

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO. 3:07CR192

RICHARD "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM,
TIMOTHY R. BALDUCCI,
STEVEN A. PATTERSON

**GOVERNMENT'S COMBINED RESPONSE IN OPPOSITION TO
DEFENDANTS SIDNEY A. BACKSTROM AND DAVID ZACHARY SCRUGGS'
MOTION FOR SEVERANCE**

Comes now the United States by and through the United States Attorney's Office for the Northern District of Mississippi and submits this its combined response to pretrial motions for severance filed by defendants Sidney A. Backstrom and David Zachary Scruggs.

Background

The defendants are named in each count of a six-count indictment charging a conspiracy to violate Title 18, United States Code, Sections 666(a)(2)(b), 1343 and 1346 (count one) and substantive counts of violations of Title 18, United States Code, Section 666(a)(2)(b) and Section 2 (counts two, three and four), and substantive charges of a violation of Title 18, United States Code, Section 1343 and 1346 (counts five and six).¹

¹In their recitation of the evidence defendants select isolated events and snippets of conversations, upon which is superimposed a distorted interpretation and a demand that this myopic view is somehow exculpatory and should be considered by the Court alone, to the exclusion of the entire volume of evidence to be presented at trial. An example of this tactic can be found at page 18, paragraphs 18-19, of Backstrom's Motion for Severance as relates to the consensually recorded telephone conversation between Balducci and Backstrom on November 13, 2007. Attached hereto as Exhibit 1 is the entire transcript, with the pertinent and relevant conversation taking place beginning at page 12 and continuing to page 19.

In context, Balducci is bringing Backstrom up to date reviewing the fact that "we've"

Law and Argument

Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of offenses and defendants. Said rule provides:

Joinder of Offenses and of Defendants

(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

As reflected on the face of the indictment, the offenses are of the same or similar character and are also based on the same series of acts and transactions constituting the conspiracy to corruptly influence a judicial officer of the State of Mississippi and to engage in honest services wire fraud with respect to that same official. No defendant makes any claim of misjoinder under Rule 8 of the Federal Rules of Criminal Procedure. Rather, they move for a severance under the discretionary authority of the Court pursuant to Rule 14 of the Federal Rules

given him (Judge Lackey) fifty (thousand dollars) to order the case to arbitration, but broaches the possibility that for more money the judge would keep the case and ultimately dismiss against Scruggs, et al. Backstrom ruminates that if “we overreach again” that it might come back to “bite us.” Backstrom decides to stick with arbitration rather than to “do something exotic.” As opposed to evidence of exculpatory behavior, the November 13th conversation is clear evidence of the knowledge and participation of co-conspirators to bribe Judge Lackey.

Other examples abound, such as the November 1, 2007, consensual recording between Balducci, Zach Scruggs and Backstrom, and Balducci and Richard “Dickie” Scruggs, the transcript of which is attached as part of a response to other motions filed in this case.

of Criminal Procedure. That rule, entitled Relief from Prejudicial Joinder, states as follows:

If it appears that a defendant or the government is prejudiced by the joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce as evidence at trial.

The grant or denial of a severance is within the sound discretion of the trial court and that decision is reviewed on appeal for an abuse of discretion. United States v. Sudeen, 434 F.3d 384, 387 (5th Cir. 2005); United States v. Lewis, 476 F.3d 369, 383 (5th Cir. 2007).

The general rule on severances was set forth over a quarter century ago by the Fifth Circuit in United States v. Perez, 489 F.2d 51 (5th Cir. 1973), cert. denied, 417 U.S. 945, when the court said:

To obtain a severance under Rule 14, the movants have the burden of convincing the court that without such drastic relief they would be unable to obtain a fair trial . . . a mere showing of some prejudice has usually been held insufficient, for qualitatively it must be the most compelling prejudice against which the trial court would be unable to afford protection. Ibid. at 65.

The Fifth Circuit in Perez relied on Opper v. United States, 348 U.S. 84, 95 (1954), which is to the same effect. The Fifth Circuit later elaborated on and extended its reasoning in Perez with the decision in United States v. Bright, 630 F.2d 804, 813 (5th Cir. 1980), and in United States v. Park, 531 F.2d 754 (5th Cir. 1976), where it stated:

The existence of prejudice in large measure depends on the facts and circumstances of each case . . . it is axiomatic that the granting of a severance is within the discretion of the trial judge . . . the burden of demonstrating prejudice is a difficult one and the ruling

of the trial judge will rarely be disturbed on review . . . the defendant must show something more than the fact that a separate trial might offer him a better chance of acquittal. Ibid. at 762.

The Eleventh Circuit articulated the solid rationale underlying this long-standing interpretation of Rule 14 in United States v. Walker, 720 F.2d 1527, 1533 n. 2 (11th Cir. 1983), cert. denied, 104 S. Ct. 1614:

Joinder expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once.

