UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 09 CR 002-2
v.	)	Judge Glen H. Davidson
	)	Magistrate Judge S. Allan Alexander
BOBBY B. DELAUGHTER	)	
	)	
Defendant.	)	

DEFENDANT DELAUGHTER'S MOTION FOR PRETRIAL HEARING CONCERNING CO-CONSPIRATORS' STATEMENTS

Defendant, **BOBBY B. DELAUGHTER**, by and through his attorneys, **THOMAS ANTHONY DURKIN, JOHN D. CLINE,** and **LAWRENCE L. LITTLE,** respectfully moves this Court, pursuant to the Due Process, Effective Assistance of Counsel, Counsel of Choice, and Confrontation Clauses of the Fifth and Sixth Amendments to the Constitution to the United States, Rules 801(d)(2)(E) and 104(a) of the Federal Rules of Evidence, and the principles enunciated in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1988) and *United States v. James*, 590 F.2d 575 (5th Cir. 1979), as follows: (1) for a pretrial evidentiary hearing; or, in the alternative, (2) a formal written proffer by the government that permits the Court to determine preliminarily, and prior to the impaneling of the jury or the swearing of the first witness, the admissibility of co-conspirator statements against him so as to insure against the risk of a mistrial, and not so economically prejudice Defendant into having to defend a second case that he would be without funds to defend with private counsel of his choosing.

In support of this motion, Defendant, through counsel, shows to the court the following:

1. Judge DeLaughter, along with the Co-Defendant, Richard F. "Dickie" Scruggs, is charged in Count One with conspiring to violate 18 U.S.C. § 666, the federal bribery statute. Both Judge DeLaughter and Scruggs are also charged in Counts Two, Three, and Four with "honest services" mail fraud in violation of 18 U.S.C. §§ 1342 & 1346. Named as co-conspirators or co-schemers, but not charged as defendants in these counts, are Joseph C. Langston, Timothy R. Balducci, Steven A. Patterson and Ed Peters. Count One also alleges other co-conspirators both known[1] and unknown to the Grand Jury.

2. In the indictment and from the limited course of discovery provided to date, the government has described certain conversations which it alleges will implicate Judge DeLaughter in the conspiracies alleged in the indictment. Counsel presumes as well that certain documents will also be sought to be introduced.

3. While many of these statements and documents appear to be hearsay as to Judge DeLaughter, the government will likely argue that they are admissible under Rule 801(d)(2)(E) as statements made by co-conspirators during the course of and in furtherance of the conspiracy.

4. Before such statements are admitted, however, this Court must make a preliminary determination as to their admissibility pursuant to Rule 104(a) of the Federal Rules of Evidence. *Bourjaily v. United States, supra*. Such a determination must be premised upon the government's presenting to the Court sufficient evidence to convince the Court that it is more likely than not that: 1) a conspiracy existed; 2) the defendant and the declarant(s) were members thereof; and, 3) the proffered statement(s) were made during the course of, and in furtherance of,

[1] See, Defendant DeLaughter's Motion for a Bill of Particulars , p.2 ¶ I(2) & p.3 ¶ II(3), requesting the identity of these known but unnamed individuals. The use of known but unnamed individuals only heightens the concerns addressed herein regarding the need for a pre-trial determination regarding co-conspirator statements.

the conspiracy. *James, supra,* at 579-581; See also, *United States v. Santiago,* 582 F.2d 1128 (7th Cir. 1978), and *United States v. Cox*, 923 F.2d 519, 527 (7th Cir. 1991).

5. The Fifth Circuit's seminal decision setting forth its requirements for use of hearsay testimony of a co-conspirator under Rule 104(a) requires that the judge alone make the determination of the admissibility of the evidence. The court warned that: "the jury is to play no role in determining the admissibility of the statements… Because of our conclusion … that the trial court's threshold determination of admissibility is normally to be made during the presentation of the government's case in chief and before the evidence is heard by the jury, it is more appropriate to adopt a 'substantial' evidence rule rather than one which requires, at that stage of the proceedings, a 'preponderance'of the evidence." The court concluded, therefore, that a declaration by one defendant or co-conspirator is admissible against another defendant only "upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy." The Court added that "as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury." 590 F.2d at 579-81. (Emphasis added) See also, *United States v. Miliet,* 804 F.2d 853, 856 (5th Cir. 1986).

6. Subsequently, the Fifth Circuit has read the United States Supreme Court decision, in *Bourjaily v. United States,* 484 U.S. 171 (1987), as modifying the *James* decision by holding that "the offered statement itself can properly be considered along with the other evidence in determining whether the hearsay declarant was the defendant's co-conspirator." *United States v. Perez,* 823 F.2d 854, 855 (5th Cir. 1987). Otherwise, "the dictates of *James* are not changed" by *Bourjaily. United States v. Ascarrunz,* 838 F.2d 759, 762 (5th Cir. 1988).

7. Even before *Bourjaily*, the Fifth Circuit "parenthetically noted that the *James* rule format is not absolute; hearsay testimony may be adduced before the court makes the *James* findings. *United States v. Lauga,* 762 F.2d 1288, 1291 (5th Cir. 1985). In *United States v. Manzella,* 782 F.2d 533, 545 (5th Cir. 1986), the Court held that *James* does not *require* the trial court to hold a pre-trial hearing to determine the admissibility of a co-conspirator's statement. See also, *United States v. Fragoso,* 978 F.2d 896, 899 (5th Cir. 1992).

8. However, the Fifth Circuit has likewise recognized that while a pre-trial hearing is not mandated, *James* "indicates that one *should be held* 'whenever reasonably practicable…'" *United States v. Nichols,* 695 F.2d 86, 90 (5th Cir. 1982)[Emphasis added], and "the optimum method for avoiding inadvertent introduction of hearsay and resulting reversible error…'" *United States v. Gonzalez,* 700 F.2d 196, 203 (5th Cir. 1983). Thus, the following guidance appears to remain undisturbed by *Bourjaily* or ensuing decisions of the Fifth Circuit:

> In order to prevent the jury's being prejudiced by inadmissible hearsay, *James* establishes two procedural safeguards. *Ideally, before trial* the prosecutor should make a showing of substantial…evidence that the statement is admissible. Then at the conclusion of evidence, considering both the prosecution's evidence *and* the defense evidence, the trial court must find that the preponderance of the…evidence shows the statement is admissible. The district court *should, whenever reasonably practicable,* require the showing of a conspiracy *and of the connection of the defendant with it before admitting declarations of a co-conspirator." Nichols,* 695 F.2d at 89-90 [Emphasis added]. [2]

9. Moreover, it should be recalled that the Fifth Circuit proclaimed in *James* itself, unmolested by *Bourjaily*, that it was intending to establish only *minimum* standards for the introduction of co-conspirator declarations. Its instruction to trust courts in this regard is well worth repeating:

> This opinion intends to establish *minimum* standards for the admissibility of co-conspirator statements. Nothing stated herein shall prevent a trial judge from requiring more meticulous procedures…to assure that statements (1) are not admitted until properly

[2] "To connect a defendant to a conspiracy, the Government must show that the defendant knew of the conspiracy and voluntarily joined it." *United States v. Salvatore,* 110 F.3d 1131, 1146 (5th Cir. 1997)

> authenticated by substantial…evidence and (2) do not remain in the proof to be submitted to the jury unless their admissibility is established by a preponderance of the evidence." *James,* 590 F.2d at 583 [Emphasis added].

10. In *Nichols,* the trial court opined that a pre-trial evidentiary hearing would be burdensome. Significantly, however, instead of totally depriving the court itself of any advance knowledge of the Government's evidence in this regard, it "held a proffer hearing," wherein both sides gave proffers of what their evidence would be. In affirming this procedure, the Fifth Circuit reiterated its statement in *United States v. Ricks,* 639 F.2d 1305, 1309 (5th Cir. 1981):

> "'Whatever be the form of the hearing, its use is merely to inform the trial judge as to whether or not the proponent of co-conspirator statements has sufficient evidence that they [are admissible].' We will not condemn this procedure…" 695 F.2d at 90.

The obvious reason the Fifth Circuit will find no fault in the district court judge who avails himself of such a pre-trial procedure is that "[t]he danger of offering hearsay before a *James* ruling lies in the risk that the court will ultimately disallow the evidence and a mistrial (or reversal on appeal) will be mandated." *Lauga,* 762 F.2d at 1291. [3]

11. Defendant submits as well that this case presents an exceptional circumstance where such a hearing will not only result in greater judicial efficiency, but also avoid substantial and very real potential prejudice to Judge DeLaughter as his connection to the charged conspiracies is based solely on the uncorroborated testimony of alleged co-conspirators – evidence which is slim at the very best, and legally suspect in the first instance. See, Defendant's Motion to Dismiss Count One for Failure to Charge an Offense and Defendant's Motion to Dismiss Counts Two, Three and Four for Failure to Charge an Offense, filed simultaneously herewith, and incorporated herein by reference.

[3] The Fifth Circuit has made it also clear that "the trial court has 'discretion to determine the application of the *James* ruling and rationale in the specifics of the trial setting encountered.'" *Manzella,* 782 F.2d at 545

12. Based on the lack of substantial direct evidence against him, and the tenuous legal thread supporting the allegations of federal criminal liability, a serious question can be said to legitimately exist in this case that the government's proof will fail to show that Judge DeLaughter was a knowing and intentional member of the charged conspiracy or scheme.

13. Nothing can demonstrate the legal and evidentiary problems with this case better than the attached transcript of the presentation made by Assistant U.S. Attorney Norman, the lead prosecutor in this case, in an oral argument before Judge Biggers on February 21, 2008, in *Scruggs I*.[4] A transcript of this hearing, marked Exhibit A, are attached hereto and made part hereof. Attempting to defeat Scrugg's motion *in limine* to exclude the very evidence in this case under Rule 404(b) – evidence that the Defendants "vehemently denied" at the time – Mr. Norman remarkably conceded the following in describing the conduct of Scruggs and his cohorts in the Wilson case:

> "Wilson is interesting in several respects. First, what strikes me about this case, unlike most cases we try in this courtroom, these aren't unsophisticated people. These are extremely sophisticated lawyers at the top of their game, at the top of their trade.
>
> *There was no effort to get Bobby DeLaughter to break the law. There was no effort to get Bobby DeLaughter to rule in violation of the law. That would have been foolish, and these men are smart.* What they wanted Bobby DeLaughter to do was shade the law at every opportunity, to ensure a victory they probably would have anyway." (Exhibit A, p. 18, lines 4-14) (Emphasis added)

14. This transcript also makes for good reading with respect to various other factual and legal weaknesses in this prosecution, as quite ably pointed out by Scruggs' counsel. Without belaboring the point, even a quick reading of this transcript points out the shifting sands of the government's evidence. Or, as Scruggs' counsel rather colorfully suggested:

[4] As the Court may well be aware, Co-Defendant Scruggs was charged along with his son David Zachary Scruggs, Sidney A. Backstrom, Timothy R. Balducci and Steven A. Patterson in cause number 3:07-cr-00192-NBB-SAA, entitled *U.S. v. Scruggs, et al*. This case involved allegations of a $40,000.00 FBI-surveilled cash payment from Balducci to Circuit Judge Henry Lackey. All Defendants have pleaded guilty before Judge Biggers.

> "I think the goal posts are moving a little bit here. They're [now] not going to prove a crime, they're going to prove a, quote, bad act. And I'm now not sure what the bad act is. It's not bribing Judge DeLaughter; it's not paying him to influence any opinion. It's paying him to shade the law? What law was – there was no law shaded." (*Id.*, p. 20, lines 7-13).

15. While Mr. Norman goes on to urge Judge Biggers that he does believe this conduct amounts to a crime, as opposed to a bad act, as is pointed out in our motion to dismiss the "honest services" mail fraud counts it is exactly this type of "I know it when I see it" prosecutorial discretion that creates honest services constitutional implications in the first place.

16. In light of this legal debate and paucity of evidence linking Judge DeLaughter to the charged conspiracies, it is strongly submitted that this case, indeed, cries out for a pre-trial evidentiary hearing. Without a hearing, this Court will be left solely with the representations of the government that its evidence will sufficiently connect DeLaughter to the alleged co-conspirators – a bad idea generally and an even worse one under the tenuous theory of prosecution here.[5] This will lead inevitably to endless side bars or other hearings outside the presence of the jury, considerable confusion, and, worst of all, the very real possibility that this case will result in a mistrial. Worse yet, the Court will be left with little or no assurances that the jury will not mistakenly rely upon the co-conspirator statements, admitted preliminarily, as evidence of DeLaughter's membership in the charged conspiracies.

17. And, for Judge DeLaughter, a mistrial will most certainly deny him his constitutional right to counsel of his choosing. See generally, *Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed. 2d 140 (1988). Judge DeLaughter has been a public servant for most of his professional life, having served as a Hinds County Assistant District Attorney from 1987 to 1999; as a County Court Judge in Hinds County from 1999 to 2002; and then as a Hinds County Circuit Court Judge from 2002 to the present time. The reality of Judge DeLaughter's

[5] This debate before Judge Biggers could not drive that point home any more clearly.

relatively modest financial means, and the costs of defending a case of this magnitude with private counsel, only exacerbates the very real need to avoid a mistrial in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant DeLaughter's Motion For Pretrial Hearing Concerning Co-Conspirators' Statements was served on March 26, 2009, in accordance with Fed.R.Crim.P.49, Fed.R.Civ.P.5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA . Cause No. 3:07CR192
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Plaintiff . Oxford, Mississippi
. February 21, 2008
v. . 9:30 a.m.
.
RICHARD F. "DICKIE" SCRUGGS .
DAVID ZACHARY SCRUGGS .
SIDNEY A. BACKSTROM .
.
Defendants .
. . . . . .

MOTION HEARING
BEFORE THE HONORABLE NEAL B. BIGGERS
U.S. SENIOR DISTRICT JUDGE

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Proceedings recorded by mechanical stenography, transcript produced by computer.

