

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 SEVER AND
INCORPORATED MEMORANDUM OF LAW**

COMES NOW Defendant David Zachary Scruggs, and by and through counsel, pursuant to Fed. R. Crim. P. 14, files this Motion to Sever. Defendant David Zachary Scruggs would show as follows:

Introduction

David Zachary Scruggs (hereinafter "Zach" Scruggs) moves for a separate trial from his codefendants, Richard Scruggs and Sidney Backstrom. Given his lack of involvement in this alleged conspiracy and the lack of evidence against him, a joint trial with Richard Scruggs and Sidney Backstrom will prejudice Zach Scruggs's right to a fair trial. Should this Court permit the introduction of the Rule 404(b) evidence the Government has moved to admit against Richard Scruggs, the jury will be allowed to consider evidence that is wholly unrelated to any conduct of Zach Scruggs. Although the proposed 404(b) evidence does not, in any way, involve Zach Scruggs, it has the potential, indeed the likely result, of improperly washing over onto Zach Scruggs because of the common surname, the nature of the evidence, the massive amounts of publicity this case has generated and because of any jury's natural inability to distinguish

between defendants so closely related. The facts of this indictment stand alone as the sole allegation of wrongdoing against Zach Scruggs.

The Government should not be allowed to inject unrelated claims which operate to indirectly and by inference expand its case against Zach Scruggs. Indeed, the Government should not be allowed even the possibility of this fair-trial-defeating advantage in meeting its burden of proof against Zach Scruggs. Should this Court sustain this motion, the jury will not be influenced by evidence which as a matter of law its members should not consider – evidence that will become part of and thus indistinguishable within the whole of the cloth the Government hopes to weave. A separate trial is the only way in which this Court, with certainty, can protect the Constitutional rights of Zach Scruggs. To allow otherwise poses the substantial risk of convicting Zach Scruggs, not based on the evidence the government has against him, but based on the unfairly prejudicial weight of evidence against other defendants, admitted felons, and other acts and events in which he played no part.

Factual Background

Defendant Zach Scruggs and his codefendants, Richard Scruggs and Sidney Backstrom, are charged individually, under 18 U.S.C. §§ 371, 666, 1343 and 1346, with six counts of bribery, conspiracy and fraud.

Zach Scruggs's role in the alleged conspiracy is limited to three discrete events, none of which were criminal, and all of which would have occurred without his presence. Moreover, Zach Scruggs's role, even under the Government's theory, played no essential part in achieving the alleged objective. If the alleged conspiracy were a movie, Zach Scruggs's character might not even have a name, or, more likely, would have been cut from the final script. Whether taken

together or considered individually, these events do not prove knowledge of a conspiracy or intent to engage in any criminal act. For this evidence to even be potentially incriminating, one must view the three events under a false premise – that Zach Scruggs knew of a conspiracy or another’s intent to bribe a judicial official. He had no such knowledge.

The three events are as follows: First, the government claims that Zach Scruggs participated in the initial March 2007 meeting with the now-convicted Tim Balducci and the now-convicted Steve Patterson regarding Balducci’s representation of the Scruggs Katrina Group (“SKG”) in a lawsuit against SKG (“Jones” suit). Of note, however, the March meeting occurred when Steve Patterson and Tim Balducci dropped into the offices of the Scruggs Law Firm without an appointment to discuss the Scruggs Law Firm’s involvement in an unrelated case in Kentucky. Near the end of the meeting, Steve Patterson brought up the Jones suit and represented that Tim Balducci had a long standing professional and personal relationship with Judge Lackey. Steve Patterson suggested that the Scruggs Law Firm hire Tim Balducci to represent their interests in the Jones case. Tim Balducci informed the group that the next time he saw Judge Lackey he would notify him that he would be representing the Scruggs Law Firm in the Jones case. As Steve Patterson’s plea statement makes clear, no criminal conduct was discussed or considered during that meeting.

Second, the Government claims that Tim Balducci delivered an Order signed by Judge Henry Lackey (the judge in the SKG litigation/Jones suit) to Zach Scruggs on October 18, 2007. The implication is that Zach Scruggs, by the fortuity of working late on a brief in the Scruggs Law Firm offices and being there to receive the Order, knew of Tim Balducci’s alleged bribe of Judge Lackey. The Government further alleges that Zach Scruggs directed Tim Balducci to a

packet containing retainer information and payment related to Tim Balducci's anticipated *voir dire* work in an unrelated litigation which the Government alleges served as "cover" for the alleged bribe paid to Judge Lackey. Importantly, however, the packet picked up by Tim Balducci was prepared by someone other than Zach Scruggs, who had no knowledge that there was any payment inside. Zach Scruggs simply had the misfortune of being there when Tim Balducci arrived at the Scruggs Law Firm after business hours to deliver the Order. There is no evidence, other than innuendo and speculation, showing that Zach Scruggs had any role in or any knowledge of the events in which Tim Balducci was involved. As stated previously, when void of the false premise – that Zach Scruggs knew of an alleged conspiracy to bribe a judicial official – this act, as with the other two discussed within this motion, is not incriminating or otherwise suggestive of criminal behavior.

