

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

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UNITED STATES OF AMERICA

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v.

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Criminal No. S-98-0358

ELDRIDGE DUBOISE

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MOTION IN LIMINE TO INSTRUCT JURY
AS TO LIMITED EVIDENTIARY PURPOSE OF ALLEGED CONSPIRATORIAL
CONDUCT PRECEEDING MR. DUBOISE'S EIGHTEENTH BIRTHDAY

Now comes the defendant, Eldridge Duboise, by and through his attorneys, James Wyda, Federal Public Defender for the District of Maryland, and Kathryn Frey Balter, Assistant Federal Public Defender, who hereby moves this Honorable Court to rule prior to trial that any evidence of acts Mr. Duboise is alleged to have committed prior to becoming eighteen years of age must be accompanied by an instruction to the jury that such evidence can only be considered for the limited purpose of determining whether Mr. Duboise's post-eighteen acts were made with the requisite knowledge. As grounds therefore, he states the following:

1. Mr. Duboise is currently charged by indictment with conspiracy to distribute heroin and cocaine, in violation of 21 U.S.C. § 846 (Count One); possession of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) (Count Twenty-One); and conspiracy to use and carry firearms during and in relation to a drug trafficking offense, in violation of 18 U.S.C. § 924(o) (Count Twenty-Two).

2. In United States v. Spooone, 741 F.2d 680, 687 (4th Cir. 1984), the Fourth Circuit ruled that, in cases where a defendant is alleged to have committed conspiratorial acts both before and

after his or her eighteenth birthday, any evidence of pre-eighteen acts is admissible, if at all,¹ only for the limited purpose of establishing knowledge under Rule 404(b) of the Federal Rules of Evidence.

3. In other words, Mr. Duboise may be convicted only based on acts which he committed after turning eighteen years of age; evidence of his alleged juvenile acts is admissible only to show that he knew of the conspiracy's existence.

4. Counts one and twenty-two charge conspiracies from "in or about 1990 and continuing thereafter up to on or about September 23, 1998." In 1990 Mr. Duboise was ten years old. Mr. Duboise turned eighteen years old on February 17, 1998. The indictment was returned seven months after Mr. Duboise turned eighteen years old.

4. Accordingly, Mr. Duboise requests that this Court issue a pre-trial ruling which orders that any evidence admitted in this case involving acts he allegedly committed before turning eighteen years of age must be accompanied by a jury instruction stating that such evidence may be considered only for the limited purpose of determining whether Mr. Duboise's post-eighteen acts were made with the requisite knowledge.

¹ The defense is not conceding that the evidence is admissible under Rule 404(b), but only that, if it is admissible, it can only come in under that rule, rather than as substantive evidence of the offense. Mr. Duboise is presently not aware of the precise nature of the evidence which the prosecution will seek to offer regarding Mr. Duboise's juvenile conduct under Rule 404(b). Once the government provides, as it is required to do under Rule 404(b), "reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial[.]" the defense may well challenge the admissibility of that evidence under Rule 404(b). See United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988) (evidence is admissible under Rule 404(b) only if it is relevant to an issue other than character, necessary, and reliable).

Moreover, any evidence relating to acts which Mr. Duboise allegedly committed prior to his eighteenth birthday must also, of course, satisfy the requirements of Rule 403. See id. (even if evidence is admissible under Rule 404(b), its probative value must still outweigh the danger that the evidence will produce unfair prejudice to the defendant). Accordingly, once the defense is informed of the nature of the evidence of Mr. Duboise's alleged juvenile acts, it will likely challenge the admissibility of that evidence under both Rules 404(b) and 403.

5. In support of his motion, Mr. Duboise refers this Court to the attached memorandum of law.

WHEREFORE, Eldridge Duboise respectfully moves this Honorable Court to issue a pre-trial ruling ordering that any evidence admitted in this case that involves acts Mr. Duboise allegedly committed before turning eighteen years of age be accompanied by an instruction to the jury that the evidence may be considered, under Rule 404(b), only for the limited purpose of determining whether Mr. Duboise's post-eighteen acts were made with knowledge of the alleged conspiracy's existence.

Respectfully submitted,

JAMES WYDA
Federal Public Defender
for the District of Maryland

KATHRYN FREY BALTER
Assistant Federal Public Defender
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(410) 962-3962

REQUEST FOR HEARING

Pursuant to Rule 105.6 of the Local Rules of the United States District Court for the District of Maryland, Mr. Duboise requests a hearing on this Motion in Limine.