(CALL TO ORDER OF THE COURT)

THE COURT: All right. Gentlemen, yesterday, I think we decided that we would start today with the motion to dismiss Counts 2, 3, and 4. But since this 404(b) material is fresh on all of our minds, we won't have to reiterate it to talk about that motion. If you gentlemen are ready to go to the 404(b) material, I prefer to do that. If you're not, we can go back to the 2, 3, and 4.

MR. KEKER: We're ready, Your Honor.

MR. NORMAN: We are, Your Honor.

THE COURT: Okay. Well, let's go to the 404(b), Mr. Keker. Just one second. I saw Mr. Trapp stand up. You were going to talk on the --

MR. TRAPP: I just wanted to say good morning, Your Honor. I'm so far down here I wasn't sure if you could see me.

THE COURT: Barely. All right, Mr. Keker.

MR. KEKER: Mr. Trapp's worried (inaudible). The 404(b) has two issues, as the Court well knows. I'm not going to talk about the law very much on the first one. But the first issue is whether or not the evidence is just there to show character, bad character, or is there some intent, motivation, opportunity, plan, scheme; is it relevant to one of the enumerated issues of 404(b).

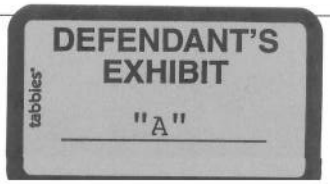
The second part of 404(b) is equally and maybe more important; and that is, if you determine that there is some

probative value, does that probative value substantially outweigh the risks that are basically 403 risks, unfair prejudice, confusion of the issues, causing to delay in the trial.

We believe that this evidence about Wilson v. Scruggs, which is a case that was before a lot of judges from 1994 on, but among them was Judge DeLaughter in Hinds County, meets both -- does not meet either one of these tests. At most, it's character evidence; and second, it's -- it would lead to a lot of unfair prejudice, confusion of issues, and so on. And I think you got a taste of this yesterday.

I'm not about to talk to you about what the law in this area is because you know it very well. You got a taste for Balducci. Balducci says in response -- Mr. Balducci says in response to a question from the prosecutor, how did you know when you were there agreeing to bribe a judge that -- and you'd never talked to Mr. Scruggs about bribing a judge, and you're agreeing to bribe a judge, how did you know that the Scruggs -- Scruggs would cover it for you, cover this money? He's paying money to a judge.

And Mr. Balducci, who was a witness -- I think you could see he was somewhat motivated to help the prosecution -- says "because he bribed another judge." You say, well, excuse me? What other judge? Judge DeLaughter, he said, was bribed. How was he bribed? Was he bribed with money? No, it wasn't money.



But I believe he offered him a federal judgeship? No, he didn't offer him a federal judgeship. He offered to try to get him on a list for a federal judgeship. Well, okay. That's very interesting.

What was Judge DeLaughter suppose to do? Vague I mean, I'm not sure what Judge DeLaughter was suppose to do. He certainly and that case didn't involve money. Mr. Langston has said, in front of all the lawyers here, in front of them, I believe; over and over and over again, that he knows of no money that ever went towards Judge DeLaughter.

THE COURT: You say Mr. Langston?

MR. KEKER: Mr. Langston is the person who

THE COURT: I know who he is, but I don't know where he how do you know what he said to him?

MR. KEKER: Here's how we know, because when he entered his plea before Judge Mills, here's what happened: He was representing Mr. Scruggs. Mr. Zach Scruggs' lawyer, Mr. Farese, at some point while this case was pending, took Mr. Langston, Mr. Scruggs' lawyer. So this is Mr. Zach Scruggs's lawyer takes Dick Scruggs' lawyer into the Government and they make a deal for Mr. Langston.

And Mr. Langston gets and goes to Judge Mills, not to you; and they make a they put a lid on it, and he is now cleared for all crimes, known and unknown, according to his plea agreement. And he is the witness and we have no idea

what was motivating Mr. Langston

THE COURT: I think the plea agreement said related and unrelated.

MR. KEKER: Beg your pardon. Beg your pardon. Related and unrelated. But all as I understand it, all crimes. And we expect the Government to call and when they gave us 404(b) notice, they said "good and sufficient notice is for you to go read his allocution of the plea where Mr. Dawson described what the offense was." And he said that the offense was from December of 2006 until March of 2007 there was a conspiracy to influence Judge DeLaughter by promising him to recommend get him on a list or something for a federal judgeship. And in return, they were going to get favorable rulings.

Now, there's a lot of things that are interesting about that and a lot of things that I think you need to consider as you go forward and think about whether or not this evidence is going to make the trial of this indictment a fair one. First of all, let's just start with Mr. Scruggs strongly denies any kind of bribe or corruption in the Wilson v. Scruggs case, doesn't know of any; and we believe that this minitrial would show that there wasn't any.

The issue of favorable rulings, we don't know what they're talking about. There were some favorable rulings to Mr. Scruggs; but most importantly, there were unfavorable

rulings to Mr. Scruggs. And indeed, the summary judgment motion in that case was denied. Other motions were denied. I can show them to you if you want to. The case went to trial. When the case went to trial, Judge DeLaughter had been trying to get that case settled for a long time, as any decent judge would have.

And after the case was in trial, it finally did settle; and this whole dispute between Mr. Wilson and the Scruggs firm ended up with Mr. Wilson getting close to $4 million as you heard yesterday, not as much as he wanted but not a goose egg. Every decision in that case and I challenge them to point to one decision that that this doesn't fit was correct on the law. You read those order after order after order, they're right; they make sense.

Judge DeLaughter did what was apparently an excellent job. He made the decisions that any good judge would have made; it was a contract case. The thing of value in that case, Mr. Scruggs doesn't appoint judges. Senator Lott, Senator Cochran don't appoint judges. No one knows of any recommendation that Mr. Scruggs has ever made for a judgeship that has been accepted as a recommendation from a senator.

These senators and Mr. Scruggs are from different political wings. Judge DeLaughter, as I understand it, is a democrat. So and again, it's the White House that appoints judges, not the senators.

And then, what judgeships are they talking about? There were three during this period, and I think it's worth noting. Judge Lee went senior in April. Judge Jordan, two weeks later, was appointed to take his position. Judge Barbour went senior in February of 2006. Judge Southwick was appointed in June, before the trial of this Wilson v. Scruggs case.

THE COURT: Southwick was to the circuit.

MR. KEKER: Okay. Then I got that wrong. I thought that Southwick Judge Barbour's position was filled by somebody, and I've got it wrong. I'm not sure who it

THE COURT: I'm not sure it's ever been filled.

MR. KEKER: Oh, I'd understood we've got some he was announced as a circuit court judge. Is he the one that replaced Judge Pickering when that didn't work out?

THE COURT: Yes.

MR. KEKER: I think that's right. So there was an announcement in June that Southwick was taking Judge Barbour's place in the district court and or at least was nominated for that; and then, apparently, they changed and put him on the Fifth Circuit.

THE COURT: Well, Barbour's position, I think, is still open, isn't it?

MR. KEKER: And that's what Mr. LeBlanc was just telling me. And then Judge Bramlette announced senior status in March of that year and Judge Ozerden in September was

appointed to that position. But so whatever the vacancies were, they were all filled during the time that the Government alleges this conspiracy happened. And this the notion of a quid pro quo just sort of doesn't line up, doesn't make any sense.

The Judge Ozerden position, by the way, was always designated or people, at least, understood that it was probably going to go to a south Mississippi, south coast person.

If the issue is whether or not there's anything criminal or wrong or even unusual about Mississippi lawyers or California lawyers or any other state lawyers recommending to people that they know a good judge for a federal judgeship, whether or not they have cases pending before them, then we'll have to try that issue.

Because we know that some of the most I mean, one particularly, highly, highly respected lawyer in Jackson was recommending Judge DeLaughter to Senator Lott at the same time; and this lawyer happened to have in his office many cases before Judge DeLaughter. People who don't have cases before a judge could look forward to having cases before a judge. People who don't have cases now maybe had cases in the past and so on. Recommending a good judge to the federal bench is not a crime.

So the point is, to get through this, to get the experts

to talk about what this case was about, how Judge DeLaughter ruled, what happened when, what work the lawyers did, would really swamp the case that the indictment is about and has very, very little to do with it.

It is unfair let me start out with, the most huge unfairness here is for the defendant Zach Scruggs and Sid Backstrom. It's my understanding that the Government doesn't contend, at least hasn't so far, that the evidence is admissible or relevant as to either of them.

So this would be one of those deals where they would suggest to you that we try the case for a week; we work very hard to understand Wilson v. Scruggs; we talk about all these orders; we call experts; and then your instruction to the jury that they should just ignore this evidence when it comes to considering the cases of Dick Scruggs' son and his partner, Mr. Backstrom.

I mean, it's just not going to work, Your Honor; and I think a judge of your experience can evaluate that, obviously, for yourself. It's unfair to Dick Scruggs. If the Government wants to bring this case as a separate charge, I guess they will do it. There's nothing anybody can do about that. But the idea that Langston, who was the counsel of record in Wilson v. Scruggs they say that he just popped on the scene in, I think, January and filed an appearance, January of 2006.

He was he filed an appearance in the Hinds County

action, but he'd been in this case since at least 2004. The case was in Federal Court in the Southern District of Mississippi. Judge Lee stayed it so that state court action could proceed for sort of an accounting action, and then there was more to do in federal court. He'd been involved in it for a long time. He wasn't a newcomer to the case.

Another reason of unfairness which we don't we haven't played out yet is that there's various privileges involved here that may be invoked and may make it difficult for us to get all the evidence that we need to counter whatever it is Mr. Langston feels like saying.

And I just raise I asked the Government if they would accommodate us by getting witnesses that I believe were under their control to the hearing. And they informed me and they very graciously did that. Mr. Langston is available if you want to hear from him. But I asked about Mr. Ed Peters, who is the local formal D.A., local lawyer in Hinds County that was hired.

And, again, if it's a crime to hire if the charges that they were worried about getting hometowned in Hinds County, then that's true; they were worried about it. Judge DeLaughter's former law clerk was on the other side, was had good relations with Judge DeLaughter, was advising the lawyers, Mr. Merkel and others, about how to litigate that side of the case.

Mr. Scruggs side of the case, through Joey Langston, hired Mr. Ed Peters, who was also both a friend, former boss, professional colleague of Judge DeLaughter, had a lot of cases before him. Still has a lot of cases before him I believe. But that's what it was. I don't think that's certainly, it's not a crime. It's not unusual. And it doesn't lead to the charge here.

So what we've learned when we asked for Ed Peters to come here is that they informed us that his lawyer said he might take the Fifth. I don't know. We'll still try. Judge DeLaughter, I don't know what the situation is going to be there.

I do know that both Senators Lott and Cochran, who we understand make these recommendations by consensus, not by one person deciding things, have speech and debate clause with the United States Constitution privileges, which they may or may not assert; I just don't know. But they certainly are important witnesses.

This gives us about a month if you decide to let this in. We've got to go out and get experts to study this file and come in and testify about the fact that these were good, honest, true, supported by law, fair, proper rulings. That's going to take a lot of time.

And then another unpleasant loose end is the one I already mentioned. The idea that Mr. Zach Scruggs' lawyer thought that

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it was okay to take Mr. Dick Scruggs' lawyer into the Government and insist that these are really separate matters; therefore, he doesn't have a conflict, is something I suppose we'd have to get into.

So I don't know what to say about I mean, I can argue it more legally. But this really does sound like one of those instances where a trial judge, using his discretion, has to decide maybe to put it put it to the Government. I mean, if the Government says that they want to prosecute Mr. Dick Scruggs for this and call it a crime, then we ought to do it all at once. We'll try that case. But it won't be with Sid and Zach because they're not under 8(b), they couldn't be joined to that case.

And I guess the basic question is, If the Government thinks they have a case that they can prove beyond a reasonable doubt; they went to the grand jury, they brought it back; you've heard a lot about it, why shouldn't they just go ahead and do that and not, basically, divert the jury into some other direction?

I believe that if you're thinking about this it would be very useful for you to hear from Mr. Langston, not for a long time, but and from Mr. Peters, too, about what the contours of this allegation are so that you can decide whether or not it makes any sense to try them as 404(b) in this case. And we would ask you to do that. We'd ask for a hearing where I can

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examine Mr. Langston about some of these matters for a little while, whatever time limit you want to put on it.

THE COURT: All right. Now, you know, Mr. Keker, the Court's not going to give you a license to compete with Marco Polo for a fishing expedition, as we got into yesterday almost. And I'm not sure that 404(b) entitles you to anything more than reasonable notice by the prosecution of what of the substance, the gist, of what they intend to prove, if it's allowed, in a 404(b) type testimony.

So the fact there is law to the effect, previous similar cases, that the that this notice requirement of 404(b) does not supersede the Jencks Act, which limits you to your discovery, as you know. I'm not even sure you're entitled to know what Mr. Langston is going to say until after he testifies on direct.

Of course, they can give you the substance of what he says if they're ordered to, you know, earlier than that, like they've done on these other witnesses. But I want to hear what the Government has to say about Mr. Langston being called to testify in this case, in this hearing.

MR. KEKER: Could I respond just real briefly?

THE COURT: Yes.

MR. KEKER: The purpose of putting Mr. Langston on is not some right what we're saying is there's I think I said enough and you know enough about the dangers of this kind

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of evidence so that it would be well within your power, and in this case would make a lot of sense, to have a Rule 104 of the Federal Rules of Evidence hearing where a trial judge can insist on a proffer, and the proffer can come in whatever form.

It can come from the Government; it can come from the witness. But before Mr. Langston and I am not talking about Jencks Act. Before he gets up and talks to a jury who's supposed to be trying this case about Judge Lackey getting a cash bribe in this case, that we all know about, and Mr. Langston completely clutters it up with these allegations, which are far afield and we don't believe have any probative value, but to the extent that they that you think otherwise, we're just off on a frolic and a detour and a whole other case.

And then afterwards you think, Gee and then we stand up after Mr. Langston testifies and say, We need the Jencks Act material, and we need a continuance, and we need all this stuff to counter these allegations. We've got a real trial problem on our hands, and we will try to avoid it. But one way to deal with it is to put Mr. Langston up and make a good firm decision now after you listen to him, that I don't want to get into this in this trial.

