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

UNITED STATES OF AMERICA

Versus No. 3:07-CR-00192-NBB-SAA

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

MOTION OF DEFENDANT SIDNEY A. BACKSTROM FOR SEVERANCE AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

COMES NOW THE DEFENDANT, Sidney A. Backstrom ("Mr. Backstrom"), and moves this Court, pursuant to Rule 14 of the Federal Rules of Criminal Procedure, and the Fifth and Sixth Amendments to the United States Constitution, for a trial separate from co-defendant Richard F. Scruggs ("Richard Scruggs"). In support of this motion, Mr. Backstrom represents the following to the Court:

FACTUAL AND PROCEDURAL INTRODUCTION

1. The indictment in this case, filed November 28, 2007 [Docket Entry 1] charges Mr. Backstrom and co-defendants Richard F. Scruggs and David Zachary Scruggs ("Zach Scruggs") with multiple counts of violations of 18 U.S.C. §§2, 666(a)(2)(b), 1343, and 1346.

2. Mr. Backstrom is one of four lawyers who are members of the Scruggs Law Firm, P.A. ("the Scruggs Law Firm"). Besides the members, the Scruggs Law Firm also employs one associate.

3. The indictment generally alleges that the co-defendants conspired to "corruptly give, offer, or agree to give" $50,000 to Circuit Judge Henry L. Lackey ("Judge Lackey") to

"obtain an order" or "influence the outcome" in the civil action styled *Jones v. Scruggs, et al.* in the Circuit Court of Lafayette County, Mississippi.

4. The allegations against Mr. Backstrom in the indictment are limited:

(a) The indictment alleges Mr. Backstrom attended a meeting around March 28, 2007 with Richard Scruggs, Zach Scruggs, Timothy Balducci and Steve Patterson in which the *Jones* case and Judge Lackey are discussed. At his plea hearing, Steve Patterson established that meeting did not involve any scheme to attempt to corruptly influence Judge Lackey.

(b) The indictment alleges that on May 4, 2007, Mr. Backstrom e-mailed a proposed order to Timothy Balducci ("Balducci"). Indictment, Count One, Overt Acts, at ¶5 and Count Five. However, despite its seizure of the content of the Scruggs Law Firm's computer hard drives, and having full access to Balducci's office and computers, the Government has not produced any copy of any such e-mail. It simply does not exist.

(c) The indictment alleges that on September 21, 2007, immediately after meeting with Judge Lackey and agreeing to pay $40,000 to the Judge, Balducci "placed a four-minute telephone call to The Scruggs Law Firm and discussed the bribery transaction" with Mr. Backstrom. *Id.* at ¶10. However, the tapes produced by the Government contain numerous statements by Balducci which contradict the assertion that the "four-minute call" (which was not taped) included any discussion of bribing Judge Lackey. For example, on September 27, 2007 Balducci told Judge Lackey "there ain't another soul in the world that knows about this but you and me" and "this is something that is strictly between me and you."

The indictment alleges three conversations between Balducci and Mr. Backstrom.

(i) on October 18, 2007, Balducci allegedly told Mr. Backstrom that he (Balducci) had delivered a copy of "those papers that we've been waiting on." *Id.* at ¶19. The indictment further alleges that this statement "referr[ed] to the order obtained by bribery." *Id.*

> (ii) on November 1, 2007, Balducci allegedly discussed an amended order with Mr. Backstrom and Zach Scruggs and said, "we paid for this ruling; let's be sure it says what we want it to say." Id. at ¶21.
>
> The recorded conversation, however, does not establish that Mr. Backstrom made any response to this statement to indicate that he understood Balducci to be speaking about bribery of a judge. Indeed, it is clear that Mr. Backstrom is reading the document at the time.
>
> (iii) according to the indictment, on November 13, 2007, Balducci allegedly had a telephone conversation with Mr. Backstrom "wherein they discussed the bribery scheme in return for a ruling in favor of RICHARD "DICKIE" SCRUGGS and The Scruggs Law Firm. *Id.* at 25.
>
> The recorded conversation, however, makes clear that this is the first time Balducci makes a reference to an opportunity to have the judge "fix" the case, and that Mr. Backstrom declined that suggestion, saying instead that the judge should do what he feels is "the right thing to do based on what's been put before him."

