

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

UNITED STATES OF AMERICA

vs.

RICHARD F. "DICKIE" SCRUGGS

DAVID ZACHARY SCRUGGS

SIDNEY A. BACKSTROM

Case: 3:07-cr-00192-NBB-SAA

**DEFENDANT DAVID ZACHARY SCRUGGS'S
REBUTTAL MEMORANDUM IN SUPPORT OF HIS MOTION
TO DISMISS THE INDICTMENT FOR GOVERNMENT MISCONDUCT**

COMES NOW Defendant David Zachary Scruggs, and by and through counsel, pursuant to Local Rule 7.2(D), files this Rebuttal Memorandum in Support of his Motion to Dismiss the Indictment for Government Misconduct. Defendant Scruggs would show as follows:

Introduction

The Government's response to this Motion¹ makes it clearer than ever that the Government fed the grand jury its own false version of what happened when Tim Balducci visited the Scruggs firm on November 1, 2007. His visit turned into an attempt to bring Zach Scruggs within the alleged conspiracy to bribe a judge. The transcript of his actual conversation, though, proves that he was not successful in accomplishing his goal, as he later claimed in his grand jury testimony. There was certainly no "reaction" from Zach Scruggs that this "was not a problem" or agreement from him that a payment (whether it was \$10,000 or any other amount) would be fine. See Resp. Br. pp. 3, 5 (citing the grand jury transcript).

At any rate, the Government's claims to the contrary ultimately miss the point. This motion is not about whether a grand jury might possibly have reached the Government's conclusions after hearing the Government's transcripts of what was actually said. It is about whether the Government short-circuited the grand jury's decision-making process by simply drawing ultimate factual conclusions for the grand jury—conclusions that are simply not borne out by the transcripts of Zach Scruggs's actual conversations.

Unfortunately for the Government, the grand jury transcript sections it has helpfully inserted into its brief speak for themselves. It is astounding that even now, when the grand jury transcripts and Mr. Balducci's recorded conversations are out in the open and this Court can easily compare them side by side, the Government still clings to its position. Further, the Government has now implicitly conceded in its response brief that no other evidence was presented to the grand jury that Zach Scruggs knew and agreed that not only was Judge Lackey's order being drafted *ex parte*, but that his firm was paying a bribe to Judge Lackey. Thus, the precise words used by Mr. Balducci in front of Zach Scruggs (whether he was actually part of the conversation or not) *are* material. Why were these crucial words, upon which rests the whole of the Government's proof on the dispositive issues of Zach Scruggs's knowledge and agreement, not simply disclosed to the grand jury?

Before the grand jury, the Government tried to spin the transcripts of the conversation that Mr. Balducci *actually had* with Zach Scruggs. The grand jury was led to believe that Tim Balducci and Zach Scruggs discussed and agreed to the payment of a bribe (of \$10,000 or some other amount) to Judge Lackey, and that is simply not what happened. If such a statement *had* been made, it would have been this statement *and only this statement* that would have trans-

¹ Hereinafter, "Resp. Br."

formed a potential ethical violation (earwiggling) into the crime of bribery. But it did *not* happen, and falsely saying *it did happen* is a material misstatement.

These misstatements were elicited and sponsored by the Government. As discussed below, both the Government's witnesses (and now the Government itself, in its response brief) have made several mischaracterizations of the November 1, 2007, Balducci-Backstrom-Zach Scruggs conversation.

**Discussion of Specific Material Misstatements
in the Transcript and the Government's Response Brief**

**1. Zach Scruggs' alleged knowledge of the
payment of any amount of money to the judge**

- (a) Tim Balducci falsely testified that he "told them"—that is, Sid Backstrom and Zach Scruggs—that "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..." Resp. Br. at 2 (citing the grand jury transcript).

The actual transcript of the November 1, 2007 discussion is devoid of any statement made in Zach Scruggs's presence that Judge Lackey "wanted" an additional \$10,000, additional money, additional "sweet potatoes," or *anything* of value, *in return for something*. Such a reference would obviously have sent up red flags to someone who was otherwise not keyed in to code words and vague references. It would have disclosed that something of value was being paid (1) to a judge; (2) at the judge's request; (3) to get the judge to do something. That is indisputably bribery, and it is the bribery the Government alleges happened here. But that critical fact—the fact of Judge Lackey "wanting" and actually requesting something of value in order to do something—is not what was discussed at the November 1, 2007, meeting. Unless there is evidence that some prior conversation laid the groundwork for these crucial elements

(which there is not), mere allusions (made while Zach Scruggs was leaving the room) to the delivery or pick-up of “sweet potatoes” or the group’s collective “paying for” something make little sense and standing alone, could hardly be expected to refer to bribery.

The same thing is true for discussion of the payment of \$10,000, a *specific amount of money*. That is an important additional detail because it makes clear that a planned amount of money is actually being transferred from one party to another party: the judge. Without this reference, we are left again with the mere delivery or pick up of “sweet potatoes,” or the collective and seemingly figurative “paying for” something. The falsification of these details in Balducci’s grand jury testimony is inescapable.