Third, the Government claims that Zach Scruggs was in Sidney Backstrom's office when Tim Balducci said, "I've got to go back for another delivery of, uh, another bushel of sweet potatoes down there.... So get it right 'cause we're paying for it to get it done right." The recording leaves considerable doubt that Zach Scruggs is either an intended or actual part of this conversation, or that he even heard it. Even had he heard it, there is no evidence that Zach Scruggs would have known the meaning of what was said. Indeed, hearing such a cryptic and ambiguous statement is not a criminal act.

The rest of this case involves a tangle of individuals, lawsuits, attorneys, judges, and alleged schemes which on their face do not relate to or involve Zach Scruggs. The only alleged links between all of this and Zach Scruggs are the three events described above.

Standard for Granting Severance Under Rule 14

Rule 14 of the Federal Rules of Criminal Procedure provides as follows:

- (a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.
- (b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

While there is a preference for joint trials of conspiracy defendants who are indicted together, "[t]here may, however, be instances when the joining of offenses or defendants will actually prove to be prejudicial, and thus, it may be necessary for a district court to 'order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.'" United States v. Tarango, 396 F.3d 666, 672 (5th Cir. 2005) (quoting Rule 14).

Specifically, Rule 14 warrants severance "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." Tarango, 396 F.3d at 672 (citing Zafiro v. United States, 506 U.S. 534, 539 (1993)). "Such a risk might occur 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 codefendant." Zafiro, 506 U.S. at 539. See also Tarango, 396 F.3d at 674 (citing Delli Paoli v. United States, 352 U.S. 232, 243, 77 S.Ct. 294, 303, 1 L.Ed.2d 278 (1957) (Frankfurter, J., dissenting) ("The Government should not have the windfall of having the jury influenced by evidence against a defendant which, as a matter of law they should not consider but which they cannot put out of their minds.")).

Because Rule 14 is a bulwark of the right to a fair trial, the Court must exercise its discretion under Rule 14 to preserve fairness at all stages of the proceeding. “The trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice does appear.” Schaffer v. United States, 362 U.S. 511, 516 (1960). A court’s decision not to sever parties or counts will be reversed if the court abuses its discretion. See United States v. McCarter, 316 F.3d 536 (5th Cir. 2002) (reversing trial court’s decision not to sever trial of prejudicial counts); United States v. Singh, 261 F.3d 530 (5th Cir. 2001) (reversing trial court’s decision not to sever trial of prejudicial count, where it might have affected jury’s finding in the face of scant evidence that defendant had knowledge that workers he hired were illegal); Barton v. United States, 263 F.2d 894 (5th Cir. 1959) (trial court abused discretion in failing to sever trial of codefendant).

Argument

I. The Highly Prejudicial Spillover Effect of Inadmissible Evidence Relating Only to David Zachary Scruggs’s Co-Defendants’ Conduct Requires a Separate Trial.

The vast majority of the evidence at trial will relate to persons other than Zach Scruggs. Zach Scruggs touches the Government’s case on only three occasions. None of the evidence relating to the alleged conspiracy against Zach Scruggs is admissible unless it can be shown that—at a minimum—Zach Scruggs knew of the alleged plan to bribe Judge Lackey. Aetna Cas. & Surety Co. v. Guynes, 713 F.2d 1187, 1193 (5th Cir. 1983) (Evidence of alleged conspiracy to defraud insurer was inadmissible against defendant where there was no attempt to prove that defendant intended to be part of, or knew of, the scheme). As the Government knows, Zach Scruggs is not mentioned by name in relation to any act in furtherance of any alleged bribery in

any of the telephone intercepts obtained by, or video/audio surveillance conducted by, the Government.

Without sufficient evidence tending to show that Zach Scruggs knew that a judge was purportedly being bribed in exchange for a favorable ruling in a case (in which Zach Scruggs was, at most, an indirect client), the rest of the “conspiracy” story is inadmissible as to him; thus, a severance is required. Tarango, 396 F.3d at 673-675.

