**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**

# OBJECTIONS TO PRESENTENCE INVESTIGATIVE REPORT

Sidney A. Backstrom through his undersigned attorney, objects to the Presentence Investigative Report ("PSR") as follows:

## I. INTRODUCTION

1. There are two (2) substantive objections. One is to Paragraph 41 Specific Offense Characteristics and, the second is to Paragraph 44 Adjustment for Role in the Offense. Specifically, the 18 level increase for Specific Offense Characteristic must be reduced to 6. The two (2) level increase for role in the offense must be eliminated.

2. The PSR in Paragraph 41 incorrectly concludes "the benefit in this case to be approximately estimated at $5.3 million." The $5.3 million is relief sought by the Plaintiffs in the *Jones* case. The estimate of the benefit is based on an unsupportable false premise that arbitration would have resulted in an unfair resolution of the attorney fee dispute. This is a false premise because under state and federal law arbitration is favored. The Federal Arbitration Act sets a national policy in favor of arbitration. Arbitration is a fair process for resolving claims including claims for punitive damages.

> **Note:** To avoid misunderstanding, these objections are solely to place the conduct in what counsel believes is a fair and accurate statement of the facts and law. It is not to avoid or diminish acceptance of responsibility by Mr. Backstrom. To be clear, whether in the first instant a lawyer offers money or a judge asks for money, the payment of money by a lawyer to a judge is illegal—that is not disputed.

3. The arbitration provision in the Joint Venture Agreement provided the arbitrators with broad authority to grant relief. All claims in the *Jones* case, including punitive damages were a proper subject of arbitration. Senior Circuit Court Judge William F. Coleman has now ruled, under applicable Mississippi law, that the *Jones* case dispute should have been arbitrated (subject to sanctions for the conduct in this case).

4. No decision has been rendered on the *Jones* case claims in any forum. There is no credible evidence from which one can estimate or infer the *Jones* case Plaintiffs would have obtained $5.3 million more in the circuit court forum than in arbitration.

5. The PSR concluded Mr. Backstrom exercised supervision and management over Tim Balducci ("Balducci") and Steve Patterson ("Patterson"). There is no evidentiary bases to conclude Mr. Backstrom had any substantive communication with Patterson, much less exercised control over him. Contrary to the conclusionary statement, neither the PSR nor credible evidence show Mr. Backstrom exercised supervision or management over Balducci. Even crediting everything set out in the PSR, it shows Balducci was giving direction to Mr. Backstrom.

6. Crediting for argument sake all of Balducci's claims, the PSR shows Balducci directed Mr. Backstrom to prepare proposed orders; used him as an intermediary to communicate with Dick Scruggs; told Mr. Backstrom of his hiring by Dick Scruggs; told Mr. Backstrom he could change the Judge's order; and told Mr. Backstrom of the opportunity to have Judge Lackey fix the case by killing it. None of these singularly or in combination evidence control, supervision or management of Balducci.

7. The PSR shows Balducci and Patterson directed their attention and discussion to Dick Scruggs, not Mr. Backstrom. Dick Scruggs is the person who retained and authorized payment to Balducci and provided materials to him. On the other hand, Balducci simply used Mr. Backstrom to perform task and on occasion informed him of what was going on.

## II. SPECIFIC OFFENSE CHARACTERISTIC VALUE

### A. Arbitration Favored and Fair Process

8. As noted in the Presentence Report at paragraph 10, the underlying civil case of Jones, et al. vs. Scruggs, et al. (the "*Jones* case") was filed on March 15, 2007. On March 19,

2007, the Defendants in the *Jones* case filed a Demand for Arbitration of the attorney fee dispute with the American Arbitration Association ("AAA"). A copy is attached as Exhibit 4 to the Defendants' Motion to Stay Proceedings and Compel Arbitration (referred to as "Motion to Compel"). From March 19 forward, the civil defendants in the *Jones* case consistently sought arbitration.

