UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No. H-94-58
	)	
v.	)	
	)	
GLAZIER FOODS CO.,	)	[filed 4/26/94]
	)	
Defendant.	)	
	)	

GOVERNMENT'S RESPONSE TO THE DEFENDANT'S MOTION FOR A SEPARATE HEARING TO DETERMINE THE EXISTENCE OF A CONSPIRACY

The United States of America, through its undersigned attorneys, hereby responds to the Defendant's Motion for a Separate Hearing to Determine the Existence of a Conspiracy. The defendant has requested an evidentiary hearing to determine the admissibility of co-conspirator statements that the government may seek to introduce at trial. In this case, the defendant and the Court have already had an extensive preview of the evidence during the trial of United States v. John J. Johnson, CR-H-92-152, and the government has clearly shown the involvement of the defendant Glazier Foods Company, and its bid

manager John J. Johnson, in the charged conspiracy. The government therefore requests that it be allowed to follow the usual practice of structuring the presentation of its case-in- chief to allow the Court to make a preliminary factual determination pursuant to Fed. R. Evid 104(a) as soon as practicable and that co-conspirator statements as defined by Fed. R. Evid. 801(d)(2)(E) be conditionally admitted subject to the establishment of an adequate foundation for admissibility.

I
CLARIFICATION OF THE LEGAL STANDARDS FOR ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

The defendant clearly misstates the standards for admissibility of co-conspirator statements. Defense Motion ¶ 2. Co-conspirator statements are properly admitted if the trial court makes a factual determination that the government has established, by a preponderance of the evidence, that:

1. a conspiracy existed;

2. the declarant and the defendant were members of the conspiracy; and

3. the statements were made in the course and in furtherance of the conspiracy.

Bourjaily v. United States, 483 U.S. 171, 175-176, 107 S.Ct.

2775, 2778 (1987); United States v. James, 590 F.2d 575, 590 (5th Cir. en banc), cert. denied, 442 U.S. 917 (1979); see also Fed. R. Evid. 104(a) and 801(d)(2)(E). The trial court will only be reversed if its findings are clearly erroneous. United States v. Chase, 838 F.2d 743, 749 (5th Cir.), cert. denied, 486 U.S. 1035 (1988); United States v. Snyder, 930 F.2d 1090, 1095 (5th Cir. 1991), cert. denied, ___U.S.___, 112 S.Ct. 380 (1992).

II

THE LAW DOES NOT REQUIRE A SEPARATE HEARING

In the pre-eminent case on this issue, the James case, the Fifth Circuit prescribed a procedure for handling co-conspirator statement evidence. The en banc panel held that Rule 104(a) requires the judge alone to make the preliminary determination of admissibility. 590 F.2d at 580-81. With respect to the order of proof, the Fifth Circuit held that "[t]he 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 co-conspirator." Id. at 582. If not practicable, the court may admit the statements subject to later connection. Id. at 582; Fed. R. Evid. 104(b); see also Bourjaily, 483 U.S. at 176 n.1,

107 S.Ct. at 2779 n.1 (". . . we do not express an opinion on the proper order of proof that the trial courts should follow in concluding that the preponderance standard has been satisfied in an ongoing trial" (emphasis added)).

Recently, however, the "constraints" of the James procedure have been significantly relaxed. United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987); see also United States v. Gentry, 839 F.2d 1065, 1074 (5th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 2034 (1988); United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), cert. denied, ___U.S.___, 111 S.Ct. 2057 (1991). In Rocha, the Fifth Circuit held that:

> The district court need not make a determination prior to the introduction of the statement, whether the proposed statement complies with Rule 801(d)(2)(E). Instead, the court may . . . allow the introduction of the challenged statement, subject to the prosecutor's subsequent establishment of an adequate foundation.

916 F.2d at 239, citing United States v. Kimble, 719 F.2d 1253, 1257 (5th Cir. 1983), cert. denied, 464 U.S. 1073 (1984).

Thus clearly, in the Fifth Circuit, a separate hearing is not required by law, but rather the trial court may admit co-conspirator statements subject to the later establishment of an adequate foundation.

