

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

3 *****

4 GRAND JURY 11-06

7 IN RE: DICKIE SCRUGGS, ET AL.

9 TRANSCRIPT OF TESTIMONY
10 OF
11 TIMOTHY R. BALDUCCI

12 The following proceedings were had before the
13 United States Grand Jury for the Northern District
14 of Mississippi on November 27, 2007.

15 APPEARANCES:

16 ROBERT H. NORMAN, ESQ.
17 THOMAS W. DAWSON, ESQ.
18 Assistant United States Attorney

19 ALPHA REPORTING CORPORATION
20 Polly Woods Bassie
21 236 Adams Avenue
22 Memphis, Tennessee 38103
901-523-8974

23

24

25

1 PROCEEDINGS

2

3 TIMOTHY R. BALDUCCI,

4 Called as a witness, having been first duly

5 sworn by the Foreperson of the Grand Jury, was

6 examined and testified as follows:

7 MR. FOREMAN: Please state your full name

8 and spell your last name.

9 THE WITNESS: Timothy Reece Balducci,

10 B-A-L-D-U-C-C-I.

11 EXAMINATION

12 BY MR. NORMAN:

13 Q. Sir, would you tell the Grand Jury what you

14 do for a living, please.

15 A. I'm an attorney.

16 Q. And how long have you been practicing law?

17 A. Since 1991, 16 years.

18 Q. Presently what's the name of your firm and

19 where is it located?

20 A. Patterson Balducci, New Albany, Mississippi.

21 Q. And before that I believe you were with the

22 Langston Law Firm in Prentiss County, is that

23 correct?

24 A. Yes, sir.

25 Q. And then at one time I believe you were here

3

1 in Oxford in practice?

2 A. Yes, sir.

3 Q. Sir, you and I have talked as recently as

4 this morning and you know what we're doing here this

5 morning. But I want to cover a couple of basic

6 things with you first. You know that you don't have

7 to be here.

8 A. Yes, sir.

9 Q. And you're a lawyer and a very intelligent

10 one, so you know that if you don't want to testify

11 before the Grand Jury we would respect that, and

12 there would be no hard feelings.

13 A. Yes, sir.

14 Q. What we want to talk about are matters that

15 are not going to be pleasant. And the Grand Jury
16 has a right to know how this got started and where
17 we stand at this point. They have a right to know
18 about any deals or agreements that we have with you.
19 And we'll talk about that.

20 But I want to begin by putting a date on
21 the record, the date of the filing of a lawsuit that
22 I believe you're not involved in. And that is,
23 Jones and others versus Scruggs and the Scruggs Law
24 Firm and others filed in the Circuit Court of
25 Lafayette County, Mississippi March 15th of this

1 year 2007. Are you familiar with that lawsuit, sir.

2 A. Yes, sir.

3 Q. And you are not a party to that lawsuit or do
4 you represent any party to that lawsuit; is that
5 correct?

6 A. That's correct.

7 Q. Sir, a few days or a few weeks -- two or
8 three weeks I guess before that lawsuit was filed do
9 you recall having a discussion with Sid Baxtrum of
10 the Scruggs Law Firm about the Jones Law Firm?

11 A. Yes, sir.

12 Q. What was the nature of that discussion,

13 please?

14 A. Mr. Baxtrum and I had a conversation wherein

15 he told me that the Scruggs Katrina group of which

16 his firm was a member -- Scruggs Katrina Group is a

17 consortium of about five law firms that got together

18 to prosecute cases against insurance companies for

19 denial of benefits to homeowners after Hurricane

20 Katrina. And that the Jones Law Firm was a member

21 of the Scruggs Katrina Group.

22 And I was generally aware that after the

23 Scruggs Katrina Group had secured a significant

24 settlement with State Farm insurance company that a

25 dispute had arisen amongst the members of the

1 Scruggs Katrina Group relative to how they were

2 going to distribute the attorney fees that came

3 about as a result of that settlement. Specifically

4 Jones Law Firm was making a demand for a larger

5 portion of the fees than the Scruggs Law Firm than

6 the other members of the Scruggs Katrina Group

7 thought the Jones Law Firm was entitled to.

8 And that dispute had gotten to the point

9 where it was obvious to the members of the Scruggs

10 Katrina Group that their dispute was not going to be

11 resolved amicably and that some litigation was going

12 to be brought as a result of that dispute.

13 Q. Did Sid Baxtrum intimate to you that there

14 might be a place for your firm on the Scruggs

15 Katrina Group?

16 A. Yes. He related to me that because of the

17 dispute that had arisen with the Jones Law Firm,

18 that the other members of the Scruggs Katrina Group

19 were going to expel, I guess, for lack of a better

20 word, the Jones Firm from their group. And that the

21 Scruggs Katrina Group had a number of other

22 settlements that they were anticipating were going

23 to come about in the near future with other

24 insurance companies. And that the nature of their

25 litigation group was such that they would need

6

1 another firm to step up and replace the Jones Firm.

2 And Sid Baxtrum led me to believe that me

3 personally, my firm, could fill that role after the

4 Jones firm was out of their group.

5 Q. If that had come to pass what would it have

6 meant to your firm?

7 A. Potentially millions of dollars in fees.

8 Q. Okay. By the way this dispute over the legal

9 fees in the case of Jones versus Scruggs, what

10 amount of money are we talking about? How much was

11 at stake in terms of legal fees?

12 A. My understanding was that the approximate

13 total of the fees from the State Farm settlement to

14 the Scruggs Katrina Group was approximately 26

15 million dollars.

16 Q. So that lawsuit was filed on March 15th. You

17 had already had some awareness of the lawsuit

18 because of your conversation with Sid Baxtrum?

19 A. Yes, sir.

20 Q. On March 28th you met with Judge Henry

21 Lackey. But I only use that date to frame a period

22 of time. Between the filing of the lawsuit, March

23 15th, and your first meeting with Judge Lackey on

24 March 28th, what occurred at the Scruggs Law Firm?

25 A. There was a meeting that was held at the

1 Scruggs Law Firm -- their office is on the square
2 here in Oxford -- where myself, my partner Steve
3 Patterson and Dick Scruggs, his son Zach Scruggs,
4 his law partner, and Sid Baxtrum, their law partner,
5 where we all met. And the issue of the litigation
6 that had been filed against them by the Jones Law
7 Firm came up.

8 During the course of that discussion about
9 that litigation, Zach Scruggs or Sid Baxtrum -- I'm
10 not sure which one -- initially brought up the fact
11 that the case was -- had been assigned here in the
12 Circuit Court of Lafayette County to Judge Henry
13 Lackey, Circuit Judge. And both Zach Scruggs and
14 Sid Baxtrum knew that I had a long history of a
15 close both professional and personal relationship
16 with Judge Lackey.

17 Judge Lackey is from Calhoun County. He
18 and I have been friends for going on better part of
19 15 to 20 years. We were very close. And during the
20 course of that meeting members of the Scruggs Firm
21 approached me and asked me if I thought it would be

22 possible for me to use my personal relationship with

23 Judge Lackey to influence him to assist them in

24 something that they wanted done in the case.

25 Q. You said members of the Scruggs Law Firm.

8

1 When that suggestion was posed, was Richard Dickie

2 Scruggs present?

3 A. Yes, sir.

4 Q. Was Zach Scruggs present?

5 A. Yes, sir.

6 Q. And was Sid Baxtrum present?

7 A. Yes, sir.

8 Q. So when you say a member of the Scruggs Law

9 Firm did you say it that way because you're simply

10 not sure which one did the talking?

11 A. Well, honestly Mr. Norman, it was a group

12 discussion from them. It was presented to me in

13 sort of a free form discussion during the meeting

14 with all three of them interacting with me on that

15 issue.

16 Q. Okay. And I believe you said there was a

17 fifth individual present?

18 A. Steve Patterson, my partner.

19 Q. Now, in fairness, money was not mentioned

20 initially; is that true?

21 A. That's correct.

22 Q. All right. How did you respond to their

23 inquiry about whether or not you thought you might

24 be able to influence Judge Lackey?

25 A. Well, what they wanted done was they believed

9.

1 that pursuant to their original agreement in the

2 Scruggs Katrina Group, the agreement where these

3 five law firms came together to jointly prosecute

4 these cases against the insurance companies, they

5 had a written agreement that defined the various

6 member firms' duties, obligations. And there was a

7 provision in there that said that if a dispute arose

8 among those members that the members agreed that

9 that dispute should be resolved by way of

10 arbitration.

11 And arbitration is a process where you

12 essentially don't go to Court. You go in front of a

13 mediator or an arbitrator. And it's an alternative

14 way to resolve a dispute without filing a lawsuit
15 and going to Court. And that's what they wanted
16 done. The Jones Firm had filed the lawsuit against
17 the group. And the Scruggs Firm wanted that case to
18 be sent to arbitration rather than to be heard in
19 the Circuit Court in front of Judge Lackey.

20 And what they were asking me to do was to
21 influence Judge Lackey and get him to send that case
22 to arbitration and take it out of his court. So
23 when they asked me that if I thought based on my
24 relationship with him if I could do that, I told
25 them that I was willing to try. And that I would

10

1 approach Judge Lackey and that I would ask him if he
2 would be willing to do that.

3 Q. Why would you take that on? Why would you be
4 willing to put yourself at risk by doing that?

5 A. Well, there were a couple of reasons.

6 Q. That's what I would like for you to tell the
7 Grand Jury, please.

8 A. Well, one was obviously the fact that I had
9 been led to believe by the members of the Scruggs

10 Firm that if the Jones Firm was replaced and that if
11 I helped them to accomplish that feat and to get
12 that done, if they were successful, that me and my
13 firm would essentially take their place.

14 And they told me there were a number of
15 settlements that were on the horizon with other
16 insurance companies. Namely, Nationwide and Austin.
17 And they expected that they would reach settlement
18 with those companies soon at least equal to the
19 settlement that they had reached with State Farm.

20 And I believed that if I helped them that I would
21 share in that, and I would share in the attorney's
22 fees that would be derived from that.

23 And I was at a time in my law practice
24 where I had just left the Langston Firm and got out
25 on my own in New Albany. And I did not have any

11

1 resources. And I was trying to start this business
2 and, you know, I needed the money and I didn't have
3 it. And it was the lure of that in large part that
4 convinced me to do it.

5 And then there was a second part also.

6 Prior to this when the State Farm settlement was
7 being negotiated by the Scruggs Katrina Group, there
8 was a significant issue that was impeding that
9 settlement. And it was the fact that the Attorney
10 General of the State of Mississippi, Jim Hood, was
11 investigating and threatening to criminally
12 prosecute State Farm as a result of their denials of
13 policy owners' benefits on the coast.

14 And so what was happening was a real
15 strange dynamic at the time. You had on the one
16 hand the Scruggs Group which was suing State Farm
17 and aggressively pursuing them in civil litigation.
18 And at the same time you had the Attorney General
19 who was investigating and threatening to indict the
20 company and prosecute them criminally. And from
21 what I was told by the Scruggs Group that they could
22 not settle their civil cases with State Farm unless
23 State Farm got essentially world peace.

24 State Farm was not going to settle these
25 civil cases unless they could be assured that the

1 Attorney General was not going to prosecute them -

2 criminally. And so the Scruggs settlement was being
3 held up because of the investigation that was
4 ongoing by the Attorney General's office.

5 Well, both me and my partner Steve
6 Patterson have had a long relationship with the
7 Attorney General. And the Attorney General in fact
8 is distantly related to Steve, my partner. And
9 General Hood and I have known each other for a long
10 time going back to when he was the DA here and when
11 I was a practicing lawyer here. We had a close
12 relationship.

13 So before this issue with the Jones suit
14 came up, the Scruggs Firm approached Steve and I and
15 essentially hired us as lobbyists. And what they
16 told us was if you will go and meet with the
17 Attorney General and if you will help him to resolve
18 his issues with State Farm and try to craft some
19 settlement with that issue -- there was both civil
20 and criminal aspects to General Hood's involvement
21 with State Farm. And Scruggs asked us to go and
22 work with the Attorney General, work with the
23 lawyers who are representing the Attorney General,
24 who we knew personally and worked with before, to

25 try to help them almost mediate that dispute and try

13

1 to get that dispute between the Attorney General and

2 State Farm resolved.

3 And in exchange for that if we were

4 successful in doing that, then that would pave the

5 way for Scruggs to settle his State Farm cases. And

6 they told us that if we were successful in lobbying

7 and working with the Attorney General's lawyers to

8 bring that to a resolution that they would pay us

9 \$500,000.

10 Q. And in short you were successful?

11 A. We were successful.

12 Q. So in your view Dickie Scruggs owed you

13 \$500,000.