9. On April 10, 2007, the Defendants filed the Motion to Compel. A copy of the Motion to Compel is attached as Exhibit "A." On April 10, 2007, the civil defendants also sent a Supplemental Demand for Arbitration to AAA. The Supplemental Demand specifies all claims asserted by the Plaintiff's First Amended Complaint in the *Jones* case are to be arbitrated. See Exhibit 5 to the Motion to Compel attached as Exhibit "A." These claims included Plaintiffs claims for one-fifth of the $26.5 million in attorney fees and for punitive damages. As noted, Special Circuit Court Judge Coleman has now ruled, subject to sanction for the conduct in this case, that the *Jones* case dispute should be arbitrated. A copy of his opinion is attached as Exhibit "B."

10. The Defendants in this case, specifically including Mr. Backstrom, continuously sought to have the *Jones* case dispute sent to arbitration. Arbitration would have been by a three (3) member panel selected from AAA's national roster of independent, neutral arbitrators. There is no allegation or suggestion any arbitrator or the arbitration process was or was targeted for improper influence.

11. An arbitration provision is a forum selection by parties to an agreement. *See e.g. Community Care Center of Vicksburg, LLC v. Mason*, 966 So. 2d 220 (Miss. App. 2007) (arbitration merely means both parties have agreed upon forum through which to pursue their claims). The Mississippi Supreme Court has stated arbitration is favored and firmly embedded in both federal and state laws. *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 521 (Miss. 2005). The Mississippi Supreme Court has held that arbitration of disputes is a "fair process in which to pursue claims." *Id* at 521; *Accord, Covenant Health Rehab of Picayune, L.P. v. Brown*, 949 So. 2d 732, 741 (Miss. 2007) (court struck a waiver of punitive damages in holding arbitration was a "fair process" for plaintiffs to pursue their claims)].

12. In *Vicksburg Partners*, the Mississippi Supreme Court upheld an arbitration provision contained in a nursing home admission agreement. The Supreme Court, however,

struck a provision in the agreement that waived punitive damages. *supra,* 911 So. 2d at 523-24. This allowed the nursing home resident, or her estate, to seek punitive damages in the arbitration proceeding. *See also*, *Forest Hill Nursing Center, LLC v. McFarlan*, 2008 WL852581 (April 1, 2008 Miss. App. Ct.) (arbitration agreement enforceable, in part, because no waiver of punitive damage provision).

13. All of the Plaintiffs' claims in the *Jones* case were arbitraitable. There is no rational bases to conclude the monetary result in arbitration would be different than a circuit court action or otherwise unfair to the Plaintiff (or unduly favorable to the civil defendants). Such an assumption conflicts with federal policy in the Federal Arbitration Act that favors arbitration. It also conflicts with the Mississippi Supreme Court ruling that arbitration is a **fair process**.

14. Federal law, also, allows arbitrators to award punitive damages. The parties to the Joint Venture Agreement in the *Jones* case, adopted a liberal arbitration provision. The Joint Venture Agreement did not contain any waiver of punitive damage provision. See Exhibit 1 to Exhibit "A." It did incorporate the guidelines of the American Arbitration Association ("AAA"). These include Rule R-43 which grants, to the arbitrators, broad authority to grant full relief. A copy of R-43 is attached as Exhibit "C." (All the applicable AAA rules are Exhibit 2 to the Motion to Compel which is attached as Exhibit "A.") Incorporation of the AAA rules authorize the arbitrator to award punitive damages. *See Bonar v. Dean Witter Reynolds, Inc.*, 835 F. 2d 1378, 1387-88 (11th Cir. 1998) and cases cited; *Lee v. Chia.*, 983 F. 2d 883, 887 (8th Cir. 1993). *See also, Mastrobuono v. Sheason Lehman Hutton, Inc.*, 514 U.S. 52, 61-62, 115 S. Ct. 1212, 1218 (Sup. Ct. 1995) (where arbitration clause does not exclude punitive damages and provides for broad relief it encompasses an award of punitive damages).

