

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:07CR192

RICHARD F. SCRUGGS,  
DAVID ZACHARY SCRUGGS, and  
SIDNEY A. BACKSTROM

**GOVERNMENT'S COMBINED MEMORANDUM OF AUTHORITIES AND  
RESPONSE TO THE DEFENDANT DAVID ZACHARY SCRUGGS'  
MOTION TO DISMISS THE INDICTMENT**

Comes now the United States and files this its response to the defendant David Zachary Scruggs' latest motion to dismiss his indictment. The government would respectfully show unto the Court as follows:

Defendant David Zachary Scruggs again moves the Court to dismiss the indictment brought against him, making essentially two arguments: First, he would have the Court believe that both Tim Balducci and Special Agent William Delaney committed perjury before the grand jury; and second, that the Assistant United States Attorney knowingly sponsored that perjured testimony. Both arguments are based upon the defendant's own misleading characterizations of the grand jury testimony. He also requests the Court to grant another oral argument on the Motion.<sup>1</sup>

**I. DISCUSSION**

While the Court's supervisory authority over the grand jury is limited, it is of course a violation of 18 U.S.C. § 1623 to knowingly make a material false declaration before the grand

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<sup>1</sup>No hearing (argument or evidentiary) is required. It is entirely within the Court's discretion to rule on the pleadings. *See United States v. NMR Corp.*, 954 F.2d 1040, 1048 (5<sup>th</sup> Cir. 1992); *United States v. Chargra*, 735 F.2d 870, 873 (5<sup>th</sup> Cir. 1984).

jury, that is, false testimony capable of influencing the tribunal on the issue before it. *See Blackmon v. United States*, 108 F.2d 572, 573 (5<sup>th</sup> Cir. 1940). Certainly a district court has the power to dismiss an indictment based upon prosecutorial misconduct, “. . . when prosecutorial misconduct amounts to overbearing the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather than the grand jury.” *See United States v. McKenzie*, 678 F.2d 629, 631 (5<sup>th</sup> Cir. 1982); *see also United States v. Strouse*, 286 F.3d 767, 775 (5<sup>th</sup> Cir. 2002).

**A. Tim Balducci**

The defendant seeks to depict Balducci’s description of his November 1 meeting with Zach Scruggs and Sid Backstrom as false and misleading. Specifically, the defendant would like for the Court to believe that when Balducci said he told Scruggs and Backstrom the judge needed “an additional \$10,000,” he committed perjury; that the Assistant United States Attorney knowingly sponsored that perjury; and that the statement was material to the grand jury’s decision to return the indictment against him. Actually, the exchange to which defendant refers went as follows:

Q. And with the wire recording, what was being said, what did you discuss with Sid Backstrom and Zach Scruggs?

A. Well, I told them – at this point I was cooperating with the U.S. Attorney’s Office and the FBI. And I told them that I had met with the judge that morning and that there had been a little hitch. That there had been a recent filing by Mr. Jones’s attorneys that changed the complexion of the case a little bit. And that that had happened before the judge got to file the original Order that I had brought to them. And that now things were a little bit different.

And the judge was still inclined to do it, but that the judge wanted now an additional \$10,000 to do it because he felt a little exposed on the facts now because of this recent filing by Mr. Jones’s attorneys.

Q. How did Zach Scruggs and Sid Backstrom react?

A. It was not a problem.

Q. Did you discuss with them the contents of the Order and whether or not the contents of the Order pleased them?

A. Yes.

Q. Tell us about that part of the conversation.

A. I essentially showed them the proposed Order that the judge had given me and told them that this was the Order that he was inclined now to sign that was reflective of the new filing and the change. And that he wanted an additional \$10,000 to do that. They reviewed it, discussed it at length and essentially after that discussion came to the conclusion that it was fine as it was written.

And during the course of that conversation I told them, you know, now is the time to make any changes that you want made because we're paying for it. So get it like you want it because we're paying for it.

Q. Is it possible that you might have used the term sweet potatoes again referencing the amount of money involved?

A. I think I did.

After examining this exchange, several things become clear. First, there was no perjury. It is clear that Balducci was describing the events that took place on November 1 at the Scruggs Law Firm.<sup>2</sup> Balducci went to the firm with a new order and told the defendants why the judge did not file the one Balducci had given to Zachary Scruggs two weeks earlier. He also told them that the judge wanted more money for this new order. While Balducci described this additional

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<sup>2</sup>The transcript of the November 1<sup>st</sup> conversation has been previously filed as Exhibit 1 to the Government's Response in Opposition to a Motion to Dismiss for Outrageous Government Conduct. With respect to this issue see pages 17 - 30 of said transcript.

payment as “sweet potatoes,” nobody seriously contends they believed Balducci was taking potatoes to Calhoun City.

