

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

UNITED STATES OF AMERICA

v.

Case No.: 3:07CR192-NBB-SAA

RICHARD F. SCRUGGS,  
DAVID ZACHARY SCRUGGS,  
SIDNEY A. BACKSTROM,

**MOTION FOR CHANGE OF VENUE AND COMBINED MEMORANDUM OF LAW**

Defendants Richard F. Scruggs, David Zachary Scruggs, and Sidney A. Backstrom hereby move this Court for a change of venue due to the extraordinary pretrial publicity of this case in the Northern District of Mississippi and throughout the State of Mississippi.

**I. INTRODUCTION**

Defendants recognize that changes of venue are not routine. But this is hardly a routine case. This case has attracted extraordinary pretrial publicity throughout Mississippi, headlining newspapers in Northern Mississippi multiple times per week. Even pre-trial motions on attorney substitutions are widely covered and hotly debated. Fueled by sensational allegations and conspiracy theories, Mississippi state officials, local bloggers and everyday citizens from across the state have strived to make Dickie Scruggs (hereinafter “Scruggs”) a poster-child for greed, attorney malfeasance and tort reform. Even a Mississippi Supreme Court Justice, ignoring the presumption of innocence, stated publicly that he was “nauseated” by Scruggs’s alleged conduct.<sup>1</sup>

The actions of State Farm, Defendants’ erstwhile enemy in hundreds of Katrina insurance fraud cases, have further poisoned the well. State Farm repeatedly sought to drag Scruggs into a

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<sup>1</sup> *Justice Speaks About Bribery Accusations*, WAPT.com, Jan. 26, 2008. Ex. 1. All Exhibits (“Ex.”) cited herein are exhibits to the Declaration of Brook Dooley filed herewith.

section 1983 case it had filed against Mississippi Attorney General Jim Hood, accusing Scruggs and Hood of engaging in an “extortion conspiracy,”<sup>2</sup> and ultimately compelling Scruggs’s deposition. State Farm and the media have repeatedly played up Scruggs’s connections to Mississippi Democratic politics, injecting a highly partisan tone to Scruggs’s upcoming trial. One columnist suggested that Scruggs’s indictment was, for the Republican Party, equivalent to “Santa Claus com[ing] early.”<sup>3</sup>

But the prejudice from this widespread publicity applies equally to all three Defendants. While Scruggs, the most well-known of the three, receives most of the negative attention, news stories almost invariably mention the indictment of Defendants Zach Scruggs and Sid Backstrom along with that of Scruggs. All three men are repeatedly linked in media stories to the guilty pleas of Tim Balducci, Steve Patterson and Scruggs’s former attorney Joey Langston. As a result, there is a “reasonable likelihood” that outside influences and publicity will prevent a fair trial, and this “reasonable likelihood” requires a change of venue. Defendants therefore respectfully request transfer to another district in the Fifth Circuit outside Mississippi, where the jury pool has not been so saturated with publicity.

## II. LEGAL STANDARD

Defendants have a right to trial before a jury that is not prejudiced by community sentiment or pretrial publicity. Their 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)). In high profile cases like this one, the Supreme Court has held that “legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.” *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (internal quotation marks omitted).

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<sup>2</sup> Plaintiffs State Farm’s Bench Memorandum Regarding Trial Deposition of Richard F. “Dickie” Scruggs, at 2. Ex. 2.

<sup>3</sup> *Katrina Lawyer Indicted with Bribery*, Day to Day (Nat’l Public Radio broadcast Dec. 5, 2007) (quoting Sid Salter, editor and columnist for the Clairon-Ledger). Ex. 3.

When there is “a reasonable likelihood” that publicity or other outside influences will prevent a fair trial in the community, then a change of venue is required. *See Sheppard*, 384 U.S. at 363. It is the demonstrable likelihood of prejudice—rather than actual prejudice—that triggers a change of venue. That is, due process requires “a jury drawn from a *community*” that is not affected by adverse publicity or community prejudice. *Rideau v. Louisiana*, 373 U.S. 723, 727 (1963) (emphasis added). Those affected by publicity or other influences often may not admit or even be able to recognize it in themselves. *See Estes v. Texas*, 381 U.S. 532 (1965). Thus, as the Supreme Court noted in *Rideau* and *Estes*, the court may (and sometimes must) transfer venue before voir dire. As Judge Wisdom wrote in *Pamplin v. Mason*, 364 F.2d 1 (5th Cir. 1966):

The test is no longer whether prejudice found its way into the jury box at the trial . . . . As we read the Supreme Court cases, the test is: Where outside influences affecting the community’s climate of opinion as to a defendant are *inherently suspect*, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial.

*Id.* at 5 (emphasis added); *see also Murphy v. Florida*, 421 U.S. 794, 797 (1975) (quoting *Marshall v. United States*, 360 U.S. 310, 313 (1959)); *United States v. Williams*, 523 F.2d 1203, 1208 (5th Cir. 1975); *Johnson v. Beto*, 337 F. Supp. 1371, 1376 (S.D. Tex. 1972); *United States v. Marcello*, 280 F. Supp. 510, 513-14 (E.D. La. 1968) (finding that under Rule 21(a), venue must be changed where there is a “a reasonable likelihood” that outside influences will prevent a fair trial); *United States v. Tokars*, 839 F. Supp. 1578, 1581 (N.D. Ga. 1993) (granting change of venue “under the constitutional standard of *Murphy v. Florida* and also under the supervisory standard of *Marshall v. United States*”).