15. Here the Joint Venture Agreement incorporated the AAA rules. The Joint Venture Agreement did not contain any provision waiving punitive damages. Accordingly, there was no legal or contractual impediment to the award of punitive damages by the arbitrators.

B. **Payment Determines Specific Offense Characteristic Value**

16. U.S.S.G. §2C1.1(b)(2) provides, in part "the value of the payment [or] the benefit received or to be received in return for the payment…whichever is greatest…" shall be used to

determine the U.S.S.G. § 2B1.1(b)(1) level. The Background notes instruct that, "[i]n a case…in which the value of the benefit cannot be determined, the value of the bribe is used…."

17. Clearly, the joint venture lawyers believed that arbitration was a fair way to resolve any disputes when they signed the Joint Venture Agreement with the broad arbitration provision. As noted, courts have ruled arbitration is a fair process. Here, Judge Lackey was paid to enter an order compelling arbitration. There is no allegation of any effort to improperly influence the arbitration process. The PSR points to no evidence that shows or infers the arbitration process could result in an unfair outcome.

18. The $26.5 million in legal fees in question were paid as a result of arms-length settlement negotiations between the lawyers on behalf of their Katrina victim clients and State Farm Insurance Company ("State Farm"). The legal fees constitute a legitimate payment for legal services of the Scruggs Katrina Group in connection with settlement of 640 Katrina victim claims against State Farm. The Scruggs Law Firm rendered valuable legal services to these Katrina victims and was legitimately entitled to a share of the attorney fees.

19. Conceptionally, since the arbitrators decision must be presumed fair there cannot be any value assigned as the "net benefit" received in return for the payment to Judge Lackey. In addition, since there has been no decision in the *Jones* case, there are no amounts to use to try to infer a value of the net benefit that would have flowed from the bribe to send the case to arbitration. Here, the bribe only went to the procedural question of forum—not a substantive outcome.

20. The PSR's estimated $5.3 million net benefit received from the bribe contradicts logic, common sense and human experience. This estimate is premised on the bribers paying the judge to send the case to independent decision makers, over whom the bribed judge has no control, because the briber believed the bribed judge would give favorable treatment to the adverse non-bribing party. A "rational briber" would think the bribed judge would favor him, not disfavor him.

21. Balducci demonstrates how a "rational briber" operates. On November 1, Balducci made separate bribe offer to Judge Lackey. Balducci offered to split a $20,000 cash fee with Judge Lackey in return for fixing a criminal negligent homicide case. A rational briber, like Balducci, pays a judge to use his position to fix the case for the briber's benefit—not send the

case to an independent decision maker over whom the bribed judge has no control. (Transcript of November 1 taped meeting between Balducci and Judge Lackey)

22. In contrast, on November 13, Mr. Backstrom rejected the opportunity to have Judge Lackey keep the *Jones* case to "kill it." When Balducci presented that "opportunity," he first confirmed the order compelling arbitration was "signed, sealed and delivered." Balducci emphasized the judge was ready to do what they wanted and would keep the case to kill it. Thus, there is no credible evidence showing Mr. Backstrom believed or had reason to believe the circuit court was an unfavorable forum. The PSR fails to cite any credible evidence that suggests Mr. Backstrom believed the civil defendants or The Scruggs Firm would get better results in arbitration than in front of a judge, who he was told was ready fix the case by killing it.

23. The Application Notes: Paragraph 3, Application of Section (b)(2) make it clear "[T]he value of the benefit received or to be received' [in return for the payment] means the net value of such benefit." Even if one were to assume The Scruggs Firm would do better in arbitration than before a "bribed judge," there is no credible evidence from which one can calculate, estimate or infer the "net value of the [bribe] benefit." As noted above, The Scruggs Firm performed valuable legal services for the clients in connection with the State Farm litigation and settlement. The firm was entitled to be compensated for those services.