14 A. Yes, sir.

15 Q. Did you take it?

16 A. Well, sort of. Once that occurred we went

17 back to Mr. Scruggs and we had a discussion with him

18 about the fact that we had completed the job that he

19 had hired us to do and that in our view he owed us

20 \$500,000. And the agreement was that he was going

21 to pay us \$500,000. And we desperately needed that
22 money. As I said we had just started our law firm
23 in January of '07 this year. And this was in early
24 March of this year, late February, early March. And
25 we had just really gotten started. And we needed

14

1 that money to hire staff, to get out building, to
2 buy computers, infrastructures, do the things that
3 you need to do to start a business. And we were
4 counting on that money.

5 And when we went to Mr. Scruggs and told
6 him that we felt like we had completed our job and
7 that he owes us the money, he told us then for the
8 first time, yeah, I'm going to pay you but I'm not
9 going to pay you up front. I'm going to pay you
10 \$100,000 a month for five months until I pay it off,
11 which was not what we had agreed to. And he did pay
12 us one month. And then he didn't pay for us the
13 next month.

14 Q. And you were approached sometime in late
15 March of this year about trying to influence Judge
16 Lackey. Were you concerned about ever collecting

17 the other \$400,000.

18 A. Yes, sir. I knew then that he owed us
19 \$400,000, the money that we were counting on to
20 operate our business. And I was nervous and
21 suspicious that if I didn't do this for him that he
22 had already renigged on the deal once that we made.
23 I was nervous and suspicious that he might renig
24 altogether and not pay us the money that he had
25 promised.

15

1 Q. So is that a succinct summary of the two
2 reasons that you were motivated to help the Scruggs
3 Law Firm when they asked for your assistance?

4 A. Yes, sir.

5 Q. Did you in fact meet with Judge Lackey on or
6 about March the 28th of this year?

7 A. I did.

8 Q. Where sir?

9 A. I met with him at his office, his personal
10 office in Calhoun City.

11 Q. And would you tell us please what occurred
12 during that meeting?

13 A. Prior to that meeting I placed a call to
14 Judge Lackey and just told him that I needed to come
15 see him, that I had a matter that I needed to
16 discuss with him. He told me fine, come to his
17 office in Calhoun County. So I did in the next
18 couple of days. Met with him on the day that you
19 referenced.

20 And at that meeting I told him that I was
21 there about a case that was pending in front of him.
22 And I told him that I was not a party to the case
23 and I was not a lawyer and not representing anybody
24 involved in the case but that I had an interest in
25 the outcome of that case.

16

1 And I explained to him the issue that a
2 lawsuit had been filed against The Scruggs Group and
3 that they had filed in response to that a request
4 asking that the case be sent to arbitration and that
5 I was there to advise him of that and to ask him if
6 he would take the case and submit it to arbitration
7 rather than keep it in his court. And I told him if
8 he did that, that that would be a personal favor to

9 me and that there would be an advantage to me that

10 would come about from that, if he would do that.

11 Q. And I know that you believed -- and it's not

12 related, but I want to ask you about another part of

13 that conversation. Did you discuss with Judge

14 Lackey becoming of counsel with your law firm?

15 A. Yes, sir.

16 Q. What is of counsel?

17 A. Of counsel is a -- it's just sort of a status

18 that's usually held by retired lawyers. Many times

19 retired judges become of counsel to a firm. They

20 serve as advisors, mentors. They help a law firm

21 like mine with marketing. You know, it's good for

22 your reputation as a lawyer. It's good for your

23 stature. It's good for business if you can

24 represent yourself as having distinguished members

25 of the bar as retired members of your firm. And in

17

1 fact, I had been successful already in securing

2 several of counsel members in my firm.

3 Q. Those people draw regular salaries in the

4 firm, don't they?

5 A. Yes, sir.

6 Q. For example, the average of counsel

7 individual in your firm, how much do they get a

8 month from you of counsel?

9 A. About a \$1,000 month stipend.

10 Q. And they might or might not do anything for

11 that \$1,000; is that correct?

12 A. That's correct essentially.

13 Q. So at least in a person's retirement years

14 that might be a lucrative situation for the

15 individual who is of counsel?

16 A. Sure it would.

17 Q. Can you see why Judge Lackey might have

18 thought that would be a quick pro quo here in

19 exchange for helping you out?

20 A. In retrospect, yes, I can see how he would

21 have, could have construed that in that manner, yes.

22 Q. And of course at that time you didn't know

23 that he picked up the phone and called the U.S.

24 Attorney's Office as soon as you walked out?

25 A. No, sir.

1 Q. Did you report back to the Scruggs Law Firm?

2 A. I did.

3 Q. Who did you talk with if you remember?

4 A. Sid Baxtrum after my initial meeting with the

5 judge. And I essentially told him that I had met

6 with the judge and advised him of what they wanted

7 and that the judge appeared to me to be -- well, the

8 judge had told me that he would look into it and

9 that he would consider it. And then I told Sid

10 Baxtrum just that, that I felt optimistic that the

11 judge was going to take a look at it and try to help

12 us.

13 Q. On or about May 4th did Sid Baxtrum email

14 something to you?

15 A. Yes, sir.

16 Q. What was it?

17 A. He emailed me a proposed order in the case

18 for the judge to sign which would have sent the case

19 to arbitration. It was essentially what they wanted

20 done.

21 Q. It would have accomplished what the Scruggs

22 Law Firm needed to accomplish?

23 A. Yes, sir.

20 A. Yes, sir.

21 Q. Why is that?

22 A. I'm not sure. But there was a period of time

23 after I met with Judge Lackey and gave him the

24 proposed Order where at the time in my belief I

25 thought everything was okay. I thought the judge

20

1 was reviewing the case, looking at it, looking at

2 the Order, considering it, thinking about whether or

3 not he was ultimately going to do it.

4 Then there was period of time there where

5 Judge Lackey actually recused himself from the case.

6 That means that he removed himself from the case.

7 Q. Did that cause any consternation at the

8 Scruggs Law Firm?

9 A. Quite a bit. It was a red flag I think to

10 everybody involved that something wasn't right. And

11 I didn't know about it at the time. I got a call

12 from Sid Baxtrum who had received an Order in the

13 mail from the Scruggs Firm's lawyers who were

14 representing them in the Jones case.

15 Q. A law firm in Jackson?

16 A. They are from Jackson, but I believe the
17 specific lawyers that were representing them were
18 from their Oxford office.

19 Q. Okay.

20 A. They had sent an Order to the Scruggs Law
21 Firm, their client, demonstrating that Judge Lackey
22 had removed himself from the case. And in response
23 to that Sid Baxtrum called me and told me hey we
24 just got a copy of an Order where Judge Lackey
25 recused himself. What's going on? I told him I

21

1 didn't know. That was the first I had heard of it.

2 The conversations I had had with the judge none of
3 that was contemplated.

4 And he told me essentially that they were
5 very upset. That I needed to get control of the
6 situation with Judge Lackey and find out what was
7 going on. And so I placed a call to Judge Lackey
8 and asked him judge, what's going on here. You
9 know, I haven't talked to you in a while. Now, this
10 recusal Order has come down.

11 And he said to me at the time that he had

12 had some contact at a social event with one of the
13 lawyers in a law firm who was representing the Jones
14 Firm in the case. So in other words lawyers on the
15 other side of the case. And that one of those
16 lawyers had had a discussion with him, the judge,
17 about the merits of the Jones case. And the judge
18 felt that that was improper, that that lawyer should
19 not have been basically earwigging him about the
20 case.

21 And in response to that the judge felt like
22 the best thing for him to do was just get out of the
23 case and recuse himself.

24 Q. Now, I mean, just real bluntly, did that seem
25 odd to you since you had been earwigging the judge?

22

1 A. Sure. But you know frankly I thought at the
2 time that -- I didn't really think anything, too
3 much about it because of my personal relationship
4 with Judge Lackey. The fact that I was talking to
5 him improperly I didn't think was that surprising.
6 But the fact that somebody who didn't have the kind
7 of relationship I did with him and was talking to

8 him didn't surprise me.

9 Q. Okay. That's the summer of 2007. Let's fast

10 forward to September the 21st, this fall. Did you

11 and Judge Lackey talk on the phone about Judge

12 Lackey needing some help?

13 A. Yes, sir.

14 Q. Tell us about that please.

15 A. After the period of time where the judge had

16 recused himself, shortly after that he got back in

17 the case and issued an Order basically setting aside

18 the recusal. He came back in the case. And a

19 period of time went by where again I thought okay

20 everything's okay again. The judge has straightened

21 out this issue in his mind and he's considering

22 this. He's probably going to do this. I just need

23 to give him some time to sort through all of this.

24 And then I got a call from him on the date

25 that you referenced and he told me, he said, Tim,

23

1 I've been looking at this case, Jones versus Scruggs

2 case, and this is a really big case. There's about

3 26 million dollars at issue here in fees from what I

4 can tell. And that's a lot of money. And I'm

5 wondering if I help Mr. Scruggs with this, do you

6 think he would help me?

7 Q. And of course you did not know that Judge

8 Lackey was acting in an undercover capacity at that

9 point?

10 A. No, sir, I did not know that.

11 Q. And how did you react to his inquiry?

12 A. Well, I was a little surprised. But I said,

13 well, Judge, I don't know. What kind of help are

14 you talking about? And he said, well, not anything

15 unreasonable. I knew he was talking about money.

16 But he said not anything unreasonable. Well, I

17 didn't know what that meant. When you talk about 26

18 million dollars I don't know what's reasonable or

19 unreasonable.

20 And so I said, well, look, let me find out.

21 I think that yeah probably we can work something

22 out, but let me just do some checking and get back

23 to you.

24 Q. Who did you talk to first?

25 A. I talked to my partner, Steve Patterson,

23 other half at least by the end of that upcoming
24 month, or essentially 30 days later. And this was
25 right at the end of the month. So when he told me

25

1 that, that he had to have 20 by the first of the
2 month, there was just a period of a few days there
3 to react to that.

4 And so I told him during that meeting that
5 I would deliver the message, essentially, and that I
6 would find out if Mr. Scruggs was willing to help
7 him.

8 Q. When you left his office at 10:08 that
9 morning and you placed a phone call, who did you
10 call please?

11 A. Immediately when I left the judge's office I
12 was in my truck heading home and I placed a couple
13 of phone calls on my cell phone to Sid Baxtrum at
14 the Scruggs Law Firm, and I reported to him what I
15 had just learned from the judge and that the judge
16 wanted \$40,000 to essentially enter the Order
17 compelling the case to arbitration. And that he had
18 to have 20 by the first of the month which was just

19 a few days from then.

20 Q. Did Sid Baxtrum respond what are you talking

21 about, that's illegal?

22 A. No.

23 Q. How did he respond?

24 A. He told me that he would have to get back to

25 me. He was going to discuss it with Dick and Zach,

26

1 and that he would get back to me and let me know if

2 they were going to pay it.

3 Q. Did he get back to you?

4 A. He did.

5 Q. Can you approximate how long it took him to

6 get back to you? I know you don't know exactly.

7 A. I'm not certain exactly, but it was shortly.

8 And I'm going to say within the next 48 hours.

9 Q. Do you remember where you were when he called

10 you?

11 A. Yes.

12 Q. Where were you?

13 A. I was standing -- I don't remember where I

14 was when the call came in, but the conversation on

15 the phone when I had, I was standing in my driveway
16 at my home in New Albany. And I remember because I
17 had just gotten home from work. I had pulled up in
18 my driveway from work and I had gotten out of my
19 truck.

20 And I'm not certain if my cell phone rang
21 or if I went in the house and the house phone rang
22 and I picked it up, but it was -- right when I got
23 home I received a call from Sid. And I realized
24 then that it was a call that I needed to separate
25 myself from my wife and children and go outside in

27

1 privacy. So I walked outside into my driveway, and
2 I had the conversation in my driveway.

3 Q. And your question had been whether or not the
4 Scruggs Law Firm wanted to cover you for the
5 \$40,000. Did you get an answer?

6 A. Yes.

7 Q. What was Sid Baxtrum's answer?

8 A. You're covered. Do it.

9 Q. And by the way I will tell you that five days
10 later on the 26th we got a court order to wire tap

11 to listen to your phone conversations from that
12 point forward. The day after that wire tap went up,
13 September 27th, do you recall a conversation with
14 Steve Patterson about a conversation he had had with
15 someone named P.L.?

16 A. Yes.

17 Q. Tell us about that, please. And we're
18 referring to I think the 27th of September, but I
19 don't want to put dates in your mouth. Would you
20 agree that that was approximately right, the 27th of
21 September?

22 A. If you will indulge me one moment.

23 Q. Sure.

24 A. My best recollection, Mr. Norman, is that
25 conversation that I had with Steve Patterson was on

28

1 or about September the 27th.