5. On January 28, 2008, the Government filed its Notice of Intent to Introduce Similar Acts Evidence Pursuant to Rule 404(b) of the Federal Rules of Evidence [Docket Entry 85] ("the 404(b) Notice"). The 404(b) Notice incorporated a letter dated January 28, 2008, from counsel for the Government to the attorneys for the Defendants ("the 404(b) Notice Letter").

6. The 404(b) Notice Letter indicated that the alleged similar acts that the Government would seek to introduce at trial would be found in the information and plea colloquy including factual basis in the case of *United States v. Langston*, No. 1:08-CR-00003-MPM-JAD.

7. The Langston Information alleges:

> It was part of the conspiracy for JOSEPH C. LANGSTON and his co-conspirators to attempt to influence state Circuit Court Judge Robert "Bobby" Delaughter by providing a thing of value, that is, favorable consideration of Robert "Bobby" Delaughter for appointment to the federal district court bench in the Southern District of Mississippi, to obtain rulings in favor of Richard "Dickie" Scruggs in the lawsuit styled *Wilson v. Scruggs* pending before Judge Delaughter.

> . . . .
>
> Between January 2006 and March of 2006, JOSEPH C. LANGSTON, Timothy R. Balducci and Steven A. Patterson traveled from the Northern District of Mississippi to Jackson, Mississippi, to meet with a close personal friend of Robert "Bobby" Delaughter.
>
> On or about December 2005, JOSEPH C. LANGSTON and Steven A. Patterson delivered $50,000 in cash to the close personal friend of Judge Robert "Bobby" Delaughter, for the purpose of retaining the close personal friend to influence Judge Robert "Bobby" Delaughter.
>
> On or about February 2006, Richard "Dickie" Scruggs agreed with JOSEPH C. LANGSTON and other co-conspirators that if the *Wilson v. Scruggs* case was resolved in his favor that Langston, Scruggs, Patterson and a close personal friend of Judge Delaughter would split the savings to Scruggs as a result of a resolution of the case in favor of Scruggs.
>
> Between on or about July of 2006 and July of 2007, JOSEPH C. LANGSTON, Steven A. Patterson and the close personal friend of Robert "Bobby" Delaughter split $3,000,000, representing the savings to Scruggs as a result of rulings in favor of Scruggs by Judge Delaughter resulting in a settlement of the case.

Docket Entry 3, *United States of America v. Joseph C. Langston*, Case No. 1:08-CR-00003-MPM-JAD.

8. At the hearing on Joseph Langston's guilty plea, the Government summarized the allegations against Langston as follows:

> Specifically, the Government would show that in December of 2005 Joseph C. Langston and Timothy R. Balducci began representing Richard F. Scruggs in litigation arising out of a dispute of attorneys' fees. In January of 2006, Langston and Balducci entered an appearance as attorneys for Richard F. Scruggs in the case of *Wilson v. Scruggs*, a lawsuit assigned to State Circuit Court Judge Robert "Bobby" Delaughter.
>
> At about that time, Langston, working with Balducci and Steven A. Patterson, contacted and retained the services of Ed Peters, a close personal friend of Judge Delaughter . . .
>
> . . . . After hiring Peters, Langston and Timothy R. Balducci and Steven A. Patterson were in regular contact either by

> phone or by facsimile concerning the case; and the three traveled regularly from the Northern District of Mississippi to Jackson, Mississippi, to meet with Peters in person to discuss issues concerning the *Wilson* litigation.
>
> While Peters was not fully cognizant of the issues surrounding the litigation, he would relay whatever information he received from Langston, Balducci, and Patterson to Judge Delaughter before any of this information was filed with the Court. In at least one instance, Judge Delaughter e-mailed a rough draft of an opinion he planned to enter to Peters. And Langston and Balducci and Patterson would be able to see it before any . . . final version was filed.
>
> . . . . Scruggs told Langston to let the Judge know that if he ruled in his favor he would pass his name along for consideration regarding [a] federal judgeship. Langston then informed Peters, who, in turn, passed the information along to Judge Delaughter.

Plea Colloquy, *United States v. Langston*, at 16-17.

9. None of the allegations in either the Information or the plea colloquy in the Langston case involve any conduct by Mr. Backstrom.