24. Since legitimate services are compensable, one must separate the value of legitimate services (without a bribe) from that extra value received due to payment of the bribe. *See United States v. Frega*, 179 F.3d 793, 812 (9th Cir. 1999) (must be credible basis in the record for reasonable determination of the "but for" bribe benefit.) The PSR cites no evidence or reasoning to support its speculation that the civil defendants saved $5.3 million by having *Jones* case claims referred to arbitration. The $5.3 million is the amount of relief requested in the civil complaint. There has not been any decision on the merits of the claim. Since there was no decision one does not know if Plaintiffs would have obtained all relief sought or not.

25. One must assume, absent credible evidence to the contrary, that the independent arbitrators would give Plaintiffs a fair decision on all of Plaintiffs claims. Unsupported speculation about the arbitration decision is not proof from which the net value of the benefit from the payment to Judge Lackey can be inferred or estimated; accordingly, the value to be used here can only be the amount of the payment. *See e.g. United States v. Muldoon*, 931 F. 2d

282, 289 (4th Cir. 1991) (evidence did not show net value of the benefit of the bribe thus measure value by amount of bribe to government employee). See also, *United States v. Sapoznik*, 161 F. 3d 1117, 1119 (7th Cir. 1998) (unclear how much bribe contributed to profit from illegal gambling thus measure value by bribe amount).

26. The value to be applied to the loss chart in U.S.S.G. § 2B1.1(b)(1) is $40,000 the amount of payment. The proper increase is 6 not 18. The use of $50,000 does not effect the result both amounts are between $30,000 and $70,000. The Specific Offense Characteristic level of 18 in Paragraph 41 of the PSR must be reduced to 6. The Adjusted Offense Level and Total Offense Level in Paragraphs 46, 48 and 50 must also be adjusted to reflect this reduction.

## III. ROLE IN OFFENSE

### A. No exercise of supervision or management over others.

27. The Presentence Investigative Report ("PSR") at Paragraph 44 recommends a two (2) level increase because Sid Backstrom "exercised a managerial or supervisory role over" Balducci and Patterson during the course of the conspiracy. The Background portion of the Application Notes for U.S.S.G. §3 B1.1 says the adjustment for role in the offense is primarily concerned about "relative responsibility" for the criminal offense.

28. In Paragraph 44, the PSR does not offer any explanation for how it reached this position. The PSR discussion of the offense does not support the conclusion that Mr. Backstrom controlled and directed either Patterson or Balducci. The two (2) level increase in Paragraph 44 for Role in the Offense must be eliminated.

29. The PSR does not allege Mr. Backstrom recruited Patterson or Balducci. In Paragraph 13, the PSR states it was Zach Scruggs who first suggested Balducci use his relationship with Judge Lackey to persuade him to rule in the firm's favor. The PSR at Paragraph 12 and 13 states Dick Scruggs "laid out the conspiracy strategy." Dick Scruggs gave direction to Balducci for his meeting with Judge Lackey. The PSR does not identify Mr. Backstrom having any affirmative role in either the recruitment or laying out the strategy at that meeting.

30. Dick Scruggs was the senior partner in The Scruggs Law Firm, primary owner of the firm and firm leader. Mr. Backstrom is a worker who takes on the yeoman task of getting

work out. It is consistent with his role generally in the firm as a roll up the sleeves worker, that Mr. Backstrom performed tasks at the direction of Balducci.

31. After the initial meeting there is no other substantive contact between Mr. Backstrom and Patterson. There were no communications between Mr. Backstrom and Patterson. None is described in the PSR. None are captured on the wiretaps or consensual recordings. There is no instant where Mr. Backstrom indirectly sent any guidance, instruction or directive to Patterson. All of Patterson communications involved one or more of P.L. Blake, Balducci and Dick Scruggs. There was no control of Patterson by Mr. Backstrom; nothing in the PSR to suggest otherwise.

