

**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

**MOTION FOR RECONSIDERATION OF MOTION FOR
ACCESS TO PRESENTENCING LETTERS CONCERNING
DEFENDANTS**

COMES NOW THE DEFENDANT, Sidney A. Backstrom ("Mr. Backstrom"), and requests that the Court reconsider its Order granting Gulf Publishing, Inc.'s Motion for Access to Presentencing Letters Concerning Defendants and would show that any access Gulf Publishing has to the "presentencing letters" should be restricted.

1. Gulf Publishing, by motion of June 17, 2008, has requested that this Court provide it with access to unsolicited sentencing letters addressed to the Judge who will sentence Mr. Backstrom.

2. Before Mr. Backstrom could respond, the Court, on June 20, granted the motion.

3. Mr. Backstrom requests that the Court reconsider its ruling. Gulf Publishing relies only on one distinguishable case, *McClatchy Newspaper, Inc. v. United States District Court*, 288 F.3d 369 (9th Cir. 2002), as authority for allowing the media to have access to these letters addressed directly to the sentencing judge. In that case, the 9th Circuit Court of Appeals allowed access to letters written to the United States Attorney by the attorney of a convicted felon. The letters were written pursuant to a plea agreement. The plea agreement allowed for a reduction in the convict's sentence, if the government determined that the convict's cooperation

warranted a reduction in his sentence. The letters contained information about alleged corrupt acts by a "high political figure" and allegations of bribery by a local businessman. Issuance of the letters became an issue only after the reduction of the convict's sentence, his release, and the revocation of his parole for failing to pay restitution.

4. The *McClatchey* court, under 9th Circuit precedent, found that the public's right to monitor judicial proceedings and obtain access to Court documents outweighed the privacy interests and damage to reputation that the public official and individual might suffered by the disclosure of their names. *McClatchey*, 288 F.3d at 374. The holding of the case relates solely to post-sentence letters that contained alleged criminal allegations and were alleged to be a factor in reducing a convict's sentence.

5. Other District Courts specifically addressing the issue of sentencing letters have reached a different conclusion about the media's right to access unsolicited letters sent directly to the sentencing judge. See *United States v. Kushner*, 349 F. Supp.2d 892 (D.J.N. 2005); *United States v. Gotti*, 322 F. Supp.2d 230 (E.D.N.Y. 2004); *United States v. Lawrence*, 167 F. Supp.2d 504 (N.D.N.Y. 2001); *United States v. Corbitt*, 1988 WL 94278 (N.D. Ill. 1988), *vacated and remanded on other grounds*, 879 F.2d 224 (7th Cir. 1989).

6. *United States v. Lawrence* held that the sentencing letters were to be treated in the same manner as presentence reports. *Lawrence*, 167 F. Supp. 2d at 507-08 (citing *United States v. Boesky*, 674 F. Supp. 1128, 1128-30 (S.D.N.Y. 1987)). In the Second Circuit Court of Appeals, presentence reports are confidential, non-public records that are not subject to disclosure to third parties absent "a compelling demonstration that disclosure of the report is required to meet the ends of justice." *United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1171 (2d Cir. 1983). In so holding, the Second Circuit relied, in part, on the Fifth Circuit's decision in *United States v. Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977). In *Martinello*, the Fifth Circuit

held stated that "requiring disclosure of a presentence report is contrary to the public interest as it may adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused, for use in the sentencing process."

7. While the letters at issue in this case are not from the accused, many, if not all, are of a confidential nature, intended by the writer to be confidential by their text. *See Boesky*, 674 F. Supp. at 1129. In this sense, the disclosure of sentencing letters submitted to the sentencing judge "would undermine the integrity of the fact-gathering procedure involved in preparing presentence reports." *Lawrence*, 167 F. Supp. 2d at 507 (quoting *Boesky*, 674 F. Supp. at 1130). Just as the disclosure of presentence reports would interfere with the Court's ability to obtain candid information about the accused, routine disclosure of sentencing letters might have "a chilling effect and discourage the valuable input as to the character of the defendant and other relevant sentencing concerns that would be garnered from the community during the sentencing process."

8. Based on the rationale of *Lawrence* this Court should refuse to disclose the sentencing letters submitted to it.

9. Another line of reasoning also concludes that sentencing letters may be withheld from disclosure to third-parties, including the media. In *United States v. Gotti*, the Court analyzed disclosure under both the First Amendment right of access to criminal trials and the common law right of access to judicial documents.

10. Moreover, the Second Circuit recognizes a First Amendment right to judicial documents. *Gotti*, 322 F. Supp. 2d at 239. By contrast, the Fifth Circuit does not recognize any First Amendment right to judicial documents. *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426-27 (5th Cir. 1981). Consequently, Gulf Publishing's request for access to the sentencing letters does not implicate any First Amendment right.

11. The common law right of access to judicial documents is the proper analytical lens through which the Court should assess Gulf Publishing's request. *See Gotti*, 322 F. Supp. 2d at 250. Under Fifth Circuit case law, a Court is afforded broad discretion in determining whether to close judicial documents to the public. *See Belo*, 654 F.2d at 429-30 (finding that trial court's decision not to allow copying of tapes entered in evidence at criminal trial was not abuse of discretion). The cases from other district courts that specifically have address the issue of disclosure of sentencing letters have uniformly determined that such letters should not be disclosed. *See United States v. Kushner*, 349 F. Supp.2d 892 (D.J.N. 2005); *United States v. Gotti*, 322 F. Supp.2d 230 (E.D.N.Y. 2004); *United States v. Lawrence*, 167 F. Supp.2d 504 (N.D.N.Y. 2001); *United States v. Corbitt*, 1988 WL 94278 (N.D. Ill. 1988), *vacated and remanded on other grounds*, 879 F.2d 224 (7th Cir. 1989).

12. The concern expressed in those cases about the privacy concerns of persons submitting such letters to the Court consistently outweighs any benefit to the public in knowing their content. Such is the case here. This Court should follow the precedent of these sister district courts who have addressed the specific issue of disclosure of sentencing letters submitted to the sentencing judge. This Court should exercise its discretion to maintain the confidences and personal information revealed in the sentencing letters submitted on behalf of Mr. Backstrom. The Court should deny Gulf Publishing's motion to obtain access to these letters.

Respectfully submitted,

PHELPS DUNBAR LLP

BY: /s/Frank W. Trapp

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CERTIFICATE OF SERVICE

I, Frank W. Trapp, do hereby certify that I have electronically filed the foregoing Motion to Reconsider 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 Kecker, Esq., Todd Graves, Esq. and J. Rhea Tannehill, co-counsel for Sidney A. Backstrom.

This, the 20th day of June, 2008.

/s/Frank W. Trapp
Frank W. Trapp