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

UNITED STATES OF AMERICA — PLAINTIFF

VS. — CIVIL ACTION NO.: 3:07-CR-00192-NBB-SAA

RICHARD F. "DICKIE" SCRUGGS, DAVID ZACHARY SCRUGGS AND SIDNEY A. BACKSTROM — DEFENDANT

RENEWED 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"), and from co-defendant David Zachary Scruggs ("Zach Scruggs"). In support of this motion, Mr. Backstrom represents the following to the Court:

FACTUAL AND PROCEDURAL INTRODUCTION

1. Mr. Backstrom has previously filed a Motion to Sever [Docket No. 88], which was denied by this Court [Docket No. 132]. This defendant re-alleges and re-incorporates the allegations ad legal arguments previously asserted in that motion.

2. Mr. Backstrom respectfully submits that two recent rulings by this Court significantly increase the unfair prejudice that Mr. Backstrom will suffer as a result of being tried with Richard Scruggs and Zach Scruggs.

3. First, this Court has granted the Government's motion for miscellaneous relief [Docket No. 146], to the extent it requested that an "anonymous jury" be impaneled. The Government's argument for this extreme measure, which the Court adopted, was based heavily

on the Government's allegation that Richard Scruggs had, in addition to the alleged bribery of Judge Lackey, previously offered something of value – consideration for a federal court judgeship – to the Hon. Bobby DeLaughter, Circuit Judge of Hinds County, for a favorable ruling in the civil action of *Wilson v. Scruggs*. The ruling also relied on the unprecedented pre-trial publicity inferring the case's notoriety will result in publicity that could expose the jurors to harassment or intimidation.

4. Second, the Court denied [Docket No. 134] the defendants' joint motion to exclude the Government's proffered "other bad acts" evidence pursuant to Fed.R.Evid. 404(b). Through this proffered evidence, the Government seeks to show that Richard Scruggs, allegedly with the knowledge of Zach Scruggs, sought by means of an intermediary to offer the consideration of judicial appointment to Judge DeLaughter in exchange for a ruling in favor of Richard Scruggs' former law firm in the *Wilson* case.

5. The impaneling of an "anonymous jury" is seldom used in American trials. Any resident who pays attention to the various "trials of the century" that have garnered extensive media attention, or who watches "Court TV," "Law and Order," "Perry Mason," or even "Boston Legal" knows it. Impaneling an anonymous jury denies Mr. Backstrom his right to a jury of known individuals. *See e.g. United States v. Sanchez*, 74 F. 3d. 562, 565 (5th Cir. 1996). The anonymous jurors will doubtless conclude that both allegations of judicial bribery (about the *Jones* case and the *Wilson* case) are very serious indeed, and that the Court is concerned enough about the alleged past judicial bribery to take such an extreme measure in this case.

6. This is particularly unfair to Mr. Backstrom, who was not a member or employee of any of the law firms involved in the *Wilson* case. Indeed, as the Court knows, the Government has conceded that its Rule 404(b) evidence does not implicate Mr. Backstrom. The

Court's reliance on 404(b) evidence in connection with granting the "anonymous jury" demonstrates another use of this 404(b) evidence to unfairly prejudice Mr. Backstrom.

7. Secondly, this Court rejected Mr. Backstrom's argument that a severance was required, in part, due to the immense amount of adverse pre-trial publicity. Now the Court has relied in part on the public notoriety[1]—as demonstrated by the adverse pre-trial publicity-- as a bases for granting an "anonymous jury." The publicity focuses almost exclusively on Richard Scruggs. It is Richard Scruggs prominence that lead to the extraordinary, sensational attention to the case. On the other hand, none of the publicity focuses on Mr. Backstrom. When he is referenced by name, it is as a co-defendant of Richard Scruggs and Zack Scruggs. The Court's reliance on the notoriety as a bases of granting an "anonymous jury" shows the pre-trial publicity is a unique, prejudicial force against Mr. Backstrom.

