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

UNITED STATES OF AMERICA vs. DAVID ZACHARY SCRUGGS	Case: 3:07-cr-00192-NBB-SAA

DEFENDANT DAVID ZACHARY SCRUGGS'S RENEWED MOTION *IN LIMINE* TO EXCLUDE EXTRINSIC EVIDENCE PURSUANT TO RULE 404(b)
(With Incorporated Memorandum of Law in Support)

COMES NOW Defendant David Zachary Scruggs, and by and through counsel, files this renewed motion *in limine* to exclude the introduction by the government of extrinsic evidence pursuant to Fed. R. Evid. 404(b). Defendant Zach Scruggs would show as follows:

Introduction

Now that Richard Scruggs will not be a defendant at the trial of this case, David Zachary Scruggs renews the motion *in limine* to exclude Rule 404(b) evidence concerning the alleged attempt to corruptly influence First Circuit Court District Judge Bobby DeLaughter in connection with *Wilson v. Scruggs*. Zach Scruggs's involvement with the *Wilson* case is far too remote and the evidence's unduly-prejudicial weight is far too substantial to permit the government to introduce the extrinsic evidence at the trial of this case against only Zach Scruggs. Defendant Zach Scruggs and his law firm were not parties to *Wilson v. Scruggs*, nor did he have any direct interest in that case. Nor was he counsel to any party in that case. In fact, Zach Scruggs had not even graduated from college, let alone law school, at the time the case was filed. Although Zach Scruggs was aware of the existence of *Wilson v. Scruggs*, which pended in the Mississippi courts for twelve years, there is no allegation that Zach Scruggs ever had anything to do with a conspiracy or attempt to corruptly influence Judge DeLaughter by offering him consideration for a federal judgeship in exchange for Judge DeLaughter to "shade the law." Feb. 21, 2008 Tr. at 18:13. This alleged act was clearly the impetus and purpose behind the government's desire to submit the allegations in this trial. Because this allegation only implicates Richard Scruggs,

Zach Scruggs now requests that the Court reconsider permitting the government to introduce the Rule 404(b) evidence at his trial.

Relevant Procedural Background[1]

On February 11, 2008, Zach Scruggs and his co-defendants at that time moved *in limine* to exclude the introduction of irrelevant and prejudicial Rule 404(b) extrinsic evidence. *See* Doc. 93. In their motion, defendants argued that the Rule 404(b) evidence noticed by the government should be excluded on the grounds (i) that it was improper character evidence; (ii) that it will create a "trial within a trial," which may consume perhaps more time even than the trial of the offenses actually charged in this case; (iii) that it will unduly prejudice Zach Scruggs and Sid Backstrom, neither of whom was named in any of the materials identified in the government's Rule 404(b) notice letter; and (iv) that it will deprive all the defendants of a fair trial on the offenses that are actually charged in this case. *See id*. In other words, the government's 404(b) evidence is character evidence that should have been excluded on the ground that there is no proper purpose for admitting it; the evidence is not relevant under Fed. R. Evid. 402; and any minimal probative value of the extrinsic evidence is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, and unduly prolonging the trial of this case. *See id.*

The Court conducted a hearing on the motion *in limine* on February 21, 2008. Until that hearing, it was apparent from all the documents that the government identified in its Rule 404(b) notice letter that the only defendant implicated by the Rule 404(b) evidence was Richard Scruggs. However, during the hearing on the motion *in limine*, the government alleged that it had evidence that would implicate Zach Scruggs in an attempt to corruptly influence Judge DeLaughter in connection with *Wilson v. Scruggs*. Namely, the government stated only that, "Joey Langston is prepared to testify that Zach Scruggs was fully aware of what was going on in the *Wilson* case." Feb. 21, 2008 Tr. at 21:17-20. Despite proffering a vague allegation that Zach

[1] Since the Court is already familiar with the Rule 404(b) issue, Zach Scruggs does not here repeat the full background of this issue and all the arguments against it, both of which were fully briefed in Defendants' *Motion in Limine* to Exclude Introduction of Extrinsic Evidence Pursuant to Rule 404(B) and were also argued at the February 21, 2008 hearing. *See generally* Doc. 193 &

Scruggs was aware of "what was going on in the *Wilson* case," the government, to date, has only indicated that Zach Scruggs was aware that Ed Peters was hired in the case because of his long-standing relationship with Judge DeLaughter. Additionally, the government provided counsel with a copy of an email involving Zach Scruggs and Johnny Jones, wherein they discuss the *Wilson* case; however, nothing in the email suggests Zach's Scruggs's knowledge that any *quid pro quo* (prospective federal judgeship) was being offered to Judge DeLaughter, which is the crux of the government's offering and the very reason that the government was seeking to introduce the allegation. Hiring someone because he or she has a good relationship with a judge is certainly not a novel concept, and more importantly, not illegal. What is illegal is offering the judge something of value in exchange for some act. No such allegation exists against Zach Scruggs.