10. Prior to the filing of the Information in the Langston case, the Government sought the issuance of a search warrant for the premises of the Langston Law Firm. The Application and Affidavit for Search Warrant is presently filed under seal and can be made available to the Court at the hearing on this motion. The Application and Affidavit, however, make no allegations of criminal conduct against Mr. Backstrom.

11. Neither the Application nor Affidavit suggest Mr. Backstrom had any involvement in or anything at stake in the *Wilson v. Scruggs* litigation.

12. In addition, Richard Scruggs is the subject of two other legal proceedings challenging his conduct in connection with Hurricane Katrina litigation.

(a) In *E.A. Renfroe & Co., Inc. v. Moran, et al.*, No. 2:06-CV-01752 (N.D. Ala.), Senior District Judge Acker has referred a charge of criminal contempt against Richard Scruggs

and The Scruggs Law Firm for prosecution. Mr. Backstrom is not charged in that matter. http://www.statefarm.com/_pdf/ackerscruggs_memorandum.pdf

http://www.statefarm.com/_pdf/acker_appointment.pdf

(b) In *State Farm Fire & Casualty Co. v. Jim Hood*, No. 2:07-CV-188-DCB-MTP (S.D. Miss.) and the alias proceeding of *State Farm Fire & Casualty Co. v. Jim Hood,* No. 3-08-C-11-M (N.D. Miss.), the Plaintiff State Farm alleged a "conspiracy" between the Attorney General of Mississippi and, among others, Richard Scruggs. Considerable media attention was drawn to State Farm's attempts to depose Richard Scruggs in those cases. See http://yallpolitics.com/index.php/yp/post/6451 ("It is an amazing risk for Scruggs' lawyers to have run with their client out on bond and under indictment currently in two different cases," commenting on http://www.yallpolitics.com/images/SFvHood/MillsOrder020408.pdf). Mr. Backstrom is not alleged to have been a part of that alleged conspiracy either.

LAW AND ARGUMENT

13. This Court has authority to sever the trial of Sidney Backstrom from that of Richard Scruggs. "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder or 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." Fed.R.Crim.P. 14.

14. Indeed, the Fifth Circuit has made clear that "[t]here may . . .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) (emphasis added). In *Tarango*, the Court of Appeals affirmed the

grant of a severance (albeit in the context of a post-trial motion) where the "overwhelming" focus of the testimony and evidence was on Tarango's alleged co-conspirator.

15. The Supreme Court, in *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 938 (1993), held that a severance is properly granted "if there is a serious risk that a joint trial would compromise a specific trial right of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." The *Zafiro* Court outlined factors to consider in determining whether the prejudice to the moving defendant is sufficient that severance should be granted under this test:

(a) "[W]hen many defendants are tried together in a complex case and they have markedly different degrees of culpability," 506 U.S. at 539, 113 S.Ct. at 938, *citing Kotteakos v. United States*, 328 U.S. 750, 774-75, 66 S.Ct. 1239, 1252-53 (1946).

(b) "[W]hen 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." 506 U.S. at 539, 113 S.Ct. at 938.

(c) "Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice," *id., citing Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968).

16. As the facts set forth above demonstrate, each of these factors is present here. Three codefendants are to be tried in this case; and the Government's allegations encompass another two alleged co-conspirators. The allegations against Mr. Backstrom, however, are sparse in comparison to those involving Richard Scruggs, Timothy Balducci and Steven Patterson. Indeed, as the October 24, 2007 (recorded) conversation between Balducci and Mr. Backstrom

shows, Mr. Backstrom's role in the Scruggs Law Firm was to write pleadings and briefs, take and defend discovery, and argue motions – not to make major strategic decisions.

17. Moreover, as discussed in paragraph 4 above, the few allegations made by the indictment against Mr. Backstrom are each subject to vigorous dispute. The taped conversations show Mr. Backstrom had no knowledge that Balducci agreed to Judge Lackey's request for money in return for an order he was legally obligated to enter.

18. Indeed, the November 13, 2007 conversation indicates that Mr. Backstrom had no knowledge that Judge Lackey had misused his position and his relationship with Balducci to pressure Balducci to give him money, or that Balducci had willingly acceded to this demand for money. Rather, Balducci told Backstrom that the order staying the *Jones* case and compelling arbitration was "signed, sealed, and delivered." Given the controlling Mississippi and Federal precedent on enforcement of arbitration arguments, that was no less and no more than the law required of Judge Lackey. But then Balducci added, "but I, there, he, he brought up an issue with me, not an issue, but he brought up an opportunity with me um, that before I told him to file it . . . I gotta go back to my client . . . It's almost like a settlement offer."