In *United States v. Moody*, 762 F. Supp 1485 (N.D. Ga. 1991), the district court reviewed the tests set out in Federal Rule of Criminal Procedure 21(a), the relevant Supreme Court precedent, two Fifth Circuit cases, and ABA Standard for Criminal Justice 15-1.4. The court concluded that a motion for change of venue must be granted whenever:

(1) the court “is satisfied” of the existence of great prejudice; (2) outside influences affecting the community’s opinion as to defendant[s] are “inherently suspect”; (3) there is “reasonable likelihood that prejudicial news prior to trial will prevent a fair trial”; or (4) there is “substantial likelihood” a fair trial cannot be had in the absence of transfer.

*Moody*, 762 F. Supp. at 1486-87. Under any of these standards, Defendants' case should be transferred out of Mississippi, or at least out of Oxford.

Finally, in considering prejudice, it is not necessary that the publicity be false or irresponsible. Instead, courts have focused on, *inter alia*, the following factors, *all of which are present in this case*:

- Whether news coverage is "massive" and "pervasive." *See Beto*, 337 F. Supp. at 1376; *Tokars*, 839 F. Supp. at 1582. Defendants have been the focus of *hundreds* of local newspapers articles and television broadcasts both describing the crimes charged in this case and alleging various misdeeds in other aspects of Scruggs's career.
- Whether the crimes charged are sensational. *See United States v. McVeigh*, 918 F. Supp. 1467, 1474 (W.D. Okla. 1996). Defendants are charged with a bribery conspiracy that is highly inflammatory and shocking, especially given Scruggs's prominence in Mississippi. It has been reported in sensational terms as a crime upon the entire State of Mississippi.
- Whether the media has reported prejudicial material that would not be admissible at trial. *See Sheppard*, 384 U.S. at 360; *Irvin v. Dowd*, 366 U.S. 717, 725-26 (1961); *United States v. Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980). Local stories are rife with inadmissible and prejudicial hearsay about Scruggs, as well as allegations about his relationship with Attorney General Hood and other third parties that will not be relevant in this case.
- Whether the defendant's or a co-defendant's confession was reported. *See Rideau*, 373 U.S. 723 (1963); *Irvin*, 366 U.S. at 726; *Coleman v. Kemp*, 778 F.2d 1487, 1540 (11th Cir. 1985). The local press and the prosecution have commented extensively on the guilty pleas of Timothy Balducci and Steven Patterson, as well as Scruggs's former counsel Joey Langston, and they have heavily reported on Scruggs's deposition in the *State Farm v. Hood* case and the

suggestion that Scruggs was forced to invoke his Fifth Amendment rights.

- Whether the publicity reflects a public desire for revenge against the defendant, *see Moody*, 762 F. Supp. at 1488-89; *Coleman*, 778 F.2d at 1538. Local press has declared that convicting Defendants is necessary to show “greedy trial lawyers” a lesson and help remove a mark of shame from Mississippi’s honor.
- Whether significant time has elapsed between the publicity and trial, “since time frequently erodes prejudicial effect.” *Beto*, 337 F. Supp. at 1377. This case is set to go to trial only four months after the Indictment was handed down, and publicity of the case has been pervasive during the intervening months.

Because these factors tilt so heavily toward unreasonable and unfair prejudice against Defendants, venue should be transferred outside the state of Mississippi.

### **III. SCRUGGS HAS BEEN A CONTROVERSIAL AND POLARIZING FIGURE IN MISSISSIPPI FOR YEARS**

Few lawyers, if any, are better known in Mississippi than Dickie Scruggs.<sup>4</sup> As the editorial page of the Clarion-Ledger noted: “[I]n terms of public figures in Mississippi history, the flamboyant, hard-charging Scruggs is in a league of his own.”<sup>5</sup> For thirty years, Scruggs has represented Mississippians who have been harmed by large corporations, be they asbestos manufacturers, cigarette companies or large insurance companies. Scruggs is most well-known for his leading role in the multi-state litigation against major tobacco companies in the 1990s. That case, in which plaintiffs’ lawyers coordinated closely with state Attorneys General, resulted in a massive \$240 billion settlement with state governments that the tobacco companies will pay out over the next twenty years.<sup>6</sup> Mississippi will ultimately receive \$4 billion of that money.<sup>7</sup> Mr. Scruggs’s role in that case made him a celebrity, and even a character in the 1999 film “The Insider.” More recently, Scruggs joined with other lawyers to form the Scruggs Katrina Group,

<sup>4</sup> Michael Kunzelman, *Scruggs’ career in jeopardy*, Hattiesburg American, Dec. 1, 2007. Ex. 4.

<sup>5</sup> *Editorial: Scruggs case: A league of his own*, Clarion-Ledger, Dec. 9, 2007. Ex. 5.

<sup>6</sup> Nelson D. Schwartz, *Court Intrigue for the King of Torts*, N.Y. Times, Dec. 9, 2007. Ex. 6.

<sup>7</sup> *All Things Considered* (Nat’l Public Radio broadcast Feb. 21, 2005). Ex. 7.

which has litigated hundreds of homeowner suits against State Farm, USAA and other insurance companies for insurance fraud and failure to pay claims properly in the wake of Hurricane Katrina. Scruggs has been a prominent giver to Democratic Party candidates both in Mississippi and in Washington.