If the Government thinks this is a crime, they have a way to deal with it; they can bring a charge. If they just want to kind of use it to clutter up this case, then we're not going to let them do that. That's where we think you ought to come out.

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And then, as I said, they're about to argue their severance motion. But it seems to me that they haven't over I mean, we can talk about limiting instructions to the jury all we want. But those of us who have tried cases for a long time know there are certain kinds of things that can't be overcome by limiting instructions.

THE COURT: All right. As I understand the Government's position at this point I'll like to hear what they have to say about it they would contend I'm drawing this conclusion from their brief that they filed in opposition to your motion to disallow 404(b), that they intend to offer this for the purpose of proving intent. That's as I understand their position at this time.

Now, 404(b) also allows testimony of previous bad acts to prove absence of mistake or misunderstanding, as you know. Now, if Mr. Scruggs got on the stand and said, Well, this is a mistake, I gave this is a mistake. Mr. Balducci and I misunderstood each other. The money that I gave him I did not understand it was to be for to bribe Judge Lackey. I was giving it to him for some work he had done for me, and it was all a mistake.

Now, would that 404(b) evidence of Mr. Langston also be available to show the absence of a mistake, if that defense were put on by you?

MR. KEKER: I think the Government would argue at

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that point something diff they wouldn't argue 404(b); they'd argue impeachment. I mean or and they might to the extent that they did, but that's not the situation that we have. The situation that we have I mean, I can see Mr. Scruggs testimony opening the door to various things that otherwise might not be admissible in this trial.

But I can also see it not opening the door, and it's not we don't know whether Mr. Scruggs is going to testify or not. It depends on what the Government does. What we're talking about now and what I'm moving to exclude is use in the case in chief of this information as required by 404(b). And I think that's a much different and really, I guess I should make that clear.

We're not asking you to make a decision about what evidence can come in on cross examination. We may ask you to make that decision during the trial or something before we put Mr. Scruggs on but and try to get advanced rulings. But we're not asking for that now. We're asking for, Should this come in, in the Government's case in chief?

THE COURT: Okay. I understand. Mr. Norman.

MR. NORMAN: Good morning, Your Honor. We spent yesterday hearing that Mr. Scruggs had no criminal intent. I took that as the gist of the motion to dismiss yesterday, that the Government had created some crime, that Mr. Scruggs had no intention of violating the law. And now we stand before you

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arguing the 404(b) that goes directly to that point.

Your Honor, I'd like to talk first about the Wilson case and then talk about why I believe its relevance outweighs its prejudicial value. Wilson is interesting in several respects. First, what strikes me about this case, unlike most cases we try in this courtroom, these aren't unsophisticated people. These are extremely sophisticated lawyers at the top of their game, at the top of their trade.

There was no effort to get Bobby DeLaughter to break the law. There was no effort to get Bobby DeLaughter to rule in violation of the law. That would have been foolish, and these men are smart. What they wanted Bobby DeLaughter to do was shade the law at every opportunity, to ensure a victory they probably would have anyway. And that's an irony that's interesting in both these cases, both in the matter involving Judge Lackey and in the matter involving Mr. Wilson.

There is every reason to believe that the Scruggs Law Firm probably would have prevailed in both those cases. The strange part about this is that wasn't good enough. They had to have an edge. And that resulted in efforts to corrupt judges free, if possible, because these are businessmen. They know the value of a dollar. Free, if possible.

But if it was necessary to pay, they were willing to do that. Not only because of the $30 million at stake, the $26.5 million at stake, but also because of the status involved.

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Your Honor, in the Wilson case, Mr. Langston and Mr. Balducci came into that case when it became clear that Mr. Dunbar wasn't being as successful as Mr. Scruggs would like. And Bobby DeLaughter, sitting on the bench, had a best friend, a best friend in the world; he'd worked for as an assistant DA, when he tried the cases that they've made movies about. That boss, of course, as everybody knows, was Ed Peters. And it was common knowledge that the two were tight.

The brief testimony of Joey Langston would be that they hired Bobby DeLaughter. And at first, we heard they hired him as a consultant

THE COURT: You mean Ed Peters.

MR. NORMAN: Ed Peters, I'm sorry. No money went to Bobby DeLaughter. They hired Ed Peters to be a consultant. What struck me first was, That makes no sense. Ed Peters has been a prosecutor, like me, for 30 years. Like me, he knows nothing about civil litigation. Why pay him a million dollars to bring him in to advise sophisticated civil lawyers on how to try civil cases? That's absurd.

They brought him in as Joey Langston would testify, they brought him in and paid him a million dollars, $50,000 cash, followed by monthly payments making up a million dollars to corruptly influence his best friend, Bobby DeLaughter. And then, to be sure, they dangled a federal judgeship in front of him.

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Now, everybody in this courtroom knows Mr. Scruggs doesn't have the ability himself to do that. But he has the connections to the senator. Counsel opposite would argue that the senator does not appoint judges. And everyone in this courtroom knows that, best of all, Your Honor. But Your Honor also knows how valuable it is to have a senator put you on the list. And that's what happened.

And Joey Langston would say they made sure Bobby DeLaughter knew they caused that to happen. And they did it in the middle of trial when it was critical. Did Bobby DeLaughter violate the law

THE COURT: What do you mean they did it in the middle of the trial?

MR. NORMAN: As the case was pending and approaching its completion, after, I think, ten years of litigation this happened in March when the case was settling going to trial and then settling in the summer of 2006. As Joey Langston and Tim Balducci took over the representation of the Scruggs Law Firm, commencing some time, I think, in the fall of 2005 but really getting hot in December 2006 and culminating in August of 2006 when the matter settled.

By the time the matter got to trial, the judges' rulings had whittled away at the plaintiff's case to the point where Bobby DeLaughter said from the bench to counsel for both sides, "I don't know why you want to try this case, nothing's left but

bragging rights." And he was right.
It is true that there was a judgment against the Scruggs Law Firm. But it's important to know it was a victory for them because they paid no new money. That's what they'd already paid Wilson. They, in effect, won on the merits.
And they did that not by asking Bobby DeLaughter to actually break the law
THE COURT: I don't know. You still haven't explained my question. What do you mean in the middle of the trial?
MR. NORMAN: In the middle of the pendency of the case, I should have said, Your Honor, not in the actual trial of the case, the pendency of the case. I'm sorry.
Your Honor, the testimony would be brief from Mr. Balducci, about what you heard yesterday. The testimony at trial from Mr. Langston would be brief, about what you've heard from me this morning. That testimony would also implicate Zach Scruggs. Joey Langston is prepared to testify that Zach Scruggs was fully aware of what was going on in the Wilson case. It will not implicate Sid Backstrom.
However, the Peterson case stands for the proposition that if 404(b) evidence is admissible against a defendant, then with a proper limiting instruction, it is admissible in the case in chief. Now, as we all know, this Court has complete discretion in this matter; and in the event the Court decides to allow

this evidence, it could be in the case in chief or it could be in rebuttal.
I'd like to address that point very briefly, without citing a case from another circuit that I cited in my brief, because I don't think the Court will find that particularly persuasive.
But as you know, Your Honor, the Beechum test is that, first, this extrinsic evidence must be relevant to a question that's critical to the trial of our case. And second, the probative value has to outweigh the prejudicial effect, where the intent involved in the extrinsic acts is the very same intent that's alleged and that must be proven by the Government in this case. The Beechum decision stands for the proposition. That, in and of itself, satisfies the relevancy prong of the Beechum test. Obviously, the Court still has to make that determination; and that's discretionary with the Court.
Then the question is, Is it overly prejudicial? And the Beechum court suggested that we consider the similarity of these two, the extrinsic offense and the charged offense, in making the decision whether or not the probative value outweighs the prejudicial effect. What are the similarities? First, these two offenses both involved
THE COURT: Okay. I think I understand the similarities from what was said yesterday. But what is your position on the extent of discovery that would be available to

the defendants, as far as expanding the length of the trial; and what would be the what would you have to prove in order to prove that this action, alleged action, by Mr. Scruggs was a similar crime? Would you have to prove the same elements that you have in this case, that you have to prove in this case? Or would it just be that Mr. Langston said it happened and that's it?
MR. NORMAN: First, Your Honor, I think it's important to start by saying that the evidence of extrinsic acts doesn't have to be a crime at all. Simple bad acts are sufficient if they're relevant. However, in this case, it was a crime; and that's part of the similarity between the two offenses. The standard of proof that we must use, Beechum says, "This Court should determine, before admitting that evidence, that a reasonable jury could find on that evidence that the extrinsic acts actually occurred."
THE COURT: All right. But would you have to prove, for example, the Title 18, 666, material that you have to prove in this case?
MR. NORMAN: No, Your Honor. Because of the fact that all is required is bad acts. We believe that crime occurred, but we don't have to prove that. We have to prove that a bad act occurred that is relevant to something other than general character in this case.
Now, counsel opposite also brought up privileges. I don't

know if the Court wants me to address that or not, but I'd like to. Because I'd like for the Court to know that when Mr. Farese brought Mr. Langston in to plead guilty to this offense of attempting to bribe a judge in the Southern District, attempting to corruptly influence that judge, he obtained written waivers from both, both Mr. Zach Scruggs and Mr. Langston, before doing that. And I've not seen them. I haven't asked to. I haven't cross examined him, but I'm sure they're available if need be.
Your Honor, as far as a privilege, any attorney/client privilege goes, as the Court well knows, if a lawyer and his client are involved in a crime together, there is no privilege. Now, we don't anticipate any executive privilege on the part of a senator. I don't believe you're going to see that as a problem. So I don't see that privilege will be an issue.
What kind of notice are they required to have?
THE COURT: Okay. You don't need to go into that. I've looked at that in your briefs. But who would you anticipate calling if this type material were allowed into evidence, what witnesses?
MR. NORMAN: Your Honor, we'd already have Tim Balducci on the stand; and I would ask him, basically, what I asked him yesterday. That would probably be the first time this issue would be before the Court for your determination. Secondly, we would call Joey Langston. And his testimony, I

believe I could the direct examination, I could do in five minutes. We would call Senator Lott, and I believe his testimony would be short, sir.

THE COURT: All right. Thank you.

MR. KEKER: Could I respond to some of that?

THE COURT: Yes, you may.

MR. KEKER: Let me start I think the goal posts are moving a little bit here. They're not going to prove a crime; they're going to prove a, quote, bad act. And I'm now not sure what the bad act is. It's not bribing Judge DeLaughter; it's not paying him to influence any opinion. It's paying him to shade the law? What law was there was no law shaded.

They're going to prove that Ed Peters, who was a friend of the judge and a former boss and a person who has many cases before him and does a lot of work before him and is a person that lots of lawyers in this state hire as local counsel when they go down to Hinds County because he knows he's part of the courthouse crowd, to balance Mr. Kirksey, the judge's former law partner, who's there for the same reason Mr. Merkel's got him.

We are going to try that and try to explain to this jury that, you know, that's not really that's kind of maybe it's the way things are done. Maybe you like it; maybe you don't like it. But it doesn't have anything to do, ladies and

gentlemen, with the charge that's before you.

But we're going to spend a lot of time trying that because what they're they aren't willing to say it's a crime. They're not willing if they think it's a crime, then they can carry out their professional responsibilities and deal with it. They have grand jury power. But so, first of all, that concerns me.

And then second of all, the idea that they are going to call Tim Balducci, who has some hearsay, and Joey Langston, who has his deal and whatever he's going to say about this, and that that's going to be the end of it; and that we're just suppose to sit there and cross examine them for five minutes after they testify for five minutes, is not on any planet that I'm knowledgeable about.

We want to call they just in this presentation, there's a lot of people who have been accused of a lot of nastiness. And if nothing else, they ought to have the right to come forward and say the way they see it. Mr. Peters, if we can get him on the stand, we'll put him on the stand. Judge DeLaughter, if we can get him on the stand, we'll put them on the stand. Senators Lott and Cochran, we want them both.

And then we want the lawyers in Jackson who have cases pending before Judge DeLaughter, like Joey Langston, who are recommending Judge DeLaughter as a federal judge because they think he's a good judge. A lot of people think he's a very

good judge.

When you get into this file and find out what this case is about, it was decided before Judge DeLaughter even got ahold of it, it was decided that the contract between Mr. Scruggs and Mr. Wilson was clear and unambiguous; and we're not going to have parole evidence; and your rights depend on the word existing and the word is.

It's one of those trials about what does is mean? And Judge DeLaughter wrote an opinion saying, "Is is what it is, and existing means existing." And what he told these people is, "I'm strictly construing the contract and that leads to simply an accounting."

And when the accounting was all done, it turned out that the $6 million that Mr. Scruggs had paid Mr. Wilson was enough, so that Mr. Wilson wasn't owed more money. And at that point, when Mr. Wilson figured that out and figured that he was that's what the bragging rights is about. But this case went to trial, summary judgment was denied, a lot of money changed hands in Mr. Wilson's favor. It was a fair and fully litigated thing.

Mr. Langston and I think we'll bring this out, and I think Mr. Langston's got enough ego that he'll probably admit this did a heck of a job. He took advantage of a foolish effort by Mr. Wilson's lawyers to say to the judge, we want we want you to determine under this existing what is due

under the contract. And once that was determined, it turned out that Mr. Scruggs had paid, by the $6 million, enough money to cover all of the claims that Mr. that Mr. Wilson had.

So all of that is going to have to be litigated. And at the end of it, the jury and, I think, you are going to be left scratching your heads thinking, What has this got to do with, and haven't we really gone way away from the things that the jurors are sworn to do, which is make a decision about the charges in this indictment.

He says that this shows intent. I don't see the intent at all the same. Mr. Balducci, at the behest of Judge Lackey, said, Okay, I'll bribe you. And the question in that case is whether or not Mr. I mean, various cases whether or not Mr. Scruggs joined that conspiracy, and so on.