III

THE COURT MAY CONSIDER THE HEARSAY STATEMENTS THEMSELVES IN DETERMING ADMISSIBILITY

In this case, the government intends to offer substantial independent evidence which will prove the conspiracy charges. Nevertheless, in making its initial determination regarding the admissibility of co-conspirator statements, the Court may consider both the hearsay statements the government seeks to admit, as well as independent evidence of the conspiracy. Bourjaily v. United States, 483 U.S. at 181, 107 S.Ct. at 2781; see also Gentry, 839 F.2d at 1074; United States v. Valdez, 861 F.2d 427, 432 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989). The rationale for this is found in Bourjaily where the Supreme Court stated:

> In making its determination [the court] is not bound by the rules of evidence

> except those with respect to privileges. . . .
>
> * * *
>
> [Rule 104(a)] on its face allows the trial judge to consider any evidence whatsoever, bound only by the rules of privilege. . . .
>
> * * *
>
> Even if out-of-court declarations by co-conspirators are presumptively unreliable, trial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case.
>
> * * *
>
> We think that there is little doubt that co-conspirator's statements could themselves be probative of the existence of a conspiracy and the participation of both the defendant and the declarant in the conspiracy . . ..

483 U.S. at 177-180, 107 S.Ct. 2780-2781 (emphasis added).

Once a conspiracy is found to exist, the

requirement that a statement be made in furtherance of the conspiracy is construed broadly. United States v. Snyder, 930 F.2d at 1095; United States v. Lindell, 881 F.2d 1313, 1320 (5th Cir. 1989), cert. denied, 496 U.S. 926, 110 S.Ct. 2621 (1990); United States v. Lechuga, 888 F.2d 1472, 1479-80 (5th Cir. 1989); United States v. Ascarrunz, 838 F.2d 759, 763 (5th Cir. 1988). Likewise, once the court has determined that such statements are admissible, they should be considered by the jury with all of the other evidence without special instructions. Ascarrunz, 838 F.2d at 762; see also United States v. Elam, 678 F.2d 1234, 1249-50 (5th Cir. 1982).

CONCLUSION

The government requests that it be allowed to structure the presentation of its case-in-chief to allow the Court to make a preliminary factual determination pursuant to Fed. R. Evid. 104(a) as soon as practicable, and to conditionally admit co-conspirator statements as defined by Fed. R. Evid. 801(d)(2)(E) subject to the establishment of an adequate foundation for

admissibility. The separate hearing proposed by the defendant would only serve to prolong and unduly complicate the proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that true and correct copy of the foregoing United States' Response to the Defendant's Motion for a Separate Hearing to Determine the Existence of a Conspiracy and proposed Order was sent via Certified Mail-Return Receipt Requested this 25th day of April, 1994, to:

Joel M. Androphy, Esq.
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Antitrust Division

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No. H-94-58
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v.	)	
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GLAZIER FOODS CO.,	)	
	)	
Defendant.	)	
	)	

O R D E R

Upon consideration of the Defendant's Motion for a Separate Hearing to Determine the Existence of a Conspiracy and the Response of the United States,

The Defendant's Motion is hereby DENIED.

IT IS HEREBY ORDERED that:

1. The Government will structure the presentation of its case-in-chief to allow the Court to make a preliminary factual determination pursuant to Fed. R. Evid 104(a) as soon as practicable; and

2. Co-conspirator statements as defined by Fed. R. Evid. 801(d)(2)(E) are conditionally admitted subject to the establishment of an adequate foundation for admissibility.

DONE AND ENTERED THIS _____ day of _____, 1994.

_____
UNITED STATES DISTRICT JUDGE

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Moreover, the law does not require a separate hearing to determine the admissibility of co-conspirator statements. Recently, the "constraints" of the procedure announced in United States v. James, 590 F.2d 575, 590 (5th Cir. en banc), ##

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cert. denied, 442 U.S. 917 (1979), have been significantly relaxed. See United States v. Perez, 823 F.2d 854, 855 (5th Cir. 1987). In the Fifth Circuit, a separate hearing is not required by law, but, rather, the trial court may admit co-conspirator statements subject to the later establishment of an adequate foundation. United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), cert. denied, 111 S.Ct. 2057 (1991).

Co-conspirator statements are properly admitted if the trial court makes a factual determination that the government has established, by a preponderance of the evidence, that (1) a conspiracy existed; (2) the declarant and the defendant were members of the conspiracy; and (3) the statements were made in the course and in furtherance of the conspiracy. Bourjaily v. United States, 483 U.S. 171, 175-176, 107 S.Ct. 2775, 2778 (1987). In making its admissibility determination, the court may consider both the hearsay statements the government seeks to admit, as well as independent evidence of the conspiracy. Id. at 181. In this case, as in the Johnson case, the co-conspirator statements will meet the requirements of Bourjaily.

Accordingly, the government respectfully requests that it be allowed present its case-in-chief so that the court may make a preliminary factual determination pursuant to Fed. R. Evid. 104(a) as soon as practicable, and conditionally admit

co-conspirator statements as defined by Fed. R. Evid. 801(d)(2)(E) subject to establishment of an adequate foundation for admissibility, and that the Motion be denied.

Respectfully submitted,

"/s/"

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