While Scruggs's advocacy on behalf of Mississippians has brought him accolades in some circles, it has also brought him a host of enemies. In addition to the companies he has sued, Scruggs has raised the ire of many Mississippi Republicans. As one Mississippi columnist summed it up: "Republicans hate him."<sup>8</sup> Scruggs has also been targeted by tort reform advocates, who have sought for years to bring him down.<sup>9</sup> In short, in the state of Mississippi, Scruggs is very well known, is admired by some and reviled by others, and is the object of intense community interest. As a result, his current legal woes are the subject of immense publicity.

#### IV. COVERAGE OF THIS CASE HAS BEEN PERVASIVE

Press attention to the case against Dickie Scruggs, Zach Scruggs, and Sid Backstrom within the State of Mississippi has been nothing short of extraordinary. The Northeast Mississippi Daily Journal ("Daily Journal") with a circulation of 36,300, has run more than 130 separate stories about the criminal case in its pages and on its website since the first of December. Its coverage includes regular columns like SCRUGGS UPDATES and SCRUGGS WEEK IN REVIEW.<sup>10</sup> The Clarion-Ledger has run thirty-seven stories of its own, not including

<sup>8</sup> *Katrina Lawyer Indicted with Bribery*, Day to Day (Nat'l Public Radio broadcast Dec. 5, 2007) (quoting Sid Salter, editor and columnist for the Clarion-Ledger). Ex. 3.

<sup>9</sup> The president of the U.S. Chamber Institute for Legal Reform has been "crowing that Mr. Scruggs's indictment proves what she and other critics of trial lawyers have been arguing all along. She says she plans to use the case as an example of 'plaintiffs' lawyers gone wild.'" Nelson D. Schwartz, *Court Intrigue for the King of Torts*, N.Y. Times, Dec. 9, 2007. Ex. 6. See also Adam Bryant, *Who's Afraid of Dickie Scruggs?*, Newsweek, Dec. 6, 1999 ("Scruggs has become a lightning rod in the highly charged debate over the role of trial lawyers and the fat fees many of them have earned."). Ex. 8.

<sup>10</sup> See, e.g., Daily Journal Articles: Patsy Brumfield, *UPDATE: Langston withdraws as Scruggs' attorney*, Jan. 8, 2008; Patsy Brumfield, *OnlinExtra: Scruggs Update*, Jan. 12, 2008; Patsy Brumfield, *Scruggs Update: Prosecutors Ready to Say Bribery Attempts Aren't Anything New*, Jan. 28, 2008; *SCRUGGS UPDATE: Must Scruggs answer State Farm questions?*, Feb. 1, 2008; Mike Tonos, *Week in Review Scruggs*, Feb. 1, 2008. Ex. 9.

AP wire reports,<sup>11</sup> and the Defendants' hometown Oxford Eagle has led with the Scruggs case on at least 12 separate days.<sup>12</sup> Even the Biloxi Sun-Herald, 337 miles downstate from Oxford, has run twenty-eight stories about Scruggs since the November 28 indictment.<sup>13</sup> One week of coverage in Mississippi captures the intensity of the press attention: between January 14<sup>th</sup> and 20<sup>th</sup>, four Mississippi newspapers ran a combined 30 different stories about the Scruggs case, not including AP wire reports (eleven by the Daily Journal, nine by the Clarion-Ledger, and three each by the Oxford Eagle and the Biloxi Sun-Herald).<sup>14</sup> Almost all of these media accounts refer to the case as the "Scruggs bribery scandal" or "Scruggs case" or otherwise call attention to Dickie Scruggs's name in the headline, but the vast majority of these stories mention Defendants Zach Scruggs and Backstrom as well.<sup>15</sup> The print media blitz has been supplemented by Mississippi-based web logs (blogs) that report, in excruciating detail, every event in the prosecution and defense of the Scruggs criminal case, the criminal contempt case against Scruggs in Alabama, the recently-dismissed State Farm case against Attorney General Hood and

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<sup>11</sup> See, e.g., Clarion-Ledger Articles: Jerry Mitchell, *Oxford lawyer indicted*, Nov. 29, 2007; Sid Salter, *Scruggs: Politics fuel a rush to judgment*, Dec. 2, 2007; Sid Salter, *Money, power, politics and the law: Dickie Scruggs, Lightning Rod*, Dec. 9, 2007; Jerry Mitchell, *Documents allege Hinds judge e-mailed proposed order to Scruggs' attorneys*, Jan. 18, 2008; David Hampton, *Legal system needs a close look*, Jan. 20, 2008. Ex. 10. See also, Jerry Mitchell, *Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

<sup>12</sup> See, e.g., The Oxford Eagle Articles: Alyssa Schnugg and Jonathan Scott, *Scruggs arrested on bribery charges*, Nov. 29, 2007; Alyssa Schnugg, *Scruggs defense team shaken up*, Jan. 9, 2008; Alyssa Schnugg, *Patterson Pleads Guilty in Judicial Bribery Case*, Jan. 15, 2008; Alyssa Schnugg, *Judicial Bribery Trial Delayed a Month*, Jan. 17, 2008, Ex. 12. See also, Alyssa Schnugg, *Langston Pleads Guilty in Judge Bribery Case*, Jan. 14, 2008. Ex. 13.

