

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	<b>Criminal No. 3-95CR-294-R</b>
	)	
<b>v.</b>	)	<b>Filed: 12/4/95</b>
	)	
<b>MRS. BAIRD'S BAKERIES, INC. and</b>	)	<b>Violation: 15 U.S.C. § 1</b>
<b>FLOYD CARROLL BAIRD,</b>	)	
	)	
<b>Defendants.</b>	)	

**GOVERNMENT'S RESPONSE TO DEFENDANTS' JOINT MOTION  
TO DISMISS COUNT 2 OF THE INDICTMENT**

The United States of America, through its attorneys, hereby responds to Defendants' Joint Motion to Dismiss Count 2 of the Indictment.

The Defendants jointly seek to dismiss Count 2 of the indictment pursuant to Fed. R. Crim. P. 12(b) on grounds that the five-year statute of limitations has expired. Such a motion to dismiss may be raised only on legal grounds prior to trial. The Defendants, however, have asserted entirely factual grounds for their motion.

For purposes of a Rule 12(b) motion, a court must accept the factual allegations contained in the indictment as true in order to protect the sanctity of the grand jury and prevent a mini-trial before the trial. Costello v. United States, 350 U.S. 359, 363 (1956). If an indictment is valid on its face, a defendant may not challenge it on grounds that allegations in it are not supported by adequate evidence. *Id.* at 363. Rule 12(b) contemplates challenges made to the legal sufficiency of an indictment that are capable of determination by the court without a trial. Such challenges cannot raise factual issues that need to be resolved by a jury.

U.S.v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986), cert. denied, 478 U.S. 1007 (1986). A defendant may not challenge factual allegations in an indictment through a Rule 12(b) motion. U.S. v. Mann, 517 F.2d 259, 267 (5th Cir. 1975), cert. denied, 423 U.S. 1087 (1976). A defense motion under this rule is an improper method of asserting a defense to anticipated trial evidence. U.S. v. Nikuda, 8 F.3d 665, 669 (9th Cir. 1993).

Defendants argue strenuously in their motion, based upon their examination of pre-trial discovery materials, that the government will be unable to meet its burden of proof at trial with respect to Count 2. This is precisely the type of argument that is not permitted in a motion to dismiss under Rule 12(b) because it invades the province of the trial jury. Shortt, 785 F.2d at 1452.

Initially, it should be noted that this argument is entirely based upon the Defendants' analysis of materials made available to them through the discovery process. Pre-trial discovery does not serve to reveal every shred of evidence that the government will present at trial. Secondly, the Defendants' argument is obviously based upon their subjective interpretation of the available evidence. The government will present sufficient evidence at trial to prove beyond a reasonable doubt that the conspiracy in Count 2 did not end until 1992.

Defendants cite no legal authority for their proposition that the government should be ordered to make a good faith showing to the Court prior to trial that Count 2 is not time-barred. Their assertion that such a showing would not be burdensome upon the government does not remedy the inherent defect in the nature of their motion. The only showing that the government is required to make is that a grand jury returned this indictment alleging that the conspiracy alleged in Count 2 occurred within the previous five years.

**CONCLUSION**

The Defendants are free to endeavor to show and argue to the jury at the trial of this indictment that the conspiracy alleged in Count 2 terminated more than five years before the indictment was returned. This is an issue that simply cannot be resolved prior to trial as a matter of law by the Court.

WHEREFORE, the government respectfully requests that the Defendants' Joint Motion to Dismiss Count 2 of the Indictment should be denied in its entirety.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
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	)	
<b>Defendants.</b>	)	

**ORDER**

The Court, having considered the Defendants' Joint Motion to Dismiss Count 2 of the Indictment and Brief in Support Thereof and the Government's Response hereby finds that the motion should be denied in its entirety.

IT IS SO ORDERED this \_\_\_\_ day of \_\_\_\_\_, 1995.

\_\_\_\_\_  
JERRY BUCHMEYER, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

**CERTIFICATE OF SERVICE**

This is to certify that true and correct copies of the foregoing Government's Response to Defendants' Joint Motion to Dismiss Count 2 of the Indictment and proposed Order were mailed via Federal Express on the \_\_\_\_ day of December 1995, to

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