

**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.<sup>1</sup> In the grand jury, the government asked Mr. Balducci what he discussed with Sid Backstrom *and* Zach Scruggs on November 1, 2007.<sup>2</sup> 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,

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> Ex. A at pp. 29-30.

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<sup>3</sup> 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

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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.<sup>4</sup> 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

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<sup>4</sup> 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)).<sup>5</sup> 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).

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<sup>5</sup> 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).<sup>6</sup>

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

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<sup>6</sup> 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).<sup>7</sup>

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

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<sup>7</sup> 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 3<sup>rd</sup> 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