Second, even if the grand jury took Balducci’s statements concerning the \$10,000 as literally as the defendant would have the Court believe, the prosecutor immediately sought to clarify those statements. Despite the defendant’s attempt to characterize it as such, there is nothing “cryptic” about this exchange. The prosecutor plainly asked: “Is it possible that you might have used the term sweet potatoes again referencing the amount of money involved?” To which Balducci responded, “I think I did.” As the defendant concedes, misstatements made by a witness can certainly be corrected by the prosecutor, as in the case at bar. *See Goodrich v. Hall*, 448 F.3d 45, 50 (1<sup>st</sup> Cir. 2006).

Third, the statements concerning the \$10,000 are not material. *See United States v. McAfee*, 8 F.3d 1010, 1017 (5<sup>th</sup> Cir. 1993) (alleged perjurious statements must be material to the point in question). It is clear that the thrust of Balducci’s testimony concerned the fact that they *paid* Judge Lackey for the Order and needed to deliver additional “sweet potatoes.” The *amount* of the bribe is immaterial except as regards jurisdictional amounts. It is a crime to bribe a judge with fifty dollars, and it is a crime to bribe a judge with fifty thousand dollars. Discussing in detail the order sending the case to arbitration, Balducci said to Zach Scruggs and Sid Backstrom, “[w]e’re paying for it.” The defendant does not deny that Balducci said this; he simply contends he was not a part of the conversation at that time. Simply because the defendant David Zachary Scruggs *says* he wasn’t a party to that part of the conversation doesn’t make it so; it certainly does not require the conclusion that the government’s witness committed perjury, or that the prosecutor sponsored perjury. Nothing inappropriate occurred before the Grand Jury.

Finally, the defendant complains that Balducci might have committed perjury by describing the conversation in reverse chronological order. Balducci testified that he, Zach Scruggs, and Sid Backstrom discussed a bribe being paid to Judge Lackey. Whether specifics relating to the money (\$10,000 or “sweet potatoes”) occurred at the beginning of that conversation or the end is simply of no consequence.

## **2. William Delaney**

Next, the defendant argues that Agent William Delaney committed perjury when he described the events that took place on November 1, 2007. Specifically, Agent Delaney said:

Tim Balducci had a copy of that last Order written by Judge Lackey with him when he went into the Scruggs Law Firm. He met first with Sid Backstrom and then later Zach Scruggs came in. And the three of them discussed what had happened over the last week, the filings and everything, and why the Order hadn't been filed. And the judge had called Tim the day before and said look, some changes have come up. It's not going to change anything, but I just need you to come down here, and I need to discuss this with you in person, for him, Mr. Balducci, to go back to Judge Lackey on the 1<sup>st</sup>. Plus the fact that you still owe me \$10,000 from your original agreement.

So that was the nature of the discussion between Tim Balducci, Zach Scruggs and Sid Backstrom. He showed them this latest Order that he picked up on November 1<sup>st</sup>. Both Zach Scruggs and Sid Backstrom looked over the Order. Tim specifically had them look at the new paragraph that Judge Lackey had written into the latest Order. They read it. They reviewed it.

Tim ended up telling them at the end, look, is this how you want the Order to read? You guys are paying for it, so you might as well get it the way you like it. And they both agreed it was fine as it is.

Contrary to the defendant's argument, a fair reading of Agent Delaney's description of the events makes it clear that his statement concerning the \$10,000 was not made to indicate what Balducci said to Scruggs and Backstrom; that portion of Agent Delaney's testimony was

clearly related to a conversation between Balducci and Judge Lackey. Again, it is the defendant's disingenuous characterization of Agent Delaney's testimony that is demonstrated rather than any government misconduct.

Moreover, as with Balducci's testimony, the thrust of Agent Delaney's statements was to show that the defendants were involved in a conspiracy to bribe Judge Lackey. There is no dispute the three discussed the order in detail, and it is clear Balducci describes the fact that the order is the direct result of a bribe. While Balducci did not literally say "[y]ou guys are paying for it," as Agent Delaney described, Balducci did say; "Get it how you want it 'cause *we're* paying for it to get it done right." Agent Delaney's description was not meant to be a verbatim recitation of Balducci's statement, but instead was to convey the information accurately and it certainly did so.

## **II. CONCLUSION**

The defendant's motion makes serious allegations devoid of substance. The Court should not countenance gratuitously inflammatory motions that would only appear to be designed to influence the potential jury pool. In the end, the defendant does not dispute that on November 1, 2007, he was involved in a conversation with Sid Backstrom and Tim Balducci. Nor does the defendant dispute that the conversation was a detailed one, concerning highly inappropriate communications with a judge hearing a case in which the Scruggs Law Firm was involved. Indeed, the defendant himself was making suggestions as to how the judge should word an order about which their own lawyers and opposing counsel knew nothing. Defendant has cited no

authority from this Circuit or the Supreme Court that would authorize the relief he seeks on the unsubstantiated allegations before the Court. Accordingly, this motion should be summarily denied.

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 THE DEFENDANT DAVID ZACHARY SCRUGGS' MOTION TO DISMISS THE INDICTMENT** 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 6th day of March, 2008.

/s/ Robert H. Norman  
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