<sup>13</sup> See e.g., Anita Lee, *Scruggs case: "This is going to be awful for all"*, Biloxi Sun-Herald, Dec. 2, 2007, Ex. 42; Holbrook Mohr, *Lawyer pleads guilty, cooperating in case involving Scruggs*, Biloxi Sun-Herald, Dec. 5, 2007, Ex. 35; Anita Lee, *FBI searches Scruggs' office in Oxford*, Biloxi Sun-Herald, Nov. 28, 2007. Ex. 46.

<sup>14</sup> See Ex. 15.

<sup>15</sup> By way of comparison, coverage *outside of Mississippi* has been light. As of February 9, 2008, The Times-Picayune of New Orleans, had run only 12 stories about the case, the Memphis Commercial Appeal only 14, and the Houston Chronicle had barely covered it all. There have also been a few feature articles about the case in the New York Times and Wall Street Journal. See, e.g., Nelson D. Schwartz, *Court Intrigue for King of Torts*, Dec. 9, 2007, Ex. 6; Nelson D. Schwartz, *The Legal Trail in a Delta Drama*, New York Times, Jan. 20, 2008, Ex. 16. See also Ashby Jones & Peter Lattman, *In Scruggs Probe, Focus Turns to Another Lawyer*, Wall Street Journal, Dec. 1, 2007; Ashby Jones, *New Allegations About Scruggs Court Papers Link Plaintiffs Lawyer To Conspiracy Case*, Wall Street Journal, Jan 15, 2008. Ex. 17.

the various cases in which State Farm has sought Scruggs's testimony. *See*

[www.yallpolitics.com](http://www.yallpolitics.com); [www.folo.us](http://www.folo.us).

The stories at times border on the ridiculous. Articles and blog postings have detailed the Scruggs family's annual Christmas party;<sup>16</sup> the flight of Scruggs's private plane to Dallas for a maintenance visit;<sup>17</sup> and the efforts of Joey Langston to sell his ski house at Telluride.<sup>18</sup> Newspapers run profiles of the case's key parties that would benefit Hollywood celebrities.<sup>19</sup> The broad public curiosity has spawned numerous conspiracy theories,<sup>20</sup> including the salacious allegation that Scruggs will attempt to bribe jurors in his criminal case.<sup>21</sup> Ole Miss law professor Ben Cooper summed up the media frenzy, calling the Scruggs case "the biggest legal case in the country, and it's going on right here."<sup>22</sup>

As stated at the outset, "the massiveness and pervasiveness of the news coverage is relevant" to determining whether a defendant will be prejudiced by pretrial publicity. *See, e.g., Beto*, 337 F. Supp. at 1376; *Tokars*, 839 F. Supp. at 1582. In this case, the staggering volume of

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<sup>16</sup> Paulo Prada and Peter Lattman, *It's Party Time For Dickie Scruggs In Oxford, Miss.* Wall St. Journal, Dec. 4, 2007. Ex. 18.

<sup>17</sup> "lotus", *Air Scruggs stirreth*, <http://folo.wordpress.com/2008/01/25/air-scruggs-stirreth/>, Jan. 25, 2008. Ex. 19.

<sup>18</sup> Patsy R. Brumfield, *Langston moves to liquidate some expensive assets*, Daily Journal, Jan. 31, 2008. Ex. 20.

<sup>19</sup> Errol Castens, *Balducci: The eye of a legal storm*, Daily Journal, Dec. 22, 2007; Patsy R. Brumfield, *Joey Langston: Good and Guilty*, Daily Journal, Feb. 4, 2008. Ex. 21.

<sup>20</sup> Editorial: *Scruggs Case: A league of his own*, Clarion-Ledger, Dec. 9, 2007 (suggesting that the case "has spawned more legal, political, business and even college football rumors . . . [than] can be chronicled in the space available here"); *see also id.* ("[T]he rumors have taken on a life of their own."), Ex. 5; *Katrina Lawyer Indicted with Bribery*, Day to Day (Nat'l Public Radio broadcast Dec. 5, 2007) ("[T]he are tremendous amount of theories swirling around; unfortunately not very many of them have much basis in fact."). Ex. 3.

<sup>21</sup> Wyatt Emmerich, *Scruggs' indictment difficult to compute*, The Greenwood Commonwealth, Dec. 15, 2007. Ex. 22.

<sup>22</sup> Patsy R. Brumfield, *Legal eagles feel pain from bribery cases*, Daily Journal, Jan. 23, 2008, sec. A, p. 1. Ex. 29. Marty Wiseman, director of the Stennis Institute of Government at MSU called the scandal "absolutely huge" and described it as "a scandal that has many Mississippians across the state talking." *See* Jerry Mitchell, *Bribery scandal impact historic/Cast of characters reminds many of former elected official Bilbo, who admitted to taking bribes 97 years ago*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

pretrial publicity in Mississippi would make it nigh impossible for Defendants to empanel a jury that was not very familiar with the allegations of the case and its central figures.

