

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

UNITED STATES OF AMERICA

V. CRIMINAL CASE NO. 3:07CR192-NBB-SAA

RICHARD F. "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM,
TIMOTHY R. BALDUCCI,
STEVEN A. PATTERSON

**GOVERNMENT'S COMBINED MEMORANDUM OF AUTHORITIES
AND RESPONSE TO DEFENDANTS' "MOTION IN LIMINE TO EXCLUDE
INTRODUCTION OF EXTRINSIC EVIDENCE PURSUANT TO RULE 404(b)**

Comes now the United States of America, by and through the United States Attorney for the Northern District of Mississippi, and in response to the defendants' Motion in Limine to Exclude 404(b) Evidence, would respectfully show unto the Court the following facts, to-wit:

The defendants protest that the government is attempting to introduce evidence of a different attempt to corruptly influence a *different* judge of a *different* court in a *different* case by *different* attorneys in a *different* year (emphasis theirs). That is of course why it is called *extrinsic* evidence. They also protest that the evidence would portray uncharged misconduct which has never been litigated in any court. Again, that is in most instances what 404(b) evidence is about. They complain that admission of that evidence will create a "trial within a trial," and they opine that if the court is going to admit that evidence, they are entitled to Rule 16 discovery and a continuance to prepare. On the contrary, the presentation of 404(b) evidence will be brief, the standard of proof is not proof beyond a reasonable doubt, and reasonable notice setting forth the general nature of the evidence is required, not Rule 16 discovery. No continuance is required, and the interests of defendants David Zachary Scruggs and Sidney A.

Backstrom can be well protected by a limiting instruction to the jury.

FACTS

The evidence would show that when Circuit Judge Henry Lackey tested the defendants' intent by setting a figure, \$40,000, Balducci's immediate response was that he did not believe that would be a problem. He did not believe that would be a problem because he had been involved the year before in representing Richard F. "Dickie" Scruggs and The Scruggs Law Firm in the case of Wilson v. Scruggs, in the circuit court of Hinds County, Mississippi. Richard F. Scruggs and The Scruggs Law Firm had been willing on that occasion to spend money to hire Ed Peters for the purpose of corruptly influencing Peters' close and trusting friend, State Circuit Judge Bobby Delaughter. Richard F. Scruggs and The Scruggs Law Firm had also caused the possibility of a federal judgeship to be communicated to Judge Delaughter in a further effort to corruptly influence the judicial process, or in the defendants' parlance, to ensure that they would get a "fair" trial.

Rule 404(b) notice was filed January 28, 2008, . The affidavit for the search of Joey Langston's office was provided to the defense, and the defendants were referred to the transcript of Langston's guilty plea. All that the rule requires is " . . . reasonable notice of the general nature of the evidence." (Emphasis added.) The notice and information provided far exceeds the "general nature" of the evidence sought to be admitted.

The facts in the case at bar and the facts in the Wilson case are strikingly similar. In both cases, Richard F. "Dickie" Scruggs and The Scruggs Law Firm used others as intermediaries in their bribery attempts. Balducci, Langston and Patterson paid Ed Peters to corruptly influence Judge Delaughter, a trusted long-time friend. Dickie Scruggs caused Langston to communicate

through others that Delaughter would be considered for a federal district court judgeship, in order to further corruptly influence the outcome of Wilson v. Scruggs, in his favor. In the Lackey case, Scruggs and The Scruggs Law Firm used Balducci to unethically and corruptly influence his long-term, trusted friend, Henry Lackey. As in Wilson, it was for the stated purpose of just getting a “fair” trial. Unable to get it for free, the defendants did not hesitate to pay \$50,000 to corruptly influence Judge Lackey, while speaking in lofty terms about it being the “proper” thing to do. In both cases the litigation involved millions of dollars that were at stake in contested attorneys’ fees, and, ironically, in both cases there may have been reason to believe The Scruggs Law Firm would likely prevail, even without the bribes, but they were willing to have judges corruptly influenced to ensure they had an edge. The corrupt overtures in both cases occurred within a one year period, and both were designed ultimately to ensure success by impugning the integrity of the judicial process.

