

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

UNITED STATES OF AMERICA

vs.

DAVID ZACHARY SCRUGGS

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

**DEFENDANT DAVID ZACHARY SCRUGGS'S SENTENCING
MEMORANDUM**

Defendant David Zachary Scruggs (hereafter "Zach Scruggs"), through undersigned counsel, files this Sentencing Memorandum for consideration by the Court in determining the appropriate sentence for Zach Scruggs. The sentencing hearing is currently scheduled for July 2, 2008.

Zach Scruggs previously filed objections to the Presentence Report (PSR) and is aware that the Court has reviewed those objections. Zach Scruggs does not intend to reiterate all of those objections, but would request that the Court consider them as incorporated within this Memorandum.¹ Nothing that Zach Scruggs describes in this Memorandum (or his incorporated objections) is, in any way, intended to minimize his responsibility for his crime. Rather, it is the defendant's intent to ensure an accurate understanding of the facts and circumstance of *his* plea and factual basis and to draw the Court's attention to factors the defendant believes are particularly significant and relevant to the Court's analysis and ultimate determination of his sentence.

¹ A copy of the defendant's objections is intentionally absent from this publicly filed memorandum, subject to the Court's determination of the appropriateness of doing so given the rules of confidentiality regarding PSRs.

Zach Scruggs has admitted to misprision of a felony; that is, he failed to alert authorities and the firm's registered counsel that Tim Balducci was attempting to personally and improperly influence Judge Lackey through the benefit of his personal relationship with the judge. The defendant acknowledges that he should have reported these actions, and that this failure has cost him a federal felony conviction and the loss of a promising professional legal career. This matter has further cast untold pain upon his expecting wife and young children. For all of this, Zach Scruggs takes full responsibility.

Zach Scruggs did not, however, participate in a conspiracy to bribe Judge Lackey as originally charged in the indictment. The PSR (May 27, 2008) and Addendum (June 25, 2008) overlook the important differences between the Government's original charge and Zach Scruggs's ultimate plea. In response to Zach Scruggs's objections to the PSR, Probation concluded that Zach Scruggs was "in the conspiracy from the beginning and was aware of the efforts to corruptly influence Judge Lackey." Addendum at 22. While Zach Scruggs has admitted his awareness of Tim Balducci's efforts to personally influence Judge Lackey, Zach was not involved in any decisions, efforts or agreements to pay money to Judge Lackey. Nor, importantly, is the Government now alleging that he was. Further, it was not reasonably foreseeable that Tim Balducci was bribing the judge, as Zach Scruggs was aware of Tim Balducci's relationship with Judge Lackey and reasonably assumed that the personal relationship was the extent of Tim Balducci's attempted influence. This is further supported by the fact that no one ever discussed or contemplated bribing the judge until Judge Lackey suggested payment as part of the Government's "sting" operation.

Zach Scruggs's lack of involvement in the bribery aspect of this case is precisely why the Government submitted the Information which, by the government's own factual basis, only refers to Honest Services Fraud (18 USC §§ 1343/1346), specifically supported by Zach Scruggs's knowledge of Tim Balducci's efforts to use his personal relationship to influence Judge Lackey and not the originally charged bribery or, for that matter, the originally charged Honest Services Fraud. These facts are readily apparent on the face of the filed plea agreement, factual basis and Information. As the Court undoubtedly recognizes, this plea is factually and legally unique, and was purposely fashioned to acknowledge the separate and distinct nature Zach Scruggs's conduct and to arrive at a sentence of probation, which the Government has agreed would be an appropriate and just result.

Further, in anticipation of Probation's efforts to include information and activity from the to-be-dismissed indictment – specifically the bribery – counsel for Zach Scruggs had a conversation with the Government wherein counsel directly expressed this concern. In response, the Government stated that in the event Probation made such an effort, the Government would not support it. Counsel understands that the Government communicated this fact, in addition to other facts consistent with the Government's recommendation of probation, to Probation on Friday, June 27, 2008.