Tarango is instructive. In that case, a physician and his medical office manager (Tarango) were indicted for aiding and abetting health care fraud and conspiracy to commit the fraud. Tarango, 396 F.3d at 669. Tarango allegedly prepared and submitted claim forms to health care insurers that contained the physician’s fraudulent certification that his patients needed certain medical treatments and supplies. Id. The physician absconded after jury selection, but was tried jointly (in absentia) with Tarango. Id. at 670. The jury acquitted Tarango of conspiracy, but returned a guilty verdict on the aiding and abetting charge. Id.

During the course of the trial, only 5 of the 50 witnesses testified to the purported “complicity” of Tarango in the physician’s allegedly fraudulent certifications; the rest detailed the physician’s role in the scheme and how the scheme had operated. Id. “[L]ittle evidence was presented to show that Tarango was aware that the medical diagnoses or the requests for medical equipment contained in the billing statements were false, and thereby could constitute illegal conduct on her part.” Tarango, 396 F.3d at 674. This did not escape the notice of the trial court, which noted that much of the evidence related to the physician’s particular knowledge and was thus inadmissible against Tarango:

Much of the evidence regarding Patel’s knowledge of the false diagnoses and improper billing procedures was based on his medical expertise; this evidence was inadmissible against Tarango. The district court commented that this case pre-

sented circumstances expressly disfavored in a conspiracy prosecution involving multiple defendants, in that testimony that was allowed to be heard by the jury solely as it pertained to Patel was deemed to be probative as to the allegations against Tarango, even though the testimony was inadmissible against her. In effect, the court found that there was little evidence that Tarango had knowledge of, or had any specific intent to engage in, the conduct of which Patel was convicted. Moreover, the court found that the limiting instruction that it gave the jury was ineffective in insulating Tarango from the prejudicial effect of being joined with Patel.

Id. at 671.

The district court ultimately granted a new trial. Based on the trial court's concerns regarding the "overwhelming" focus of the evidence on Tarango's alleged co-conspirator and the prejudicial effect of the co-conspirator's sudden flight from the court's jurisdiction, Tarango affirmed the district court's exercise of its discretion. Id. at 675.

The Government's desire to try Zach Scruggs with his father as a co-conspirator presents the same problem faced by the Tarango court. Based on the indictment, it is clear that the overwhelming balance of the transactions, facts and evidence surrounding the alleged bribery scheme relate to persons other than Zach Scruggs. As in Tarango, the key to the alleged conspiracy is the conduct of others; there is no meaningful evidence that Zach Scruggs was knowledgeable of, let alone in agreement with, any alleged scheme to bribe Judge Lackey or any other judge. Zach Scruggs deserves to have a jury that is presented with evidence that relates only to his knowledge and agreement, not the purported knowledge and agreement of various alleged co-conspirators. Anything else would grant the Government "the windfall of having the jury influenced by evidence against a defendant which, as a matter of law they should not consider but which they cannot put out of their minds." Tarango, 396 F.3d at 674.

II. A Separate Trial Is Required to Avoid the Inevitable Prejudice that Will Accrue to David Zachary Scruggs from the Government's Presentation of Rule 404(b) Evidence Against His Father, Richard Scruggs.

The Government's strategy in this case presents yet another reason for severance. The Government has indicated its intention to offer Rule 404(b) evidence to show that Richard Scruggs (Zach Scruggs's father and codefendant) has on a prior occasion allegedly conspired with others in an attempt to influence a judge.

Although not charged in the case, the allegation is that Richard Scruggs and the now-convicted, former attorney Joseph Langston used a third party to influence a circuit judge in a case involving attorneys' fees. Richard Scruggs has not been charged as a co-conspirator in that scheme and there is no evidence that that scheme involved any payment to a sitting judicial officer, whether requested by the Judge (as here) or offered by a third-party. Langston was charged and has pleaded guilty in that scheme and, on information and belief, will attempt to implicate Richard Scruggs in that scheme. Nothing in the Government's 404(b) proffer implicates Zach Scruggs in the Joseph Langston scheme. Thus, the 404(b) proffer is inadmissible as against Zach Scruggs. See United States v. White, 788 F.2d 390, 394 (6th Cir. 1986) (district court erred in admitting evidence of codefendant's prior bad acts against defendant).