But nobody contends that a bribe to Judge Lackey for an order is some kind of I mean, is okay. It's clearly a corrupt act. The jury is going to understand that. And the question is, Who was responsible for it? And, so, whatever the intent is in that case, they have to nobody's going to wonder whether or not if you knowingly are making a cash bribe to a judge you have that kind of intent.

Over here, what they are going to have to do is figure out, Is there anything wrong? And now we're getting is it a bad act to hire Mr. Peters? And this million dollars, by the way, Your Honor, this they've said in their proffer there

was a reverse contingency fee. If you guys do better than X, you get some money. And they did better than X, and they got some money. It wasn't, up front, here's a million dollars to go do something.

So I think, just this discussion, is kind of getting now they say before they didn't say; but now, I guess, they say that Mr. Zach Scruggs I don't thoroughly understand. But, clearly, Mr. Backstrom is not involved in this and is not involved in these allegations. And the idea that he has to sit through this is a big problem.

So this keeps moving. I mean, we now know here's what you know, the similar act, it was not an effort to get Judge DeLaughter to violate the law. It was not an effort it was not involving any money to Judge DeLaughter or anything of value, except that at some point oh, and you asked about chronology. Let me make sure that this is straight because we've gotten some discovery on this.

Senator Lott called Judge DeLaughter on about March 29th. Said, I understand you're interested in a judgeship; why don't you send me a resume. Turns out he already had resumes from other people, that had sent him Judge DeLaughter's. This is March 29th of 2006. Judge DeLaughter wrote him a letter and sent it the next day. It's dated March 30th.

Two of the judgeships were gone very quickly, Judge well, at least one of them was. Judge Jordan was appointed

very soon after that. The trial in this case wasn't until August. Summary judgment rulings, some of which went against the Scruggs firm, were in July. So there it's not it doesn't connect up. It's not like this case. It doesn't add anything. And in fact, it detracts. We'll be spending a lot of time dealing with something that has really nothing to do with this indictment. If they can prove this indictment, let them do it.

MR. NORMAN: Your Honor, excuse me. Counsel opposite misstated one fact, unintentionally I know.

THE COURT: All right. You may rebut shortly.

MR. NORMAN: All I wanted to say to the Court is that at one point counsel opposite said there was no money up front to Ed Peters, and that isn't true. It is true that there was a reverse contingency agreement; and because of that agreement, a lot of this money went to Mr. Peters. But $50,000 of amount went to Mr. Peters up front in cash in a plain brown envelope with the statement being made, "There's no 1099 on this."

MR. KEKER: And I don't think the evidence maybe we can find out. Is there going to be any evidence that Mr. Scruggs said, Pay Mr. Peters as a consultant without a 1099 or in cash; or was that something as I understand the evidence, that's something that Mr. Peters I mean, Mr. Balducci and Mr. Langston cooked up.

THE COURT: All right. Well, we'll see, maybe. The

Court is fully advised at this point of what the evidence is that the Government wishes to introduce under 404(b), fully apprised sufficiently to rule on this motion. I do not feel at this time that there's that any testimony by any witness would be productive or would add anything that's necessary to be known to the Court before ruling on it.

The Court wants to take this motion under advisement and read a couple of cases that have been presented to me in your briefs again before ruling. And the Court will take this motion of 404(b) under advisement and rule on it within a few days.

All right. Who is going to represent the defendants on the dismissal of Counts 2, 3, and 4?

MS. LITTLE: Your Honor, I will. I'm Jan Little from Keker & Van Nest.

THE COURT: All right, Ms. Little.

MS. LITTLE: Thank you. Good morning, Your Honor.

THE COURT: Good morning.

MS. LITTLE: Counts 2, 3, and 4 charge the defendants with violating 18 USC Section 666(a)(2), which criminalizes the offer of a thing of value to an agent of a state or local Government with an intent to influence him in connection with any business or transactions of such Government agency provided that the Government or agency receives over $10,000 in federal funding in a one year period surrounding the charge.

Now, the Government here claims that Judge Henry Lackey is an agent of two entities, Lafayette County and the Administrative Office of the Courts. There are three questions that Your Honor must answer in evaluating our motion. First, is Judge Lackey an agent of either Lafayette County or the Administrative Office?

Second, if so, was the purported bribe made in connection with any of the business of Lafayette County or the Administrative Office? And third, if both of those things are true, is it constitutional, under these facts, to apply the statute to this conduct? And we respectfully submit that the answer to each of these questions is no. This conduct cannot be charged under Section 666.

First, we'll start with the agency question; and we'll start with the statute. The Statute 666 defines an agent as a person authorized to act on behalf of an organization or Government; and they give the example of servant, employee, officer, manager, or representative.

And then in the Fifth Circuit, the Phillips case I think both sides agree that the Phillips case sets forth various factors that are considered in applying this statute. Your Honor, Judge Lackey of the Third Circuit Court of Mississippi is not an agent of Lafayette County. Lafayette County is one of eight counties in the third circuit, but he is not an employee or officer of Lafayette County.

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We start with the Mississippi Constitution. Article I of the Mississippi Constitution sets forth the three branches of Government. Article V discusses the executive branch and includes in Section 135 and 138 the county officers under the executive branch, including sheriff, coroner, assessor, clerks of court, members of the board of supervisors, but not judges.

THE COURT: If he's not an agent of the county or the Administrative Office of the Courts, who is he an agent of?

MS. LITTLE: He's a member of the judicial branch. It is a separate branch of Government.

THE COURT: Is he an agent of any governmental institution?

MS. LITTLE: I suppose he'd be an agent of I mean, he's an agent of the courts, of the Supreme Court. I mean, it comes under the judicial branch, Article VI, which has the judicial branch, as opposed to article V, which is the executive branch.

THE COURT: I think the statute also says a manager, doesn't it, an agent or a manager of a governmental unit?

MS. LITTLE: Yes. But Judge Lackey is not a manager of Lafayette County either nor is he manager of the administrative offices of the U.S. excuse me of the courts. I say U.S. Courts; I'm thinking Your Honor certainly wouldn't consider yourself a manager of the AO of the federal judiciary.

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THE COURT: No. Well, I don't know. But anyway sometimes I think they're the manager of us.

MS. LITTLE: I think Mr. Meacham thinks that, Your Honor, but

THE COURT: Yes. But he's gone now.

MS. LITTLE: Okay.

THE COURT: But, at any rate, does not a circuit judge manage some of the moneys of the county?

MS. LITTLE: Your Honor, the legislature will appropriate moneys that can used for courthouse facilities and the like. But that doesn't make Judge Lackey a manager of the county any more than you know, Your Honor has to sign CJA vouchers, for example. Those are moneys that are appropriated by the U.S. Treasury. They're appropriated down.

You have to sign the vouchers for those moneys to be paid for indigent defense, but that doesn't make you an agent of the U.S. Treasury, nor does it make you an agent of the Administrative Office. It's the three branches of Government each have their roles. The legislature appoints the funds, and they're used by the Courts as necessary.

This is in the Hosford case, and the Supreme Court of Mississippi discusses this, how it's the legislature's obligation to provide the funding that's necessary for the courts to do their business. But that does not create an agency relationship.

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With respect to let me just talk for a minute about the Administrative Office. I think the Mississippi Constitution answers the question for Lafayette County. It's a separate branch of Government, period. With respect to the Administrative Office, we can look to the Mississippi Code, Section 9 21 3 or excuse me dash 1, which is cited in our brief, which says that the Administrative Office of the Court's purpose is to administer the nonjudicial business of the courts. That sort of answers it right there.

Judge Lackey is doing the judicial business and the Administrative Office does the nonjudicial business. Judge Lackey is not an agent of the Administrative Office. And again, if you apply the Phillips' test, the Administrative Office does not set the judge's duties; the Administrative Office does not supervise the judges, does not pay the judges' salaries. Those all come from the state; they do not come from the Administrative Office of the Courts.

The second factor that Your Honor must consider is whether this alleged bribe happened in connection with any of the business of either Lafayette County or the Administrative Office. And again, this is really it's tied to the agency question. It's really, Is there an action that's in the scope of the agent's power?

And again, Judge Lackey does not conduct the business of Lafayette County. He conducts the judicial business, but he

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doesn't operate funds or do any of the business of Lafayette County. I mean, the business he conducts is settling disputes between private litigants. And Lafayette County could even be a litigant before Judge Lackey. But he does not conduct Lafayette County's business.

THE COURT: Well, could a under your theory, could a circuit judge ever be a party to a 666(e) charge?

MS. LITTLE: Yes, if there's some relationship to some moneys involved. For example, the Castro case cited in our brief talks about kickbacks to a judge in order to get public defender appointment moneys paid. Or, for example, there's the Massey and the Grubb case which involved judges spending moneys for the hiring of detectives.

So when there's a bribe to a judge that somehow involves the judge doing something involving moneys, then there can be a 666 violation. Here, the claim is that a bribe was paid to influence a judge's ruling, has nothing to do with anything with the public funds. It's simply to influence a ruling between private parties.

And interestingly, the only cases where that kind of conduct has happened they're out of circuit. But the Frega case in San Diego this is a huge investigation in San Diego involving 12 years' worth of corruption where plaintiffs' lawyers were paying superior court judges to influence their rulings in cases. And Judge Rafeedie in San Diego said that

cannot be a 666 violation.
Similarly, the McCormick case out of Massachusetts cited in our brief has to do with bribes to police officers in order to not investigate something. Again, the Court said, that can't be a 666 violation. Because it's not there's no involvement of the public funds there. It's simply paying a public official to influence their decision making, but not to influence their involvement with public moneys, as was the case in Castro and Massey.
So unless there's some kind of tie to the money that's the point of the Phillips case in Louisiana. There has to be some connection between the bribe and the money, some expenditure of public money; and that's not present here.
Finally, Your Honor, on the constitutional point, in order for this conduct to be punishable and be constitutional, there has as I just mention, there has to be some connection to money being influenced. This 666 comes under the Necessary and Proper Clause of the Constitution, the spending power. There's got to be some nexus to money some how.
Now, the Sabri case says you don't have to show a direct connection between the crime and specific federal dollars, because money is liquid and you don't have to tie it right to the federal dollars. But there's got to be some connection to some expenditure of money somewhere or else it's unconstitutional as applied.

So for these reasons, this conduct cannot be reached by 666. And Your Honor asked exactly the right question, Can a judicial officer ever be charged? Yes, if the judicial officer is being bribed in order to do something to spend public moneys, like pay an indigent defense counsel, like pay for a private detective.
But when a judge is being bribed to influence rulings between private parties the Frega case, the McCormick case say, no, that cannot be a 666 violation.
THE COURT: All right. Well, are you familiar with the Fifth Circuit case that holds that if a judicial officer is merely corrupt and can be bribed, that that in itself threatens the integrity of the federal funds, that that judicial officer has some ability to control?
MS. LITTLE: Is it the Lipscomb case?
THE COURT: Even though there was no money involved in the act that he was bribed for, Fifth Circuit case?
MS. LITTLE: No.
THE COURT: Well, I don't have it. Let's see
MS. LITTLE: Is it maybe the Lipscomb case or the I'm not sure which case you're talking about.
THE COURT: Well, let's see. U.S. wait a minute. No, this is another case. Oh, well, you cited the case from San Diego; but that was, as you said in your brief correctly so in the Patrick Frega case, U.S. v. Patrick Frega which

was the Southern District of California. As you said, Judge Rafeedie held that the federal bribery statute did not apply because there was no money.
But, as you correctly cited later in one of your footnotes, that was before the Sabri v. U.S. which held that it was not necessary to have a nexus between the federal funds and the act charged.
MS. LITTLE: That's right, Your Honor. But there still has to be a connection to some kind of funds. And if you look at the Sabri case, it talks about that. It says, Otherwise, you would just criminalize purely local acts; and that would upset the federal state balance that our Constitution holds so dear. There's got to be some kind of connection to some funds.
Sabri talks first of all, Sabri is of course, it's a facial challenge. It's not a challenge to the law as applied. But what's important is in Sabri it talks about it says, "Congress has the power to keep a watchful eye on expenditures and to protect spending objects from the menace of local administrators on the take."
So while Sabri says you don't have to show a direct link to the actual federal dollars, because, as Sabri points out, dollars are dollars, they are fungible, it's liquid. But you still have to have some connection to spending, to funding. Otherwise, you just have a purely local crime.

In the Fischer case, that's discussed. Otherwise, you're going to have a situation where purely local offenses, which are punishable by state law, end up coming into federal court where they don't belong.
Mississippi has a state court a state bribery statute that could apply here. Just as in the Frega case, Judge Rafeedie noted that the California Penal Code, Section 93, which criminalizes bribery of local people. That does not that's enough. The state's rights can punish that conduct if they want to, but that doesn't mean the case belongs in federal court.
THE COURT: If this state statute was the one that was going to control, who would prosecutor that?
MS. LITTLE: That would be up to the state D.A.
THE COURT: I know; I know. But I've read recently that the Attorney General said he wouldn't prosecute this case.
MS. LITTLE: I think there's district attorneys, there's other folks, that could prosecute it.
THE COURT: All right. No. I mean, just because one state institution says they would not take on the case doesn't mean that that would give this Court jurisdiction.
MS. LITTLE: That's exactly right.
THE COURT: I said that sort of facetiously. But the case the Fifth Circuit case that I had in mind when I asked you about it was U.S. v. Albert Lipscomb. Are you familiar

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with that case?
MS. LITTLE: Yes. The Lipscomb case is frankly, I'm not quite sure what to do with it. It's a very long opinion, about a hundred pages. You have Judge Wiener, writes a very lengthy opinion on discussing the Phillips test and whatnot. Judge Duhé concurs in the result but not in that analysis, and then Judge Smith dissents. So I'm not even sure what precedential value the Lipscomb case has.
It's very scholarly and interesting to read, but I'm not sure that it has because there's a concurring opinion that doesn't join in that particular analysis, I'm not sure how much value it has to us. Thank you.
THE COURT: Okay. Thank you. Mr. Sanders?
MR. SANDERS: Your Honor, I don't think the Lipscomb case has any value to the defense position in this case either. I want to respond I can respond to defense counsel's arguments in the same order she made them.
First of all, I want to respond to her agency argument. The Government's position is that Judge Lackey was an agent of the Administrative Office of Courts and of Lafayette County. As defense counsel pointed out, the first place to look is the statute itself, subsection D(1) of 666 points out that the definition of an agent, for purposes of this statute, is whether he's a representative authorized to act on behalf of the agency at issue.