On February 26, 2008, the Court denied the motion *in limine*. *See* Doc. 134. In the Order permitting the introduction of the Rule 404(b) evidence, the Court found that the extrinsic evidence was relevant to the government's case against Richard and Zach Scruggs because the extrinsic act was sufficiently similar to the charged offense in this case. *See* Doc. 134 at 3. The Court further found that the extrinsic evidence was relevant only to the issue of "intent," since the defendants pleaded not guilty. *See id.* Additionally, the Court concluded that the probative value of the extrinsic evidence was not substantially outweighed by its undue prejudice. *See id.* In accordance with these findings, the Court ruled that it would instruct the jury that it may consider the extrinsic evidence only "in determining the intent issue." *Id.*

Since the Court issued its Order permitting the government to introduce the extrinsic evidence related to the *Wilson* case, Zach Scruggs's co-defendants, Richard Scruggs and Sid Backstrom, have both pleaded guilty to one count of conspiracy to corruptly influence a state court judge in connection with *Jones v. Scruggs*. The government has not charged Richard Scruggs with any offense related to *Wilson v. Scruggs*, nor has it indicted any individual for any conduct related to that case.

Feb. 21, 2008 Tr.

Argument

I. Now That Richard Scruggs Will Not be a Defendant at Trial, the Court Should Reconsider the Motion *in Limine* to Exclude the Rule 404(b) Evidence.

A. The extrinsic evidence is irrelevant to the issue of "intent" in the case against Zach Scruggs.

The extrinsic evidence related to *Wilson v. Scruggs* is not probative of "intent" in this case. In the Order permitting the government to introduce the Rule 404(b) evidence, the Court found that the extrinsic act evidence has "significant probative value" on the issue of "intent" solely because Zach Scruggs and his then co-defendants had pleaded not guilty. Doc. 134 at 3 (citing *United States v. Duffaut*, 314 F.3d 203, 209 (5th Cir. 2002)). Although Zach Scruggs does not dispute that the government bears the burden of proving beyond a reasonable doubt each element of the charged offenses, including the element of intent, and that his "not guilty" plea places "intent" as well as every other element of every charged offense at issue, the mere fact that the government still has to prove the element of "intent" does not mean *per se* that all extrinsic act evidence that may be tangentially related to "intent" has "significant probative value." *Id.* While such evidence (assuming one's knowledge of conduct sufficiently similar to the crime charged) may have "significant probative value" in some cases, it is not true in this case where it is beyond any reasonable dispute that Zach Scruggs, who is an attorney, knows that bribing a judge is a crime. The extrinsic act evidence that the government seeks to introduce in this case has nothing to do with the facts of this case and does not have a tendency to make it any more likely that Zach Scruggs was aware that bribing Judge Lackey was a crime, particularly given that Zach Scruggs had no knowledge of the alleged *quid pro quo* in the *Wilson* matter. *See* Fed. R. Evid. 401. Thus, at trial, there will be no serious dispute that providing Judge Lackey with $40,000 constituted a bribe and was illegal, nor will there be any dispute about the fact that Judge Lackey demanded and did in fact receive $40,000 from Tim Balducci. In short, there is no question in any reasonable person's mind that offering a judge $40,000 constitutes a bribe and is illegal. As such, these matters are beyond any reasonable dispute and extrinsic evidence of Zach Scruggs's general intent is therefore not relevant within the meaning of Fed. R. Evid. 401.

All the charges indicted in this case are specific intent crimes. The issue with respect to Zach Scruggs's specific "intent" in this trial will be what Zach Scruggs knew and did not know about the bribe of Judge Lackey. Permitting the Judge DeLaughter extrinsic evidence to be admitted against Zach Scruggs will not make it any more likely that Zach Scruggs had knowledge of the criminal agreement and willfully joined with Balducci and others to pay Judge Lackey $40,000 for the order compelling the *Jones v. Scruggs* case to arbitration. The Judge DeLaughter allegations are about an attempt in 2006 to corruptly influence a *different* judge of a *different* court, in a *different* case that Zach Scruggs had nothing to do with, by *different* attorneys who did not represent Zach Scruggs. Those allegations have nothing to do with Zach Scruggs's factual *awareness* of what Balducci was doing in 2007, nor do they show any agreement by Zach Scruggs to corruptly influence Judge DeLaughter. To the defendant's knowledge, the evidence will only show Zach Scruggs's awareness that Ed Peters was hired in the *Wilson* matter and that Zach Scruggs was aware that Ed Peters had a good and long-standing relationship with Judge DeLaughter. As such, it is difficult, if not impossible, to determine how the introduction of the Rule 404(b) evidence will assist the jury in determining whether Zach Scruggs was aware of and willfully agreed to Balducci's payment of $40,000 to Judge Lackey. To put it another way, whether Richard Scruggs, Peters, and Langston improperly influenced Judge DeLaughter in 2006 (by offering consideration of the federal judgeship) does not make it more or less likely that Zach Scruggs in 2007 had any knowledge of and/or willfully agreed to Balducci's payment of $40,000 to Judge Lackey. Although it is correct that the government still bears the burden of establishing the element of "intent" beyond a reasonable doubt, the Judge DeLaughter extrinsic evidence is not probative of specific intent in this case against Zach Scruggs and it should be excluded. *See* Fed. R. Evid. 401.