- (b) Tim Balducci falsely testified that he “told them that this was the Order that he [Judge Lackey] 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.” Resp. Br. at 3 (citing the grand jury transcript).

Balducci’s false statement could not have gone unnoticed because it was repeated. After Balducci testified falsely the first time about his alleged disclosure that the judge wanted something of value in exchange for his order, and his alleged disclosure that a specific amount of U.S. dollars would be paid to the judge, the Government did nothing to correct it. In fact, it elicited and sponsored the false testimony a second time.

- (c) The Government continues the misrepresentation in its response brief by stating “[Balducci] also told them [Backstrom and Zach Scruggs] that the judge wanted more money for this new order.” Resp. Br. at 3.

The Government itself (and not just its witnesses) now mischaracterizes what Balducci said on November 1, 2007. As discussed above, the transcript makes clear that Balducci never told Zachary Scruggs (and never uttered in his presence) (i) that the judge wanted

anything of value in order to enter the order; or (ii) that money was actually being paid to the judge to influence his action.

- (d) Agent Delaney falsely testified that Balducci, Backstrom, and Zach Scruggs discussed Balducci's owing Judge Lackey "\$10,000 from your original agreement." Resp. Br. at 5 (citing the grand jury transcript).

The Government's attempt to explain away this false testimony is not credible. This Court can simply read the section cited in the Government's brief at p. 5 and decide for itself whether Agent Delaney abruptly switched gears in the middle of his narrative of what Balducci allegedly told Backstrom and Zach Scruggs, and recounted instead what Judge Lackey and Balducci had discussed. Clearly, Agent Delaney was testifying about Balducci's conversation with Zach Scruggs and Backstrom—not about Balducci's earlier conversation with Judge Lackey. Both before and after this alleged "flashback," Agent Delaney made clear that he was recounting the Balducci-Scruggs-Backstrom conversation on November 1, 2007: ("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... So that was the nature of the discussion between Tim Balducci, Zach Scruggs, and Sid Backstrom.") Resp. Br. at 5.

Even if by accident or confusion, then, Agent Delaney unfortunately recounted a complete and utter falsehood about the critical conversation: that Balducci had disclosed to Zach Scruggs that Judge Lackey had earlier told Balducci that Balducci "still owe[d] me \$10,000 from your original agreement." Resp. Br. at 5. If Zach Scruggs had actually been told this by Balducci, it would show that he had knowledge that a specific amount of money² was being transferred to Judge Lackey by "agreement." That is an element of the crime. Falsely stating

² Of course, the transcript shows that Zach Scruggs had no knowledge that anything of value, let alone money or a specific amount of money, was being transferred to Judge Lackey by anyone's agreement or for any reason.

that it happened is a material misstatement. The Government's failure to correct it was misconduct.

- (e) Agent Delaney falsely testified that Balducci told Backstrom and Zach Scruggs that "you guys are paying for [the Order]." Resp. Br. at 5 (citing the grand jury transcript).

Balducci did not address Zach Scruggs and Sid Backstrom on November 1, 2007, saying that "you guys are paying for it." Resp. Br. at 5 (citing the grand jury transcript). Such a direct remark to Zach Scruggs as he was heading away from Balducci to the door of Sid's office on his way out, referencing Zach Scruggs's direct "payment" for something, would materially alter what was said. It would make it more possible for the grand jury to believe that Zach Scruggs heard this statement and should have responded with a question. But that is not what Balducci said. He actually said, "...*we're* paying for it." (emphasis added) That comment may or may not refer to Zach Scruggs, and may or may not have been directed to Zach Scruggs. Agent Delaney's version leads to the inference that it was said to, and referenced some action by, Zach Scruggs. That is the ultimate question, not an assumption that the Government can falsely graft into Mr. Balducci's actual words on November 1. Again, the Government acted improperly by allowing this false statement to stand.

2. The Government's alleged "clarification" of Balducci's false testimony did not cure the lie

Immediately after Balducci testified that he told Backstrom and Zach Scruggs, "you're paying for it," the Government asked, "Is it possible that you might have used the term sweet potatoes again referencing the amount of money involved?" Balducci responds, "I think I did." Resp. Br. at 3 (citing grand jury testimony). But this testimony merely seems to indicate that Balducci used the term "sweet potatoes" *again* when he was making the "we're paying for it"

comment. It does not plausibly “clarify” that Balducci *never* referenced in Zach Scruggs’s presence a payment of \$10,000 to the judge at the judge’s request—a claim that Balducci prominently and falsely made to the grand jury not once, but twice, without any correction by the Government.