Kathryn Frey Balter
Assistant Federal Public Defender

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**MEMORANDUM OF LAW IN SUPPORT OF
MOTION IN LIMINE**

In this case, the government will seek to prove that Mr. Duboise allegedly committed certain conspiratorial acts prior to turning eighteen years of age. In United States v. Spoone, 741 F.2d 680 (4th Cir. 1984), the Fourth Circuit held that such evidence is admissible, in cases where a defendant's participation in a conspiracy is alleged to have spanned his or her eighteenth birthday, only for the limited purpose of establishing the defendant's knowledge under Federal Rule of Evidence 404(b). Mr. Duboise here seeks a pre-trial ruling that any evidence of alleged acts he committed prior to reaching eighteen years of age will be accompanied by an instruction that reflects the holding of Spoone.

ARGUMENT

The Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42, requires certification by the Attorney General, as well as a hearing and specific findings of fact by a district judge, before a juvenile may be prosecuted as an adult in federal court. See 18 U.S.C. § 5032.² Although the FJDA does not expressly address the treatment to be accorded a defendant whose alleged

² The FJDA applies to any person below the age of twenty-one who is alleged to have committed an offense prior to reaching the age of eighteen. See 18 U.S.C. § 5031.

involvement in a conspiracy spans his or her eighteenth birthday, several courts, including the Fourth Circuit, have interpreted the statute to require that the defendant be convicted only for conspiratorial acts committed as an adult. In other words, evidence of conspiratorial acts committed prior to the defendant's eighteenth birthday cannot be used to establish guilt, but instead is admissible, if at all, only for the limited purpose of establishing knowledge under Rule 404(b).

In Spoone, an eighteen year old defendant was prosecuted federally for his involvement in an auto theft conspiracy. At trial, the government offered evidence of conspiratorial acts committed by the defendant both before and after turning eighteen. The Fourth Circuit ruled that the district court had properly admitted the evidence, but, in affirming the lower court's ruling, made it explicitly clear that proof of the defendant's pre-eighteen conduct was admissible only for a limited purpose under Rule 404(b). The Spoone Court noted that the jury was entitled to assess the evidence of the pre-eighteen acts "in light of other evidence showing that [the defendant] had known of the auto theft scheme since its inception. See Fed. R. Evid. 404(b)." 741 F.2d at 687. In addition to citing Rule 404(b), the Fourth Circuit also expressly emphasized that "the trial court repeatedly instructed the jury that it could not consider the juvenile acts as evidence of [the defendant's] guilt." Id.; see also, United States v. Maddox, 944 F.2d 1223, 1233 (6th Cir. 1991) (to convict a defendant whose alleged participation in conspiracy began prior to her eighteenth birthday, government must prove she committed acts in furtherance of conspiracy subsequent to turning eighteen; defendant "cannot be held liable for pre-eighteen conduct," although such conduct may "be relevant to put post-eighteen actions in proper context"); United States v. Thomas, 114 F.3d 228, 266 (D.C. Cir. 1997) (because "it is the adult participation that

gives the district court jurisdiction over the eighteen to twenty-one year old defendant, evidence of continued membership in the conspiracy must be predicated on the adult acts and the jury ordinarily must be so instructed”; however, pre-majority evidence may be admissible under Rule 404(b)).

Accordingly, under Spoone, when a defendant is prosecuted as an adult in federal court for a conspiracy that allegedly involved both pre- and post-eighteen conduct, the pre-eighteen conduct is admissible under Rule 404(b) only to show that the defendant’s post-eighteen acts were committed with knowledge of the conspiracy. See Thomas, 114 F.3d at 265 (“In holding that the jury was entitled to hear evidence of [the defendant’s] pre-eighteen conduct for the limited purpose of showing knowledge of the conspiracy’s existence, the [Fourth Circuit in Spoone] relied on Federal Rule of Evidence 404(b), which permits the introduction of evidence of prior conduct to prove intent or other elements of the mens rea, but forbids such evidence to be used to infer the charged wrongful act.”).³

In light of Spoone, Mr. Duboise respectfully requests that this Court issue a pre-trial ruling ordering that any evidence admitted in this case which relates to conspiratorial acts he allegedly committed before turning eighteen years of age will be accompanied by a jury instruction stating that such evidence may only be considered for the limited purpose of determining whether Mr. Duboise knew of the alleged conspiracy, but not to establish his guilt.

³ In Thomas, the D.C. Circuit relied heavily on Spoone in rejecting, “as contradictory to the statutory procedures Congress established” in the FJDA, the government’s position that an adult conspiracy conviction need not be based only on adult conduct but may also include pre-eighteen conspiratorial acts. Id. at 266. Accordingly, the Thomas Court ruled that the district court had erred by not providing the jury instruction which Mr. Duboise seeks here (but went on to find that the error had not prejudiced the defendant). Id. at 266-67.

Respectfully submitted,

JAMES WYDA
Federal Public Defender
for the District of Maryland

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(410) 962-3962

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of November, 1998, a copy of the foregoing Motion In Limine was delivered to _____, Assistant United States Attorney, 101 West Lombard Street, Baltimore, Maryland 21201.

KATHRYN FREY BALTER
Assistant Federal Public Defender