



Disqualification of AUSA in Scruggs Case Is Message to Prosecutors

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The botched prosecution of Senator Ted Stevens was a wake-up call of sorts for the U.S. Department of Justice that there would be severe consequences for prosecutors who did not comply with obligations under *Brady* and related cases. The Department took another hit recently when a federal judge removed an Assistant United States Attorney from the case against the son of disgraced anti-tobacco attorney Richard Scruggs based on a finding that the prosecutor inexcusably withheld information when negotiating the son's 2008 guilty plea in a judicial bribery scandal.

Zach Scruggs pleaded guilty in March 2008 to failing to report his father's alleged scheme to pay a Mississippi state judge in a fight over distribution of \$26 million in attorneys' fees from Hurricane Katrina insurance litigation. Scruggs says that he pleaded guilty because prosecutors told him that one of their witnesses was going to implicate him in the scheme.

According to an opinion issued by U.S. District Judge Neal B. Biggers, however, the witness's testimony would implicate the father in the scheme, but not the son. After serving 14 months in prison, Zach Scruggs moved to vacate his conviction, claiming that he only recently learned of the government's misrepresentation on which he relied. Notably, Assistant U.S. Attorney Robert Norman – who has been involved in the case since its inception – will not be involved in litigation over that motion. In a written ruling, Judge Biggers found that the prosecutors' "failure to correct [Norman's] misrepresentation was probably a matter of neglect rather than intentional wrongdoing" but "that neglect [was] inexcusable under the law and the facts of this case."

Noting the "unusually low burden of proof in attorney disqualification cases" and the government's lack of an explanation for the failure adequately to correct the record, Judge Biggers was "compelled to find that the neglect reaches the level of 'impropriety' within the meaning of that term as contemplated by the Fifth Circuit." Despite the objections of the U.S. Attorney's Office that disqualification of Norman would place an unnecessary hardship on the government, Judge Biggers ruled that his conduct was enough to disqualify him.

This case offers some support for the views of those who believe that prosecutors often mislead defendants about the nature and strength of their evidence, particularly in the context of plea negotiations. It may also give some greater impetus to efforts to establish, either by legislation or rule, a requirement that prosecutors disclose *Brady* and similar information before a defendant enters a guilty plea.





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Of course, an equally important question is whether the removal of the prosecutor is an adequate remedy for the government's "impropriety" that may have cost Zach Scruggs 14 months in prison that he did not deserve. The court recently denied Scruggs' motion for summary judgment on his request to vacate his conviction, on this and other grounds, based on unresolved questions about whether and when Scruggs and his attorney may have learned prior to the guilty plea that the witness in question would not have implicated him in the bribery scheme.

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