8. Mr. Backstrom is being denied his right to a public and open trial by a known jury of his peers as a result of allegations against his co-defendants – allegations of the *Wilson* case that the Government concedes do not apply to him and the notoriety flowing from incredible level of public attention to the charges against Richard Scruggs. Neither of these would be a factor in a separate trial of Mr. Backstrom, thus eliminating the primary reasons for the "drastic" "devise of last resort," [that is, trial by an "anonymous jury."] *See United States v. Krout*, 66 F 3d. 1420, 1427 (5th Cir. 1995).

9. Without a severance, the Court will have to pile limiting instructions on Rule 404(b) evidence upon limiting instructions on an anonymous jury upon limiting instructions on

[1] The increase in readership of the on-line "blogs" when they carry articles about this case is discussed by Ms. Brumfield of the Northeast Daily Journal in a story posted on the "Folo" blog: http://www.folo.us/2008/03/04/patsys-story-on-scruggs-bloggers. (The story indicates that it was forwarded from Djournal.com, the Daily Journal's website, because the Daily Journal had decided not to print it as a story in the newspaper). Ms. Brumfield quotes several of the blog editors as experiencing exponential increases in readership since they began covering this case. For example, "Djournal.com online editor Todd Vinyard says he sees spikes in readership when it carries Scruggs-related stories, and others in the online world report a similar jump." *Id.* Alan Lange, editor of the blog "Y'all Politics," told Ms. Brumfield that "since late November when Scruggs and four others were indicted in the Lackey case…traffic to Y'all Politics has tripled." David Rossmiller, an insurance attorney who maintains a regular blog on insurance litigation issues, estimated 15-20 more readers since he focused on *United States v. Scruggs*. And the anonymous editor of the Folo blog stated that with the coverage of this case, the number of "hits," or views of the site, had jumped "like a shuttle launch." *Id.*

pre-trial publicity in an effort to prevent unfair consideration of these in reaching a verdict on the charges against Mr. Backstrom. This is to much "limiting" for the jurors to reasonably compartmentalize. These limiting instructions simply cannot protect Mr. Backstrom's right to a fair trial. Only a severance can remove this unfair prejudice.

10. The remaining factor considered in ordering the anonymous jury is the maximum period of incarceration and monetary penalties provided by stacking the maximum penalty of each count in the multi-count indictment. This factor standing alone cannot justify an anonymous jury. Otherwise, one would be justified in virtually every multi-count indictment. In addition, here the Government has already capped the two (2) acknowledged conspirators at five (5) years. With even a minimum deference to proportionality, this shows any sentence (in the event of a conviction) is not likely to approach the maximum of seventy-five (75) years.

11. In addition, the Government's proffered evidence regarding the *Wilson* case involves an alleged scheme with prominent features different than the one alleged in the instant indictment. Presently, there is no allegation in the *Wilson* case that Judge DeLaughter requested he be paid money in exchange for a favorable ruling. Rather, the allegations in *Wilson* is that a recommendation for a federal judgeship was offered in exchange for a "favorable ruling." In this case, by contrast, the undisputed evidence proves that the idea for payment of money originated with the FBI through Judge Lackey.

12. Indeed, the taped conversations, the grand jury testimony of Mr. Balducci and Agent Delaney, and the testimony of Balducci and Agent Delaney in this Court, all make clear that until September 18, 2007, Balducci did not think he had offered **any** *quid pro quo* at all to Judge Lackey. At the same time the tapes conclusively demonstrate the demand for payment of money originated with the FBI through the judge on September 18, 2007.

13. It was Judge Lackey – not any of the defendants – who first said to Balducci that if he (the judge) help them will they help me? Judge Lackey's demand for money in return for exercising his judicial responsibility constitutes extortion, not attempted bribery. In the context of granting an "anonymous jury" based, in part, on interference with the judicial process, the distinction between the judge originated versus defendant originated interference is a paramount distinction. Since it was the judge, at direction of the FBI, who introduced the interference in the judicial process, any adverse inference against Mr. Backstrom concerning such interference is very weak, if not, non-existent and unfair.