2 Q. Okay. Who is P.L. Blake?

3 A. P.L. Blake is an individual who lives in
4 Birmingham, Alabama. And he was a, for lack of a
5 better word, an operative that Mr. Scruggs used
6 during the tobacco litigation.

7 Q. Someone close to Dickie Scruggs?

8 A. Very close.

9 Q. And does this person -- if you know, does

10 this person receive funds as a result of that

11 relationship?

12 A. Receives from my understanding and based on

13 what I personally reviewed about a million dollars a

14 year from the tobacco settlement.

15 Q. What was it that Steve Patterson was saying

16 about P.L.?

17 A. Steve related to me that Steve had had a

18 conversation with P.L. prior to me and Steve talking

19 where Steve had told P.L. that he and I, Steve and

20 I, were working on something for Dick Scruggs and

21 that Dick knew what we were doing. And it was going

22 to cost \$40,000 to get it going. And that Steve had

23 asked P.L. to talk to Dick and relay that

24 information and to find out from Dick if he, Dick,

25 wanted Steve and I to go forward and accomplish that

29

1 task. And that if he, Dick, would pay the \$40,000

2 to accomplish that task.

3 Q. But you'd already had confirmation from Sid
4 Baxtrum, so why were you and Steve interested in
5 talking to P.L.?

6 A. Well, two reasons. First of all because we
7 had not -- Steve and I had not had a direct
8 communication from Dick Scruggs on that issue. But
9 also because -- it's hard to explain and it's hard
10 to understand. But Mr. Scruggs and Mr. Blake have a
11 pattern, a practice of relaying information through
12 that means. Mr. Blake has served for many years as
13 a conduit and a layer of separation, if you will,
14 between Mr. Scruggs and other people on sensitive
15 issues. And Steve and I both knew that. And Steve
16 knew that an appropriate way to approach Scruggs
17 about that would be to go through P.L. because it
18 had happened before.

19 And keep in mind too, during this time we,
20 Steve and I were very concerned about how we
21 approached this issue with Mr. Scruggs based on what
22 had been told to us about our role in assuming the
23 Jones Firm role in the Scruggs Katrina Group and
24 also because he owed us \$400,000 too. We didn't
25 want to upset any of that. So we were trying to

1 sort of play by the rules that we knew Mr. Scruggs
2 normally played by.

3 Q. So Steve Patterson is telling you that he's

4 talked to P.L., P.L. knows you've got a problem the

5 size of which is 40. And what do you take from that

6 conversation? What's the result of that

7 conversation with Steve Patterson?

8 A. Steve ultimately told me that he had a

9 subsequent conversation with P.L. where P.L. told

10 Steve that P.L. had relayed that information to Dick

11 Scruggs and that Dick Scruggs had said for us to go

12 ahead finish the job and that he would cover the

13 \$40,000.

14 Q. That same day did you have occasion to meet

15 with Sid Baxtrum at the Scruggs Law Firm?

16 A. Yes.

17 Q. Did he give you something?

18 A. He gave me a proposed Order to take to the

19 judge.

20 Q. Okay. He had already emailed you one on May

21 4th and you had faxed that to the judge. I take it

22 this was a slightly different order?

23 A. It was. By this time six months had gone by

24 from the time that I had originally brought that

25 first Order to the judge. And then he had

31

1 subsequently recused himself and got back in. And

2 we had all of that sort of controversy. And I think

3 the thinking at the time was we need to just make

4 this short and simple.

5 Q. Did you take that Order to Judge Lackey?

6 A. I did.

7 Q. That day?

8 A. Yes.

9 Q. And did you give Judge Lackey anything else

10 besides that Order?

11 A. I gave him \$20,000 in cash.

12 Q. And at the time you didn't know that was

13 being videotaped?

14 A. No, sir.

15 Q. What did you do after you left Judge Lackey

16 after you gave him the Order and \$20,000? Where did

17 you go?

18 A. I went back to the Scruggs Law Firm.

19 Q. Okay. And do you recall why you went back,

20 who you talked to, what it was about?

21 A. I went back and reported to Sid Baxtrum

22 essentially what had just occurred.

23 Q. At 11:44 you called Steve Patterson and

24 basically told him what?

25 A. Basically told him what had happened, that I

32

1 had met with the judge, given the Order and had

2 given him \$20,000.

3 Q. All of that was on or about September 27th.

4 A few days later, I don't think you or I know

5 exactly how many days later, did you and Steve

6 Patterson have an occasion to be in the Scruggs Law

7 Firm and talk with Dickie Scruggs?

8 A. Yes.

9 Q. About something else?

10 A. Well, we were there for a meeting with Dick

11 Scruggs because Dick Scruggs was heavily involved in

12 a campaign at the time for Gary Anderson for

13 Insurance Commissioner. And Scruggs had spent about

14 a half million dollars on some advertising against
15 George Dale, the incumbent insurance commissioner at
16 the time. It was called independent expenditure for
17 t.v. commercials and print ads to try to beat Dale.

18 And he had. Anderson had defeated
19 Democratic primary. And Steve Patterson, my
20 partner, is an old politician. He was State Auditor
21 for two -- twice elected to State Auditor. And has
22 been involved in state politics basically all of his
23 life. So Scruggs had reached out to Steve to try to
24 assist in this issue that he was working on about
25 trying to help Gary Anderson get elected.

33

1 So that's what we were there for. We had
2 gone over there to meet with him about that. And he
3 called us into his office. As soon as we walked in
4 before we ever sat down, Mr. Scruggs unsolicited
5 said I've already talked to P.L. and I know Steve
6 you've talked to P.L., and I just want you to know
7 everything's okay. Y'all go ahead and get it done,
8 and you're covered.

9 Q. October 10th there was a phone call from

10 Steve Patterson to you on your cell phone. And he
11 asked if the Order had been signed. Do you recall
12 that conversation?

13 A. Yes.

14 Q. Did that prompt you to do anything?

15 A. It prompted me to make a call to Judge Lackey
16 to check on the status. Sort of a gentle prodding
17 to let him know that --

18 Q. Did you tell him you needed to pick up
19 something?

20 A. I told him I needed to pick up a bushel of
21 sweet potatoes.

22 Q. Now, I think it's clear, but just for the
23 record you weren't actually interested in potatoes;
24 is that fair to say?

25 A. Yes, sir.

1 Q. October 16 or 17 do you recall going into
2 Steve Patterson's office and getting on the
3 telephone with Dick Scruggs?

4 A. Yes, I do.

5 Q. What was that about?

6 A. I arrived at my office and walked in the
7 front door and walked straight into Steve's personal
8 office. And he was on the phone when I walked in
9 with Dick Scruggs. And he was in the middle of a
10 conversation with him. And as I walked in Steve
11 said on the phone to Dick, well, wait a minute, Tim
12 just walked in. Just tell him all of this directly.
13 Here he is. And he literally handed me the phone as
14 I walked in the office.

15 And I picked the phone up and he said it's
16 Dick. And I greeted him on the phone and basically
17 said what's up. And during that conversation Dick
18 Scruggs told me that he had developed essentially a
19 cover story of how he was going to get me the
20 \$40,000 to pay Judge Lackey. I had already paid the
21 20 myself because of the timing. As I told you
22 there were just a few days there. The judge needed
23 the money, and I didn't have the time to coordinate
24 all of this with the Scruggs firm. They had already
25 told me that they would cover me, so I went ahead

1 and paid the first 20.

2 So Scruggs knew in the course of that
3 conversation that he had to give me 40. And what he
4 told me -- what he had been telling Steve and what
5 he told me directly on the phone was that he had a
6 Hurricane Katrina case coming up for trial in
7 December, this coming month, on the coast in State
8 Court. And that they were in trial preparation for
9 that. And he told me that he was going to send me a
10 check for \$40,000 and that he was going to reference
11 it as a retainer. And that he was going to
12 reference in correspondence to me that he was hiring
13 me to prepare a voir dire, which is an examination
14 of potential jurors.

15 When you have a case and you pick the
16 jurors one of the things you have to do as a lawyer
17 is you have to ask questions to the jury and try to
18 develop that to get the 12 jurors who will
19 ultimately serve.

20 And so what he was saying was rather than
21 just send you \$40,000, I am constructing this cover
22 story where I'm going to send you 40 but I'm going
23 to say that it's for you preparing my voir dire in
24 this upcoming trial.

25 Q. Okay. A day or so later, October the 18th,

36

1 again of this year, do you recall -- I think you

2 were on the road, and I may be mistaken on that.

3 But do you recall getting a phone call from Steve

4 Patterson indicating that he had just been talking

5 with Dickie Scruggs?

6 A. Yes.

7 Q. What did that prompt you to do?

8 A. I knew that they were preparing the check for

9 me to get and the related voir dire materials that

10 he said he was going to send me. And that it would

11 be at his office for me to pick up. And Steve was

12 calling to relate to me that he had spoken with, I

13 think, Dick Scruggs, or at least someone in his

14 office. And that that package was ready for me to

15 pick up.

16 Q. Were you also instructed to leave something

17 for Mr. Scruggs?

18 A. Copies of the Orders that I had picked up

19 from the judge.

20 Q. Did you then go to meet with Judge Lackey?

21 A. Yes, sir.

22 Q. And tell us please about that meeting. Did

23 you give anything? Did he give anything?

24 A. At that meeting I met with Judge Lackey again

25 and I brought \$10,000 in cash. And of course at

37

1 that meeting Judge Lackey gave me two copies of an

2 Order. The copies were identical. One Order, just

3 two copies of a proposed Order sending the Jones

4 versus Scruggs case to arbitration.

5 Q. Is that what the Scruggs Law Firm wanted?

6 A. Yes.

7 Q. Were those the Orders that they had proposed?

8 A. No. They were different. And the judge

9 explained to me that he had changed the Order that

10 Sid Baxtrum had sent me that I had previously given

11 him. Judge explained to me that he didn't use that

12 Order, that he had drafted a different Order still

13 accomplishing the same thing, but the language was a

14 little bit different because he wanted it to reflect

15 more the way he did things, more of the way he

16 styles his Orders. And it was a little more

17 substantive with findings of fact and some

18 conclusions of law rather than the bare bones Order

19 that Sid Baxtrum had given me that I had given him.

20 Q. Were those two copies stamped copies?

21 A. No.

22 Q. What did you do with one or both of those

23 Orders?

24 A. I left that meeting with the judge. I went

25 straight to Oxford to the Scruggs Law Firm to

38

1 deliver the Orders. And I got there and the only

2 person who was there of the three was Zach Scruggs.

3 And I went into his office, and I gave him one of

4 the copies of the Order. And I told him at the time

5 that I had just left the judge and here was the

6 Order that the Judge was sending to be filed in the

7 Court file, and that this was just basically a

8 preview that I had gotten from him. And that the

9 real Order would be filed within the next couple of

10 days.

11 Q. How did Zach Scruggs react?

12 A. He was very happy. And he told me, he said

13 good job. You've been a good friend to us.

14 Q. Okay.

15 A. And the other Order I had -- it was two

16 copies. I left one with Zach. Neither Sid nor Dick

17 were there, so I took the other copy with me and I

18 destroyed it.

19 Q. Did you thereafter call Sid Baxtrum from your

20 cell phone?

21 A. I did.

22 Q. And tell us please about that conversation.

23 A. I called Sid after that because I wanted him

24 to know that it in my mind it was done. That the

25 judge had signed an Order and had given me a copy of

39

1 the Order that was going to be entered. And I

2 wanted him to know that I had done what he wanted me

3 to do. And I told him that. That I had been by the

4 office and he wasn't there. I believe Sid was on

5 the coast when I talked to him. And that I had left

6 a copy of the Order with Zach.

7 And I explained to him that the original

8 would be filed in the next few days. And I told

9 him, you know, you'll get formal notification of
10 this Order through your attorneys. The Order will
11 go to your attorneys representing you in the case.
12 And don't be surprised -- I mean, actually be
13 surprised. Act surprised when you get it. Make
14 sure you don't let the cat out of the bag that you
15 knew it was coming.

16 Q. Did he respond what are you talking about?

17 A. He responded, he said, great. Essentially
18 that that was great and that everything was going to
19 work out for all of us like we wanted it to.

20 Q. And I don't know that I asked you this, but
21 did you in fact pick up the \$40,000 at the Scruggs
22 Law Firm?

23 A. Yes. It was in a package that Steve had told
24 me that would be there waiting for me.

25 Q. All right. So we move now to November the

40

1 1st, probably the darkest day in your life I would
2 imagine. Let's begin before we get to the bad part
3 though, let's begin with another meeting with Judge
4 Lackey on November 1st. What happened?