32. Mr. Backstrom did not supervise or manage Balducci. Balducci had his own agenda with Judge Lackey. His offer of an "Of Counsel" position to Judge Lackey benefited the Patterson Balducci firm.. Balducci sought to cultivate a corrupt relationship with Judge Lackey in order to make money solely for himself and his firm fixing cases. On November 1, 2007, Balducci offered to split a $20,000 cash fee with Judge Lackey to fix a negligent homicide case. Obviously, Balducci believed this corrupt relationship was going to cure his firm's lagging local legal practice. (See November 1, 2007 transcript of meeting between Balducci and Judge Lackey). This bribe was solely for the benefit of Balducci and his firm. It had nothing to do with Mr. Backstrom.

33. In addition, Balducci and Patterson sought to capitalize on Balducci's close relationship with Judge Lackey to ingratiate themselves with Dick Scruggs. For example, it was Dick Scruggs (not Mr. Backstrom) they needed to call Jimmy Biden and Gabor, a lawyer practicing in Europe with whom they wanted to do business. (See e.g. September 27, 2007 wiretapped call between Patterson and Balducci attached as Exhibit "D.")

34. At the plea hearing, counsel voiced an objection to the allegations (1) that Mr. Backstrom drafted and e-mailed to Balducci the proposed order that Balducci faxed to Judge Lackey on May 4 and (2) that Mr. Backstrom had a four (4) minute conversation with Balducci on September 21 concerning the firm reimbursing or covering a $40,000 payment to Judge Lackey. Both allegations are set out in the PSR. Assuming for argument's sake here the disputed allegations were credited, neither one shows Mr. Backstrom supervising or managing Balducci.

B. **Balducci's Role.**

(i) **"Of Counsel" benefits only Balducci's firm.**

35. At the March 28, 2007 meeting Balducci, on his own initiative, offered an "Of Counsel" position with his firm to Judge Lackey when he retired. This "Of Counsel" allowed the use of Judge Lackey's name and reputation by the Patterson Balducci firm. This was solely to benefit the Patterson Balducci firm.

36. While not in the PSR, it is commonly known as the Patterson Balducci firm paid a monthly stipend to several prominent Mississippians for allowing the firm to list them as "Of Counsel." These Mississippians, include the Honorable Norman Gillespie, former Governor Bill Allain and former Chancellor Rodney Shands. Patterson and Balducci believed the use of these names brought prestige and business to their firm. Similarly, Balducci and Patterson desired to add Judge Lackey as "Of Counsel" because of his reputation would benefit their firm.

37. Mr. Backstrom did not direct, suggest or request this offer of an "Of Counsel" position be extended. Indeed, Mr. Backstrom had nothing to do with the offer. There is nothing to suggest he was even aware of the offer. Mr. Backstrom would not have paid Judge Lackey either directly or through The Scruggs Law Firm for the "Of Counsel" listing by Balducci's firm. Mr. Backstrom would not have benefited from the Patterson Balducci firm listing Judge Lackey as "Of Counsel."

(ii) **No May 4 e-mail order.**

38. Mr. Backstrom did not draft and e-mail the May 4, 2007 "Order Compelling Arbitration" that Balducci faxed to Judge Lackey. It is undisputed the FBI never found any trace of such e-mail or order in the electronic files of The Scruggs Law Firm or Balducci's electronic files. Indeed, according to the U.S. Attorney's office the FBI ran a word check for the misspelling of "Defnendants," but found no instant where the misspelling occurred in The Scruggs Law Firm electronic files.

39. Mr. Backstrom's secretary, who routinely drafts and finalized proposed order for him, never saw the order until after indictment. (See Affidavit of Linda Hollowell attached as Exhibit "E.") Mrs. Hollowell does not believe Mr. Backstrom drafted the order. See Affidavit of Linda Hollowell.

40. A copy of the order was located in Balducci's in-house word processor. See Exhibit "F." But no e-mail was produced by Balducci. This established Balducci drafted the order. Mr. Backstrom simply did not prepare and e-mail the May 4 order to Balducci. Balducci's claim otherwise is flat wrong.