B. The extrinsic act evidence is inadmissible character evidence and has no probative value in the case against Zach Scruggs.

That the extrinsic evidence is not probative of "intent" further demonstrates that the real purpose for introducing the extrinsic evidence about his father's alleged misconduct is to show

Zach Scruggs's bad character, and his bad genes. Until the hearing on the motion *in limine*, the government had never suggested that Zach Scruggs had anything to do with the Judge DeLaughter allegations. But at the hearing, the government averred for the first time that Langston would testify that "Zach Scruggs was fully aware of what was going on in the *Wilson* case." Feb. 21, 2008 Tr. at 21:17-20. The government, however, did not explain what it was that Zach Scruggs was aware of or how Zach Scruggs's mere awareness of someone else's bad act constitutes Rule 404(b) evidence of a similar act that *Zach Scruggs* had performed. Indeed, it is black letter law that mere knowledge of a conspiracy does not make one a coconspirator. *See Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943) (holding that the essence of a conspiracy is not mere knowledge of another's illegal purpose, but the intent to "further, promote[,] and cooperate in it"). Although Zach Scruggs adamantly denies that he had any knowledge of an attempt to corruptly influence Judge DeLaughter, if all the government intends to show is that Zach Scruggs had knowledge that *other* people were attempting to influence Judge DeLaughter, then the Court should not permit that evidence to be introduced against Zach Scruggs, who after all is charged with crimes requiring *specific intent*.

To this date, the government still has not identified any bad act that *Zach Scruggs* performed. The government has not alleged that Zach Scruggs ever suggested that he could get Judge DeLaughter considered for a federal judgeship (nor that he was aware of another's efforts to do so), nor has it alleged that Zach Scruggs ever contacted any U.S. Senator about Judge DeLaughter, nor has it alleged that Zach Scruggs ever conspired or otherwise agreed to do anything that could constitute an attempt to corruptly influence Judge DeLaughter. Even when the government's allegations are taken in their most favorable light, they do not show that Zach Scruggs engaged in any action to corruptly influence Judge DeLaughter. The introduction of this evidence would serve no other purpose than to show that Zach Scruggs is the *kind* of person who affiliates with people that attempt to corruptly influence judges, or that Zach Scruggs is related to such *personae non gratae*. As such, this evidence squarely falls within Rule 404(b)'s prohibition against the admission of extrinsic *character* evidence, and it should be excluded.

C. The unduly prejudicial effect of the extrinsic evidence substantially outweighs any minimal probative value of that evidence.

The substantial prejudice of permitting the government to introduce the Judge DeLaughter extrinsic evidence is magnified in a trial against only Zach Scruggs. As explained in the motion *in limine*, the government's introduction of the Judge DeLaughter extrinsic evidence is unduly prejudicial because: (i) the Judge DeLaughter allegations of potential criminal wrongdoing (*quid pro quo*) have nothing to do with Zach Scruggs; (ii) the Judge DeLaughter allegations have not been charged and Zach Scruggs and the Court will be burdened with the task of conducting a time-consuming mini-trial on those allegations, which have nothing to do with the facts of this case; (iii) it will take Zach Scruggs a substantial amount of time to investigate the Judge DeLaughter allegations and to develop a defense to them; (iii) admission of evidence related to the uncharged Judge DeLaughter allegations would create a significant danger that the jury might convict Zach Scruggs for the allegations in the *Wilson* case, rather than this case; and (iv) admission of the 404(b) evidence related to an ongoing investigation that is extensively covered in the Mississippi press would magnify the effect of prejudicial press on Zach Scruggs's case, before and during trial. Although the Court concluded in its Order denying the motion *in limine* that "the probative value [of the extrinsic evidence] is indeed not substantially outweighed by undue prejudice," the Court did not otherwise discuss the undue prejudice to Zach Scruggs, nor did it make any finding with respect to the prejudicial impact on Zach Scruggs of having to conduct a mini-trial about allegations, the significant portion of which have nothing to do with him, and the possibility that he might be convicted for the alleged Judge DeLaughter conduct that is not here charged against him. This prejudice is indeed substantial and should be reconsidered.