5 A. I had gotten a call just a couple of days
6 before that from Judge Lackey. And Judge Lackey had
7 essentially said that we needed to finish up our
8 business. I had paid him 30. I owed him another
9 10. We needed to finish our business. And that
10 there had been a little bump in the road. He told
11 me nothing major, but there had been a little bump
12 in the road and he needed me to come down there and
13 explain to me what had happened and to work it out.

14 And so on November the 1st I went to
15 Calhoun and met with him. And during the course of
16 that meeting I paid him the remaining \$10,000 that
17 was owed. And he explained to me that there had
18 been a recent filing in the case and that he needed
19 to change that original order slightly, that he had
20 given me previously that I had given to Zach. He
21 needed to change that by one paragraph to reflect
22 some recent event that had happened in the filing of
23 the case.

24 Q. Did he give you an amended Order to take with
25 you?

1 A. He did.

2 Q. And what did you do with it?

3 A. I walked out of his office and as soon as I

4 walked outside I was confronted by the FBI.

5 Q. To your credit you immediately cooperated; is

6 that correct?

7 A. I immediately cooperated, yes, sir.

8 Q. And came to the U.S. Attorney's Office and

9 met with Mr. Dawson and myself; is that correct?

10 A. That day.

11 Q. And you agreed to wear a body wire, and you

12 did that; is that correct?

13 A. Yes, sir.

14 Q. Where did you go wearing that body wire?

15 A. I went to the Scruggs Law Firm.

16 Q. Who did you meet with first, please?

17 A. I met first with Zach Scruggs and Sid Baxtrum

18 sort of in combination.

19 Q. And with the wire recording, what was being

20 said, what did you discuss with Sid Baxtrum and Zach

21 Scruggs?

22 A. Well, I told them -- at this point I was

23 cooperating with the U.S. Attorney's Office and the

24 FBI. And I told them that I had met with the judge
25 that morning and that there had been a little hitch.

42

1 That there had been a recent filing by Mr. Jones's
2 attorneys that changed the complexion of the case a
3 little bit. And that that had happened before the
4 judge got to file the original Order that I had
5 brought to them. And that now things were a little
6 bit different.

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

12 Q. How did Zach Scruggs and Sid Baxtrum react?

13 A. It was not a problem.

14 Q. Did you discuss with them the contents of the

15 Order and whether or not the contents of the Order
16 pleased them?

17 A. Yes.

18 Q. Tell us about that part of the conversation.

19 A. I essentially showed them the proposed Order

20 that the judge had given me and told them that this
21 was the Order that he was inclined now to sign that
22 was reflective of the new filing and the change.
23 And that he wanted an additional \$10,000 to do that.
24 They reviewed it, discussed it at length and
25 essentially after that discussion came to the

43

1 conclusion that it was fine as it was written.

2 And during the course of that conversation

3 I told them, you know, now is the time to make any

4 changes that you want made because we're paying for

5 it. So get it like you want it because we're paying

6 for it.

7 Q. Is it possible that you might have used the

8 term sweet potatoes again referencing the amount of

9 money involved?

10 A. I think I did.

11 Q. Then did you meet with -- that was Zach and

12 Sid Baxtrum. Then did you meet with Dickie Scruggs

13 in his office?

14 A. I did.

15 Q. Did you go over this with him?

16 A. Essentially the same thing. Advised him of
17 what the hitch was, that the judge was willing to
18 sign the new Order but that it was going to cost him
19 an additional \$10,000 to do it. And I needed to
20 know from him if he wanted that done.

21 Q. And what did he say?

22 A. He said he did. And he said he would pay the
23 money.

24 Q. Did he indicate how or did he ask you about
25 how to get the \$10,000 to you?

44

1 A. Yes. He asked me if I had a suggestion on
2 how he should get me the additional \$10,000 because
3 he wanted a cover for it. He didn't want to just
4 give me the money. He wanted a cover like he had
5 had a cover for the 40 originally. And so because
6 we had done the 40 the way we had done it before, I
7 suggested to him that he could pay me another
8 \$10,000 in this same case that he had supposedly
9 retained me in. And that that could be for me
10 preparing the jury instructions in that case.

11 Q. The next day, November 2nd did an email come

12 from the Scruggs Law Firm forwarding you jury
13 instructions and mentioning the check for \$10,000?

14 A. There was an email that came to me from one
15 of Mr. Scruggs's assistants. And he had forwarded

16 not jury instructions but just some reference
17 material and some things that I turned over to the

18 FBI.

19 Q. All right. Were there any instructions in
20 that email about the 10,000?

21 A. That I could come and pick up the check at
22 their office.

23 Q. Monday, November 5th did you go to the
24 Scruggs Law Firm?

25 A. I did.

45

1 Q. What did you pick up first?

2 A. I picked up the original documents that had
3 been emailed to me previously and a check for

4 \$10,000 with a cover letter.

5 Q. And safely turned over the \$10,000 to the
6 FBI; is that correct?

7 A. Yes, I did.

8 Q. All right. November the 13th did you phone
9 Sid Baxtrum to discuss this entire matter?

10 A. I did.

11 Q. And did he discuss with you the scheme and
12 artifice to defraud?

13 A. Yes, he did.

14 Q. Did he discuss with you the money?

15 A. Yes, he did. We essentially during that
16 conversation recounted the whole series of events

17 from step one to where we were that day.

18 Q. He did not deny knowledge of any of that, is
19 that not fair to say?

20 A. That's fair to say.

21 Q. Mr. Balducci, are you concerned for your
22 safety now that you cooperating with the
23 government?

24 A. Yes, sir.

25 Q. And are you concerned about the safety of

46

1 your family?

2 A. Primarily, yes, sir.

3 Q. Have you asked for protection and help in

4 getting out of the area as a result of those
5 concerns?

6 A. I have.

7 Q. And have we reached an agreement? Although
8 we have not signed anything yet, have we reached an
9 agreement about what's going to become of you in
10 this case?

11 A. We have an agreement in principal, yes, sir.

12 Q. I guess for your protection let's talk about
13 that protection. Also, the Grand Jury has a right
14 to know about it. Did Mr. Dawson offer you a plea
15 to a criminal conspiracy to bribe Judge Lackey?

16 A. Yes, he did.

17 Q. And did we also promise you that if you
18 continued to substantially assist the way you've
19 been doing that we would ask the judge to consider
20 leniency in your case in an amount that's totally up
21 to him?

22 A. Yes, sir.

23 MR. DAWSON: Tim, just a couple of
24 questions.

25 BY MR. DAWSON:

1 Q. Of course that plea to a criminal conspiracy

2 would be a felony, would it not?

3 A. Yes, sir.

4 Q. And that would cause you to lose your law

5 license; is that correct

6 A. Yes, sir. I have already prepared a letter.

7 I'm licensed in five jurisdictions: Mississippi,

8 Alabama, Tennessee, Texas, and the District of

9 Columbia. And I've prepared a letter that I'm going

10 to send as soon as this testimony is over

11 voluntarily surrendering my law license in those

12 jurisdictions and agreeing to a voluntary

13 disbarment.

14 Q. And one clarification. In the November the

15 2nd email, the second email, the last one that

16 Mr. Norman asked you about, was the 10,000-dollar

17 figure actually mentioned in the email, or was it

18 the cover letter that the \$10,000 was mentioned?

19 A. I'm not certain if it was mentioned in the

20 email or not. I know in the materials that I picked

21 up the check was there, and it was referenced in the

22 cover letter with the materials. I'm not certain

23 that it was the email. If I said that I misspoke.

24 MR. DAWSON: That's all. Let me make sure

25 that Mr. Norman doesn't have anything else.

48

1 BY MR. DAWSON:

2 Q. Mr. Balducci, we've covered a lot of

3 territory here in an eight-month period

4 investigation. And certainly you did not know what

5 was going on until within the last -- I guess

6 November the 1st was the first time. And then you

7 began cooperating at that time.

8 A. That's correct.

9 Q. And since we have covered a lot of ground

10 rather quickly, there may be other details of the

11 various meetings and telephone conversations that we

12 have not completely covered because we were trying

13 to give a summary of hitting the high points of this

14 investigation as you knew. Is that correct?

15 A. That's correct, yes, sir.

16 Q. So if in fact you have to testify at any

17 subsequent proceeding under trial, you understand

18 and the Grand Jury must understand that it may be in

19 much more detail about the various meetings and

20 telephone calls. Is that correct?

21 A. Yes, sir.

22 MR. DAWSON: I think that's all we have at

23 this time. I know the Grand Jury has been working

24 through the lunch hour. But if you have any

25 questions to ask or you want us to ask any more

49

1 questions, we'll be glad to do that.

2 GRAND JUROR: The work that you supposedly

3 done, did you actually turn anything in? Did you

4 produce anything to cover this, or did they give it

5 to you to give back to them? Or who did the work?

6 THE WITNESS: The work was never done. It

7 was a complete cover for the transfer of the money.

8 I never did any of the work, and I was never asked

9 again about it.

10 GRAND JUROR: Nobody else done the work?

11 THE WITNESS: That I don't know.

12 BY MR. DAWSON:

13 Q. This was just a ruse, was it not, to

14 reimburse you the money that you had paid to Judge

15 Lackey on the alleged bribe scheme?

16 A. That's correct.

17 GRAND JUROR: What about the \$400,000? Was

18 any of that paid besides the 100,000.

19 THE WITNESS: I ultimately did get paid the

20 remainder of the money over time.

21 GRAND JUROR: During this same month period

22 you got the 400,000?

23 THE WITNESS: Yes, sir.

24 MR. NORMAN: Thank you, sir.

25 (WHEREUPON, THE WITNESS WAS EXCUSED.)

50

1 CERTIFICATE

2

3 STATE OF MISSISSIPPI:
4 COUNTY OF DESOTO:

4

5 I, Polly V. Woods, Court Reporter and
6 Notary Public, DeSoto County, Mississippi, CERTIFY:

6

7 The foregoing proceedings were taken
8 before me at the time and place stated in the
9 foregoing styled cause with the appearances as
10 noted.

9 Being a Court Reporter, I then
10 reported the proceeding in Stenotype, and the
11 foregoing pages contain a true and correct
12 transcript of my said Stenotype notes then and there

11 taken.

12 I am not in the employ of and am not
13 related to any of the parties or their counsel, and
14 I have no interest in the matter involved.

14 I further certify that in order for
15 this document to be considered a true and correct
16 copy, it must bear my signature seal, and that any
17 reproduction in whole or in part of this document is
18 not authorized and not to be considered authentic.

17 Witness my signature, this the
18 2nd day of January 2008.

18

19

Polly V. Woods

20

21 Notary Public at Large
22 For the State of Mississippi

22

23 My Commission Expires:
24 July 29, 2009

24

25

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

3 *****

4 GRAND JURY 11-06

5
6
7 IN RE: DICKIE SCRUGGS, ET AL.

8
9 TRANSCRIPT OF TESTIMONY
10 OF
11 WILLIAM DELANEY

12
13 The following proceedings were had before the
14 United States Grand Jury for the Northern District of
Mississippi on November 28, 2007.

15 APPEARANCES:
16 TOM DAWSON, ESQ.
17 ROBERT NORMAN, ESQ.
DAVID SANDERS, ESQ.
Assistant United States Attorney

18
19 ALPHA REPORTING CORPORATION
20 Polly Woods Bassie
21 236 Adams Avenue
22 Memphis, Tennessee 38103
23 901-523-8974

24

1 PROCEEDINGS

2

3 WILLIAM DELANEY,

4 Called as a witness, having been first duly

5 sworn by the Foreperson of the Grand Jury, was examined

6 and testified as follows:

7 MR. FOREMAN: Please state your full name and

8 spell your last name.

9 THE WITNESS: William P. Delaney,

10 D-E-L-A-N-E-Y.

11 EXAMINATION

12 BY MR. DAWSON:

13 Q. Mr. Delaney, you're a special agent with the

14 Federal Bureau of Investigation?

15 A. Yes, I am.

16 Q. And how long have you been so employed?

17 A. Twelve years.

18 Q. And would it be fair to say that with respect to

19 this investigation concerning the attempted bribery of

20 a certain judge Henry L. Lackey by a number of people

21 in a conspiracy, were you the case agent with respect

22 to that investigation?

23 A. Yes, I am.

24 Q. I want you to sort of start at the beginning and

1 tell how you got involved in this particular

2 investigation and what you did with respect to

3 discussing and dealing with the cooperation of Judge

4 Lackey.

5 A. I believe it was back in April of this year. I

6 was informed by my supervisor at the time that there

7 was a matter pending in the northern district of

8 Mississippi, and I needed to go speak with Tom Dawson

9 and John Hailman of the U.S. Attorney's Office in

10 Oxford regarding this matter. So I made an appointment

11 and spoke with them. And they relayed to me that Judge

12 Lackey had confided in him that Tim Balducci had

13 approached him a little while earlier and had made some

14 inappropriate overtures to him regarding a civil case

15 with the Scruggs Law Firm. And that the judge wanted

16 to report that matter to the U.S. Attorney's Office.