41. Balducci told Judge Lackey the order was "some thoughts, ideas and suggestions I put down." (Transcript of May 4 taped conversation of Balducci and Judge Lackey.) On May 9 and May 21, Balducci repeatedly told Judge Lackey only the two of them and Dick Scruggs knew of their conversations. (Transcripts of May 9 and May 21 taped conversations of Balducci and Judge Lackey.) These contemporaneous statements also refute his story or show he is a chronic liar. Undoubtedly his uncorroborated claims are unreliable.

42. Moreover, for purposes of this discussion of role in the offense, crediting the Balducci version set out in the PSR at paragraph 16, does not show management or supervision by Mr. Backstrom. If anything happened on May 3 or 4 that involved anyone at The Scruggs Firm, it was a result of Judge Lackey's call to Balducci on May 3, 2007. See PSR Paragraph 15. Following Judge Lackey's call, Balducci would have initiated and directed the drafting of any proposed order. Drafting an order in response to Balducci's instruction (or request) does not show supervision or management by the drafter.

(iii) **Recusal-Unrecusal-Hearing**

43. The PSR omits discussing Judge Lackey's recusal. Following the recusal on May 23, 2007, no one at The Scruggs Firm directed Balducci to attempt to persuade Judge Lackey to get back into the case. Judge Lackey produced his notes related to this case at a hearing in the *Jones* case. In his notes, Judge Lackey recounts a meeting with Government counsel on June 1. According to Judge Lackey's notes, there was an agreement that he would unrecuse himself to see if there was any attempt to contact him about the *Jones* case.

44. In early June a hearing was set for July 17, 2007 in the *Jones* case. After the hearing date was set, Judge Lackey visited the Patterson Balducci firm office on June 28. He was wearing a wire. The *Jones* case and the upcoming hearing were not discussed. (*See* Transcript of June 28, 2007 tape.) Similarly after the hearing, Judge Lackey was not contacted by Balducci.

(iv) **Post Hearing Contacts**

45. In August, Judge Lackey initiated contact with Balducci to discuss the *Jones* case. In response to Judge Lackey's inquiry, Balducci said Dick Scruggs wanted arbitration. (*See* Transcript of August 9, 2007 tape.) On September 18, Judge Lackey initiated the discussion of money saying to Balducci, "If I help them, will they help me?" Balducci said absolutely no question. "I'm the one that needs to handle that." (See Transcript of September 18, 2007 tape). There is no contention Mr. Backstrom authorized or directed Balducci in these communications.

(v) **No September 21 "cover" call**

46. In a follow-up meeting with Balducci on September 21, Judge Lackey said he wanted $40,000 due to a financial problem. Balducci committed to paying the money to get the help needed for his financial problem. (Transcript of September 21, 2007 tape.) Balducci claims following his meeting with Judge Lackey that he had a four (4) minute call to The Scruggs Firm. Balducci claims he talked to Mr. Backstrom and asked if they (the firm) would cover a $40,000 payment to Judge Lackey. Then he claims sometime within a couple of days, Mr. Backstrom called him back to say the firm would cover the payment.

47. If one, for the sake of argument, credits his claim, at best it shows Mr. Backstrom is a go between, not supervisor or manager of Balducci. Thus, even crediting this story shows Mr. Backstrom was not making any decision or directing Balducci but only acting as an intermediary. Playing an essential role in the offense is not the equivalent to exercising managerial control over another. *See United States v. Lalonde,* 509 F.3d 750, 766 (6th Cir. 2007). An intermediary in this context is not exercising supervision or management.

48. The credible evidence shows this conversation did not occur. First, Mr. Backstrom denies having a conversation with Balducci in which covering a $40,000 payment to Judge Lackey was discussed. There is no record of a call from Mr. Backstrom to Balducci within several days of September 21. Balducci repeatedly told Judge Lackey that no one else knew of the payment. In a wiretap conversation with Patterson, Balducci says he did not discuss the $40,000 with Mr. Backstrom. (See Exhibit "G, Excerpts of October 8, 2007 wiretap conversation of Patterson and Balducci.")