19. Balducci then asked Mr. Backstrom, "You know, do you, do you really want this to go to arbitration or do you want him to keep it and try to fix it?" In response, Mr. Backstrom declined the invitation to have Judge Lackey "fix" the case. He ended Balducci's solicitation by telling Balducci the judge should do what he feels is right based upon what has been put before him.

20. But, as predicted in *Zafiro*, there is a significant risk that this strong case in Mr. Backstrom's favor will be prejudiced by the evidence presented about the other alleged co-conspirators, particularly Richard Scruggs, Patterson and Balducci.

21. The risk is exacerbated by the Government's intent to introduce evidence of alleged similar conduct by Richard Scruggs, Patterson and Balducci – during an overlapping tie period – in the *Wilson v. Scruggs* case. This would clearly be inadmissible against Mr. Backstrom. *United States v. White,* 788 F.2d 390, 394 (6th Cir. 1986) (one defendant's "prior bad acts" not admissible against co-defendant).

22. Additionally, the Rule 404(b) evidence of which the Government has given notice consists of alleged statements by Balducci, Patterson, and co-defendant Richard Scruggs, about an alleged conspiracy in which Mr. Backstrom is not alleged to be a member. As to Mr. Backstrom, any such statements would be irrelevant, unduly prejudicial and otherwise inadmissible within any evidentiary exception. In addition, Mr. Backstrom has no assurance that he will be allowed to cross-examine Richard Scruggs about any such statements, thus raising issues under the Confrontation Clause and potentially under *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968).

23. The Government's introduction of the evidence set out in the Rule 404(b) Notice will severely prejudice Mr. Backstrom. First, the Rule 404(b) evidence in *Wilson* case –overlaps the same time period as those in the instant indictment. Second, both the *Wilson* case and instant indictment feature allegations of attempts to influence state court judges, of disputes of the Scruggs firm with other lawyers over millions of dollars in attorney fees and of involvement of the Scruggs firm, Richard Scruggs, Steve Patterson and Timothy Balducci. Third, at lease two key Government witnesses will testify about both conspiracies. In essence, the Government seeks to prove a separate and distinct alleged conspiracy while using those salient, common allegations and witnesses to meld the two into each other. This blending of the two conspiracies will roll over and crush Mr. Backstrom's right to only face the allegations against him.

24. Moreover, the *Wilson* case will present a "trial within a trial." The evidence will comprise testimony of both Balducci and Patterson, as well as, Joseph Langston and presumably Edward Peters. Each witness will only testify once in the Government's case in chief and testimony about the *Wilson* case and about the *Jones* case will be given at the same sitting. Counsel for Richard Scruggs can then be expected to cross-examine these witnesses extensively about the *Wilson* allegations (again, during the same sitting where counsel will cross-examine these witnesses about the *Jones* case), further confusing the jury. While not required to, counsel for Richard Scruggs may elect to call witnesses to refute the Government's 404(b) evidence. This impending "trial within a trial" will require an impossible task requiring the jury to repeatedly catalogue evidence into separate compartments.

25. Obviously, the jury should determine the charges against Mr. Backstrom solely on the basis of the evidence admitted against him, *United States v. Crawford*, 581 F.2d 489, 491 (5th Cir. 1978). Instead they are highly likely to become confused about which transactions are at issue for Mr. Backstrom, or, even worse, decide that the Government's 404(b) evidence implicates Mr. Backstrom by virtue of his mere membership in the Scruggs Law Firm and what will appear to be an overall similarity in the two(2) attorney fee dispute cases..

26. As many courts have realized:

> [A] "gross disparity" in the evidence presents a danger that some defendants will suffer "spillover prejudice" due to the accumulation of evidence against other defendants. When that occurs, a defendant may suffer a transference of guilt merely sue to his association with a more culpable defendant. **In instances where the evidentiary disparity is unquestionable the court will not presume that jury instructions will adequately cure potential prejudice, and severance is appropriate.**

United States v. Stoecker, 920 F.Supp. 876, 886 (N.D. Ill. 1996), *quoting United States v. Andrews*, 754 F. Supp. 1161, 1177-78 (N.D. Ill 1990), and *citing United States v. Garner*, 837 F.2d 1404, 1413 (7th Cir. 1987) (internal quotes omitted) (emphasis added).