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As to and just as an example, as to the Administrative Office of Courts, Mississippi's statute, 9 1 36 I think I've cited in my brief points out that certain funds come to the Administrative Office of Courts and those funds are then sent to the various circuit judges in the state.
I think he receives $40,000 per year for staffing. He receives $4,000 a year for supplies. He receives $4,000 for rent, as an example, if he wants to rent office space. And in fact, Judge Lackey does use that money as well. He certainly is authorized to act on behalf of the Administrative Office with that money. In fact, when he gets that money, he then goes out and hires his staff.
It's up to Judge Lackey who he's going to hire as a law clerk, for instance, or a court administrator, Ms. Monette, for instance, Judge Lackey hires. He even is authorized to decide where he wants to rent property. He chooses the supplies. When they send him $4,000 for supplies, they don't actually send him a $4,000 check. He actually goes out and purchases everything he needs and then sends an invoice to the court. So certainly when he is out looking, he is authorized to act on behalf of the Administrative Office.
Under the Phillips case and I'm not certain how much precedential value Phillips has left. Judge Jolly relied very heavily on principles that were abrogated by, I think, the Supreme Court in Sabri. But a few of the factors that Judge

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Jolly pointed to in the Phillips case were, for instance, whether or not the principal had control over the agent.
In this case, back to 9 1 36, as I pointed out in the response, judges circuit judges have to come up with a plan, a personnel plan; and they have to then submit that plan as to how they're going to be utilizing the funds of the Administrative Office.
And pursuant to the statute, I cited the statute and quoted it, They then determine whether they'll accept that plan or not. They're certainly exercising authority over them when they decide whether or not they're going to allow him to utilize a particular plan.
Another example, as I pointed out, is whether he can rent a particular property or not. If Judge Lackey wanted to rent his own building, for instance, then he's he must then provide an appraisal for the value of that property. And then it's up to the Administrative Office of Courts whether or not they're going to be willing they're willing to pay money for him to rent that particular property. It's just another example of them having control over him.
Whether he has control over another question that comes out of the Phillips case, whether Judge Lackey has control over employees of the Administrative Office of Courts comes, again, right out of 9 1 36. The statute provides specifically that the employees working for him, the specific ones who are

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considered employees of the Administrative Office, are there at the will and pleasure of the circuit judges. So he certainly has control over his court administrator, for instance, who is seen as an employee of the Administrative Office.
The Phillips case, as I know the Court is aware, was actually a case with a tax assessor out of the state of Louisiana and whether or not he was an agent of the Louisiana Parish. It's a case that is pretty fact specific as well. As this Court is aware, I'm sure and as every first year law student is aware when you learn in law school a rule of law and your textbook tells you that 49 states have followed that particular rule of law, you realize pretty quickly that that one state is almost always going to be Louisiana.
So the tax administrator's position as is opposed to the as it relates to the parish doesn't have a great deal of value when we're looking at a circuit judge in the state of Mississippi.
But one of the other points they look to is whether or not the parish paid the tax assessor's salary in Louisiana. They pointed out that the parish had nothing to do with his salary. In this case, we don't dispute that the state pays Judge Lackey's salary; but it's certainly administered and goes through the Administrative Office of Courts.
As to Lafayette County, whether or not Judge Lackey is an agent of Lafayette County, again, we're looking to see whether

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he's authorized to act on behalf of the county. It almost goes without saying that a circuit judge acts routinely on behalf of Lafayette County. First and foremost, the orders he signs are headed by "in the United States or "In the Circuit Court of Lafayette County." I'm making the same mistake defense counsel made.

But as examples of him acting on behalf of Lafayette County, when Judge Lackey is hearing cases at the courthouse here on the square, he may be assessing fines to certain parties, perhaps to an attorney who shows up late. All of those fines go straight to the general fund of Lafayette County, certainly acting on behalf of the county.

He is the one who chooses who will be the county's victim assistance coordinator, for instance. He selects the public defender. As I pointed out in my response brief, just recently in Lafayette County I think there were a number of supervisors who wanted to change the public defender. I think it was Mr. Ken Coghlan, who was involved in this case at one point. And Judge Lackey wouldn't allow it. He was certainly acting on behalf of the county.

If the public defenders, for instance, have a conflict of interest as I pointed out in my response it's Judge Lackey who then, for the county, selects a private individual. That private individual who represents an indigent defendant would also submit to Judge Lackey his bill at the end of the

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day; and it's Judge Lackey who determines whether or not the county is going to pay that much. I could go on.

I mean, Judge Lackey is going to order the county to pay any expenses, for instance, that that particular defense counsel wants. If he wanted a psychiatric evaluation or if he wanted a witness from across country. I know that different attorneys oftentimes ask for that stuff, and the supervisors wring their hands because the judge is ordering the county to pay those kinds of things.

Whether Judge Lackey has control over county employees, I don't think there's anybody over in the courthouse who would say that Judge Lackey doesn't have control over them, from the circuit clerk all the way down to law clerks, court reporters, anyone else who the Administrative Office and the county both pay their salaries.

Finally well, not finally. Secondly, as to whether or not there is a connection with the bribe paid in this case and a business transaction or series of transactions of the Administrative Office or Lafayette County, as I pointed out in my response, certainly cases being heard in circuit courts in the state of Mississippi today are very real parts of the business anyone who is in business, anyone who's practicing law in the state now, circuit courts are a very real part of their business.

And any sort of contract dispute parties to contracts

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are always aware that if they are unable to resolve conflicts that the circuit courts are going to be there to help them resolve these conflicts. If they want to then go into the court, they're going to pay as I pointed out in my response a fee. They're going to pay $107. For instance, Johnny Jones, in this case, paid $107 to have the circuit court provide a service, to have Judge Lackey hear the case, to have a court administrator work the case.

THE COURT: One thing I didn't understand about your brief, you said that these fees to bring a case into court, to file a case, you listed a hundred dollars or something for him to file a civil case. And then you listed something like $370 to file a criminal case. Who pays that in a criminal case?

MR. SANDERS: Yes, sir, I believe the district attorney's office pays that.

THE COURT: Really?

MR. SANDERS: I'm not certain of that. I just know that to bring a criminal case in circuit court

THE COURT: You mean the district attorney's office has to pay $370 every time they file an indictment?

MR. SANDERS: I'm not certain one way or the other. I think there's a $300 fee for every criminal case that is brought, but I don't know who pays that.

THE COURT: It's probably never collected. It'd probably be by the defendant.

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MR. SANDERS: It may well be.

THE COURT: Taxed as court costs to the defendant. But I don't think it's paid up front; when you file an indictment, somebody has to pay $370.

MR. SANDERS: May not be. I may have gotten that wrong. I do know though, however, in a civil case. As we're talking about before us now, that the plaintiff does pay a $107 fee when he files his complaint.

Obviously, when he files that complaint, he is expecting a service to be provided from Judge Lackey, from all the staff, from the county employees, everyone working that case. Portions of that $107 fee go to pay employees of the Administrative Office of Courts and go to pay salaries of the county employees.

Obviously, as well, the bribe paid to Judge Lackey was certainly in connection with Judge Lackey's position as a circuit judge. So I think clearly the bribe paid in that was absolutely in connection with a business transaction of both the Administrative Office and Lafayette County.

Finally, their argument that this statute is unconstitutional as applied to them in this case. The first argument they make is that public money must be implicated. That's not my interpretation of the Sabri decision. In fact, the Sabri decision made it clear that there didn't have to be any connection for jurisdiction purposes between the forbidden

conduct and the federal funds.
THE COURT: What were the facts in the Sabri decision?
MR. SANDERS: In the Sabri decision, I do believe that Sabri was a developer in Minnesota; and he was bribing someone, I believe on a city council, something like that; so that he would then be able to avoid certain ordinances, certain zoning regulations, that kind of thing, I believe that was it.
The Court, though, eventually ruled that
THE COURT: What about the Lipscomb case, the Fifth Circuit case that Ms. Little said she didn't have any much didn't like?
MR. SANDERS: Yes, sir.
THE COURT: What are the facts of that?
MR. SANDERS: Your Honor, I'm not familiar with the facts of the Lipscomb case, and I'm not because when I was doing the research and reading everything up to this case, I felt like Lipscomb the decision that Lipscomb made, as well as Moeller, I believe, those decisions were so completely abrogated by the Sabri case because they were they spent a great deal of time and effort discussing whether or not there had to be a connection to the federal funds. And when Sabri came in, they ruled there didn't have to be any connection whatsoever.
I think that Lipscomb was made post Salinas. And Salinas

had intimated that that was the case but hadn't come right out. They had put some language in the Salinas case that looked like there may still need to be some connection in some instance, and that's kind of what the Lipscomb case discussed. And then the Sabri decision came in next and made it clear that there didn't need to be any connection.
Their position that there has to be a connection to at least some funds, then, Your Honor, is essentially, as I pointed out in my brief, their arguing logic would dictate that they must be arguing that, Well, then there has to be a connection to state or local funds. And that just that doesn't make sense in an argument that there's no federal jurisdiction.
If the Court has said there doesn't have to be a connection to federal money, then certainly the Court didn't mean that there but there does have to be a connection to state or local money to confer jurisdiction on the federal courts. I don't think state or local money would have anything whatsoever to do with jurisdiction in Federal Court.
And then, finally, they argued that the behavior in this case was just too attenuated to a federal interest in crime. And as I said in my brief, I think that's precisely what the defendants were arguing in Sabri, and that's precisely what the Supreme Court ruled did not have to be done.
THE COURT: All right. Thank you.

MS. LITTLE: Your Honor, very briefly?
THE COURT: Yes.
MS. LITTLE: I'd like to respond to a couple of points. Mr. Sanders referred to the business of office space being provided or money for office being provided by the Administrative Office. In fact, my understanding is that at least for the office supplies and rent, the money does not come from the Administrative Office. It comes from the treasury from the state treasury and is certified by the Supreme Court.
But in any case, if you look at the Phillips case, footnote 13 talks about the fact that the parish there provides office space and the like; but that doesn't make Mr. Phillips, as the tax collector, an agent of the parish. And similarly, the Hosford case in the Mississippi Supreme Court talks about the fact that the legislature as part of, again, separation of powers, the legislature is required to appropriate funds in order for the judiciary to do its job, but that does not create an agency relationship.
Briefly, on the Lipscomb case, Lipscomb involved a Dallas city counsel person, as I recall. But it did not involve a judge. And what I'm thinking about is essentially the Government hasn't cited a single case where a circuit court or a state court judge is prosecuted under Section 666 for being bribed for a ruling. That's what this case is about, and I'm not aware of any case where 666 has been applied in that

situation, the situation that we have before us.
Finally, I just wanted to point out that, yes, there's got to be some kind of after Sabri, there still has to be some kind of connection to money. I don't mean to argue that it's only purely state and local money. There's got to be a pool of money where there are some federal funds flowing into it. That's what the Sabri case talks about. It talks about the liquidity of money. There has to be a pool of money, some of which is federal.
The Sabri case points out that 666 was enacted to kind of fill some gaps in 641 and 201. 641 is theft of federal moneys and 201 is federal bribery. And what 666 was meant to do was fill some gaps there where you have, for example, theft of a pool of money, some of which is federal and some isn't. And 666 is also meant to fill a gap in 201 where you have bribery of a state court official who has some connection to federal moneys, that's what 666 was intended to do.
What Sabri says, is, okay, well you have these kind of mixed state and federal funding situations. You don't have to trace the crime right to those particular dollars and quarters and $20 bills that are federal; you don't have to do that. But there still has got to be some connection to this pool of money, otherwise you can't get to the Necessary and Proper Clause of the Constitution. There's got to be some connection to money, and that's what Sabri says.

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Again, "Congress has the power to keep a watchful eye on expenditures and protect spending objects from the menace of local administrators on the take." Here, Judge Lackey was allegedly bribed to issue a ruling between two private parties. There's no expenditure of public moneys of any kind involved.

THE COURT: All right. Thank you.

All right. We will be in recess now for 15 minutes.

(AFTER A SHORT BREAK, THE PROCEEDING CONTINUED)

(CALL TO ORDER OF THE COURT)

THE COURT: All right. The Court is tell her to come back in here, please. The Court is has considered the arguments and the briefs filed by the attorneys on their motion to dismiss Counts 2, 3, and 4, and finds that that the a circuit judge does have duties that makes him or her an agent or a manager of a county in which the circuit court sits and of the Administrative Office of the Court in that the judge has authority to hire certain employees, pay them from county funds, or from AO funds.

He has the authority to buy supplies. He has the authority to appoint public defenders, to levy fines whose moneys go into the county treasury. And from which treasury, he can expend certain funds for other purposes. He also has the or she has the authority to appoint deputy court clerks during term times of Court and set per diem rates for those clerks and how many days they would be paid.

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And even though the order this order of the of Judge Lackey in this case, which he was allegedly given money to issue, did not affect any federal funds or any funds at all, the Court has reviewed two cases that it believes is controlling in this case.

The Fifth Circuit obviously gives a much more liberal interpretation to Title 18, Section 666, than does the Ninth Circuit in the cases that were cited by the attorney for the defendant. The Ninth Circuit obviously has held that there must be some affecting of federal of money by the issuing of the order, if 666 is to apply. The Fifth Circuit has held the opposite.

The Lipscomb case in the Fifth Circuit was had a factual basis of a city councilman who was who had bribed a or a city councilman who had been bribed by a taxi cab company to issue certain votes and to in favor of the taxi cab company, did not involve expenditure of funds and that was held to incur jurisdiction.

That case said specifically that a corrupt or state official who has real responsibility for, or often participates in, the allocation of federal funds is a threat to the integrity of those funds even if they are not actually directly affected by his corruption.