**V. PUBLICITY OF THE SCRUGGS CASE HAS BEEN INFLAMMATORY AND PREJUDICIAL**

**A. Sensationalist Reporting, and Vitriolic Published Letters and Web Postings, Have Fanned the Flames of Community Outrage**

Numerous friends, colleagues and family have stood by Defendants during the painful ordeals of the past two-and-a-half months. But for those who do not know Defendants personally, the vociferous and condemnatory language of the press has undoubtedly taken a toll. The tone of the publicity about Scruggs has been exceedingly negative. Not surprisingly, given Scruggs's numerous battles in Mississippi over the years, a number of Mississippians with axes to grind have been grinding away, expressing a hatred toward Scruggs normally reserved for the most violent criminals. Local editorials, letters to the editor, and website postings have called the case a "grievous assault on our justice system by greedy lawyers;"<sup>23</sup> and "a stench in the nasal passages of my beloved state of Mississippi."<sup>24</sup> They have called Scruggs a "scum bag leach," "the epitome of human filth," and suggested he will have a "special VIP section roped off in Hades."<sup>25</sup> They have compared Scruggs to Theodore Bilbo, "one of Mississippi's most notorious racist elected officials who faced bribery accusations in both the state and U.S. Senate,"<sup>26</sup> and they have compared his conduct to that of a child molester.<sup>27</sup>

Prominent members of the Northern Mississippi legal community, knowing full well the risks of prejudicing a venire in small-town Mississippi, have nonetheless piled on in

<sup>23</sup> Editorial: *Hood disappointing*, The (Senatobia, Mississippi) Democrat, Dec. 18, 2007. Ex. 23.

<sup>24</sup> Letter to the Editor: *Scruggs, Lott set up a need for gas masks*, Clarion-Ledger, Dec. 16, 2007. Ex. 24.

<sup>25</sup> *Readers' Comments to Jerry Mitchell, Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 25.

<sup>26</sup> Comments to Jerry Mitchell, *Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

<sup>27</sup> Comments to Posting by Ashby Jones, *Scruggs Rolls Out the Welcome Mat; Oxford Responds*, <http://blogs.wsj.com/law/2007/12/04/scruggs-rolls-out-the-welcome-mat-oxford-responds> (Dec.4, 2007, 8:49 a.m.). Ex. 26.

condemnatory public statements about Scruggs. Clarksdale attorney Charlie Merkel told one reporter about the indictment: “I’m not surprised, because [Scruggs is] willing to use any means to an end. And it irks the hell out of me when Scruggs skates on the edge and makes the profession look bad.”<sup>28</sup> Elsewhere, Merkel called Scruggs’s alleged acts “despicable.”<sup>29</sup> Grady Tollison, who represented Johnny Jones in the fee-dispute before Judge Lackey, alleged that Scruggs has “had a consistent pattern of violating his fiduciary duties to partners in these legal ventures.”<sup>30</sup> Another lawyer for Jones, Roy Percy went even further, declaring of Defendants in their hometown Oxford Eagle: “They should be ashamed to the deepest core. My clients are ashamed they were once associated with them. The entire legal profession has been stained.”<sup>31</sup> Bobby Bailess, president of the Mississippi Bar, likewise spoke as if the Defendants had already been convicted: “We hope and pray that what’s going on now out of Oxford are isolated incidents. . . . I’m shocked. I’m disappointed. I’m angry.”<sup>32</sup> One University of Mississippi law student dramatically stated that “We, who inherit the reputation of the legal community they’ve left us, will bear their shame.”<sup>33</sup>

Of perhaps even greater concern, Mississippi judges also have been opining on Defendants and the charges against them. Judge Lackey, who will presumably be one of the Government’s key witnesses at trial, gave a widely-publicized interview in which he claimed to have experienced a “shock that I can’t put into words,” and stated, “I was furious. I mean, this strikes at the heart of our judicial system.”<sup>34</sup> Two separate Mississippi Supreme Court justices

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<sup>28</sup> Nelson D. Schwartz, *Court Intrigue for the King of Torts*, N.Y. Times, Dec. 9, 2007. Ex. 6.

<sup>29</sup> Jerry Mitchell, *Judge under panel’s scrutiny*, Clarion-Ledger, Jan. 27, 2008. Ex. 27.

<sup>30</sup> Nelson D. Schwartz, *Court Intrigue for the King of Torts*, N.Y. Times, Dec. 9, 2007. Ex. 6.

<sup>31</sup> Alyssa Schnugg, *Langston pleads guilty in judge bribery attempt*, The Oxford Eagle, Jan. 14, 2008. Ex. 13.

<sup>32</sup> Jerry Mitchell, *Lawyers champion judicial reforms*, Clarion-Ledger, Jan. 20, 2008. Ex. 28.

<sup>33</sup> Patsy R. Brumfield, *Legal eagles feel pain from bribery cases*, Daily Journal, Jan. 23, 2008, sec. A, p. 1. Ex. 29. That article begins: “The professional stink coming from guilty pleas in two Mississippi judicial bribery cases is an odor that will not soon evaporate, legal community leaders say.” *Id.*

<sup>34</sup> Ashby Jones & Peter Lattman, *How Scruggs Case Came Together/Judge Helped Probe After He Says Bribe Was Offered to Him*, Wall St. Journal, Nov. 30, 2007. Ex. 30.

have openly discussed the case as well. In a speech before an audience of lawyers and judges in Jackson reported by WAPT.com, Justice Jess Dickinson claimed that he was “nauseated by allegations that Dickie Scruggs and other lawyers tried to bribe judges.”<sup>35</sup> Chief Justice Jim Smith, who apparently and inexplicably was notified about the purported bribes months in advance of the indictment,<sup>36</sup> said he was “horrified” by the Defendants’ alleged conduct.<sup>37</sup>

Most troubling, a number of stories have elevated Defendants’ alleged conduct into an attack on Mississippi itself. One editorial accused Defendants of impugning the character of the entire state of Mississippi and doing long-term damage to Mississippi’s economy:

Most lawyers and judges are honest, but a few who – with their cohorts – are famous and become notorious, poison the atmosphere, damaging the state’s reputation, with lingering liability for economic development, expansion, and standing among the other states.<sup>38</sup>

Another Northern Mississippi paper cloaked the indictment in fiery class rhetoric aimed at stirring the passions of potential jurors:

Are we to believe this is a rare occurrence? Does this prove what many people have been saying for years: the rich get justice and the poor get the shaft? This is a case where rich trial attorneys sought to protect their income streams by offering \$3 [sic] to other attorneys who would in turn bribe a judge to protect a \$26 million cash cow. Dickie Scruggs has been in the game a long time. Is this the first time he has used his money to get a favorable ruling? And who did Scruggs, Patterson and company expect would be left paying that legal tab? Well, fellow taxpayers, that would be you.<sup>39</sup>

Such language can only inspire potential jurors to seek justice against Defendants, on behalf of the honor of the State of Mississippi. The demonization of Scruggs, and in particular its focus on the damage done by Defendants to Mississippi’s reputation, is likely to prejudice a Mississippi

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<sup>35</sup> *Justice Speaks About Bribery Accusations/Justice: Lawyers’ Accusations Undermine Trust In Law*, WAPT.com, Jan. 26, 2008. Ex. 1.

<sup>36</sup> John Surratt, *Justice: Court will ‘get to bottom’ of Scruggs case*, (McComb, Mississippi Enterprise-Journal), Jan. 23, 2008. Ex. 31.

<sup>37</sup> Jerry Mitchell, *Miss. chief justice suggests change in choosing appellate judges*, Clarion-Ledger, Jan. 24, 2008. Ex. 32.

<sup>38</sup> *Editorial: Legal reform*, Daily Journal, Jan. 27, 2008. Ex. 33.

<sup>39</sup> *Editorial: Mr. Hood: Don’t Leave Justice To The Feds*, Scott County Times, Jan. 16, 2008. Ex. 34. Elsewhere, the editorial suggests that “the best legal minds are manipulating the law to get rich *at our expense*.” *Id.* (emphasis added).

jury against him and his co-Defendants. An editorial in the local Greenwood Commonwealth suggested precisely this scenario:

Scruggs' real threat is **the complete intolerance of Mississippians toward anything that even hints at judicial corruption.** A corrupt cop is much worse than a corrupt crook. Scruggs' governmental role and legal prominence means the average citizen will hold him to a very high standard. If that's the case, circumstantial evidence will be sufficient. **Jurors may decide that protecting the integrity of the courts is worth the possibility of sending an innocent man to jail. Guilt by association may prove to be enough.**<sup>40</sup>

Marty Wiseman, of the Stennis Institute at Mississippi State University, similarly suggested that much of the buzz this case has created is borne from dislike of the legal profession in Mississippi: "A lot of people take joy in watching lawyers go down."<sup>41</sup>

The media has also focused intently on the guilty pleas of Scruggs's alleged co-conspirators Timothy Balducci and Steven Patterson, and the guilty plea of Scruggs's former counsel Joey Langston to attempting to corruptly influence Hinds County Judge Bobby DeLaughter in an unrelated matter.<sup>42</sup> In these numerous articles, the press has again and again repeated the details of the allegations against Defendants, blurring the lines between the conduct of those individuals who have pled and the minimal evidence that ties Defendants to their activities. That reporting, and the guilt by association it implies, poses a serious threat to the fairness of the venire.

#### **B. Inadmissible Allegations of Scruggs's Conspiring with Attorney General Hood and Partisan Political Posturing Have Further Poisoned the Jury Pool**

State Farm's repeated personal attacks on Scruggs, attacks wholly unrelated to the pending criminal case, have served only to inflame passions against Defendants. As part of its civil suit against Attorney General Hood, State Farm insisted on deposing Scruggs as a third-

<sup>40</sup> Wyatt Emmerich, *Scruggs' indictment difficult to compute*, The Greenwood Commonwealth, Dec. 15, 2007 (emphasis added). Ex. 22.

<sup>41</sup> Jerry Mitchell, *Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

<sup>42</sup> See, e.g., Holbrook Mohr, *Lawyer pleads guilty, cooperating in case involving Scruggs*, Biloxi Sun-Herald Dec. 5, 2007, Ex. 35; Errol Castens, *Balducci: The eye of a legal storm*, Daily Journal, Dec. 22, 2007, Ex. 36; Alyssa Schnugg, *Langston pleads guilty in judge bribery attempt*; Oxford Eagle Online Edition, Jan. 14, 2008, Ex. 13; Patsy R. Brumfield, *Guilty pleas add fuel to Scruggs' troubles*, Daily Journal, Jan. 15, 2008. Ex. 37.

party witness. In a series of pleadings aimed at obtaining that deposition, State Farm leveled numerous attacks against Scruggs, asserting that he engaged in an “extortion conspiracy” with Attorney General Hood;<sup>43</sup> that he personally violated State Farm’s constitutional rights,<sup>44</sup> and that Scruggs was defying a Court order to appear for deposition.<sup>45</sup> The media have covered these allegations extensively, as well as the controversy over whether Scruggs would be deposed by State Farm and his potential invocation of his Fifth Amendment rights.<sup>46</sup>