17 I followed that up by contacting Judge

18 Lackey and setting up an initial interview with the

19 judge. I believe that was probably late April, early

20 May. He relayed to me his conversation that he had
21 with Tim Balducci. He gave me a signed statement,
22 synopsis that conversation with him. The judge at the
23 end of the conversation agreed to cooperate in the
24 investigation in any way possible.

1 Q. Did that include acting in an undercover
2 capacity?

3 A. Yes, sir.

4 Q. And did it also include his consent to have his
5 chambers in Calhoun City wired for sound, so to speak
6 and also videoed?

7 A. Yes. He signed both a waiver to make a consent
8 for recordings at our request, which he did throughout
9 the time of our investigation.

10 Q. Now, did Judge Lackey relate to you what
11 Mr. Balducci had told him in that initial March 28th
12 meeting with Judge Lackey?

13 A. I'm sorry? Say that again.

14 Q. Did Judge Lackey relate to you his conversation
15 with Tim Balducci, the initial conversation which took
16 place on March 28th?

17 A. Yes, he did.

18 Q. And in that conversation was it Judge Lackey's
19 opinion or his feelings that Mr. Balducci was acting on
20 behalf of Mr. Scruggs and others?

21 A. Yes. That's what he indicated to me that was
22 what he believed was Tim Balducci was acting on the
23 Scruggs Law Firm's behalf.

24 Q. Now, after that initial meeting with Judge

1 Lackey, did he have telephone conversations and
2 meetings with Mr. Balducci throughout the summer and
3 into the fall of 2007?

4 A. Yes, he did. He had regular contact with
5 Mr. Balducci. Some in his office, some over the
6 telephone, some in courthouses while he made his rounds
7 throughout the state.

8 Q. And would it be fair to say that these
9 conversations further were leading up to the -- what we
10 now know was the attempted bribery for \$40,000 of Judge
11 Lackey?

12 A. Some were. Some were just completely casual in
13 nature and no relationship to the investigation. But
14 some certainly did.

15 Q. Now, specifically in one of the telephone

16 conversations on May the 3rd did Judge Lackey receive a
17 call or have a telephone conversation with Mr. Balducci
18 where Balducci indicated that they -- that is, his
19 people he was working with -- wanted to change the
20 strategy of getting a partial dismissal of the
21 allegations in the lawsuit and in sending the rest of
22 it to arbitration? Do you remember that telephone
23 call?

24 A. Yes.

1 Q. And after that telephone call on May the 4th do
2 you know whether or not Judge Lackey received a fax
3 from Mr. Balducci of a proposed order sending the case
4 to arbitration?

5 A. He did. He received a fax from the Patterson
6 Balducci Law Firm. The header at the top was Proposed
7 Order.

8 Q. Just for the record this is Government's Exhibit
9 2 to Judge Lackey's testimony. Does that appear to be
10 the fax that Judge Lackey received?

11 A. Yes, sir, it does.

12 Q. Now, later on in the investigation did you
13 determine how that fax came to be from -- in other

14 words did Mr. Balducci tell you how that fax came to
15 be?

16 A. Yes, he did.

17 Q. Would you tell us how it came to be?

18 A. Mr. Balducci informed me that prior to him
19 faxing this order down to Judge Lackey he received an
20 email from Sid Baxtrum at the Scruggs Law Firm. The
21 email contained the contents of this order. When Tim
22 Balducci receive that email he took the contents of the
23 email and recreated in his own document a copy of this
24 document which he then faxed down to Judge Lackey. I

1 do believe he called Judge Lackey prior to sending the
2 fax informing him that he was sending him something
3 that he wanted the judge to look at.

4 Q. Now, the relationship or the contact between
5 Mr. Balducci and Judge Lackey continued up until
6 September the 21st. Do you recall if anything happened
7 with respect to an agreement for a cash payment that
8 happened on September 21st?

9 A. September 21st Tim Balducci came down and met
10 with Judge Lackey in Judge Lackey's office in Calhoun
11 City. The meeting was actually set up by both on the

12 day or maybe two days prior. We knew Mr. Balducci was
13 coming down, so we arranged to have the judge's office
14 wired for sound for audio and video surveillance of
15 that meeting.

16 Mr. Balducci showed up. They discussed many
17 things, but at the end they talked about this
18 particular civil case. And Judge Lackey asked
19 Mr. Balducci that if the judge was willing to do what
20 the Scruggs Law Firm had asked him to do through Tim
21 Balducci, what would the Scruggs Law Firm be willing to
22 do for him in return. And Mr. Balducci asked him if he
23 had anything specific in mind, and I believe the judge
24 replied would they be willing to pay him \$40,000 if he

1 would send the case to arbitration.

2 Q. And did Mr. Balducci agree to that?

3 A. He thought it would not be a problem, but he

4 said he would need to get back with the judge on that.

6 judge's office in Calhoun City.

7 Q. And what took place at that meeting?

8 A. That meeting was also recorded by audio.

9 Mr. Balducci showed up at Calhoun City early in the
10 morning. He had with him an Order similar to this one
11 only it was briefer. It had that in an envelope. And
12 he also had \$20,000 in cash in 100-dollar denominations
13 in another envelope. He went in and met with the
14 judge. And again they had conversations about many
15 different things.

16 But at the end he gave the money to the
17 judge, which the judge then placed in a safe behind his
18 office. And he also handed the judge the envelope
19 containing the Order which the judge ultimately looked
20 at. And they discussed just basically what the Scruggs
21 Law Firm wants his Order to read.

22 Q. Now, after this meeting took place did the FBI
23 take custody of the \$20,000 in the envelope as well as
24 the envelope that was delivered by Mr. Baluducci?

1 A. Yes, we did.

2 Q. And again on October the 18th and November the
3 1st were there similar meetings where \$10,000

4 representing the last of the \$40,000 agreed upon
5 payment were made? One, 10,000 on October the 18th and
6 10,000 on November the 1st?

7 A. Yes. The only difference being on October 18th
8 and November 1st rather than Mr. Balducci bringing an
9 Order, Mr. Balducci picked up an Order signed by the
10 judge on those two occasions.

11 Q. Now, after the -- on October the 18th was there
12 a physical surveillance team that followed Mr. Balducci
13 when he left the office of Judge Lackey?

14 A. There was a surveillance in place from what I
15 recall. Mr. Balducci had been driving a red Ford
16 pickup truck to all the meetings previously. On this
17 occasion he drove a different car, a black Lincoln
18 which he had switched in New Albany. So our
19 surveillance team lost him. We obviously picked him up
20 when he showed up at the judge's office. Unfortunately
21 they could not get there in time to pick him up.

22 We directed the surveillance people to go to
23 Oxford. So as I recall there was nobody that
24 surveilled him from Calhoun City up to Oxford, but we

1 did have surveillance units in place in Oxford outside

2 the Scruggs Law Firm. And we do have surveillance of
3 him showing up at the law firm and entering the law
4 firm shortly after leaving the judge's office.

5 Q. Now, on November the 1st when the last
6 10,000-dollar payment was made by Mr. Balducci to Judge
7 Lackey, did any change in the direction of the
8 investigation take place immediately after that
9 meeting?

10 A. Yes. As Mr. Balducci was leaving the judge's
11 office myself and another agent, Special Agent Jim
12 Seros (spelled phonetically) approached Mr. Balducci as
13 he exited the office and requested to speak with him
14 regarding this matter. He agreed. He spoke with us.
15 We played for him a tape of one of the meetings that he
16 had with the judge where bribe payments were made as to
17 the investigation. And after discussing it with
18 members of the United States Attorney's Office he
19 agreed to go ahead and cooperate.

20 Q. And did he indeed cooperate that day by agreeing
21 to wear a consensual wire into the Scruggs Law Firm and
22 talk to other members of the conspiracy?

23 A. Yes, he did.

24 Q. And did he in fact talk with Zach Scruggs as

1 well as Sid Baxtrum initially when he entered the

2 office of the Scruggs Law Firm?

3 A. Yes, he did. And also to add, on that occasion

4 we had surveillance personnel in place that day also

5 which watched Mr. Balducci enter and leave the Scruggs

6 Law Firm.

7 Q. Now, was the conversation between Mr. Balducci

8 and Zach Scruggs and Sid Baxtrum recorded?

9 A. Yes, it was.

10 Q. Will you summarize for us what was said between

11 them concerning the Judge Lackey situation in the Jones

12 lawsuit they were interested in and what statements

13 were made to indicated knowledge and participation by

14 both Baxtrum and Zach Scruggs?

15 A. Mr. Balducci's conversation to Sid Baxtrum and

16 Zach Scruggs and later with Richard Scruggs was quite

17 lengthy. But regarding this matter here Tim Balducci

18 told them as you recall I brought you an Order back on

19 October 18th that the judge had signed. That Order was

20 not entered because the attorneys representing the

21 plaintiffs in this civil matter had filed some motions

22 shortly after the judge had written and signed that

23 order, and the judge felt like he needed to impress
24 those files, which he did in a subsequent Order that he

1 wrote and handed to Mr. Balducci during their meeting
2 on November 1st.

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

16 So that was the nature of the discussion
17 between Tim Balducci, Zach Scruggs and Sid Baxtrum. He
18 showed them this latest Order that he picked up on
19 November 1st. Both Zach Scruggs and Sid Baxtrum looked
20 over the Order. Tim specifically had them look at the

21 new paragraph that Judge Lackey had written into the
22 latest order. They read it. They reviewed it.

23 Tim ended up telling them at the end, look,
24 is this how you want the Order to read? You guys are

1 paying for it, so you might as well get it the way you
2 like it. And they both agreed it was fine as it is.

3 Q. After Mr. Balducci talked with Zach Scruggs and
4 Sid Baxtrum about this Order and that they had paid for
5 it and get it like they wanted it, did he later have a
6 one on one conversation with Richard, Dickie, Scruggs?

7 A. Yes, he did. He had a conversation similar to
8 what he had with Sid Baxtrum and Zach Scruggs. He
9 discussed what happened with the latest filings from
10 the plaintiff's attorneys, why the judge needed to
11 change, to amend the Order. And he had this Order in
12 place and that he wanted to get Mr. Scruggs' approval,
13 that the Order was good, that this was the Order they
14 wanted filed.

15 And at the end of the conversation he asked
16 Mr. Scruggs, he said, look, since the judge has had to
17 do this additional work he feels a little more exposed
18 on this since he had the full knowledge of the first

19 Order you wrote, rewrote a new Order. He feels a
20 little more exposed. Would it be possible to do
21 something for him, possibly pay him an additional
22 \$10,000 for doing this second order.

23 Q. Did he say you need to give an extra 10 or
24 something like that?

1 A. I believe that was the language.

2 Q. And did he then ask him do you want me to take
3 care of that, or do you want to take care of it?

4 A. Yes, he did.

5 Q. And what was Mr. Scruggs' response?

6 A. He said he would take care of it, but he wanted
7 some suggestions on how to do it.

8 Q. And what was the suggestion that Tim told him
9 about how they were going to do this?

10 A. He said since he had already been paid the
11 \$40,000 to do the voir dire Order on a Katrina related
12 case in Jackson County, a civil case, he could just do
13 the voir dire instructions on that same case --

14 Q. You mean jury instructions?

15 A. I'm sorry. Jury instructions.

16 Q. And then would Scruggs then give him the check

17 for \$10,000 appearing to hire him for the jury

18 instructions in that case, and then that would be a way

19 for Tim to have an extra \$10,000 to pay the judge?

20 A. Yes.

**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
MOTION TO DISMISS THE INDICTMENT FOR GOVERNMENT
MISCONDUCT OCCURRING BEFORE THE GRAND JURY WITH COMBINED
MEMORANDUM OF LAW**

I. INTRODUCTION

It has been clear since the filing of this indictment that the government has no credible evidence that Defendant David Zachary ("Zach") Scruggs knowingly participated in any scheme to bribe a judge. That is precisely why what little evidence the government is attempting to use must be carefully reviewed for accuracy. Following the hearings conducted by this Court last week, the government provided the defendants with the grand jury testimonies of Timothy Balducci and FBI Special Agent William Delaney. The grand jury testimonies are patently false and misleading in material respects and undoubtedly led to the erroneous indictment of Defendant Zach Scruggs. The testimonies are directly and unmistakably contradicted by the government's own electronically obtained evidence secured by the government well in advance of the testimonies. The use of false and perjurious testimony cannot be reasonably explained or justified, and the use of such evidence is an affront to our justice system and a deprivation of the most basic and inalienable rights due each of us, including Defendant Zach Scruggs. Defendant Zach Scruggs therefore respectfully moves this Court to dismiss the indictment against him.