Discussion of Authorities

Rule 404(b), Federal Rules of Evidence, provides:

(b) Other Crimes, Wrongs, or Acts. – Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

United States v. Beechum, 582 F.2d 898, cert. denied, 440 U.S. 920, 99 S. Ct. 1244

(1979), is the seminal case in this circuit on the admissibility of 404(b) evidence. In Beechum a substitute letter carrier for the United States Postal Service was charged with unlawfully

possessing an 1890 silver dollar, knowing it to have been stolen from the United States mails. When arrested he also had in his possession two credit cards that did not belong to him. The only contested issue in the case was whether Beechum intended to turn the silver dollar in to postal authorities as he claimed, or keep it for himself. Because Beechum's intent (to possess the silver dollar unlawfully) was a necessary element of the offense, the Fifth Circuit held that evidence of the credit cards (with which he was not charged) should have been admitted pursuant to ¶ 404(b) of the Federal Rules of Evidence. Beechum established a two-prong test for the admissibility of extrinsic 404(b) evidence. First, it must be relevant to an issue other than the defendant's character. Second, the evidence must possess probative value that substantially outweighs any undue prejudice to the defendant. The court noted that "where the evidence sought to be introduced is an extrinsic offense, its relevance is a function of its similarity to the offense charged. Beechum, p. 911. "Once it is determined that the extrinsic offense requires the same intent at the charged offense and that the jury could find that the defendant committed the extrinsic offense, the evidence satisfies the first step under Rule 404(b)." Beechum, p. 913. The second prong of the Beechum test comparing the evidence's probative value to the risk of any unfair prejudice ". . . calls for a common sense assessment of all the circumstances surrounding the extrinsic evidence." Beechum, p. 914. But once again, "in measuring the probative value of the evidence, the judge should consider the overall similarity of the extrinsic and charged offenses." Beechum, p. 915. See also United States v. Hernandez-Guevara, 162 F.3d 863, 872 (5th Cir. 1998). In the event the extrinsic evidence considered by the court is found to be relevant and not unduly prejudicial, it should be admitted unless the court holds that a jury could not reasonably find that the defendant committed the extrinsic acts in question. Beechum, p. 913.

Evidentiary rulings on the admissibility of 404(b) evidence are then reviewed by the Fifth Circuit Court of Appeals for any abuse of discretion. United States v. Peters, 283 F.3d 300, 311 (5th Cir. 2002); United States v. Kimmel, 777 F.2d 290, 291 (5th Cir. 1985).

Finally, the advisory committee notes indicate that no specific form of notice is required, and the plain language of Rule 404(b) clearly indicates that Rule 16 discovery is inapplicable:

. . . provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

(emphasis added)

Indeed the advisory committee notes to the 1991 amendments to the Rule indicate that the committee did not intend for the amendment adding the pretrial notice requirement to supersede any other rule regarding admissibility or disclosure of evidence as, for example, requiring the names and addresses of witnesses. There appears to be no authority for the proposition that Rule 16 discovery is required or that a second trial is envisioned by the rules.

While the court clearly has wide discretion in deciding not only whether but when 404(b) evidence becomes admissible, it is noteworthy that the Eighth Circuit has held that where intent is a necessary element, “the government need not await the defendant’s denial of intent before offering evidence of similar acts relevant to that issue. United States v. Adcock, 558 F.2d 397 (8th Cir. 1977).

The Fifth Circuit in United States v. Peterson, 244 F.3d 385 (5th Cir. 2001), addressed the concerns expressed by defendants David Zachary Scruggs and Sidney A. Backstrom. In that case extrinsic 404(b) evidence was offered to show Peterson’s intent. Co-defendants Deborah

Wills O'Keefe and Sandra Lynn Holick filed motions to sever which were denied by the trial court. Finding no error the Fifth Circuit said, "An appropriate limiting instruction, that the evidence of 'bad acts' by Peterson should not be considered as to O'Keefe and Holick would suffice to reduce the risk of prejudice." Peterson, p. 394.

Conclusion

The extrinsic evidence to be offered pursuant to Rule 404(b) of the Federal Rules of Evidence is strikingly similar to the evidence in the case *sub judice*. Because intent is a necessary element which the government must prove in the case *sub judice*, this extrinsic evidence would be exceedingly relevant. Its probative value is not outweighed by any undue prejudice and it should be admitted. It is further respectfully submitted that the evidence in question should be admissible in the government's case in chief. There is no precedent that requires Rule 16 discovery, and no reason to continue the trial of this case. The government respectfully requests that the defendants' motion in limine be denied and overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, ROBERT H. NORMAN, Assistant United States Attorney, hereby certify that I electronically filed the foregoing **GOVERNMENT’S COMBINED MEMORANDUM OF AUTHORITIES AND RESPONSE TO DEFENDANTS’ ‘MOTION IN LIMINE TO EXCLUDE INTRODUCTION OF EXTRINSIC EVIDENCE PURSUANT TO RULE 404(b)’** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 19th day of February, 2008.

/s/ Robert H. Norman
ROBERT H. NORMAN
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