18 USC § 3553

As the Court is aware, in considering and imposing Zach Scruggs's sentence, the Court is directed to consider the various sentencing factors set forth in 18 USC § 3553. Specifically, the Court is required to “impose a sentence sufficient, but not greater than necessary ... to reflect the seriousness of the offense, to promote respect for the law, and

to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant” 18 USC § 3553(a)(2). The Court “shall” achieve these purposes by considering “the nature and circumstances of the offense” and “the history and characteristics of the defendant.” 18 USC § 3553(a)(1).

Zach Scruggs understands that the distinction between the underlying crimes (Honest Services Fraud, as charged in the Information, and bribery) discussed above and throughout his objections does not involve any mathematical difference under the Sentencing Guidelines, as 18 USC §§ 1343/1346 (Honest Services Fraud) and 18 USC § 666 (bribery) are both referred to in USSG § 2C1.1. However, as already noted, in evaluating and imposing sentence, the Court must also consider the factors set forth in 18 USC § 3553, which include an assessment of the “nature and circumstances of the offense.” 18 USC § 3553(a)(1). Thus, Zach Scruggs believes that an understanding of the parties’ purpose, design and meaning behind the plea agreement and factual basis is essential to an accurate and fair evaluation of the case.

Mitigating Role under § 3553

Under the misprision guideline, USSG § 2X4.1, a defendant is not eligible for an adjustment for a mitigating role (USSG § 3B1.2), as the essence of such an adjustment, according to the application notes to USSG § 2X4.1, is taken into account by the 9-level downward adjustment under the guideline. The defendant, however, asks the Court to evaluate his minimal role when assessing the nature and circumstances of the offense. Zach Scruggs was, by all accounts, a minimal presence in this case. He does not appear in any of the wiretap applications, nowhere on the captured phone conversations, is never

described or discussed by any of the original co-defendants during the course of the offense, and at the moment Tim Balducci is preparing to seek to inculcate his co-conspirators in the offense (11/01/07 tape), he states on the introduction to the recording that he is going to see Sid Backstrom and “maybe Dick Scruggs.” *See* introduction to 11/01/07 transcript of consensual recording.

Under USSG § 3B1.2, Zach Scruggs would normally be entitled to as much as a 4-level reduction for minimal participation. Although the defendant acknowledges the inapplicability of that section under his guideline, the defendant respectfully requests the Court to consider such a reduction as an equitable adjustment under § 3553.

Other § 3553 Factors

Zach Scruggs stands before the Court a convicted felon, which carries, in and of itself, a high burden. The defendant understands that convicted persons pass before this Court on a near daily basis, and that each shares the penalty of forfeited rights. But, for Zach Scruggs, one forfeited right sets him apart. Zach Scruggs has lost, by his own conduct, the right and privilege of practicing law. As the Court is aware from its review of the Letters of Support provided to the Court, short of his family, nothing was more important to Zach Scruggs than practicing law. As described by those who know him best, Zach refused to rely on the privilege of his family name and, unlike many in his circumstance, set out to excel in school and exercise the individual commitment and discipline to succeed. That is now lost. Zach has been stricken from a profession he loved and for which he had trained his whole adult life. It is fair and appropriate for the Court to consider this unique penalty in its assessment of Zach’s sentence.

Without question, Zach will never again find himself in these circumstances; not simply by the practical reality of no longer being a lawyer, but by the understanding of the consequences of his choices. Zach's existence in the shadow of his father provided both opportunity and burden. Zach understands the price of both, and stands alone in accepting responsibility for his actions and in so doing assures this Court that no further deterrent is necessary in addressing his conduct. It is reasonably expected that the unique factual basis of this plea – if understood – will have a lasting and chilling effect on the legal community and its recognition of and commitment to legal ethics.

Benefit Calculation

Zach Scruggs objected to the proposed benefit calculated by Probation as set forth in the incorporated objections. During the sentencing of Dick Scruggs and Sid Backstrom, the Court assessed the value of the benefit at \$400,000, which, under USSG § 2B1.1, changes the Specific Offense Characteristic – “benefit” – to a 12-level increase (between \$200,000 and \$400,000) from the previously determined 18-level increase. This reduction, however, has no literal impact on the guideline range for Zach Scruggs, due to his level 19 cap under the misprision guideline at USSG § 2X4.1. While the defendant reasserts the valuation arguments set forth in his objections to the PSR, he understands that, as a practical matter, the Court will use the \$400,000 figure in evaluating his sentence.