The Government can only mount this tepid defense of its grand jury questioning *in the first place* because the Court and all the parties now have transcripts of the November 1, 2007, transcript, and can follow along with the Government’s explanation of what it was allegedly trying to do. But a grand juror hearing Balducci’s false testimony would not—indeed, could not—understand that Balducci had earlier made the “sweet potatoes” reference only one time, **and did so instead of** (in his own mind, apparently), not in addition to, his allegedly specific reference to the \$10,000. The Government knows that given Balducci’s twice-repeated and serious misstatement, it should have asked him to clarify that while in Zach Scruggs’s presence, he **never** referenced a payment of anything—whether of money or of something else of value, whether of \$10,000 or any other amount—to Judge Lackey.

Finally, the Government never even attempted to correct Balducci’s false testimony that he told Zach Scruggs that Judge Lackey wanted something (whether money, sweet potatoes, or anything else) in exchange for and in order to enter his “amended” order. It never corrected Agent Delaney’s false testimony that Balducci told Zach Scruggs the judge had complained about Balducci owing him \$10,000 under an “agreement.” These misstatements go to the core of what the Government now admits is the only evidence the grand jury heard regarding Zach Scruggs’s alleged knowledge and agreement to bribe Judge Lackey.

3. Zach Scruggs's alleged reaction that the new order, or payment of money to obtain the new order, was "not a problem."

Balducci falsely testified that Zach Scruggs "reacted" to his statement that the Judge was being paid \$10,000 for a new order by indicating that "[i]t was not a problem." Resp. Br. at 3 (citing the grand jury transcript). Again, the Government's own transcript of the actual conversation shows this did not happen. First, there is no reaction from Zach Scruggs as to the payment of \$10,000 to the judge or the judge's feeling of "exposure" because those statements were never uttered in Zach Scruggs's presence. See pages 21-31, November 1 Transcript. Second, Zach Scruggs never says, in words or through silence, that the Order is fine or unobjectionable. Id. In fact, the transcript shows that he struggles with its meaning and import. Id. Finally, the transcript shows only that Zach Scruggs opened and closed the door at the back of Sid Backstrom's office an instant—at most a second or two—after Balducci made his cryptic "sweet potatoes" and "we're paying for it" comments. It does not show he agreed with, assented to, or merely indicated he had no "problem" with a payment to the Judge. Id. at 30. Again, the Government put itself in the grand jury's place by falsely saying it actually happened, rather than letting the grand jury hear what really occurred. This is obviously a material misstatement, since it is the one slender thread that the Government could offer to demonstrate Zach Scruggs's knowing agreement to bribe a judge.

4. Zach Scruggs's alleged suggestions on how to change the order.

Zach Scruggs did discuss what the Order could mean and its possible legal effect. However, he (1) made no suggestions on how to change the order; and (2) gave no indication that it "was fine as written." See Resp. Br. at 3 (citing Balducci grand jury testimony that "They

reviewed it, discussed it at length and essentially after that discussion **came to the conclusion that it was fine as written.**"); Resp. Br. at 6 (falsely claiming that Zach Scruggs made "suggestions as to how the judge should word an order...").

False testimony that Zach Scruggs *did* make suggestions for changing the order or *did* finally approve it is material, because it could tend to indicate that on November 1, 2007, Zach believed that some prospective action on the part of Judge Lackey was still pending, and that he still had the opportunity (through payment of money or otherwise) to influence it.³ But Zach Scruggs's actual testimony, as recorded in the government's own transcript of the November 1, 2007, meeting evidences only his attempts to come to grips with the meaning of the order, not the rendering of any recommendations, requests, or approvals. The Government should have corrected this materially false testimony.

Conclusion

The Government could have come forward with other facts or testimony which somehow proves the veracity of its witness' false statements before the grand jury, or which could somehow explain the grand jury's apparent and inevitable acceptance of these repeated misstatements. Instead, the Government has simply tried to spin either the November 1, 2007 transcript, or the contrary grand jury testimony rendered a few weeks later, to make them mesh. On this Motion, then, this Court is squarely confronted with a single, simple issue: the disparity between the actual evidence of what really happened, and what the Government's witnesses (and now the Government itself) claim happened. Because even now, the Government is sticking with their false testimony, this Court need only decide whether Mr. Balducci and Agent Delaney told the truth. If they did not, then the only evidence the grand jury heard regarding Zach

³ Of course, such discussions themselves are not criminal.

Scruggs's actual knowledge of and agreement to the bribery of Judge Lackey will have evaporated. The indictment must be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Todd Graves, do hereby certify that on the 10th day of March, 2008, I have electronically filed the foregoing Defendant David Zachary Scruggs's Rebuttal Memorandum in Support of His Motion to Dismiss the Indictment for Government Misconduct with the Clerk of the Court using the ECF System, which sent notification of such filing to Thomas W. Dawson, Assistant United States Attorney, Robert H. Norman, Assistant United States Attorney, David Anthony Sanders, Assistant United States Attorney, Frank W. Trapp, J. Rhea Tannehill, Jr., and John W. Kecker.

s/ Todd P. Graves
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