14. There is a second critical distinction between the Government's allegations about the *Wilson* case and the allegations made here. In the *Wilson* case, the allegation is that Judge DeLaughter would make a dispositive ruling in favor of Richard Scruggs in exchange for the recommendation for judicial appointment.

15. But this case is tellingly different on that point. Even if all of the Government's allegations are believed, the only ruling ever requested from Judge Lackey was that a motion to compel arbitration be granted in the *Jones* case. Under the terms of the joint venture agreement between the parties in the *Jones* case, an order compelling arbitration would have sent the dispute to the American Arbitration Association ("AAA"). The dispute would have then been resolved through arbitration conducted by three (3) neutral, independent AAA arbitrators. Compelling arbitration was not, in any sense, a "final victory" for the Scruggs Law Firm. [Indeed, Richard Scruggs had previously been required to pay a substantial arbitration award to another plaintiff in the original *Wilson* case prior to the litigation in the Circuit Court of Hinds County.]

16. Moreover, the tape transcripts before the Court show that on November 13, 2007 Balducci told Mr. Backstrom the order sending the dispute to arbitration was "signed, sealed and

delivered." Balducci then asked Mr. Backstrom if he wanted Judge Lackey to keep the case and "kill it." Mr. Backstrom clearly rejected the suggestion the judge keep the case to kill it. The transcript also shows that Mr. Backstrom rejected the idea the judge "play ball." Mr. Backstrom rejected that idea, saying in effect, "Well, no, he should do what he feels is right based on what is before him."

17. As Mr. Backstrom has previously argued, 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: "[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." *Id.* 506 U.S. at 539, 113 S.Ct. at 938. "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).

18. In this case, the unfair prejudice suffered by Mr. Backstrom from being tried jointly with Richard Scruggs and Zach Scruggs has now been manifested again by this Court's reliance on the *Wilson* case allegation as a bases for impaneling an "anonymous jury." The undue prejudice is also shown by this Court's reliance on the case's notoriety, irrefutably shown by the adverse pre-trial publicity featuring the status of and charges against Richard Scruggs, as a reason for ruling the impaneling an "anonymous jury" is appropriate.

19. The use of an "anonymous jury" guarantees that, despite any limiting instruction this Court gives, the jurors will consider Mr. Backstrom to be part of the *Wilson* case and

involved in a pattern of attempting to improperly influence the judicial process. Mr. Backstrom will – because of no conduct or notoriety of his own -- be denied his right to be tried by known fellow citizens. *See United States v. Sanchez*, supra, 74 F 3d at 565.

20. Under these circumstances, Mr. Backstrom respectfully submits that this Court should reconsider the previous ruling and grant him a trial separate from any defendant who will stand trial by an anonymous jury and be subject to the *Wilson* case Rule 404(b) evidence.

WHEREFORE, PREMISES CONSIDERED, Defendant Sidney A. Backstrom respectfully requests that this Court sever his case from the remaining defendants in this indictment, and grant him a separate, public, and open trial before a publicly-known jury.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: ***/s/Frank W. Trapp***

Frank W. Trapp, MB #8261
James W. Craig, MB #7798
111 East Capitol Street • Suite 600
Jackson, Mississippi 39201-2122
P. O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300
Telecopier: (601) 360-9777
Email: Frank W. Trapp
trappf@phelps.com
James W. Craig
craigj@phelps.com

CERTIFICATE OF SERVICE

I, Frank W. Trapp, do hereby certify that I have electronically filed the foregoing Entry of Appearance on Behalf of Sidney A. Backstrom 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, John Keker, Esq., Todd Graves, Esq. and J. Rhea Tannehill, co-counsel for Sidney A. Backstrom.

This, the 12th day of March, 2008.

/s/Frank W. Trapp
Frank W. Trapp