As detailed more fully in Defendant Zach Scruggs's motion to sever, incorporated by reference herein, Zach Scruggs's role in the conspiracy alleged by the government is limited to three discrete events. None of these three events was criminal and none, whether taken together or separately, indicate a willful intent to engage in a conspiracy to violate the law. Zach Scruggs's placement in this indictment is therefore the unfortunate result of the government's failure to examine all of the evidence against Zach Scruggs in a disciplined, thoughtful or objective way. Only by making certain demonstrably false assumptions about Zach Scruggs's role in the alleged conspiracy – that Zach Scruggs knew that Timothy Balducci was *bribing* Judge Henry Lackey - can the government even hem together the beginnings of a case.

First, the government claims that Zach Scruggs participated in the initial March 2007 meeting wherein the participants discussed and agreed to Mr. Balducci's involvement in the *Jones v. Scruggs* matter pending before Judge Henry Lackey. The government and its witnesses acknowledge that no criminal conduct was discussed or considered during that meeting.

Second, the government alleges that on October 18, 2007, Mr. Balducci delivered an order to the Scruggs Law Firm and picked up a package left for him by a third party when Zach Scruggs happened to be working there after hours, again with no criminal conduct discussed.

Third, and most important for purposes of this motion, the government claims that Zach Scruggs was present in Defendant Sidney ("Sid") Backstrom's office during a November 1, 2007 conversation with Mr. Balducci, who had just been arrested by the FBI and was voluntarily wearing a body wire (at the direction of government lawyers and agents) in an effort to ensnare others.

During the course of discovery in this case, the government provided Defendant with an electronic copy of the November 1, 2007 conversation, in addition to a verbatim transcript

prepared by the FBI (attached hereto as Exhibit A) weeks before Mr. Balducci and Agent Delaney testified before the grand jury. Following the recent hearings before the Court, the government provided Defendant with transcripts of the grand jury testimonies of Mr. Balducci (November 27, 2007) and Agent Delaney (November 28, 2007) (attached hereto as Exhibits B and C, respectively). When compared to the verbatim transcript of the actual November 1, 2007 meeting, it is plain that both Mr. Balducci's and Agent Delaney's characterizations of this meeting – in particular with regard to Zach Scruggs's participation, or rather his failure to participate – are patently false and deliberately misleading in material respects. It is clear upon a comparison of these witnesses' testimonies with the transcript of the meeting itself – which the government had but did *not* present to the grand jury – that the government's presentation of this material and misleading testimony, coupled with its failure to present the objective evidence (the tape and/or transcript), was highly prejudicial to Defendant Zach Scruggs and resulted in his indictment. Given the paucity of any other evidence linking Zach Scruggs to the alleged unlawful conspiracy, it is difficult to draw any other conclusion.

Defendant Zach Scruggs therefore moves, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, that the Court dismiss the indictment due to the government's misconduct in knowingly and/or recklessly presenting false, misleading, and material testimony before the grand jury. Additionally, pursuant to Rule 6(e)(3)(E)(ii) of the Federal Rules of Criminal Procedure, Defendant Zach Scruggs moves this Court for an Order requiring the government to disclose any other testimony elicited before the grand jury related to Zach Scruggs.

II. GRAND JURY TESTIMONY

A. Timothy R. Balducci

Timothy Balducci lied to the grand jury. His testimony contained several material false statements which completely mischaracterized Zach Scruggs's knowledge of and participation in the alleged unlawful conspiracy.¹ In the grand jury, the government asked Mr. Balducci what he discussed with Sid Backstrom *and* Zach Scruggs on November 1, 2007.² Balducci Grand Jury Testimony, Ex. B at p. 41 (emphasis added). Mr. Balducci testified that he told "them" that "the judge wanted now an additional \$10,000" to enter an order in the Jones case, "because he felt a little exposed on the facts now because of this recent filing by Mr. Jones's attorneys." Ex. B at p. 42. The government then asked how "Zach Scruggs and Sid Baxtrum (*sic*)" reacted, to which Mr. Balducci answered "[i]t was not a problem." *Id.* The government next asks Mr. Balducci to tell the grand jury if the three men (Sid, Zach and Balducci) discussed the contents of the order, to which Mr. Balducci responded that the judge "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,

¹ While there was additional false and misleading testimony on other matters not addressed herein, it is noteworthy that, for example, the AUSA questioning Mr. Balducci stated that "...[Judge Lackey] picked up the phone and called the U.S. Attorney's Office as soon as you walked out [of Mr. Balducci's March 2007 meeting with Judge Lackey]." Balducci Grand Jury Testimony, Ex. B at p. 18. In fact, as the government knows, Judge Lackey did not call the U.S. Attorney's Office "as soon as" Mr. Balducci left his office, but called approximately two weeks later. *See* transcript of Agent Delaney's 2/20/08 testimony at motion hearing at p. 128.

² The transcript of the meeting indicates that Zach was not aware that Balducci was going to be at the office. Transcript of Nov. 1, 2007 Recording, Ex. A. at p. 2 (Zach Scruggs: "You comin' up here?"); *compare id.* at 14 (Backstrom [to Balducci]: "I thought you were comin' before lunch?"). Moreover, Balducci states that he came to see Sid Backstrom (*id.* at 2), but that he needed to see Zach as well, apparently about another matter that Zack and Balducci discussed while waiting for Sid in Sid's office. *See* Ex. A at pp. 2-11. *See* further, Balducci's preamble to the November 1, 2007 recording wherein he states to the recording device that he is going to see Sid Backstrom and "maybe" Dick Scruggs.

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." Ex. B at pp. 42-43.

In fact, as the actual transcript of this conversation makes clear, Mr. Balducci never mentioned \$10,000 or the judge's "exposure," and he made no reference whatsoever to "paying for" the judge's order during Zach Scruggs's participation in the conversation about the order. *See generally* Transcript of Nov. 1, 2007 Recording, Ex. A. at pp. 17-30 (*see* p. 17, where Zach Scruggs enters – asking if he is interrupting ("If ya'll need to . . . just talk . . .") -- and quickly leaves Mr. Backstrom's office to take care of something else; p. 19, where Zach Scruggs reenters; p. 30, where Zach Scruggs leaves Mr. Backstrom's office). Indeed, the transcript instead indicates that Zach Scruggs, rather than believing the order at issue was being "paid for" by the Scruggs Law Firm or others on their behalf, knew of no such impropriety. For example, Zach Scruggs reviews the order and states, as to a particular part of it, "I don't know what he's trying to say. I mean it's not bad, but I'm not sure what *his* intent was." Ex. A at 22 (emphasis added).

To be clear, during the taped conversation involving Zach Scruggs, there is absolutely no mention of \$10,000 or any cash payment. There is, however, a cryptic statement from Mr. Balducci that "I've got to go back for another delivery of uh, another bushel of sweet potatoes down there," followed by the statement "Get it how you want it 'cause we're paying' for it to get it done right" made as Zach Scruggs was leaving Sid Backstrom's office and disengaged from the conversation. Ex. A at 30. Related to this point in the conversation, on page 29 of the transcript, an unidentified female interrupts the conversation and indicates to Zach Scruggs that he has a telephone call from someone whose name he does not recognize.³ Ex. A at pp. 29-30.

³ Importantly, the caller was misidentified as "Tracie Lott." Defendant Zach Scruggs's aunt's name is Tricia Lott, and he was questioning the messenger on the name to be sure she was not speaking of his

After some comments by Zach Scruggs and Mr. Balducci about Zach's reluctance to take the call (*id.*), there is a pause (p. 30), after which Mr. Balducci appears no longer to be speaking to Zach Scruggs. Balducci's language changes from the plural "y'all" to the singular "you." And Zach Scruggs's voice is never heard on the tape again. What is heard is the sound of a door closing.

BALDUCCI: God only knows. (pause) Um, the other piece of this puzzle I hadn't told *you* yet is uh, get it how *you* want it because I've got to uh, I've got to go back for another delivery of uh, another bushel of sweet potatoes down there. So. Because of all this that has come up.

BACKSTROM: Mm-hmm.

BALDUCCI: So get it right. Get it how *you* want it 'cause we're paying' for it to get it done right.

Ex. A at p. 30 (emphasis added). The tape and transcript both reveal Zach Scruggs (who is standing near the doorway after having engaged with his secretary about the telephone call) leaving the office at the time the final comment is made. Sid Backstrom does not directly respond to the last comment as he is reading aloud some language in the draft order. *Id.* Importantly, Defendant Zach Scruggs never re-enters the room and never re-enters the government's case. That is the last conversation involving Defendant Zach Scruggs.

Thus, Mr. Balducci's grand jury testimony directly contradicts the government's own verbatim transcript of the conversation being described. Mr. Balducci's testimony falsely states that he told Zach Scruggs (and Sid Backstrom) that the judge wanted \$10,000. (The transcript of

aunt. Zach was concerned about this because of his mother's serious illness, and he did not want to ignore a call which, in his mind, could be related to his mother's health. Immediately after leaving Sid's office, Zach questioned his staff further about the caller and it was ultimately determined to be "Tracey Locke," a lawyer working with Zach on a separate matter.

the November 1 recording does not refer to any dollar figure at all, except in the course of Mr. Balducci's separate conversation with Richard Scruggs (not involving Zach Scruggs or Sid Backstrom). *See* Ex. A at p. 76 (Balducci: ". . . 'bout ten or so more?"), p. 78 (Balducci: "Um, that's probably worth about ten, don't you think?").

Thus, Mr. Balducci's lie is not just an innocent or accidental slip of the tongue arising from his or the prosecutor's uncertain memory of what was actually said. Nor is it a harmless mistake cumulative to other competent evidence presented to the grand jury establishing Zach Scruggs's knowledge that a judge was actually being bribed—there is no such evidence. The lie *created* evidence which otherwise does not exist: the elusive link between Zach Scruggs and an agreement to pay money to a judge to procure an order. Without Mr. Balducci's false testimony regarding the discussion of money being paid to a judge, Zach Scruggs only participated in an ordinary conversation about how a judge's order reads. Thus, the misstatement was material.

But this is not all. Mr. Balducci's testimony also falsely describes the order of the items discussed, saying that he first discussed with *both* men the topic of "paying" for the judge's order (including another false reference to \$10,000), and then discussed the contents of the order. As the transcript of the recording makes clear, however, the judge's order itself was discussed and then, only as Zach Scruggs was leaving the room, Mr. Balducci makes a reference to "sweet potatoes" and "... 'cause we're paying' for it..." At this point in the conversation, it is clear that Zach Scruggs is leaving the room and not involved in – if in fact he even heard – what was being said. As the transcript plainly indicates, Zach Scruggs does not even acknowledge anything Mr. Balducci says on the subject of "sweet potatoes" or paying for anything with so much as a "uh huh." As noted in footnote 3, Zach was focused on the "Tracie Lott" caller, which he

immediately addressed with his staff after walking out of Sid Backstrom's office.⁴ As discussed above, this inversion of the course of the conversation is not just a simple slip-up arising from a witness's fading memory or a prosecutor's inattention to his examination outline. It is a material falsehood because it brings Zach Scruggs into the discussion about paying a judge—a discussion he simply did not have.

In case there is any doubt about the issue of the government's knowledge of the false testimony to the grand jury, the Court should take careful note of an interesting exchange that broke the flow of questioning at the very end of Mr. Balducci's testimony about the conversation with Zach Scruggs and Sid Backstrom. The prosecutor abruptly asks: "Is it possible that you might have used the term sweet potatoes again referencing the amount of money involved?" Ex. B at p. 43. While it is unclear whether he was suggesting that the term was used *in addition* to the specific dollar amount falsely testified to by Mr. Balducci, or whether the question was a half-hearted attempt to "cure" what the prosecutor knew to be inaccurate testimony rendered earlier in the examination, it does evidence the prosecutor's knowledge of and familiarity with the taped conversation. If it was an attempt to repair the previous false testimony, a fair reading of the transcript clearly shows the complete inadequacy of the effort.

Other elements of Mr. Balducci's grand jury testimony show that the examination did not simply stray from the truth in an innocent or immaterial way. Balducci's certainty before the grand jury is completely inconsistent with his coded language when in the Scruggs Law Firm

⁴ Even though Zach Scruggs was leaving the office at the time "paying for it" was mentioned, the false testimony about "\$10,000" eliminated the ambiguity of the statement and denied the grand jury the prerogative of deciding for themselves what that meant, i.e. using up favors, good will, money, etc, particularly to an individual who has never been privy to any discussion with anyone regarding money being paid to Judge Lackey. Balducci's coded statement about "Sweet Potatoes" as Zach Scruggs was leaving the office would have, at best, had no significant meaning to one without knowledge of a conspiracy to bribe Judge Lackey.

offices less than two hours after his arrest and decision to become a government informer. For example, Mr. Balducci never used the words “sweet potato” in any conversation with any defendant except on the one occasion noted above. Moreover, at that point in the investigation, Mr. Balducci was saying and doing whatever he could to implicate his alleged co-conspirators in order to lessen the certain consequences of his unlawful acts.

