, 639 F.2d 1305, 1310 (5<sup>th</sup> Cir. 1981). The Bourjaily holding “swept” away a major portion of the James decision. United States v. Perez, 823 F.2d 854, 855 (5<sup>th</sup> Cir. 1987). The matter of when the express of findings on admissibility should be made is a matter committed to the broad discretion of the trial court. United States v. Cantu, 557 F.2d 1173, 1180 (5<sup>th</sup> Cir. 1977), cert. denied, 434 U.S. 1063 (1977).

It has long been the practice in this district that the request for a James finding is carried with the case and at the appropriate time the trial judge may make the findings of a conspiracy explicitly or in some cases implicitly. See United States v. Fragoso, 978 F.2d 896, 900-01 (5<sup>th</sup> Cir. 1992). The Fifth Circuit has consistently rejected claims that defendants are entitled to a

hearing to determine the existence of a conspiracy preliminary to the admission of co-conspirators' statements under Federal Rules of Evidence 801(d)(2)(E). United States v. West, 58 F.3d 133 141-42, citing Fragoso, supra. As the Fifth Circuit stated, "Thus, contrary to [defendants] argument, no hearing is required and the district court was free to allow admission of testimony before making the determination of whether the testimony fit within Rule 801 (d)(2)(E)." West, supra, at 142.

Conclusion

For the foregoing reasons and authorities, defendant Zachary Scruggs' motion for a pretrial James hearing is not well taken and should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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

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

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This the 21<sup>st</sup> day of March, 2008.

/s/ Thomas W. Dawson  
THOMAS W. DAWSON  
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