

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

UNITED STATES OF AMERICA

vs.

RICHARD F. "DICKIE" SCRUGGS

DAVID ZACHARY SCRUGGS

SIDNEY A. BACKSTROM

Case: 3:07-cr-00192-NBB-SAA

**DEFENDANT DAVID ZACHARY SCRUGGS'S RENEWED MOTION
FOR A JAMES HEARING WITH COMBINED MEMORANDUM OF LAW**

COMES NOW Defendant David Zachary Scruggs, and by and through counsel, files this Renewed Motion for a James Hearing with Combined Memorandum of Law. Defendant Scruggs would show as follows:

Introduction and Procedural Background

Exactly one month ago, in his rebuttal brief in support of his motion to sever (Document 116), Defendant Zach Scruggs requested alternative relief from this Court: a James hearing. See United States v. James, 590 F.2d 575 (5th Cir. 1979). This Court has not yet scheduled such a hearing, but in the meantime, the complexion of this case has completely changed. Both of Zach Scruggs' alleged co-conspirators, Sid Backstrom and Richard Scruggs, have pled. Now the trial is about one person and one person only: Zach Scruggs. With each and every alleged co-conspirator statement offered, from day one, hour one of the trial, the James questions will have to be raised and answered: (1) were the statements made by individuals who, along with Zach Scruggs, were members of the conspiracy; (2) were they made during the course of the conspira-

cy; and (3) were they made in furtherance of the conspiracy? Id.; Fed. R. Evid. 801(d)(2)(E). In other words, these are the predicate “conspiracy” facts for Zach Scruggs.

A mere week ago, it appeared that evidence in the upcoming trial of this matter would have to methodically and fully establish the elements of a crime against all three alleged co-conspirators. Clearly, the order of trial would be attuned to the case against the two conspirators most often mentioned in the evidence, Sid Backstrom and Richard Scruggs. At that time, it could arguably have made sense to delay any James hearing until the quality and nature of this evidence (with respect to Zach Scruggs) could be considered.

That option is no longer available or necessary, since there will be no parallel evidentiary submission to be made against anyone else. The relevance and inadmissibility of all the evidence now hinges solely on its relationship to Zach Scruggs—no one else. Therefore, these central questions of law and fact—the James questions—are no longer unavoidable and cannot be postponed. They are as ripe as they will ever be for resolution, since the orderly and fair presentation of all evidence at trial will depend on them. The jury has not yet been seated, so now is the time to avoid the type of prejudice against which the James Court warned. A James hearing should be scheduled as soon as possible at the Court’s convenience.

Argument

In James, the Fifth Circuit recognized the problems posed by a multi-conspirator case, where at times hearsay from one co-conspirator can prejudice another co-conspirator. It first acknowledged and then fashioned a procedure (the James hearing) to deal with the reality that it is virtually impossible to avoid prejudice arising from the constant repetition of inadmissible

statements simply by continually instructing the jury that they may be asked to disregard a co-conspirator's hearsay statements at the end of the trial:

The admissibility of a coconspirator's declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally.

James, 590 F.2d at 579.

As discussed at length in Defendant's prior motion practice and briefing, the occasions on which this Court would be required to give such instructions will be many. The overwhelming majority of out-of-court statements in this case make no reference to Zach Scruggs. Where they do incidentally refer to him, there is a wide and gaping chasm between the bare mention of his name, and the inference of his real, knowing, and willing agreement to do something illegal. What appears here as a chasm is in some prosecutions merely a gap; such a gap must ordinarily be bridged by the factual predicate evidence required under Fed. R. Evidence 801(d)(2)(E). Here, however, there are only three factual episodes available to the Government for bridging this chasm, and as discussed in Defendant's prior brief, those three episodes cannot come close to spanning the Rule 802 gap. The reason is simple: none of the episodes indicate—or even make it more likely—that Zach Scruggs knew of a conspiracy or of another person's attempt to bribe a judicial official.

To be sure, James does not mandate a pre-trial hearing outside the presence of the jury. Where prejudice is not likely to result, a trial court could hold a hearing during a break in trial or at sidebar, or consider the issue at the end of the Government's case in chief. However, James

does instruct district courts to find the predicate facts before admitting out-of-court co-conspirator declarations unless there is some particular reason that it would be inconvenient:

Both because of the “danger” to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a preferred order of proof in such a case. The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

James, 590 F.2d at 582.

Especially now that all of the other alleged co-conspirators have pled out of this case, there would be little inconvenience from such a hearing. The Government has alleged precious few connections between David Zachary Scruggs and the alleged conspiracy, so the Government could not have many witnesses capable of establishing the three Rule 802 predicate conspiracy facts by a preponderance of the evidence. This would not be a matter of trying a case twice, once for the Court and once for the jury. In fact, it will be much easier to flesh out the true factual basis for Zach Scruggs’s alleged knowledge and agreement in one fell swoop outside of the hearing of the jury and before the trial (or at least before the first relevant witness), than to allow witness after witness to provide testimony to the jury that is inadmissible against him, burdened time and again by questioning on predicate facts and the recitation of curative and cautionary instructions to a diligent but increasingly befuddled jury. This is the very reason the Fifth Circuit devised the James Hearing:

Trial judges may elect one or the other of these proceedings according to their own perception of the dangers of proceeding with-

out them, and being mindful of the teaching of James that the improper admission of hearsay to the prejudice of the defendant can rarely be eliminated by curative or cautionary instructions.

United States v. Ricks, 639 F.2d 1305 (5th Cir. 1981) (describing trial courts' practice and examining the reasons for James Hearings).

For these reasons, therefore, this Court should schedule a James Hearing at a time convenient for the Court, parties, and any witness(es) the Government may call to meet its burden on the predicate facts. The Government can then show whether there is a preponderance of evidence that David Zachary Scruggs was a knowing and willing participant in any conspiracy – let alone whether its evidence against him consists of statements made during and in furtherance of that alleged conspiracy.

WHEREFORE, David Zachary Scruggs prays that this Court issue an order setting a James Hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Todd Graves, do hereby certify that on the 19th day of March, 2008, I have electronically filed the foregoing Defendant David Zachary Scruggs's --- with the Clerk of the Court using the ECF System, which sent notification of such filing to Thomas W. Dawson, Assistant United States Attorney, Robert H. Norman, Assistant United States Attorney, David Anthony Sanders, Assistant United States Attorney, Frank W. Trapp, J. Rhea Tannehill, Jr., and John W. Kecker.

s/ Todd P. Graves
Todd P. Graves