27. As another court has noted, "spillover prejudice" exists where "the trial would include a great deal of evidence about an organized crime enterprise and its operations which would not be presented at a separate trial and which is not alleged to have been part of [moving defendants'] criminal activity." *United States v. Locascio*, 357 F.Supp.2d 536, 544 (E.D.N.Y. 2004). Such spillover evidence is particularly prejudicial where there are disparities in the degrees of involvement between the defendant against whom the Rule 404(b) evidence is admitted, and the co-defendant seeking severance, against whom the alleged bad act evidence is not admissible. *See United States v. Gallo*, 668 F.Supp. 736, 749 (E.D.N.Y. 1987).

28. Nor is the danger of "spillover evidence" limited to large-scale conspiracy cases. In *United States v. Henderson*, 95 F.Supp.2d 588, 594 (S.W.Va. 2000), the district court granted severance in a three defendant case involving narcotics offenses, on the basis that the evidence admissible against two of the members of the conspiracy alleged by the Government created the possibility of specific, compelling prejudice to the third defendant.

29. Also, the inevitable "circus-type atmosphere" that attends a case of this import, *United States v. Howorth*, 168 F.R.D. 658, 659 (D.N.M. 1996), compounds the possibility of unfair prejudice. This Court is doubtless familiar with the massive publicity broadcast on a daily basis by the print and television media and on an hourly basis by the internet "blog" media. Over 400 separate "blog" discussions have been logged by various websites since the indictments in this case have been returned. *See* "Archive: Scruggs Scandal" at http://www.yallpolitics.com/index.php/yp/categories/C10 (collecting blog threads).

30. Moreover, virtually none of the "blogs" or news stories about this case discuss Mr. Backstrom; a search of the "Y'all Politics" site yields only one such thread. http://yallpolitics.com/index.php/yp/post/yp_sid_backstrom_withdraws_from_another_katrina_related_case_involving_bald/

31. Despite the paucity of publicity directly naming him, Mr. Backstrom cannot help but be caught up in the vortex of the jury's assessment of the case against Richard Scruggs – especially as compounded by the Rule 404(b) evidence.

32. Mr. Backstrom 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. 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)). Whatever the remedy may be for such publicity in the case of Richard Scruggs, there is every reason to think the problem would be significantly reduced as to Mr. Backstrom merely by granting him a severance from Richard Scruggs.

33. Surely it would be more expeditious to grant a pre-trial severance than to grant a mistrial or a new, separate trial at a later date. *See United States v. Tarango*, 396 F.3d 666, 673-74 & n.12 (5th Cir. 2005). Should this occur, there would be a considerable waste of judicial resources that can be prevented far more easily at this stage of the proceedings. *Cf. United States v. Maranghi*, 718 F.Supp. 1450, 1451 (N.D. Cal. 1989) ("Misjoinder can constitute reversible error, which hardly serves the purpose of efficiency").

34. For these reasons, Mr. Backstrom's right to a fundamentally fair trial, to due process of law and to be tried solely on evidence against him will be violated, unless the Court grants a severance of his case from the case against Richard Scruggs.

WHEREFORE, PREMISES CONSIDERED, Defendant Mr. Sidney A. Backstrom respectfully requests that this Court, pursuant to Rule 14, order the trial of the Government's case against him to be severed from the case against Richard Scruggs.

/s/ Frank W. Trapp
Frank W. Trapp, MSB #8261
James W. Craig, MSB #7798
PHELPS DUNBAR LLP
111 East Capitol Street, Suite 600
Post Office Box 23066 (39225)
Jackson, Mississippi 39201
Telephone: (601)352-2300
Facsimile: (601)360-9777

CERTIFICATE OF SERVICE

I, Frank W. Trapp, do hereby certify that I have electronically filed the foregoing **Motion of Defendant Sidney A. Backstrom for Severance and Incorporated Memorandum of Law In Support** 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, Anthony L. Farese, J. Rhea Tannehill, Jr., Timothy R. Balducci, Hiram Eastland, Jr, and David Zachary Scruggs.

This, the 11th day of February, 2008.

/s/ Frank W. Trapp
Frank W. Trapp