Local media also have added partisan political intrigue to their coverage of the Scruggs case. The prominence of State Farm’s conspiracy and civil rights case against Democratic Attorney General Hood, whom Scruggs has supported and who is frequently linked with Scruggs in the press, has added fuel to this fire. Scores of press articles repeat that Scruggs is politically allied with Attorney General Hood and former Attorney General Mike Moore.<sup>47</sup> The coverage has taken on a strong partisan tone. One prominent Mississippi commentator, Sid Salter of the Clarion-Ledger, stated that “if you’re a Republican in Mississippi, the reaction [to Scruggs’s indictment] is that Santa Claus came early this year. . . . Democrats count on him for campaign donations; Republicans hate him, especially those who think trial lawyers are bad for business.”<sup>48</sup> Another stated that the case has delivered a “very damaging blow to the Democratic

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<sup>43</sup> Plaintiffs State Farm’s Bench Memorandum Regarding Trial Deposition of Richard F. “Dickie” Scruggs, at 2. Ex. 2.

<sup>44</sup> *Id.* Ex. 2.

<sup>45</sup> State Farm’s Memorandum in Support of Emergency Motion to Clarify Starting Time and Duration of the Deposition of Richard F. Scruggs and for Expedited Hearing, at 6-7, Ex. 38; *see also Scruggs a No-Show at Court-Ordered Questioning*, WLBT 3, Feb. 5, 2008. Ex. 39.

<sup>46</sup> Posting by Ashby Jones, *Scruggs Plans to Plead Fifth in State Farm-Hood Spat*, to <http://blogs.wsj.com/2008/01/31/report-scruggs-plans-to-plead-fifth-in-state-farm-hood-spat/> (Jan. 31, 2008, 11:17 a.m.). Ex. 40; *SCRUGGS UPDATE: Scruggs must submit to questions*, Daily Journal, Feb. 1, 2008. Ex. 41.

<sup>47</sup> *See, e.g.*, Anita Lee, *Scruggs case: “This is going to be awful for all”*, Biloxi Sun-Herald, Dec. 2, 2007, Ex. 42; Sid Salter, *Scruggs: Politics fuel a rush to judgment*, Clarion-Ledger, Dec. 2, 2007, Ex. 10; Editorial, *Hood Disappointing*, The Democrat.com, Dec. 18, 2007, Ex. 23; Editorial: *Legal reform*, Daily Journal, Jan. 27, 2008, Ex. 33; Jerry Mitchell, *Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

<sup>48</sup> *Katrina Lawyer Indicted with Bribery*, Day to Day (Nat’l Public Radio broadcast Dec. 5, 2007). Ex. 3.

Party.”<sup>49</sup> Yet another commentator suggested that “[f]or the Democrats . . . the Scruggs news [has] made life more difficult” because “the Scruggs indictment plays to all the stereotypes of greedy, unscrupulous trial lawyers . . . . If it does nothing else, this case – regardless of the eventual outcome – has to underscore to Democrats the urgency of broadening their campaign funding sources beyond such easy targets.”<sup>50</sup> A recent Clarion-Ledger cartoon again emphasized the connection between the Scruggs indictment and the Democratic Party by suggesting that the tornado of the Dickie Scruggs indictment threatened to wipe out the house known as “Democratic Fundraisin’ HQ.”<sup>51</sup>



These stories ignite political passion that should, of course, have nothing to do with how a criminal case is decided by a jury. But all of this suggests that, in Mississippi, the trial will be covered as a partisan proceeding, in which a vote to convict is a vote for tort reform and the Republican Party, and a vote to acquit is a vote for trial lawyers, Attorney General Hood, and the Democrats. This must be avoided.

<sup>49</sup> Jerry Mitchell, *Bribery scandal impact historic*, Clarion-Ledger, Feb. 3, 2008. Ex. 11.

<sup>50</sup> Lloyd Gray, *A whirlwind of news, a web of connections*, Daily Journal, Dec. 2, 2007, p. A6. Ex. 43.

<sup>51</sup> Marshall Ramsey, Clarion-Ledger, Dec. 4, 2007. Ex. 44.

### C. **These Press Accounts Threaten Defendants' Right to a Fair Trial**

The pervasive coverage of the case, the sensational rumors and innuendo, the prejudicial statements by prominent Mississippi lawyers and even Supreme Court justices, the injection of partisan politics by the media, and the calls for revenge to get back at “greedy trial lawyers” and to preserve the honor of Mississippi have created an environment that is contaminated with prejudice. *See Tokars*, 839 F. Supp. at 1582 (“[C]ombining the extraordinary volume of coverage (virtually all of which is highly negative to the Defendants) with the emotional nature of some of the coverage, one may infer that a widespread bias exists which could interfere with a fair trial.”); *Moody*, 762 F. Supp. at 1488-90 (finding “inordinate, widespread, and prejudicial publicity”); *Beto*, 337 F. Supp. at 1376-77. Moreover, the high volume of information that will not be admissible at trial or that represents pure conjecture and innuendo is particularly damaging to their right to a fair trial. In *United States v. Engleman*, the district court found that:

Publicized facts may be untrue, confessions obtained may be inadmissible into evidence, and witnesses may substantially modify their stories under oath or after confrontation and cross examination. Thus, the right to a fair trial may be substantially endangered by reporting prior to trial. The danger is especially acute when reporting extends to such matters as confessions or admissions, interviews of prospective witnesses, and speculation as to testimony or other matters to be introduced at the trial.