Also in the Fifth Circuit, the Salinas case was a case which did not involve the expenditure of any funds by the

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corrupt act of the Government official. In that case, it was a sheriff who allowed, for a fee, certain contact visits by the girlfriends or wives of the federal prisoners who were kept in the county jail temporarily. And the Fifth Circuit held in that case that that was sufficient to violate to invoke jurisdiction on under 666(e).

And they said specifically, Section 666(a)(1)(B) does not require the Government to prove the bribe in question, had a demonstrative demonstrated effect on federal funds. The enactment's plain language is expansive and unqualified, both as to the bribes forbidden and the entities covered, demonstrating by its reference to quote any business or transaction. And that is not confined to transactions affecting federal funds.

So based on the liberal more liberal interpretation of the Fifth Circuit Court of Appeals than the Ninth Circuit, the Court is of the opinion that the motion to dismiss Counts 2, 3, and 4 should be denied. And it will be so ordered. Of course, the Court reserves the right to supplement this order, delivered orally from the bench, at a later time.

All right. It's 11:25. We will be in recess now until one o'clock and, at that time, take up start on the remaining motions, which will be the two motions for severance and the motion for a change of venue. I am not prejudging by change of venue that well, change of venue is still on the

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table, it's still in play, regardless of the Court's ruling on the suppression of the wiretaps.

Because the suppression of wiretaps alone would not dismiss this case. So change of venue is still relevant. And we'll take those two motions up those three motions up at one o'clock, starting with the two motions to sever; and then the remaining motion will be the change of venue. We'll be in recess until one o'clock.

(AFTER A LUNCH BREAK, THE PROCEEDING CONTINUED)

(CALL TO ORDER OF THE COURT)

THE COURT: We have two motions to sever. Which motion do the defendants want to take up first, Mr. Backstrom or Mr. Scruggs?

MR. GRAVES: Mr. Scruggs' motion, Your Honor.

THE COURT: Very well.

MR. GRAVES: Good afternoon, Your Honor. My name's Todd Graves, along with Nathan Garrett's here at counsel table with me. We represent Zachary Scruggs. The motion before us is the motion to sever Mr. Zachary Scruggs from this trial, and I want to basically go right to Rule 14. We've briefed this pretty extensively, but the gravamen of Rule 14 is prejudice; and that's what I want to focus on.

And in the Zafiro case in 1992 the U.S. Supreme Court said, quote, there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants or

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prevent the jury from making a reliable judgment about guilt or innocence." They went on to say the defendants are tried together in a complex case, and they have markedly different degrees of culpability. This risk is heightened.

And I think there's essentially three reasons why there's a high risk of prejudice in this case. The first reason is there's a huge distance in terms of the proof that the Government's prepared to offer about Zachary Scruggs and about the other defendants in this case. That's not to suggest that I think the other proof will be sufficient to a jury; but there's under any analysis, there's a huge spread.

There are only, really, three thin threads that we wrote about in our motion coming into this that connect Mr. Zach Scruggs to this case; and those are only incriminating if you already believe that he knew that there was a major afoot, if there was a major afoot to bribe the judge and that he knew about it. Otherwise, those three thin threads in and of themselves are not incriminating.

Something that Your Honor said earlier in response to I think it was a motion for outrageous conduct, was that there was ample evidence that there was more than passive conduct on behalf of all the defendants. And respectfully, I would disagree with that. I don't know that there is any evidence of more than passive conduct on behalf of Zachary Scruggs, and I think in that motion alone the outrageous conduct motion his

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position is different than the other defendants.

To say that his actions in this case, from what we've been provided, is passive would overstate his involvement in this case. The three threads we talked about, one of them was the initial meeting. He was present at the initial meeting in March when there was a discussion about attempting to influence the judge in some manner, about the arbitration order.

Well, the Government has conceded yesterday or my understanding of what I heard was there is no allegation that that meeting, in and of itself, was would support the indictment. And, so, I think one of three threads that I came to this hearing with doesn't even exist; so now we're down to two threads that we have to deal with.

The second thread is that Zachary Scruggs was in a conference room when an order was delivered. And the description of what took place when this order was delivered, I think and again, I'm not perhaps perhaps I'm mistaken, but I think it's the only place he's even mentioned in any of the tapes in this case.

He was sitting in a conference room behind the reception station. The Scruggs Law Firm, the way it's laid out, there's a little conference room with some books in there, right behind that. He's sitting there working. Mr. Balducci comes up to deliver an order and walks in and hands it to him. And I don't see how that even connects him to this case. It was an order

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related to this case; but especially if you haven't already decided that he's a member of this conspiracy, it doesn't connect him to this case.

The third thread is the one we heard about yesterday that said that Mr. Zach Scruggs may have been in the room when Tim Balducci, who was only coming up into that office that day because he was a Government agent and going up to incriminate others based on the conduct he'd been caught with Zach Scruggs allegedly was in a room for a small portion of the conversation.

There's no allegation you can listen to the tape. He doesn't even say anything. This Government agent makes statements that at best would be confusing to a person and, at worst, would be gibberish. And Mr. Zach Scruggs says nothing. And somehow, that is evidence that he has joined a conspiracy.

And one of the things that I found interesting after we were given the grand jury transcripts yesterday, even the agent's description of what took place in that room when Mr. Balducci went in the office and spoke to Sid Backstrom and Zach Scruggs was in the room for a period of time the Government's description of that to the grand jury is not accurate.

I'm not suggesting in any way that he went in and lied about it. What I'm suggesting is it's such a fine point that this has come down to about what was said on a particular day

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and that, therefore, Zach Scruggs belongs in this case; that even the change of one word or two is pretty important. And the phrasing of it and the description to the grand jury and the tape, I think, are significantly different. Again

THE COURT: Would you be more specific on how it was inaccurate?

MR. GRAVES: Yes, I would, Your Honor. And I don't have page numbers on these transcripts, so it's hard for me to describe it. This is the grand jury transcript of 11 06 of William Delaney. And toward the back of what I have again, I don't have a page number. His description, quote, Mr. Balducci to go back to Judge Lackey. This is a paraphrase of Mr. Delaney of Mr. Balducci's what he said in that room on that day.

Mr. Balducci to go back to Judge Lackey on the first. Quote, plus the fact that you still owe me $10,000 from your original agreement." That's not in the tape. That's not what was said. And that would be a pretty incriminating statement if that was said.

Second one I only have two, Your Honor the next page. Quote paraphrased quote of Mr. Delaney paraphrasing the statement of Mr. Balducci, what Mr. Balducci would say, quote, you guys are paying for it, so you might as well get it the way you like it. And they both agreed that it is fine as it is.

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After Mr. Balducci talked with Zach Scruggs and Sid Backstrom about this order and that they had paid for it and get it like they wanted it, he did later have and it goes on and that again, I'm not alleging that the agent purposely misled the grand jury. What I'm alleging is it's a jumbling of what actually happened.

And because it's such a fine pint and one thin thread that his involvement in this case depends on, those changing of the wording that "you paid for it; you still owe me 10,000," that's pretty significant as to his position in this case.

Mr. Scruggs is not Mr. Zach Scruggs and it sounds silly to say that, but that's the way we're going to have to conduct this trial. But Mr. Zach Scruggs is not even mentioned in the September 25th or the October 16th affidavit. When Tim Balducci gives his preamble before he goes up to attempt to incriminate members of this firm, he says, "I'm going up to talk to Sid Backstrom and possibly to Dick Scruggs."

Mr. Zach Scruggs wasn't even mentioned in the preamble. I think that the evidence will show, based on the evidence, that I know anything about we can't even show the Government can't even show that he was a willing participant in an unlawful conspiracy. Yet I think it is also very possible that he might be convicted solely on the basis of the weight of the evidence against others, including his father. And I think that goes to the heart of prejudice.

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Let me step aside here very quickly. If the Court were inclined to leave Mr. Zach Scruggs in this case, I think that we are entitled to a James hearing based on the things I just said. The standard of evidence is a preponderance that the declarant and the defendant were members of the conspiracy, the same conspiracy.

The statement was made during the course of the conspiracy and was made in the furtherance of the conspiracy. And I think that this is the unusual case where it is unclear whether they could meet the standard by a preponderance, let alone by a reasonable doubt, that Mr. Zach Scruggs was even a member of an unlawful conspiracy. So that's the first thing.

The second thing is just the fact that his name is Scruggs. Beyond the total distance of evidence between he and the other defendants, his name is Scruggs. And Dick Scruggs' name is obviously Scruggs. And as they said in the Auerbach case, which admittedly wasn't a case about severance it was a case about ineffective assistance at counsel because they didn't get severance or didn't ask for severance.

Quote, the father/son relationship makes a motion for severance far more compelling than in the usual case of unrelated codefendants. That was from Auerbach, from the Eighth Circuit in 1984. Something that came up earlier here this morning that I think makes it even more compelling is, as we were talking about the 404(b) evidence, one of counsel for

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the Government said, "In the Wilson case, the Scruggs Law Firm was the defendant."

Well the Scruggs Law Firm wasn't the defendant in the Wilson case. That was a different situation before the Scruggs Law Firm existed. And if that would have gone horribly wrong for Mr. Dick Scruggs' position in that case, it wouldn't have cost Zach Scruggs a dime. So that is the kind of confusion that I fear that we're going to have to deal with throughout this case.

And even Mr. Keker, who, through no intent but an intent to try to describe who he's talking about and the difference in these he said, when he was making one of his motions arguments earlier referred to Zach Scruggs as Dick Scruggs' son. And those are the sort of descriptive elements that I think would lead to prejudice.

Yesterday, throughout the whole hearing and we tried to keep track, and perhaps with a transcript which I haven't been through I might be off by one. But I think only once or twice throughout the whole hearing when Mr. Scruggs was referred to was it made clear whether they were talking about Mr. Dick Scruggs or Mr. Zach Scruggs. And again, that element of confusion would lead to prejudice.

Based on this huge canyon of evidence, as I see it and based on that, I don't see how a curative instruction could bridge that canyon by telling the jury to put this out of their

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mind and sort this out when we, as counsel, counsel for the defense, the Court, the witnesses, can't seem to sort it out at certain points.

The last thing I want to point out, not including the distance in degree of evidence between the parties, the fact that the Scruggs name is going to be very confusing. The Scruggs Law Firm is called the Scruggs Law Firm. There's four partners, there is not just three partners in the firm; there are four partners in the firm.

Even beyond all that confusion, now we go into the 404(b) evidence; and as I said a minute ago, that deals only with Dick Scruggs for the purposes of this motion. And by assurances that counsel has been given previously, that case, the 404(b) case, there was no indication that Mr. Zach Scruggs was going to be a subject or a target or had anything to do with that case. That was my understanding. I believe that's going to be the Government's position for the purpose of this motion.

This morning, that got clouded up a little bit; but I don't think that's the Government's position this afternoon. For purposes of this motion, he has nothing to do with that case. The Scruggs Law Firm wasn't involved; and I think that, again, it's not just distance, because that courts have said that that's not always enough to grant a severance, distance, father/son name and relationship. You throw in the 404(b) evidence.

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I think that, in sum, what you start with is this huge spread in the evidence. You pile on the 404(b) evidence related to a wholly separate matter, having nothing to do with Zach Scruggs; and you wrap all that evidence and the confusion of the name, as it's recited here in the Court in the father/son relationship; and what you have is a recipe for a joint trial that will compromise the fundamental right and prejudice the fundamental right of Zach Scruggs to be judged fairly and impartially based on his conduct and his conduct alone, his knowledge and his knowledge alone, and his intent and his intent alone. And I think that calls for severance.

THE COURT: I heard something like you did this morning I believe from Mr. Norman that perhaps Zach Scruggs would also be a party to the 404(b). Did you hear that?

MR. GRAVES: What was really interesting about that, Your Honor, was it wasn't we've been led to believe that he wasn't part of the 404(b). In fact, his previous counsel, as part of the waiver of the conflict that we heard about, said that the Government had assured him he wasn't a subject or a target.

And then this morning, the very interesting nuance that I heard wasn't, Zach Scruggs will be part of it; but there is 404(b) evidence against Dick Scruggs, and Sid Backstrom will not be part of that evidence, not saying Zach will or won't be

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part of it. And that is exactly the kind of confusion we are talking about, those sort of nuances.

THE COURT: In the notice, the 404(b) notice you got, did they mention Zach Scruggs as being a party to that evidence?

MR. GRAVES: The notice is not that detailed. It's basically a letter saying to look at the previous pleadings and the previous

THE COURT: Okay.

MR. GRAVES: filings. But they did not mention one, they did not mention Zach Scruggs. Two, they specifically, unless counsel was mistaken in the conflict waiver letter that this defendant was given, they specifically said he wasn't the subject or a target of that investigation. And I can only go based on what previous counsel was told.

THE COURT: Okay. All right. Thank you.

MR. GRAVES: Thank you, Your Honor.

THE COURT: Does the Government wish to respond?

MR. DAWSON: Yes, sir. I didn't know whether the Court wanted to since we responded to the severance in a combined fashion, if you wanted to hear it individually or all at once?

THE COURT: Well, I'd rather here it individually since the reasons are different.

MR. DAWSON: All right, sir. Generally speaking,

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Your Honor, with respect to severance and joinder and I know that the Court is thoroughly familiar with those issues there is no claim under Rule 8 of a misjoinder. As counsel opposite said, they seek relief only under Rule 14, which is the discretionary authority of the Court to grant a severance in certain circumstances.

And those certain circumstances are that there can has to be a showing of compelling prejudice against which the Court is unable to afford protection. Severance has been held by the cases that we have cited in our brief to be a drastic relief, and movants have a heavy burden to demonstrate that without such relief a fair trial cannot be obtained.

Just because there is a quantitative difference between evidence in a multi defendant case is not sufficient to warrant severance. If that were the case, you could never have a multi defendant and certainly a multi defendant conspiracy case because just about in every one of those types of cases the quantitative difference between the defendants is present. However, in conspiracy cases, the evidence once a conspiracy is established, the evidence is admissible against all the co conspirators.