49. The entire episode involving P.L. Blake related communications set out in the PSR make no sense, if Balducci had already, as he later claimed, direct confirmation of the cover from Mr. Backstrom. Why would Balducci and Patterson go through P.L. Blake if there was such a direct confirmation?

50. In a wiretap conversation between Patterson and Balducci on September 27, 2007, Balducci says Dick Scruggs made the two (2) calls they needed: one to Jimmy Biden and the other to Gabor, a lawyer practicing in Europe. Patterson asks Balducci if Dick Scruggs had talked to P.L. Blake (about their solving the problem for $40,000). Balducci said he had not, so Balducci told Dick Scruggs to expect a call from P.L. Blake. Balducci never says anything to remotely suggest Mr. Backstrom had already confirmed the cover. If the September 21 four (4) minute call to Mr. Backstrom occurred—there was no reason Balducci would not have confirmed the alleged cover directly with Dick Scruggs at that meeting on September 27. (Transcript of September 27 wiretap attached as Exhibit "D").

51. Lastly, Balducci's claim is also inconsistent with Mr. Backstrom turning down Balducci's proposal on November 13 to have the judge keep the case to "kill it." And Mr. Backstrom telling Balducci the judge should do what he feels is right based upon what was before him.

(vi) **September 24 order**

52. On September 24, Mr. Backstrom did, at Balducci's direction, prepare a simple proposed order for the *Jones* case. On September 21, Judge Lackey asked Balducci for an order. Sometime later Balducci instructed Mr. Backstrom to prepare a proposed order on the *Jones* case. Balducci told Mr. Backstrom to leave the order at the front desk of The Scruggs Law Firm for him to pick up. This is not Mr. Backstrom managing or supervising Balducci, rather it's Balducci instructing Mr. Backstrom to prepare an order and directing how it would be delivered to him.

(vii) **Balducci is unreliable**

53. The unreliability of Balducci, if not outright eagerness to lie about Mr. Backstrom, is demonstrated by Balducci's grand jury testimony. In that testimony, Balducci lied when he proclaimed, in some detail, that on September 27 he met twice with Mr. Backstrom at

The Scruggs Law Firm in Oxford. He swore he met with Mr. Backstrom to pick up a draft order on his way to meet Judge Lackey. He then swore he returned to Oxford office where he debriefed Mr. Backstrom on the delivery of $20,000 in cash and order to Judge Lackey. *See* Exhibit "H" Excerpt of Balducci Grand Jury Testimony.

54. On the morning of September 27, Mr. Backstrom was in New Orleans for a 1:00 p.m. deposition. He traveled to New Orleans the day before, spent the night and returned to Oxford on September 27 after completing a deposition at 6:35 p.m. (See Exhibit "I" Affidavit of Hugh Wayne King and Exhibit "E" Affidavit of Linda Hollowell.) Balducci's testimony to the grand jury in which he detailed these meetings in Oxford on September 27, was demonstratively and irrefutably false.

(viii) **P.L. Blake, et al.**

55. The entire episode involving P.L. Blake, Patterson, Balducci and Dick Scruggs, did not involve Mr. Backstrom at all. The PSR states that Patterson and Balducci, on two (2) different occasions, sought Dick Scruggs' agreement to "cover" the payment to Judge Lackey. (See PSR Paragraphs 20, 22.) Obviously, Balducci believed Mr. Backstrom lacked any authority to bind the firm since he and Patterson sought to deal with Dick Scruggs.

56. Indeed, it was Balducci who informed Mr. Backstrom that Dick Scruggs had retained him to work on a Katrina case Mr. Scruggs was preparing for trial, that he received a $40,000 retainer and that he delivered an order to Zach Scruggs. (Transcript of October 18, 2007 wiretap conversation.) By omission of any reference to him, the PSR recognizes Mr. Backstrom had no involvement in authorizing or disbursing the $40,000 nor providing the "false documentation as a cover." This absence clearly shows Mr. Backstrom was not exercising supervision or management of Balducci.