In addition to the undue prejudice that has already been briefed to the Court, the admission of the Rule 404(b) evidence also uniquely prejudices Zach Scruggs because the allegations involve his father, Richard Scruggs, and his uncle, Senator Trent Lott, in getting Judge DeLaughter considered for a federal judgeship. Indeed, the government has represented to the Court that it intends to call Zach Scruggs's uncle, presumably to testify that Zach Scruggs's

father asked Senator Lott to consider Judge DeLaughter for a federal judgeship. *See* Feb. 21, 2008 Tr. at 25:2-3. The unduly-prejudicial impact of permitting this evidence to be introduced against Zach Scruggs is obvious. Admission of the evidence would lead to unfair prejudice against him simply by virtue of the presumed close relationship between family members. No limiting instruction will be able to cure the inescapable (but impermissible) conclusion, "like father, like son."

Furthermore, the prejudicial impact of the government's about-face at the February 21, 2008 hearing is particularly noteworthy because the government had previously been put to the task of evaluating whether Zach Scruggs was involved in the attempt to corruptly influence Judge DeLaughter. As this Court well knows, Zach Scruggs was originally represented in this case by Anthony "Tony" Farese, and Richard Scruggs was initially represented by Langston in this case. The government was also well aware of those representations. Nevertheless, during the pendency of this case, the government made no objection to Farese representing Langston in *United States v. Langston*, despite the fact that Langston was pleading guilty to a crime in which he directly implicated Zach Scruggs's father *and* despite the fact that Langston apparently – according to the government – now intends to implicate Zach Scruggs in that same conspiracy. *See* Feb. 21, 2008 Tr. at 21:17-20. By permitting the government to introduce the extrinsic evidence at trial, Zach Scruggs's former attorney in this case now will be brought in by the government to help establish Zach Scruggs's guilt in this case. The conflict here is self-evident and it is unduly-prejudicial to Zach Scruggs.[2] Not only did the government's and Langston's prior representations about Zach Scruggs's involvement (or lack thereof) with the Judge DeLaughter allegations cause Zach Scruggs to lose Farese as his lawyer in this case, but Zach Scruggs's lawyer will now be brought into this case to represent Langston, who the government alleges will provide testimony that demonstrates that Zach Scruggs is guilty of the offenses charged in this case. This prejudice warrants exclusion of the extrinsic evidence.

[2] The government previously submitted a bench memorandum to the Court in which the government fully-briefed substantially the same conflict issue. *See* Doc. 75, Bench Memo.

II. If the Court Does Not Reconsider Its Order Permitting the Government to Introduce the 404(b) Evidence, Zach Scruggs Renews the Request for Immediate Discovery and a Continuance.

In the motion *in limine*, Zach Scruggs and his then co-defendants requested that the Court permit discovery of the Judge DeLaughter allegations and that the Court continue the trial of this case if it permitted the government to introduce the extrinsic act evidence. *See* Doc. 93 at 13. In its Order denying the motion *in limine*, the Court did not rule on the request for discovery and a continuance. Zach Scruggs hereby renews his request that the Court order the government immediately to provide discovery, including (1) Fed. R. Crim. P. 16 discovery of the Judge DeLaughter materials that the government has within its possession, custody, or control; and (2) all materials that contain information which exculpates Zach Scruggs of the alleged extrinsic offense or which tends to impeach government witnesses. Zach Scruggs also renews his request for a continuance of the trial to permit him to receive the discovery, evaluate and investigate the extrinsic act allegations, and prepare his defense to those allegations.

Conclusion

WHEREFORE, Zach Scruggs prays that this Court reconsider its Order permitting the government to introduce extrinsic evidence pursuant to Rule 404(b) and that the Court exclude such evidence. In the event that the Court does not exclude this evidence, Zach Scruggs renews his request for immediate discovery related to the Judge DeLaughter allegations as well as a continuance of the trial.

Respectfully submitted, this 19th day of March, 2008.

Dated: March 19, 2008

By: /s/ Todd P. Graves

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CERTIFICATE OF SERVICE

I, Todd Graves, do hereby certify that I have electronically filed the foregoing **Defendant David Zachary Scruggs's Renewed Motion *In Limine* to Exclude Extrinsic Evidence Pursuant to Rule 404(b) and Memorandum of Law in Support Thereof** with the Clerk of the Court using the ECF system, which sent notification for such filing to Thomas W. Dawson, Assistant United States Attorney; Robert H. Norman, Assistant United States Attorney; and David Anthony Sanders, Assistant United States Attorney.

This, the 19th Day of March, 2008.

/s/ Todd Graves
Todd Graves