Understanding that motivation, one is left wondering why Mr. Balducci did not simply use with Zach Scruggs the very language he falsely told the grand jury he used. After all, the November 1 concocted story by the FBI that Judge Lackey needed an additional \$10,000 was specifically created and used to leave no doubt that those who heard it and agreed to it were guilty of this conspiracy. Any Grand Juror who heard that kind of evidence would have been reassured of the guilty knowledge of those accused. With respect to Zach Scruggs, in fact, that testimony would be *essential* to establishing his guilty knowledge. Although the testimony with respect to Zach Scruggs was inaccurate, it was needed to fill a hole in the evidence. Balducci’s materially false testimony that Zach Scruggs heard the concocted story *and* agreed to it, necessarily led to Zach Scruggs’s indictment.

B. William Delaney

To compound the false and highly prejudicial grand jury testimony of Mr. Balducci regarding Zach Scruggs’s supposed involvement in the alleged unlawful conspiracy, the Government elicited similarly misleading testimony from FBI Special Agent William Delaney. When asked to summarize what was said among Mr. Balducci, Sid Backstrom, and Zach Scruggs at the November 1 meeting, Mr. Delaney responded, in part, by stating that the three discussed what had happened over the preceding week regarding the new filings, and in the context of describing their conversation, recounted the fact that Judge Lackey had stated that he

was still owed \$10,000 from the original agreement. While, in fairness, Agent Delaney did not specifically state that those words were uttered to Sid Backstrom and Zach Scruggs, he did leave the clear impression that words of that degree and level of specificity were used. This is bolstered by his statement immediately after discussing the \$10,000 – “So that was the nature of the discussion between Tim Balducci, Zach Scruggs and Sid Backstrom.” Delaney Grand Jury Testimony, Ex. C at p. 13. Moreover, Agent Delaney’s testimony followed Mr. Balducci’s false testimony wherein Mr. Balducci stated that he specifically informed Zach Scruggs that the judge needed an additional “\$10,000.”

Agent Delaney further mischaracterized the meeting by stating: “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.” Ex. C at p. 14. To the contrary, as discussed above in connection with Mr. Balducci’s false grand jury testimony, Zach Scruggs participated in a discussion regarding the content of the proposed order and *then*, as he was in the process of exiting Sid Backstrom’s office, Mr. Balducci said to Sid Backstrom, who was reading from the order and clearly not paying attention, “Get it how *you* want it ‘cause we’re payin’ for it to get it done right.” Ex. A at p. 30 (emphasis added).

As stated previously, the Government investigated and indicted this case by blurring the characters and failing to responsibly and carefully examine each individual’s actions and each individual’s words. While the law of conspiracy may be broad in scope, its breadth is not limitless, and the Government must show each individual’s willful involvement in an *unlawful* agreement with convincing, reliable and honest evidence.

The fact that the Government elicited similar false, misleading and material testimony from both an indicted co-conspirator *and* an FBI agent surely prejudiced the grand jury and, in

the absence of other credible evidence linking Zach Scruggs to any alleged unlawful conspiracy, improperly led to his indictment. This is especially egregious where both witnesses' testimony is contradicted by objectively verifiable evidence – a transcript and recording of the actual conversation at issue – which was not presented to the grand jury. This misconduct amounts to a deprivation of Zach Scruggs's due process rights under the Fifth Amendment, and mandates a dismissal of the indictment against him.

III. ARGUMENT

The United States Supreme Court has recognized that prosecutorial misconduct can justify the dismissal of an indictment “‘if it is established that the violation substantially influenced the grand jury’s decision to indict,’ or if there is ‘grave doubt’ that the decision to indict was free from the substantial influence of such violations.” *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256, 108 S. Ct. 2369, 2374 (1988) (quoting *United States v. Mechanik*, 475 U.S. 66, 78, 106 S. Ct. 928, 945-46 (1986)).⁵ See also *United States v. Williams*, 504 U.S. 36, 46 & n.6, 112 S. Ct. 1735, 1741 & n.6 (1992) (district court’s supervisory power can be used to dismiss indictment because of misconduct before grand jury, at least where that misconduct amounts to violation of one of those few, clear rules which were promulgated by Supreme Court and Congress to ensure integrity of grand jury’s functions, such as prohibitions against false declarations before grand jury and subornation of perjury) (citing, *inter alia*, *Bank of Nova Scotia*); *United States v. Vallie*, 284 F.3d 917, 921 (8th Cir. 2000) (“An indictment cannot be based on perjured testimony, and the government may not use perjured testimony at trial if there is a reasonable chance that it would affect the jury’s judgment[.]”) (citations omitted).

⁵ In *Bank of Nova Scotia*, the Supreme Court went on to hold that the district court’s finding that prosecutors knew that the testimony of IRS agents before the grand jury was false or misleading was clearly erroneous, and thus did not support dismissal of indictment. 487 U.S. at 261, 108 S. Ct. at 2377.

The Fifth Circuit has recognized that dismissal of an indictment may be based upon false statements before a grand jury. In *United States v. Strouse*, 286 F.3d 767 (5th Cir. 2002), the defendant had successfully moved to dismiss an indictment against him based on the fact that a witness had offered material false testimony before a grand jury. On appeal, the Fifth Circuit first held that the district court did not err in finding that the witness did knowingly provide false testimony, and that the false statements were material to the grand jury's investigation of the defendant. *Id.* at 771. However, the court held that in the absence of a finding of government misconduct (which the trial court had mistakenly declined to reach), the district court was without power to dismiss the indictment. *Id.* at 772. *See also id.* (concluding that "an indictment may not be dismissed under a court's supervisory power for perjury which the government did not sponsor"). *See also United States v. Cathey*, 591 F.2d 268, 272 (5th Cir. 1979) (dismissal not warranted where there was no evidence of deliberate attempt to mislead and alleged misstatements were not material, but were about collateral matters).

Other federal courts have dismissed indictments on facts strikingly similar to those at issue in this case. In one case, for example, the district court for the Southern District of New York dismissed indictments against the defendant based upon the false testimony of a grand jury witness. *United States v. Provenzano*, 440 F. Supp. 561 (S.D.N.Y. 1977). In *Provenzano*, the government's key witness had recanted his prior testimony before a grand jury. Nonetheless, when it sought a superseding indictment, the government chose to put the witness's 22-month old testimony before the new grand jury, "instead of producing Mr. Goldfarb before the Grand Jury to enable the grand jurors to 'make the charge on its own judgment[.]'" *Id.* at 565 (quoting *Stirone v. United States*, 361 U.S. 212, 219, 80 S. Ct. 270, 274 (1959)). The court reasoned that the government's actions thus misled the grand jurors "as to 'the shoddy merchandise' they were

getting.” *Id.* The court concluded: “Here, where the Government was aware, or certainly should have been, that their key witness recanted his prior testimony, the use of his 22-month-old testimony misled the Grand Jury, depriving them of an opportunity to make an independent evaluation of the case.” *Id.* The court therefore dismissed the superseding indictment.

Similarly, in this case, the “shoddy merchandise” presented to the grand jury was the false testimony of the government’s witnesses, which directly contradicted the government’s own recording of the conversations at issue, and which was in essence the only evidence presented to the grand jury directly tying Zach Scruggs to an unlawful conspiracy. *Accord United States v. Gallo*, 394 F. Supp. 310, 315 (D. Conn. 1975) (dismissal of second indictment warranted where, *inter alia*, “the prosecutor failed to alert the second grand jury that the transcripts upon which it was to base an indictment were permeated with perjurious statements as to crucial, material events. Buckley’s false testimony before the first grand jury poisoned the waters of evidence.”).

Similarly, in *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980), a federal district court dismissed an indictment against a pharmacist (and others) for filing fictitious prescriptions and conspiracy. The defendant’s main argument to the court revolved around the testimony of another pharmacist employed at the pharmacy, Robert Sampson, regarding “whether defendant Larson had attempted to verify the legitimacy of Dr. Possinger’s prescriptions for controlled substances prior to their being filled at Fenwick Pharmacy, Inc.” *Id.* at 161. Sampson testified that Larson told him that, before filling the prescriptions at issue, he had called both the doctor’s office and the Philadelphia Police Narcotics Squad. Sampson also testified that he was present when some of these calls were made. In fact, telephone records subpoenaed by the Assistant U.S. Attorney in the case verified these calls. *Id.* at 161-62.

Nonetheless, the prosecutor questioning Sampson at the grand jury asked him: “‘Would it surprise you if I told you that Mr. Tuff (sic) and Mr. Mosner (sic) [of the Philadelphia Narcotic Squad] say they never heard of Mr. Lawson or the Fenwick Pharmacy and never spoke to Mr. Lawson and in fact on the day the call was alleged to have been made Mr. Tuff was working the midnight shift?’” *Id.* at 162. As the court observed:

[T]he Assistant United States Attorney . . . undertook to discredit Sampson regarding Lawson’s alleged calls to Philadelphia. At no time did anyone from the government give to the grand jury Officer West’s summary of Fenwick Pharmacy’s telephone records, or even reveal to the grand jury that the calls had been made. Thus, rather than introducing the telephone records to corroborate Sampson’s testimony concerning the phone calls, the Assistant United States Attorney embarked upon a grueling cross-examination of Sampson, apparently designed to give the jurors the impression that Lawson had never called Philadelphia and that Sampson was trying to cover for him.

Id. at 162 (citation and footnote omitted).⁶

The defendants argued that this was not merely a matter of failing to present exculpatory evidence to the grand jury, but rather “an affirmative attempt both to discredit Sampson and to turn exculpatory evidence into inculpatory evidence.” *Id.* The case at hand presents a similar situation – here, the government has attempted to bolster its witnesses’ grand jury testimony against Zach Scruggs which is directly contradicted by objective evidence (like the telephone

⁶ Even though the Fifth Circuit in the *Cathey* case held that dismissal was not justified on the facts before it, the court did note that “the presentation of the case to the grand jury is hardly commendable,” adding: “Why the prosecutor elected to use Derry’s hearsay account of his interview with Cathey rather than use the verbatim transcript of the interview we do not know. Use of the transcript would have avoided the problems discussed in this portion of our opinion.” 591 F.2d at 273 (citation omitted).

records in *Lawson*), the November 1 transcript. The defendants in *Lawson* also pointed out that Sampson's testimony was material "because he was the only live witness relating directly to Lawson's activities at Fenwick Pharmacy, Inc." *Id.* at 162-63. Similarly, in this case Mr. Balducci and Agent Delaney were, to Defendant's knowledge, the only live witnesses against him, and provided the only (false) testimony regarding his alleged involvement in an unlawful conspiracy.

The court in *Larson* held that "in the absence of a sufficient government explanation, the court finds that the prosecutor's questions to Sampson were deliberately misleading and calculated to create a false impression on the grand jury." *Id.* at 163. Based on this and other instances of prosecutorial misconduct, especially, though, the "[p]articularly egregious" examination of Sampson, the court dismissed the indictment, finding that the prosecutor had "denied defendants their constitutional right to an 'unbiased' grand jury." *Id.* at 172. Similarly, the government's knowing and/or reckless presentation of material testimony to the grand jury which directly contradicted the government's own recording of the events at issue deprived Zach Scruggs of an unbiased grand jury. This false testimony, on a material issue, obviously tainted the grand jury's consideration of the evidence against Zach Scruggs, and the indictment against him should therefore be dismissed. *Compare Goodrich v. Hall*, 448 F.3d 45, 50 (1st Cir. 2006) ("Even assuming the detective's testimony before the grand jury went too far, any misstep by the detective in his testimony was *corrected by the prosecutor*, and there is no reason to think *Goodrich* would not have been indicted anyway.") (emphasis added); *United States v. Fuchs*, 218 F.3d 957, 964 (9th Cir. 2000) ("Fuchs provided no evidence to show that the prosecutor encouraged the investigator to testify in the manner he did or that the prosecutor acted in any intentional way to mislead the grand jury. Any inaccuracy that resulted from the investigator's

statement that Fuchs signed for the Forest Service, rather than as a witness, was *rendered harmless when the grand jury was presented with the exchange agreements themselves.*") (emphasis added).⁷

Finally, it should be stressed that the witnesses' testimony impermissibly lumped Zach Scruggs in with other participants in the alleged unlawful conspiracy without any basis in fact. In a far less egregious situation, where prosecutors presented deposition testimony to a grand jury without any assistance, the district court dismissed the indictment. *United States v. Carcaise*, 442 F. Supp. 1209 (M.D. Fla. 1978). The court in this case explained:

The present case involves five persons each of whom allegedly participated in a common scheme to defraud in violation of 18 U.S.C. s 1341. From the record before the indicting grand jury, it appears that each defendant played a unique role in relation to the scheme. A careful consideration of the individual conduct of each defendant was, therefore, essential to the grand jury Without such, the grand jury could not reasonably have determined, with respect to each individual, whether probable cause existed to believe that, with the intent to defraud, he knowingly joined in the execution of a scheme to defraud. Likewise, without some reasonably careful scrutiny of each defendant's conduct, the grand jury could not have fulfilled its obligation to protect citizens against unfounded criminal prosecution and the enormous consequences that are attendant on any criminal prosecution, well-founded or otherwise.