Now, the Fifth Circuit has made it plain in joint trials, especially in conspiracy cases, that severance is frowned upon. And it's not favored at all. All evidence is admissible against all co conspirators. Now, there's a good reason for

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that, because you essentially have to try the same case twice or three times because there is no significant advantage if all evidence is admissible against all defendants.

Now, with respect to the allegations that were made by counsel opposite, I think that he's certainly not intentionally, but understated the evidence with respect to Zach Scruggs. In November, the first transcript, which was attached to the response I believe the response involving outrageous Government conduct there is considerable discussion between Balducci, Mr. Backstrom, and Zach Scruggs.

And I won't detail all of it; but Mr. Balducci says, "Zach, let me bring you up to speed. All right. This is on the Judge Lackey deal. Okay? You know I came by here last week, and I gave you that order." And it goes on to describe and the three of them have a discussion about the order that was provided to Judge Lackey or Judge Lackey was considering entering as a result of having been paid the $40,000.

Now, this is not just a normal conversation between attorneys concerning a case about an order a judge has under consideration. Mr. Balducci is not an attorney of record in the Jones v. Scruggs case. He is not a party to it. He has no interest in it. In fact, the Scruggs Law Firm has a very reputable firm representing them at that time, the Daniel Coker Horton law firm.

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It is clear to anyone in that conversation that something criminal is in afoot. Simply because, later on in the conversation with Backstrom and Zach Scruggs in the room, the statement is made, We need to get this right like we want it because we're paying for it. There is not one single objection. There's not one single, What do you mean, Tim Balducci? What have you done? What are you talking about? So it is clear that there's much more evidence just out of that conversation than the Court was led to believe.

Now, the other objection, I think, to a joint trial asking the Court for exercise of its discretion relates to the 404(b) evidence. Now, it is true that the 404(b) evidence is mainly against Dick Scruggs, one of the co conspirators. However, between the time that this response was prepared and this hearing began, we became aware of some evidence that might indicate that Zach Scruggs had some knowledge of the back door attempt to influence Judge DeLaughter.

We've told counsel about that evidence, as Mr. Norman indicated today. But I also told counsel that for the purpose of this motion for severance, that we would assume for the sake of argument that both Zach Scruggs and Sid Backstrom were not implicated in the 404(b) evidence. And while I'm mentioning that 404(b) evidence, I think it is clear the Court should understand it is clear from the Government that this will be not the full fledged trial of the Wilson case.

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All the 404(b) evidence its purpose is to show the intent of the persons to whom the 404(b) evidence is admitted against. And that would be to show that they attempted to and conspired to influence. It doesn't mean that we have to prove all the way down the line that Judge DeLaughter was in fact influenced or impugned by the evidence.

THE COURT: What did Joey Langston plead guilty to?

MR. DAWSON: I'm sorry?

THE COURT: What did Joey Langston plead guilty to?

MR. DAWSON: He pled guilty to the precise charge, that is, conspiracy to corruptly influence Judge DeLaughter. He pled guilty to a conspiracy charging himself, Richard F. "Dickie" Scruggs, and others. And the evidence to show it would be very brief in this sense.

THE COURT: Well, my question what I was asking about specifically, I heard Mr. Norman say today, he's not sure that that was a crime, that they committed a crime by that conspiracy; that he's not charging a crime.

MR. DAWSON: No, sir. I don't think that's what he said. I think what he said, or meant to say, was that it is not necessary to prove for 404(b) purposes that in fact it was a crime and the fact that Judge DeLaughter was in fact corruptly influenced.

THE COURT: He said something about, You don't have to show a crime; you just have to show bad acts.

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MR. DAWSON: That is correct.

THE COURT: Which implies that that wasn't a crime.

MR. DAWSON: Yes, sir.

THE COURT: I wondered why Langston would plead guilty if it's not a crime.

MR. DAWSON: That's correct. The point is, in order to be guilty of a conspiracy to corruptly influence, that can be done between people who attempt to do that without going all the way down the line and proving that the judge was actually influenced corruptly. And that's what Joey Langston pled guilty to and is prepared to testify about, direct contact with Dickie Scruggs and others with respect to what they planned to do to adversely and corruptly influence the decision by Judge DeLaughter.

Once that conspiracy is formed and an overt act is done in furtherance of that conspiracy, it matters not whether or not Judge DeLaughter was ever actually influenced. And I think that's what the import of what Mr. Norman said was this morning.

THE COURT: Do you not have to go further and show that that they carried out some overt act in attempting to carry forward with that plan, to make that plan come into fruition?

MR. DAWSON: We will show that. We will absolutely show that, with clear evidence. However, if hypothetically

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speaking, if what if all we had was just a discussion between Dickie Scruggs and Joey Langston about, Let's go influence the judge; and here's how we'll do it, we'll do X, Y, and Z, I think that would be a bad act in the sense of showing his intent with respect to this case. Now you see what I'm saying?

THE COURT: Is that all you're going to show in this case?

MR. DAWSON: No, that's not all we're going to show. I said if that's all you had that would be enough to show Dickie Scruggs' intent to corruptly influence the judicial process. But we're going to show more than that. We're going to show the actual conspiracy and an overt act in furtherance of the conspiracy.

So but the reason that we said, for the purpose of argument, that we would assume that both Backstrom and Zach Scruggs were not involved in the 404(b) evidence is because of the case of the United States v. Peterson in which the Fifth Circuit held that in a conspiracy case where 404(b) evidence was admissible against one co conspirator but not admissible against the other two, that the Court's limiting instructions were sufficient to guard against any speculative prejudice or any actual prejudice that might have existed.

The it is clear, under Fifth Circuit law that we cited in our brief and in our response, that the mere fact and I

think Zafiro, the Supreme Court case, even alluded to this. The mere fact that you might make an argument that you have a better chance of being acquitted with a separate trial is not sufficient to warrant a severance. And in this case, we do not believe that a severance is appropriate.

And moreover, if the Court were to deny severance, that doesn't mean the Court can't revisit that issue as the case develops. We don't think that that would change the Court's ruling. But if something would happen, unforeseen, that would cause a drastic prejudicial effect that the Court felt like that it could not protect the defendant, then you could always grant a severance at that time.

It's not something we recommend. I just point out that under Rule 14, that that is a continuing situation with respect to the granting or denying of severance.

THE COURT: All right. Now, Mr. Dawson, under your duty to give notice to the defendants under 404(b), what do you plan on doing? What's the Government's position as to how much detail you must go into in telling them what the synopsis of the evidence is you plan on presenting? I've heard Mr. Norman say three witnesses you anticipate calling. But I'm still not clear on

MR. DAWSON: What the adequate notice is?

THE COURT: Well, and I'm not clear on yes. And if you don't think you should tell should state at this time

what all the evidence is you plan on presenting I heard Mr. Norman say something about he doesn't he's not sure that somebody committed a crime in the Wilson case. And they don't have to charge they may not charge anybody because they're not sure it was a crime. Who is it that you're not sure committed the crime, I guess?

MR. DAWSON: Well, just for the sake of argument, you could argue that Judge DeLaughter made a decision that could be upheld, and that he there was a lack of evidence to show beyond a reasonable doubt that he actually was influenced in his decision. That does not mean that Dickie Scruggs, Joey Langston, and others didn't conspire to corruptly influence him. I think in fact, that's what Mr. Langston has pled guilty to.

THE COURT: So this I think Mr. Norman mentioned this morning that when Judge DeLaughter took a proposed order and showed it to Peters and Balducci and Langston, said, Is this okay with you basically what you're charging happened in this case with Judge Lackey. Are you saying that that's not sufficient to show

MR. DAWSON: No, sir, I'm not. I will say to the Court that that case is under active investigation. It is under active investigation. It is under active investigation by the Public Integrity Section of the United States Department of Justice in Washington, D.C. even as we speak.

THE COURT: All right.

MR. DAWSON: Now, if the Court has any additional questions with respect to the severance concerning Zach Scruggs I think at one point he did make that or one issue that he raised that I have not addressed and that is the pretrial publicity as a basis for a severance.

I'm not sure I quite understand that because whether you try them separately or together, his name is still going to be Zach Scruggs; and he's still going to have work for the Scruggs Law Firm. I don't know how you change that. So I don't think that that that ground as urged it seems to me to be a nonsegregate in an argument. And if the Court has any other questions?

THE COURT: No, not at this time.

MR. DAWSON: Thank you, sir.

THE COURT: Mr. Graves?

MR. GRAVES: A couple of points if I may. I find it very ironic that in the very motion to sever Zach Scruggs from this case because of the inability one of our points is that the jury, no matter what the curative instruction is, is not going to be able to set aside what's before them. In the very motion of that, when the Government concedes, it's not arguing that 404(b) be included.

Most of the discussion and the argument is about the 404(b) evidence against Mr. Dick Scruggs. The fact is, if you

look at everything they provided us again, I'm working off memory I don't think that Zach Scruggs' name is mentioned anywhere in those.

And this goes to the point, one of things I just heard, quote, some evidence that might indicate some knowledge. And we're talking about a person being tried under the United States Constitution based on his knowledge, his intent; and the prejudice here, I think, is clear.

Fairness and prejudice is the standard that the Court gets to decide. I'm not suggesting that the Fifth Circuit has demanded that you make a particular decision in this case. But I certainly think that this is beyond the normal case. This isn't two drug dealers, and one we've got a little more evidence against him than we've got against the other.

This is the case where the distance between what is going to be available, going back to the Wilson case, going through all the evidence in this case, is enormous. And not only is that distance the name is the same, you know, his father is on trial; and the confusion between the 404(b) evidence, the name, and everything. I think is a very real

THE COURT: Well, Mr. Graves, do you consider now that you have all of the evidence that they're going to present? Do you have it in your you have knowledge of all their evidence at this point?

MR. GRAVES: Well, Your Honor, obviously, I don't

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have all the Jencks evidence and everything in every matter. But I believe that the Government in good faith would acknowledge there may be some other things here or there, but that is basically what his involvement in this case comes down to.

And I think it really comes down to that November 1st tape. And that's something that was just spoken about a minute ago. And the thing again, if you're viewing this from the lens of if you know that there's a conspiracy and somebody starts talking about sweet potatoes, that might mean something for you. If you're in a room and someone comes in and delivers a message, you've got things on your mind, this sweet potatoes thing, and even if you heard it, it's a pretty odd thing.

If there was a true conspiracy and everyone was in on it, it'd be like it would be like Agent Delaney's testimony was. You still owe me ten grand; I owe the judge some money. Let's get this thing right and get this over with. It wouldn't be, I got to haul a load of sweet potatoes and this other gibberish.

From that moment on, you never hear Zach Scruggs' voice again. There's no discussion. I don't know that the Government can show he was in the room then. But whether he was or he wasn't, he clearly wasn't in the room after that point. And I don't know that that shows any intent to join a conspiracy.

And this other issue of perhaps they were earwigging the

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judge, perhaps they were doing things that were improper under a bar standard, that's very different than a criminal standard. That's a very different matter. And I don't know that proof that someone understands that an individual is earwigging a judge if that's the case, there are a few other law firms here in town that would suffer under that standard.

THE COURT: Well, no, certainly earwigging a judge is not criminal, even though it's highly improper; but I don't think that's an issue. All right. Thank you.

MR. GRAVES: Thank you, Your Honor.

THE COURT: All right. Mr. Trapp, are you going to speak for your client, Mr. Backstrom?

MR. TRAPP: Yes, Your Honor. Your Honor, I'd like to move directly to what I believe are the three areas that warrant Mr. Backstrom from being tried with Mr. Richard Scruggs, the senior partner, and the person who is identified with the Scruggs Law Firm.

First, there is a disparity in the amount of evidence as it relates to Mr. Backstrom versus the evidence that relates to Mr. Scruggs in this case. Essentially, Your Honor

THE COURT: Now, let me ask are you asking and Mr. Graves too, as I understand your motions. You're not asking just for severance from Mr. Richard Scruggs; you're asking for a severance from each other also, from Backstrom

MR. TRAPP: I'm just asking for a severance from

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Mr. Richard Scruggs, Your Honor.

THE COURT: Well, Mr. Graves, what were you asking?

MR. GRAVES: Your Honor, we're asking for a severance from this case and

THE COURT: You want a severance also from Backstrom?

MR. GRAVES: That would be our position, Your Honor.

THE COURT: Okay. Now, Mr. Trapp, you're only asking for a severance from Richard Scruggs?

MR. TRAPP: That's correct, Your Honor.

THE COURT: Not from Zach Scruggs?

MR. TRAPP: That's correct. Your Honor, the case against Mr. Backstrom boils down to essentially four tapes, those are October 18, 31, November 1, November 13. The credibility of Mr. Balducci I don't even believe the Government would call Mr. Patterson after the Court grants the severance, and we were tried separate.

And at trial against Mr. Backstrom and if the Court included Zach Scruggs, Mr. Scruggs would be relatively short, right at a week, I believe, Your Honor. The only tape that they have referred to that they would want to use against Mr. Backstrom that has anything relating to Mr. Richard Scruggs is a November 1st tape, and that is easily separated because Balducci has the conversation that the Court has heard about where neither what they didn't tell you is, I think, and to Mr. Zach Scruggs is leaving the office, which is

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reflected.

And Mr. Backstrom having had a is reading from this order that they presented to him, and then had some conversation about the order they don't do anything with the proposed order from Judge Lackey. But he's reading into the record on the tape and reading an order actually aloud as this sweet potato.

And actually, the way he says it, Your Honor of course, you remember I love this sweet potato because sweet potato sometimes means Vardaman sweet potato or some variety of it. Sometimes it means order; sometimes it means money. So it just goes to show sweet potatoes have more uses than we've thought of here.

Your Honor, the real if that was the only reason I could offer the Court for a severance, I believe the Court would be quick to deny it. But it's not the only reason. And the primary reason that we are seeking a severance is 404(b) evidence. And in the Supreme Court decision which dealt with whether or not antagonistic defenses and we are not asserting antagonistic defenses.

In that case, that's the Zafiro, if I am saying it right, Your Honor, Z a f i r o, Zafiro case, the Supreme Court itself notices or specifically observed that there is a serious risk when there's a joint trial that could compromise or prevent a jury from making a reliable judgment. And I'm paraphrasing.

