

**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  
REBUTTAL MEMORANDUM IN SUPPORT OF HIS MOTION  
TO SEVER AND ALTERNATIVE REQUEST FOR A JAMES HEARING**

COMES NOW Defendant David Zachary Scruggs, and by and through counsel, pursuant to Local Rule 7.2(D), files this Rebuttal Memorandum in Support of his Motion to Sever and Alternative Request for a James Hearing. Defendant Scruggs would show as follows:

**Introduction**

For all of the reasons set forth in Defendant's principal brief, a separate trial is the only way to ensure that Zach Scruggs is tried fairly. The vast majority of the evidence relates to other defendants or alleged co-conspirators—indeed, that evidence is of an entirely different order than the few episodes allegedly tying Defendant to the conspiracy. The Government does not really dispute this fact in its response brief, contenting itself to cite various cases which repeat the unremarkable proposition that severance is not a common remedy. Of course, this does not answer the question of whether serious prejudice to Zach Scruggs actually does require severance in this case. For example, the Government attempts to dismiss the consideration of the father-son relationship by arguing that in the supporting case offered by Defendant, severance

was not the question of law at issue. That response, however, does not take on the significance of the father-son relationship in making factual determinations which are relevant to legal conclusions, which was the point of the cited authority.

But even if this Court is not presently inclined to grant a separate trial, it should at least take steps before the onset of the trial to ensure that out-of-court hearsay statements of other defendants or alleged conspirators are not admitted against Zach Scruggs. First and foremost, it should hold a James Hearing.

Under Fed. R. Evid. 801(d)(2)(E), David Zachary Scruggs's co-defendants' out-of-court statements are only admissible against him as the non-hearsay of a co-conspirator if: (1) the statements were actually made by individuals who, along with the defendant, were members of the conspiracy; (2) they were made during the conspiracy; and (3) they were made in furtherance of the conspiracy. See United States v. James, 590 F.2d 575 (5<sup>th</sup> Cir. 1979) (partially abrogated on other grounds by Bourjaily v. United States, 483 U.S. 171 (1987)). The government must prove these three predicate facts by a preponderance of the evidence before it can qualify co-conspirators' statements as non-hearsay. See id.; Fed. R. Evid. 104(a).

However, if the Government does not ultimately "connect up" Zach Scruggs's co-defendants' various hearsay statements with him, then a mountain of inadmissible evidence would have been heard by the jury. This evidence would join the 404(b) evidence discussed during Defendant's principal brief as evidence which the Court must attempt to remove from the jury's consideration by curative instruction. The fact that the confluence of these two areas makes up the overwhelming majority of the Government's evidence would practically demand the Court order a mistrial. Hence, almost three decades ago the Fifth Circuit devised the James

Hearing. Before the trial begins, this Court should conduct such a hearing to put the basis of the Government's "predicate" conspiracy facts to the preponderance of the evidence test, avoiding the waste and expense of a mistrial.

### Argument

The Fifth Circuit's *en banc* decision in James recognized the reality that it is virtually impossible to avoid prejudice arising from the constant repetition of such inadmissible statements simply by continually instructing the jury that they may be asked to disregard the 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 principal brief, the occasions on which this Court would be required to give such instructions will be many. The vast 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

801(d)(2)(E) gap. The reason is simple: none of the episodes indicate –or even make it more likely than not—that Zach Scruggs willfully joined a conspiracy to bribe a judicial official.

This Court should not expose the jury to several days of such evidence and hope that a recitation at the close of the Government’s case that it should disregard certain evidence as to Zach Scruggs will cure the prejudice. At that point, given the volume of such evidence (coupled with the previously discussed 404(b) evidence) a mistrial will be the only cure. And that will mean that scarce resources will have been wasted. In this case, a pre-trial hearing outside the presence of the jury is a necessary precaution.

The Defendant acknowledges the now common practice of allowing the 801(d)(2)(E) evidence to “run with the case” and for the court to make an explicit finding after 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.

Here, there would be little inconvenience from such a hearing, and the unique facts of this case, coupled with the volume of potentially inadmissible evidence, warrants particularized

consideration. The Government has alleged precious few connections between Zach Scruggs and the alleged conspiracy, so the Government could not have many witnesses capable of establishing the three 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 without 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, if this Court does not issue an order severing the trial of Zach Scruggs from those of his co-defendants, it 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.

WHEREFORE, David Zachary Scruggs prays that this Court issue an order severing his trial from that of his co-defendants, Richard Scruggs and Sidney Backstrom and scheduling a

separate trial on the indictment in which he is charged, or in the alternative, that this Court issue an order setting a James Hearing.

Respectfully submitted,

By: /s/ Todd P. Graves

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**CERTIFICATE OF SERVICE**

I, Todd Graves, do hereby certify that on the 19<sup>th</sup> day of February, 2008, I have electronically filed the foregoing Defendant David Zachary Scruggs's Rebuttal Memorandum in Support of His Motion to Sever and Alternative Request for a James Hearing 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  
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