The importance of the deposition evidence to the grand jury function becomes apparent when that evidence is contrasted with the live testimony. The deposition testimony focused far more extensively on the individual activities of each of the defendants than did the live testimony. This court does not know what use the grand jury made of the depositions, but it is not reasonable to assume that the grand jury, unaided by a competent expert witness, could have read and understood the 1160 pages of deposition testimony in a session of six hours and forty-five minutes a part of which was occupied by other matters. Without a thorough understanding of the deposition testimony, the grand jury could not possibly have performed its tripartite duty to make a careful investigation, to

⁷ As noted in the Timothy Balducci section of this motion, the government asked Mr. Balducci, at the very end of his questioning about the critical conversation with Zach Scruggs, whether it was "...possible that you might have used the term sweet potatoes again referencing the amount of money involved?" As noted, the meaning of the question is not clear, but to the extent that it was an effort by the prosecutors to correct the false testimony, it was ineffective and reveals knowledge of the deficiency. Balducci Grand Jury Testimony, Ex. B at p. 43.

determine probable cause, and to protect citizens against unfounded accusation. The court, therefore, concludes that the procedure employed by the prosecutors in their presentation of the deposition testimony to the grand jury was so inconsistent with the responsibility of the grand jury as to require a dismissal of the indictment.

Id. at 1212-13 (citations omitted). Likewise, in the case at hand, the live testimony presented to the grand jury did not accurately focus on what exactly Zach Scruggs knew or did not know, did or did not do – it impermissibly lumped him in with other actors, in direct contrast to the objective evidence which the Government gathered and had in its possession. Unlike the defendants, who are left to explain conversations and actions recorded by surreptitious wire, the Government and its witnesses were recorded in a formal grand jury process, where witnesses are prepared and the truth paramount. The Government seeks to convict Defendant Zach Scruggs on coded words uttered after he is disengaged from a conversation and on actions perceived through a presumptuous lens; yet they indicted a man relying on testimony they knew was facially false and wholly inaccurate. Something is amiss when such conduct goes unchallenged and uncorrected.

IV. CONCLUSION

For the foregoing reasons, Defendant David Zachary Scruggs respectfully requests that the Court dismiss the Indictment based on the government's misconduct in knowingly and/or recklessly presenting false and misleading testimony to the grand jury.

Defendant respectfully requests oral argument on this motion.

Dated: March 3, 2008

By: /s/ Todd Graves
Todd P. Graves (*Pro Hac Vice*)
Nathan F. Garrett (*Pro Hac Vice*)
GRAVES BARTLE & MARCUS, LLC
1100 Main St., Suite 2600
Kansas City, Missouri 64105
Telephone: (816) 256-3052
Facsimile: (816) 817-0780

For Defendant
David Zachary Scruggs

CERTIFICATE OF SERVICE

I, Todd Graves, do hereby certify that on the 3rd day of March, 2008, I have electronically filed the foregoing Defendant David Zachary Scruggs's Motion to Dismiss the Indictment for Government Misconduct Occurring Before the Grand Jury with Combined Memorandum of Law 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
Todd P. Graves

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.¹

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

¹No 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 (5th Cir. 1992); *United States v. Chargra*, 735 F.2d 870, 873 (5th 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 (5th 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 (5th Cir. 1982); *see also United States v. Strouse*, 286 F.3d 767, 775 (5th 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.² 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

²The transcript of the November 1st 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 (1st Cir. 2006).

Third, the statements concerning the \$10,000 are not material. *See United States v. McAfee*, 8 F.3d 1010, 1017 (5th 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 1st. 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 1st. 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,

JIM M. GREENLEE
United States Attorney

/s/ Thomas W. Dawson

By:
THOMAS W. DAWSON
First Assistant United States Attorney
Mississippi Bar No. 6002

/s/ Robert H. Norman

By:
ROBERT H. NORMAN
Assistant United States Attorney
Mississippi Bar No. 3880

/s/ David A. Sanders

By:
DAVID A. SANDERS
Assistant United States Attorney
Mississippi Bar No. 10535

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:

wbraunig@kvn.com

bdooley@kvn.com

ngarrett@gbmkc.com

todd.graves@pobox.com

jkeker@kvn.com

tleblanc@kvn.com

jlittle@kvn.com

chrisrobertson@scruggsfirm.com

jrt@tannehillcarmean.com

trappf@phelps.com

This the 6th day of March, 2008.

/s/ Robert H. Norman
ROBERT H. NORMAN
Assistant United States Attorney

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA	.	Cause No. 3:07CR192
	.	
Plaintiff	.	Oxford, Mississippi
	.	February 21, 2008
v.	.	9:30 a.m.
	.	
RICHARD F. "DICKIE" SCRUGGS	.	
DAVID ZACHARY SCRUGGS	.	
SIDNEY A. BACKSTROM	.	
	.	
Defendants	.	
.	

MOTION HEARING
BEFORE THE HONORABLE NEAL B. BIGGERS
U.S. SENIOR DISTRICT JUDGE

APPEARANCES:

For the Government:	United States Attorney's Office
	Northern District of Mississippi
	BY: THOMAS W. DAWSON, ESQ.
	BY: ROBERT H. NORMAN, ESQ.
	BY: DAVID A. SANDERS, ESQ.
	900 Jefferson Avenue
	Oxford, Mississippi 38655-3608
For the Defendant	
Richard F. "Dickie" Scruggs:	
	JOHN W. KEKER, ESQ.
	BROOK DOOLEY, ESQ.
	JAN NIELSON LITTLE, ESQ.
	TRAVIS LEBLANC, ESQ.
	WARREN BRAUNIG, ESQ.
	Keker & Van Nest, LLP
	710 Sansome Street
	San Francisco, California 94111-1704

1 For the Defendant

David Zachary Scruggs:

2

TODD P. GRAVES, ESQ.

NATHAN GARRETT, ESQ.

3

Graves, Bartle & Marcus, LLC

1100 Main Street

4

Suite 2600

Kansas City, Missouri 64105

5

816-256-3173

6 For the Defendant

Sydney A. Backstrom:

7

FRANK W. TRAPP, ESQ.

JAMES W. CRAIG, ESQ.

8

Phelps Dunbar

111 East Capitol Street, Suite 600

9

Post Office Box 23066

Jackson, Mississippi 39225-3066

10

601-352-2300

11

J. RHEA TANNEHILL, JR., ESQ.

Tannehill & Carmean, PLLC

12

400 South Lamar Boulevard, Suite C

Post Office Box 1383

13

Oxford, Mississippi 38655

662-236-9996

14

15

16

Court Reporter:

Rita Davis Sisk

17

911 Jackson Avenue, Room 369

Oxford, Mississippi 38865

18

(662) 281-3027

19

20

Proceedings recorded by mechanical stenography, transcript
21 produced by computer.

22

23

24

25

1 maybe some plaintiff lawyers in Montana and some other ones.
2 But we wouldn't have any of these problems -- you wouldn't have
3 to talk about fancy jury matters. I mean, you wouldn't have to
4 talk about extended voir dire; I don't think, and so on. You
5 could just go ahead and have a normal trial if we went
6 somewhere else.

7 So I would ask that you consider our suggestion and move
8 us wherever you choose. And let's make that decision now and
9 everybody can start making arrangements because it will take
10 some logistical arrangements, obviously.

11 **MR. TRAPP:** Your Honor, I know the Court's ruling on
12 supplementation. If I might make one tiny comment?

13 **THE COURT:** All right. One tiny comment.

14 **MR. TRAPP:** The Judge Lackey district covers six of
15 the counties of the eleven counties, if I counted them right,
16 that are in the middle district. And I'd just ask the Court to
17 keep that in mind.

18 **THE COURT:** Six of the eleven counties that are in,
19 what, this division?

20 **MR. TRAPP:** Yes, Your Honor.

21 **THE COURT:** All right. Thank you.

22 All right. As I mentioned, the defendants motion for
23 change of venue is one of the most thoroughly researched
24 motions that I've seen in a long time as far as the information
25 that was gathered from news media that exists about this

1 particular case. A lot of articles, dozens if not hundreds of
2 articles, were footnoted and referred to.

3 There have been -- these articles came from newspapers in
4 this state and some other states. Counsel quoted from *The*
5 *Clarion-Ledger* and is quoted from the -- I don't know how many
6 people in this district subscribe to *The Clarion-Ledger*.
7 There's been no evidence presented to the Court about whether
8 100 or 1,000 or one million subscribe to it. I have no
9 information on which I can base how prevalent that information
10 is among the citizens of this district.

11 I don't know what the percentage -- what the subscription
12 rate is or number is of the *Tupelo Journal*. I believe it's the
13 *Northeast Mississippi Journal*. I know there have been a lot of
14 articles in that; but as far as how many people read those
15 papers, how many people out there on the street read them, no
16 information has been presented to the Court. There's been no
17 survey taken. And, so, whether it's 1 percent or 10 percent or
18 more, I don't know.

19 I do know, generally, that people get most of their
20 information now from television, more so than they used -- ever
21 have before; and only a few -- not as many people read the
22 newspaper as used to. You see that because newspapers are
23 losing money all over the country. Some are going out of
24 business.

25 But be that as it may, I have no basis on which to judge

1 the percentage of people in this district who might be called
2 for jury duty who subscribe to any of these newspapers that
3 have been cited, including the local paper. So I cannot, in
4 good faith, base a change of venue on the fact that some
5 newspapers have printed numerous stories about this case.

6 There might be some people you could walk up to on the
7 street and ask them about this case and they wouldn't know what
8 you were talking about. I've had people tell me that. But I'm
9 not basing any judgment on that either, because that's not
10 before the Court. It's not on the record.

11 But the mere fact that there have been numerous newspaper
12 articles -- and I grant, as I said, this is a very well
13 researched and documented motion -- that mere fact that
14 newspapers have printed it does not, in effect, militate on
15 this Court to move this case out of this state.

16 So for those reasons -- and also, there's been no
17 testimony by anyone who thinks that these defendants could not
18 get a fair trial from jurors in this district. So there's
19 really nothing on the record before the Court on this
20 particular motion other than a lot of -- several newspapers
21 have printed a lot of articles about this case.

22 And I cannot segue from that into a conclusion that we
23 cannot get a fair jury panel from the counties of this district
24 to hear this case. And certainly, when they are summonsed to
25 be here, we'll ask them about their opinions, about their

1 knowledge, if they heard about it, if they formed an opinion.

2 Merely hearing about the case is not sufficient grounds to
3 disqualify a person from sitting on a jury. They may have
4 heard good things about the defendants. That they know about
5 the case is not, in itself, grounds to disqualify. They can be
6 questioned about whether they have formed an opinion about the
7 guilt or innocence, if they formed it either way.

8 Some people may have formed an opinion about the
9 innocence. Some people may say they've formed an opinion about
10 the guilt. But that's what they've got to say in order to
11 disqualify them from sitting on this particular case. And even
12 if they have formed an opinion, a proper question would be
13 then, Is that opinion a fixed opinion or is it one that you can
14 lay aside and listen to the evidence with an open mind?

15 So I think jurors generally answer those questions
16 truthfully. If counsel believe they haven't answered them
17 truthfully -- which I don't want to even get into that -- but
18 of course, counsel have peremptory challenges that they can
19 exercise if they feel someone is not -- does not have an open
20 mind.

21 So at this point, the Court has -- is of the opinion that
22 the prudent course of action will be to select a jury from the
23 Northern District of Mississippi which has over a million
24 people in it. And not any particular -- I'm not saying that
25 any particular section of this district should be more

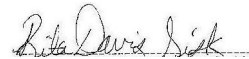
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, Rita Davis Sisk, RPR, BCR, CSR #1626, Official Court Reporter for the United States District Court, Northern District of Mississippi, was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I, Rita Davis Sisk, RPR, BCR, CSR #1626, have caused said stenographic notes to be transcribed via computer, and that the foregoing pages are a true and accurate transcription to the best of my ability.

Witness my hand, this 22nd day of February, 2008.



RITA DAVIS SISK, RPR, BCR, CSR #1626
Official Court Reporter