

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Action No. 1:07-cr-00090-WYD

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. B&H MAINTENANCE & CONSTRUCTION, INC., a New Mexico corporation;
2. JON PAUL SMITH a/k/a J.P. SMITH; and
3. LANDON R. MARTIN,

Defendants.

**UNITED STATES' REPLY IN SUPPORT OF "UNITED STATES' MOTION FOR
PRETRIAL RULING ON ADMISSIBILITY OF TESTIMONY ABOUT DEFENDANT
JON PAUL SMITH'S FALSE STATEMENTS TO THE FBI [DOCKET # 80]"**

The United States files this reply in support of the "United States' Motion for Pretrial Ruling on Admissibility of Testimony About Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80]" hereinafter "United States' Motion Docket # 80." ¹

¹ This reply addresses issues raised in both "Defendant J.P. Smith's Response to 'United States' Motion for Pretrial Ruling on Admissibility of Testimony about Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80]" [Docket # 101], hereinafter "Def. Smith Resp. Docket # 101" and "Landon Martin's Combined: (1) Response to the United States' Motion for Pretrial Ruling on Admissibility of Testimony about Defendant Jon Paul Smith's False Statements to the FBI; and (2) Supplemental Statement in Support of Severance" [Docket # 105], hereinafter "Def. Martin Resp. Docket # 105." Additionally, Defendant B&H Maintenance & Construction, Inc. ("B&H") joined Def. Smith Resp. Docket # 101. *See* "Defendant B&H Maintenance & Construction's Joinder In Defendant JP Smith's Response to Government's

I. Evidence of Defendant Jon Paul Smith's False Statements Is Admissible With Respect to Count II of the Indictment

In his response to United States' Motion Docket # 80, Defendant Smith concedes that evidence relating to Smith's false statements to the FBI on January 11, 2007, is admissible with respect to Count II of the Indictment. Defendant Smith Response Docket # 101 ¶ 5.

II. Evidence of Defendant Jon Paul Smith's False Exculpatory Statements Is Admissible With Respect to Count I of the Indictment as Evidence of Guilty Knowledge and Intent

As the United States indicated in United States' Motion Docket # 80 at 5, evidence of Defendant Jon Paul Smith's false exculpatory statements is admissible against Defendant Smith with respect to Count I of the Indictment as circumstantial evidence of guilty knowledge and intent.² *United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982) ("False exculpatory statements made by a defendant are admissible to prove circumstantially consciousness of guilt or unlawful intent.") (*citations omitted*). Defendant Smith seeks to distinguish *Zang* on the basis that the false statements in *Zang* were in the form of falsified business records. *See* Def. Smith Resp. Docket # 101 ¶ 7. However, the form of the false statement is not relevant to the admission of the false exculpatory statement. *Compare Zang*, 703 F.2d at 1191 (false

Motion For Pretrial Ruling on Admissibility of Testimony About Defendants Jon Paul Smith's False Statements to the FBI [Document #101]" [Docket # 102].

² As discussed in "United States' Reply in Support of 'United States' Notice of Intent to Use Evidence of Other Crime, Wrongs, or Acts Pursuant to Federal Rule of Evidence 404(b)' (Docket # 83)," filed on November 1, 2007, the false exculpatory statements are also admissible pursuant to Federal Rule of Evidence 404(b).

exculpatory statements contained in documents) *with United States v. Ingram*, 600 F.2d 260, 262 (10th Cir. 1979) (false exculpatory in an oral statement to police). Here, the false exculpatory statement is admissible because, as in *Zang*, a defendant's subsequent attempt to cover up his criminal activities is relevant evidence of guilty knowledge and intent. *See Zang*, 703 F.2d at 1191.

While it is true that "[f]alse exculpatory statements cannot by themselves prove the government's case," *United States v. Rahseparian*, 231 F.3d 1257, 1263 (10th Cir. 2000), the United States will not rely solely on evidence of Smith's false exculpatory statements to prove its case. To the contrary, the United States will introduce substantial direct evidence of Smith's guilt, including the direct testimony of a coconspirator and contemporaneously created incriminating documents. Evidence concerning Smith's false exculpatory statements is simply evidence of guilty knowledge and intent. Accordingly, as the *Zang* court instructed, it is "for the jury to weigh the testimony and the evidence and determine whether the false exculpatory evidence indicated a consciousness of guilt or nothing at all." *Zang*, 703 F.2d at 1191. Therefore, evidence of Smith's false exculpatory statements are also admissible with respect to Count I of the Indictment.

III. Evidence of Defendant Landon Martin's Silence

While there is a split in the Circuit Courts of Appeal regarding the admissibility of pre-arrest silence, in light of *United States v. Burson*, 952 F.2d 1196, 1204 (10th Cir. 1991), the United States will not seek to introduce evidence relating to Defendant Landon Martin's silence in the face of Defendant Jon Paul Smith's false statements to the FBI on January 11, 2006, as

evidence in its direct case. Therefore, Defendant Martin's supplemental statement with regard to severance is moot. For the reasons stated in the United States' Opposition to "Defendant Landon Martin's Motion For Severance" (Docket # 50) [Docket # 54], Defendant Martin should be tried with his coconspirators.

Should Defendant Martin testify, however, the United States may introduce evidence of his silence in the face of Defendant Jon Paul Smith's false statements to the FBI on January 11, 2006, for the purpose of impeaching his credibility. *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980) ("[T]he Fifth Amendment is not violated by the use of prearrest silence to impeach a criminal defendant's credibility.")

IV. Conclusion

For the reasons stated in sections I and II above and in the United States' Motion Docket # 80, the Court should rule that testimony relating to Smith's false statements to the FBI is admissible against Defendant Smith as to both Count I and II.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2007, I electronically filed the United States' Reply in Support of "United States' Motion for Pretrial Ruling on Admissibility of Testimony About Defendant Jon Paul Smith's False Statements to the FBI [Docket # 80]" with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants in the manner indicated by the non-participant's name:

None.

Respectfully Submitted,

s/Diane C. Lotko-Baker

DIANE C. LOTKO-BAKER

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