The use of 404(b) or uniquely prejudicial evidence against one codefendant in a conspiracy case raises grave concerns with respect to the other codefendants' trial rights, but by itself, does not always compel severance. See, e.g., United States v. Cortinas, 142 F.3d 242, 248-249 (5th Cir. 1998) (reversing convictions of some defendants for failure to sever their trials when evidence relating to the violent activities of other defendants' gang was admitted, but

finding that evidence was admissible against other defendants, whose trials need not have been severed, because they were part of the conspiracy at the time of the gang violence).

However, there is special danger in this case. Not only is Rule 404(b) evidence sought to be admitted against one of several codefendants, but the codefendant to whom the evidence relates is the father of another codefendant. Admission of evidence against Richard Scruggs would lead to unfair prejudice against Zach Scruggs simply by virtue of the presumed close relationship between a father and a son. The father-son relationship creates a serious risk of unfairness. U.S. v. Auerbach, 745 F.2d 1157, 1159-60 (8th Cir. 1984) (“The father-son relationship coupled with the son's past record would have made a motion for severance far more compelling than in the usual case of unrelated codefendants.”) That is especially the case when both father and son share the same profession and work in the same firm. No instruction will be able to cure the inescapable (but impermissible) conclusion, “like father, like son.”

In a joint trial of a complex case, it is unlikely that Zach Scruggs could prevent the jury from considering this Rule 404(b) evidence or that the jury will be able to draw the necessary distinctions between two persons bearing the same surname, no matter how carefully the Court fashions an instruction to the jury. The common surname effect would be magnified and compounded by the volume of “conspiracy” evidence admissible against codefendants (including his father) but inadmissible against Zach Scruggs, that would have already been received. See Section I, supra.

Under these circumstances, Zach Scruggs cannot receive a fair trial. See Zafiro, 506 U.S. 534, 539 (severance proper where evidence of a codefendant's wrongdoing could lead a jury to erroneously conclude that defendant was guilty); Tarango, 396 F.3d at 675 (severance proper

where overwhelming balance of evidence on other codefendants or on scheme in general could lead a jury to erroneously conclude that a defendant had the requisite knowledge to commit a crime). As a matter of law, severance is proper and this Court's exercise of its discretion to preserve Zach Scrugg's right to a fair trial would not be open to question.

III. The Extensive Pre-Trial Publicity in this Case Focused on Richard F. Scruggs Further Militates in Favor of Severing the Trial of David Zachary Scruggs.

This case has attracted extraordinary pretrial publicity throughout Mississippi, leading the headlines in newspapers in Northern Mississippi day after day since the indictments. Matters as mundane as pre-trial motions on attorney withdrawal are widely covered and hotly debated. The Government's case as presented in the indictment has been replayed over and over in the media, without benefit of the full range of the evidence. This widespread publicity poses a serious risk of prejudice to Zach Scruggs, for not only the obvious reasons that relate to finding a fair, impartial jury to decide the case, but also because the publicity has been directed at a man bearing the same surname.

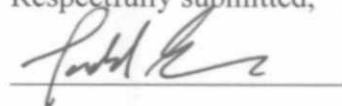
As does every person charged with a crime, Zach Scruggs has a right to trial before a jury that is not prejudiced by community sentiment or pretrial publicity, particularly when that publicity is not even directed at him, except by ricochet. His case must be decided "only by evidence and argument in open court, and not by any outside influence, whether it be private talk or public print." Estes v. Texas, 381 U.S. 532, 551 (1965) (quoting Patterson v. Colorado ex rel. Attorney General, 205 U.S. 454, 462 (1907)).

Conclusion

WHEREFORE, David Zachary Scruggs prays that this Court issue an order severing his trial from that of his co-defendants, Richard Scruggs and Sidney Backstrom, and scheduling a separate trial on the indictment in which he is charged.

Respectfully submitted,

By: _____



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CERTIFICATE OF SERVICE

I, Todd Graves, do hereby certify that I have electronically filed the foregoing **Defendant Zachary Scruggs's Motion to Sever and Incorporated Memorandum of Law** with the Clerk of the Court using the ECF system, which sent notification for 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.

This, the 11th day of February, 2008.



Todd Graves

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ORDER

On this date came on to be considered the Defendant David Zachary Scruggs Motion to Sever, and having considered same, the Court finds that Defendant David Zachary Scruggs would suffer prejudice if his case were tried with that of his co-defendants. Such prejudice can best be avoided by a severance, and Defendant's Motion to Sever is therefore GRANTED.

It is therefore ORDERED that the case of *United States of America v. David Zachary Scruggs* is hereby severed from the case of *United States of America v. Richard F. Scruggs, and Sidney Backstrom*, and shall be tried at a different time.

So ORDERED on this the ____ day of _____, 20 ____.

United States District Judge