As stated in his objections, Zach Scruggs asks the Court to discount that figure based on his ownership interest in the firm, which stands at 10%. This is the percentage of benefit that the defendant would have received from any benefit realized by The Scruggs Law Firm. If the Court were to recognize this deduction, the now 12-level

increase would be reduced to a 6-level increase, resulting in a total offense level of 11. [12 (base offense level) + 6 (benefit enhancement) + 4 (public official) = 22 – 9 (misprision adjustment) – 2 (acceptance of responsibility) = 11.]

Letters of Support

The Court was previously provided with a bound copy of numerous letters written on behalf of Zach Scruggs. As of the filing of this Memorandum, the Court is being provided with a supplemental binder containing a few additional letters received after the initial submission. These letters are written by a varied and diverse group, all having come together in their support of Zach Scruggs. There are letters from friends, schoolmates, clients (including a particularly moving letter from a *pro bono* murder defendant acquitted under Zach's representation), family, lawyers, and various members of the Mississippi community.

While all the letters are different, they all share a sense of Zach Scruggs outside of the drama and angst of this case and place Zach Scruggs's life in a broader and more revealing context. While the Court must impose a sentence for this specific conduct, in so doing, the Court is clearly encouraged to consider the individual in a light beyond the specifics of the case before the Court. While our justice system is rightfully designed to hold individuals accountable for their actions, it not draconian in its application and recognizes the relevance and significance of factors beyond guidelines and allegations.

Zach Scruggs is being measured and judged by thousands of people based on this single, albeit important, snapshot of his life. The Court is asked to give serious consideration to those who know Zach Scruggs beyond this episode; those who consistently speak of his work ethic, reliability and trustworthiness. While he has done

considerable damage to that reputation, one cannot spend a lifetime earning the type of praise expressed in these letters without being that person. The Court has known Zach Scruggs in the worst possible light. Zach Scruggs now asks the Court to not only judge him fairly within the circumstances of this case, but to view and judge him more broadly, with consideration of the Zach Scruggs defined outside this Court's walls.

Conclusion

Zach Scruggs appreciates the practical difficulty Probation faces in coming into this case in the "9th inning," with limited – in time and depth – familiarity and understanding of the many factual and legal intricacies of the case. This is not a routine case, and a fair assessment of each person's role and degree of involvement requires a detailed and long-term study of the facts and circumstances of the case. Without question, no one is better positioned to evaluate those facts and circumstances than the Government. The Government's varied and tiered sentencing recommendations among the original defendants are the result of their informed case-wide assessment of culpability and wrongdoing.

Zach Scruggs understands that the determination of the sentence to be imposed rests solely with this Court. Zach Scruggs also understands that this case has garnered unprecedented coverage in the Oxford area and beyond, and that the nature and circumstances of these events strikes a sensitive chord with the Court and other respected members of the Bar. As of this filing, the Court has sentenced Zach Scruggs's father and former law partner to significant terms of incarceration. The Court followed the recommendation of the Government and sentenced Dick Scruggs to a 60-month term. Further, the Court saw fit to accept the conditional plea of Sid Backstrom, again,

consistent with the recommendation of the Government. We now, respectfully, request the Court accept the Government's recommendation regarding Zach Scruggs and sentence him to a term of probation.

Lastly, in the event that the Court, after having reviewed the facts, circumstances and arguments surrounding this plea and the Government's recommendation, is not inclined to accept the recommendation, Zach Scruggs asks for the opportunity to discuss the matter in a pre-sentencing conference with the Court and the Government.

Respectfully submitted, this 1st day of July, 2008.

Dated: July 1, 2008

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CERTIFICATE OF SERVICE

I, Todd P. Graves, do hereby certify that I have electronically filed the foregoing **Defendant David Zachary Scruggs's Sentencing Memorandum** 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; and David Anthony Sanders, Assistant United States Attorney.

This, the 1st day of July, 2008

 /s/ Todd P. Graves