(ix) **November 1**

57. During a meeting with Judge Lackey on November 1, Balducci delivered the last cash installment of $10,000. As discussed above, Balducci then proposed to split a $20,000 cash fee with Judge Lackey to negligent homicide case. Again this bribe had nothing to do with Mr. Backstrom who knew nothing about it.

58. On the afternoon of November 1, in an undercover capacity, Balducci presented Mr. Backstrom with an order from Judge Lackey, instructing him to make any changes he wanted. Mr. Backstrom did not change anything. Declining to make a change in response to Balducci direction cannot be considered controlling Balducci or otherwise directing his action.

59. Mr. Backstrom was not present at the November 1 conversation between Balducci and Dick Scruggs. Balducci did not discuss with Mr. Backstrom the need for additional $10,000 for Judge Lackey. Mr. Backstrom had nothing to do with authorizing that $10,000 check to Balducci or providing the "false documentation as a cover" to Balducci. Again, this demonstrates he had no supervisory or management control over Balducci.

(x) **November 13**

60. On November 13, Balducci told Mr. Backstrom that Judge Lackey had "signed, sealed and delivered" the order compelling arbitration. Balducci then said that there was an opportunity to have Judge Lackey keep the *Jones* case and "kill it." Mr. Backstrom declined the opportunity. When Balducci said the judge would do whatever they wanted, Mr. Backstrom replied no. He said the judge should do what he felt was right based upon what was before him. (Corrected Excerpt of Transcript of November 13 tape attached as Exhibit "J" with accompanying affidavit of James Griffin.)

61. Mr. Backstrom responses to Balducci do not constitute the exercise of management or supervision of the commission of criminal conduct. Indeed, it is mitigating evidence. Mr. Backstrom's responses were inconsistent with an inference of exercising control over a criminal offense. He rejected Balducci's proposal of having the case fixed by the judge. This rejection shows that unlike Balducci, he was not a threat of repeat offense and his relative responsibility for the offense is substantially less than Balducci.

## VI. OTHER OBJECTIONS AND INFORMATION

62. We disagree with the Balducci version of the initial meeting set out in Paragraphs 11, 12 and 13 of the PSR. The factual inaccuracies, however, do not alter the substance that Mr. Backstrom played no role in "recruiting" or directing Balducci and Patterson's actions at the initial meeting. The inaccuracies do not alter the fact that Mr. Backstrom exercised no control or gave no directions to Balducci in connection with his meeting with Judge Lackey.

63. It is noteworthy to state all defendants at the initial meeting deny there was an intent to corruptly influence Judge Lackey. Indeed, there was no discussion of Balducci offering Judge Lackey an "Of Counsel" position with the Patterson Balducci firm. Testimony in hearings in this case, establish, for example, that Balducci told the FBI that Dick Scruggs instructed him not to do anything illegal.

64. With respect to Paragraph 61 of the PSR, Mr. Backstrom also has hypoglycemic, a blood sugar irregularity that sometimes causes him to faint. A fainting episode has occurred both while engaged in physical activity and while sedentary. We request this be added to his medical history.

## VII. CONCLUSION

For the reasons stated above, Sidney A. Backstrom respectfully requests the Court to grant his objection to Specific Offense Characteristic 18 level enhancement in Paragraph 41 and reduce that to 6 levels based upon the amount of payment to Judge Lackey, and grant his objection to the two (2) level increase for Role in the Offense in Paragraph 44 by eliminating the two (2) level increase; and the Court make the necessary adjustment to the Offense Level to reflect granting of the objections.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Frank W. Trapp, do hereby certify that I have electronically filed the foregoing Objections to Presentence Investigative Report 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 11th day of June, 2008.

***/s/Frank W. Trapp***
Frank W. Trapp