489 F. Supp. 48, 50-51 (E.D. Mo. 1980). Similarly, in *Mayola v. Alabama*, 623 F.2d 992 (5th Cir. 1980), the Fifth Circuit found that local publicity was likely prejudicial because local newspapers published the defendant’s confession as well as a number of erroneous reports that were inadmissible at trial. Any jury pool in Mississippi will have faced a four-month barrage of allegations about Scruggs and his co-Defendants, many of which are untrue and others of which will not be admissible at trial. Venue should be transferred to a less hostile and less media-saturated location.

### VI. **THERE HAS BEEN NO GAP BETWEEN THE INITIAL PUBLICITY AND TRIAL TO ALLOW PREJUDICE TO DISSIPATE**

“The time lapse between the publicity and the trial” is another important consideration in determining whether venue must be transferred, “since time frequently erodes prejudicial effect.”

*Beto*, 337 F. Supp. at 1377. See also *United States v. Capo*, 595 F.2d 1086, 1091 (5<sup>th</sup> Cir. 1979) (affirming denial of venue change because trial began almost a year after occurrence of the events, and local news coverage had subsided substantially so that most prospective jurors had only a “vague recollection” of the events). The case against Scruggs has moved quickly toward trial, giving Mississippians no respite from the media onslaught. Pretrial litigation that might in some cases be spaced out over the course of many months has proceeded rapidly, giving the media something to chew on virtually everyday. Indeed, the Daily Journal ran a lengthy article just two days ago speculating on whether Defendants would file this very motion, and its likelihood of success.<sup>52</sup> The simultaneous efforts of State Farm and its adjustment company E.A. Renfroe to depose Scruggs in State Farm’s case against Attorney General Hood, in Renfroe’s case against the insurance whistleblowers Cori and Kerri Rigsby, and in one of the homeowner suits against both companies has only heightened the media attention during the past two-plus months. Because the time elapsed between initial publicity and trial will have been so short, and because there has been no diminution in the press activity and the resulting prejudice to Scruggs, this Court should grant a change of venue.

#### **VII. VOIR DIRE ALONE CANNOT PROTECT SCRUGGS FROM PREJUDICE**

Voir dire is the procedure commonly used to identify prejudice among jurors, but the Supreme Court has recognized that a change of venue is the best way to protect against prejudice: “The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man.” *Irvin*, 366 U.S. at 727. In *Irvin*, Justice Frankfurter asked:

How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

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<sup>52</sup> Patsy Brumfield, *Monday deadline for pretrial motions in Scruggs case*, Daily Journal, Feb. 9, 2008. Ex. 45.

366 U.S. at 729-30 (Frankfurter, J., concurring). Later in *Rideau v. Louisiana*, 373 U.S. 723 (1963), where the defendant's confession was repeatedly televised, the Court did "not hesitate to hold, without pausing to examine a particularized transcript of the voir dire examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview.'" *Id.* at 1419-20.

Courts in this Circuit likewise have found that "[o]ne cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by pervasive pre-trial publicity." *Marcello*, 280 F. Supp. at 514 (quoting *Delaney v. United States*, 199 F.2d 107, 112-113 (1st Cir. 1952)). In *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963), all the jurors gave a statement "that they felt they could act impartially." *Id.* at 372. The Second Circuit held that "[t]his, however, placed on those individuals a burden we think impossible to be borne, in light of the nature of the publicity, the high proportion of jurors holding opinions of guilt, the length of time the opinions had been held and their persistence." *Id.*

In *Tokars*, the district court likewise rejected voir dire as a viable remedy because "the difficult task would be ascertaining which prospective jurors in fact are unbiased. Where the negative publicity has been so intense, the court's task would be made more difficult by prospective jurors' subconscious recollection of news coverage." 839 F. Supp. at 1584. Similarly, in *United States v. Florio*, 13 F.R.D. 296 (S.D.N.Y. 1952), the court rejected voir dire as a means to "minimize or exclude the effects of pre-trial publicity" because "[t]he instant case would have been in a state of suspension if on the voir dire a jury could not have been obtained (and the volume and nature of the pre-trial publicity indicated that such a result was inevitable). A long adjournment would have been the probable result and many months would have elapsed before the defendant would have been brought to justice." *Id.* at 299.

Given the combination of community bias and prejudicial publicity in this case, voir dire would be an unreliable and inefficient safeguard against prejudiced jurors. This is the unusual case where voir dire cannot protect the Defendants' right to a fair trial. Moreover, in a case like this one, individual, expanded voir dire will be necessary wherever venue is transferred.

### VIII. CONCLUSION

Defendants therefore request that this case be transferred to another district within the Fifth Circuit outside the State of Mississippi. In selecting the new venue, the Court should consider these factors: (1) ease of travel from Northern Mississippi, where most witnesses reside; (2) adequate court facilities and security; and (3) a jury pool that is similar in size and demographic profile to the current venue. *See Tokars*, 839 F. Supp. at 1584; *Moody*, 762 F. Supp. at 1490.

Defendants respectfully request oral argument on this motion.

Respectfully submitted, this 11th day of February, 2008.

Dated: February 11, 2008

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**CERTIFICATE OF SERVICE**

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Motion for Change of Venue as to Richard F. Scruggs** 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., Nathan F. Garrett and Todd P. Graves.

This, the 11th day of February, 2008.

/s/ Brook Dooley  
Brook Dooley