“There is a preferences in the federal system for joint trials of defendants who are indicted together, particularly in conspiracy cases.” Zafiro v. United States, 506 U.S. 534, 537 (1993). When the risk of prejudice is high a district court is more likely to determine that separate trials are necessary, but less dramatic measures, such as limiting instructions, will often suffice to cure any risk of prejudice. United States v. Scott, 795 F.2d 1245, 1250 (5th Cir. 1986).

Historically the Fifth Circuit has been reluctant to vacate a conviction because the district court denied a severance. United States v. Lewis, 476 F.3d 369 (5th Cir. 2007); see also United States v. Bieganowski, 313 F.3d 264, 287 (5th Cir. 2002) (a spillover effect by itself, is an insufficient predicate for a motion to sever); United States v. Peterson, 244 F.3d 385, 393 (5th Cir. 2001) (concluding that a limiting instruction cured the risk of prejudice of evidence used against a co-defendant); United States v. Rocha, 916 F.2d 219, 228-29 (5th Cir. 1990) (severance is required on the basis of disparity in the evidence only in the most extreme cases). The defendant must isolate events occurring in the course of the trial and then demonstrate that such events caused substantial prejudice. United States v. Lewis, supra at 384, citing United States v.

Booker, 334 F.3d 406, 415 (5th Cir. 2003).

Both Backstrom and Scruggs cite the Fifth Circuit case of United States v. Tarango, 396 F.3d 666 (5th Cir. 2005) in support of their argument that a pretrial severance should be granted. Tarango does not support their position. The district court judge was affirmed in the exercise of his discretion with respect to a post-trial granting of a new trial under Rule 33 of the Federal Rules of Criminal Procedure wherein a portion of the reasoning dealt with issues that would ordinarily be considered in determining whether or not to grant a motion for severance. Tarango stands merely for the proposition that a trial judge's decision with respect to severance considerations will not be disturbed in the absence of an abuse of discretion.

Zach Scruggs, as authority for a severance, cites United States v. Auerbach, 745 F.2d 1157, 1159-60 (8th Cir. 1984), claiming that the father-son relationship creates a serious risk of unfairness. Auerbach is not authority for a severance. Auerbach is a habeas corpus case challenging ineffective assistance of counsel for joint representation of a father and son in a firearms case. The court speculates that one of the conflicts raised by joint representation is that an independent counsel might have mitigated the effect of evidentiary issues by moving for a severance or taking other measures such as limiting instructions in providing effective assistance of counsel.

Both Backstrom and Zach Scruggs contend that the proffered 404(b) evidence is only admissible against Richard F. "Dickie" Scruggs and therefore a severance is mandated. Assuming arguendo that such evidence is solely admissible against Richard F. "Dickie" Scruggs, severance is not required. United States v. Peterson, 244 F.3d 385, 393 (5th Cir. 2001). In Peterson, 404(b) evidence was admissible against one defendant but not admissible against

others. The trial court's denial of a severance on this ground was upheld. The court noted that a risk of prejudice may arise when evidence that the jury should not consider against a defendant, and that would not be admissible if a defendant were tried alone, is admitted against a co-defendant, but the risk of prejudice will vary with the facts in each case. Zafiro v. United States, 506 U.S. 534, 539 (1993). "We have previously noted, however, that severance is not necessarily the appropriate remedy." United States v. Peterson, Ibid. at 393. United States v. Rocha, 916 F.2d 219, 228-29 (5th Cir. 1990) (severance is not required merely because the government introduced evidence admissible only against individual co-defendants and severance is required on the basis of a disparity in the evidence only in the most extreme cases); United States v. Merida, 765 F.2d 1205, 1219 (5th Cir. 1985) (severance is not required if the jury can sort out the evidence reasonably and view each defendant and the evidence relating to that defendant separately). An appropriate limiting instruction, if necessary, that the evidence of similar acts by one defendant should not be considered as to other defendants would suffice to reduce the risk of prejudice. Peterson, supra at 394.

Backstrom and Zach Scruggs also seek a severance based on pretrial publicity. No authority is cited for this novel position other than cases cited in the defendants' motion for a change of venue. Since the evidence will be substantially the same, whether tried jointly or separately and the relationships in The Scruggs Law Firm will be explored whether tried jointly or separately, severance due to pretrial publicity would only accomplish multiple trials and a drain on judicial resources, and certainly not cure any prejudice real or imagined.

Conclusion

Defendants Backstrom and Zach Scruggs have not demonstrated compelling reasons why

they would be unable to obtain a fair trial without the drastic relief requested. In essence they have not demonstrated a prejudice so compelling that the trial court would be unable to afford them protection. For the foregoing reasons and authorities, the defendants' motion for severance should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS W. DAWSON, First Assistant United States Attorney, hereby certify that I electronically filed the foregoing **GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS SIDNEY A. BACKSTROM AND DAVID ZACHARY SCRUGGS' MOTION FOR SEVERANCE** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 19th day of February, 2008.

/s/ Thomas W. Dawson
THOMAS W. DAWSON
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