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Then it says such a risk might occur when evidence that a jury should not consider against the defendant and would not be admissible if the defendant were tried alone is admitted against a co defendant. And that's exactly what this 404(b), if you look at the severance cases where the trial court has granted severances, that is generally one of the largest and most critical factors.

There are other factors that are taken into consideration, the disparity of evidence being if the Government had included the Wilson case as a count if they had included it as a count, there would be no question that we would get a severance because it has nothing to do with Mr. Backstrom.

They have submitted they've provided to us a copy of Mr. Langston's Joey Langston's plea. We have looked at the proffer of what the evidence would show that was submitted by the Government in support of that plea. And they have provided us with a copy of the affidavit for searching Mr. Backstrom's office excuse me Mr. Langston's office. None of these makes any reference whatsoever to Mr. Sid Backstrom.

But what's going to happen, Your Honor we've just heard about it yesterday. And Mr. Norman, to his credit, confirmed it again in talking with the Court today on the 404(b). Yesterday, when Mr. Balducci was being redirected by Mr. Norman, they're talking about the meeting on September 18 excuse me on September the 21st when Judge

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Lackey says, "I want $40,000."

And then the testimony was Balducci didn't think he would have a problem with that; and he said, "Why wouldn't you have a problem with that?" And Mr. Balducci said, "I have been privy previously to another matter in which Mr. Scruggs bribed another judge for a favorable outcome in that case, and I was aware of that."

Now, that's and Mr. Norman confirmed that would be the sort of testimony that they would expect to elicit from Mr. Backstrom. Mr. Backstrom will then next testify this has not gone in there and claim that he went and had a four minute conversation with Mr. Sid Backstrom. So they've got to put in that testimony one instance that Balducci knew that they were paid 40,000 because of this Wilson experience.

And the very next question's going to be, Who did you talk to first? And he's going to claim he had a four minute telephone call with Mr. Backstrom. It's these sorts of cases, Your Honor, where what would normally work in a standard case of a limiting instruction are just not going to work. The going and back and forth, the flow of that

THE COURT: Well, do you don't you I mean, I just don't see at this point that that's the way the evidence would come in at a trial, that he could ask Balducci, Why do you think why did you think there wouldn't be a problem, and then he starts saying, Well, I know they bribed another judge.

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I mean, that would be improper in my opinion and an objection would be sustained at that point.

MR. TRAPP: Well, Your Honor, all I can tell you is that that's the sort of intertwining that's been described to this Court. And the point that we were making, when you go to look at the confusion and also the amount of prejudice that would be impacting Sid Backstrom from this Wilson case and all the testimony to it, there are two common witnesses.

And when you look at the Government's proffer and Mr. Joey Langston's plea, the three the three people they talk about throughout that is Mr. Langston, Mr. Balducci, and Mr. Patterson. Patterson and Balducci, of course, will be a trial central to this case involving Judge Lackey. This is what the Government is thinking about doing; and hopefully, the Court will sustain the objection to give a limiting instruction.

THE COURT: Well, only if you object will I sustain it.

MR. TRAPP: But that's a pretty traumatic demonstration, I think, Your Honor, of the problems that would be faced by Mr. Backstrom to have to sit through a trial like that with the trial within a trial, a 404(b), which is clearly something that he has Mr. Backstrom has every right to be free of and without any prejudicial influence.

That trial is going to be sensational. And you don't have

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to look very far to see that, Your Honor. You can look at today's headline for The Clarion Ledger Mr. Mitchell is in here, a witness "Scruggs Enlisted Lott's Aid." I'd like to make this an exhibit, Your Honor.

It's got to be and they've already said they're going to put Senator Lott on the stand as one of the witnesses. That kind of testimony and sensational aspects of because of the personalities involved are going to leave Mr. Backstrom sitting over here just accumulating all sorts of prejudice, none of which has anything to do with him.

And in the Bruton case and this is not a Bruton problem as such; but in that case, the United States Supreme Court and even in Zafiro, although that was not reversed because it wasn't per se antagonistic defenses don't, per se, mean you get a severance. In both of those cases, the Supreme Court recognizes that there is a limit to the value of limiting instructions.

And there comes a time when the prejudice and spillover, where there's evidence that's not otherwise admissible against the defendant, becomes so paramount that it consumes and destroys its fundamental right to be tried and only be considered for guilt or innocence based on the evidence against him. And that's the problem that's been presented to this Court, and that's what we believe a severance is required to overcome in order for Mr. Backstrom to get a fair trial.

Your Honor, the Wilson case, it's clear the United States recognizes the tactical advantage of throwing the Wilson case in here against the defendants, against whom they have a lesser amount of evidence. It's sensational. There is some superficial appeal and appearances that the Wilson case is similar to Judge Lackey's situation.

Both of them superficially involve, from the Government's standpoint, an allegation of an attempt to influence a judge in his decision making. And both of them involve millions of dollars in attorney fees, disputes about that. And both of them involve Mr. Dick Scruggs and the Scruggs Law Firm.

And as you've heard over explained by Mr. Graves, often just in the last two days, day and a half, we've heard references to the Scruggs firm. And of course, that's a reference to Mr. Richard Scruggs in general. And it becomes synonymous, but there is a difference.

There's even a difference between the Scruggs firm where the is not capitalized and the firm is not capitalized and the, cap; Scruggs, cap; firm, cap. There's even a difference there. So the shorthand version then becomes a shorthand version, a reference not to just Mr. Richard Scruggs but to all the defendants who are parties and partners in that law firm.

Your Honor, there are cases, the Crawford case, which, again, is antagonistic defenses. There were just two defendants there. The Tarango case, again, that was a

disparity of evidence coupled with in that case the co defendant had absconded. The United States says, Well, there's not a case on record where severance or the public has figured into the decision of whether or not to sever a defendant.

There's not many cases I couldn't find any at the time I looked at it in which a severance was granted because one of the co defendants absconded. But it became a factor in the Tarango case. And that's exactly what Your Honor is called upon to do and any judge hearing any motion for severance that is, look to the facts and circumstances of the case in front of them.

We would incorporate a motion for change of venue in this case, and we would because of all the publicity. And Your Honor, if Mr. Backstrom was not the partner of Dick Scruggs and these allegations were made against him, all these people out here would not be here. The headline from yesterday, "Tapes: Judge's Order Edited." The edit was Mr. what's being referenced, if you read the article, is that Mr. Scruggs apparently, on the tape, suggested at one point that it needed a colon, which is not put in by the way.

But the point of it is, this kind of publicity is running over this case. And while the Court will have means to it, such as a change of venue to try to minimize the adverse part of that, with the 404(b) and Senator Trent Lott and Judge Bobby

DeLaughter and maybe Ed Peters being put on the stand and taking the Fifth Amendment, that kind of activity, testimony, witnesses, all sensational, they'll be the gallows will be full of people.

The gallows are going to be full of other lawyers who have only ill will towards Dick Scruggs. The lawyers are going to be full I mean, going to be full of bloggers who have a bent that there ought to be a conviction in this case. There is a tidal wave, a tsunami, of enormous proportions of ill will and hostility involved in this case. State Farm, that's not going to go anywhere. They're going to generate whatever they can.

THE COURT: The jury up here you know, hopefully, if the jury if this were tried, you know, altogether, the jury can certainly be insulated from these lawyers out in the courtroom, who may or may not have ill will, wouldn't you think?

MR. TRAPP: Once we start trial they can, Your Honor. But I'm just saying that's going to go on until trial time, and it's going to continue even once the jury is insulated. We hope that insulation will be effective, and I'm not suggesting it won't. But it's going to precondition. And when you start putting sensational type testimony that's going to be ongoing, you heard it said to Your Honor, "The Wilson case is an active investigation," as we sit here. They'll be plenty of press play on that.

And there's going to be that tidal wave that's going to go up, and the Court is going to put up a board against it; but all the stuff that goes on before Your Honor and that's why the publicity aspect is unique in this case, and it's a factor that the Court should consider. Because as I said, Mr. Backstrom is just a regular working lawyer.

Now, there may be people that don't like regular working lawyers, but that's what he is. And if he didn't happen to have the good fortune to work with Richard Scruggs and the Scruggs Law Firm and the same allegation was made against him, as I said, we wouldn't be having this discussion. We wouldn't be talking about 404(b), and we wouldn't be talking about this tidal wave of adverse publicity.

THE COURT: Now, are you aware of any 404(b) material that might apply to your client?

MR. TRAPP: Not a drop, not a scintilla.

THE COURT: And the Government hasn't implied to you there might be any?

MR. TRAPP: No, Your Honor. And there isn't any.

THE COURT: Okay. Thank you.

MR. TRAPP: Thank you, Your Honor.

THE COURT: Mr. Dawson?

MR. DAWSON: Your Honor, I'll be very brief, simply because the arguments proffered on behalf of the Government against severance in the previous oral argument apply here as

well. And that's one reason we did the combined response, because they were so similar. The striking thing, I think, about everything that council opposite has argued, it is purely speculative.

And you do not grant severances based on speculation. Just the mere fact that there's a disparity among defendants and evidence admitted against defendants has been clearly said by this the Fifth Circuit and I believe even the Supreme Court and certainly other circuits it is not sufficient to grant a severance.

The case of Tarango that counsel was proud of should be point out be pointed out that that was a motion for a new trial case. And in the posttrial Rule 33 motion, the trial court speculated indicta that one of the reasons that might be considered on a retrial would be a severance motion. And they affirmed the discretion of the district court in granting a new trial motion.

Now, that's a far cry from being four cornered authority that they're entitled to a severance at this stage of the proceedings. So we don't think that the Tarango case is any authority for the severance. And it certainly does not abrogate the Peterson case, which we have previously cited to the Court, with respect to the prophylactic measures that a limiting instruction can cure any potential prejudice.

Now, again as I state here, while there's all sorts of

speculation about what kind of prejudice may exist, that's all it is; it's speculation. And the Court will have

THE COURT: Well, let me ask, what about speculation about what the disparity of evidence is? I asked Mr. Graves if he thought he was now basically aware of all the evidence against his client and against the other clients. What do you say to their knowledge of how much or if all the evidence has been presented to them, basically all of it?

MR. DAWSON: Certainly, we have complied with Rule 16, provided all of the tapes, transcripts, documents, that we have in our possession. And I think that the hearings that we've been through the last yesterday and today has certainly augmented that, and we have given because of when you have grant evidentiary hearings and motions for suppression under Rule 12, Rule 26.2 comes into effect; and we have to give early Jencks. That's what we've done.

So I think that we have provided all that the evidence that we are aware of that we have presently in our possession. Obviously, there will be subpoenas for certain for example, phone records or other trial subpoenas that we will have to provide that information as it comes in. But it's all, for all practical purposes, been identified to all the defendants about what the evidence is going to be. I don't know if that is exactly

THE COURT: I was just curious as to whether you have

witnesses who are not on record by transcript or testimony that know facts about this case that are not included in what you've provided them.

MR. DAWSON: Well, Your Honor, there may be; but we are not required under Rule 16 to provide witness lists.

THE COURT: Well, I know that. That's why I mean, I know, but whether not necessarily that you need I wasn't suggesting you need to do that. I'm just you know, their argument is based on the disparity of evidence between the three defendants. And my question to you is, Do they have a good grasp of how much disparity there is, or is there evidence that you have that they don't know about that would make the disparity less?

MR. DAWSON: I suspect there'll be some of that, Your Honor. I think they probably have as in any multi defendant case in a conspiracy, you're going to have different roles for different people and certain members of conspiracy will engage in certain conduct and certain conversations that others do not. And I think they do have probably as good a grasp as you could get on that basis.

But I would come back to the proposition that once you show that a conspiracy exists all evidence is admissible against all co conspirators that are members of the conspiracy. Now, for example, I think you might bring the Court's attention to Mr. Patterson.

Mr. Patterson said, when he first found out, attended that meeting, that he didn't think that there was any conspiracy afoot, but readily admitted that he joined a conspiracy later on as reflected by his intercepted telephone conversations and discussions with Mr. Balducci, Mr. Scruggs, and others.

And, so, I don't see how any severance from that perspective solves any of the problems that they are fairly frantic about. The only exception to that would be the 404(b), which the Fifth Circuit has said that any prejudice can be handled with limiting instructions.

And juries are presumed to follow the instructions of the Court. I mean, that's a standard instruction I know that the Court gives in every criminal case. And I might add that there are avenues that the Court is is available to the Court concerning the voir dire and selection of the jury and preinstructions to the jury and instructions at the end of the case and instructions during as the evidence unfolds. So

THE COURT: All right. Well, I think that answers the question.

MR. DAWSON: Yes, sir. Thank you.

THE COURT: Thank you.

MR. TRAPP: Your Honor, if I might just briefly?

THE COURT: Very well.

MR. TRAPP: Your Honor, on this notion of speculativeness, the 404(b) is real. You've heard it described

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here to consist of at least three witnesses from the standpoint of the United States, which includes Mr. Balducci. It also includes a whole lot more from the defense side. So there is no question all of that evidence comes in.

Secondly, the news and publicity that's contained within the motion for change of venue, as well as these two articles, those are real. There's no speculation about that, and there's no speculation about the audience sitting out here watching this.

THE COURT: What do you say to Mr. Dawson's rebuttal about your claim and also Mr. Graves' argument about the disparity of the evidence between the three defendants when, in a charge of conspiracy, the evidence against one conspirator is available and should be considered against the other conspirators?

MR. TRAPP: Well, Your Honor, that sort of begs the question the question is, How much evidence do they have against one defendant versus another, and how much of the other evidence, if it was a separate trial? Otherwise, it wouldn't be admitted or otherwise. And, so, they have to Mr. Graves says, I believe you have to make a threshold determination of participation in the conspiracy before it applies

THE COURT: That's right Marmolejo or James determination. But if that's made, if that's found, then whatever Mr. Dick Scruggs does is attributable to Mr. Zach

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Scruggs.

MR. TRAPP: But that's at the end of the case after all of it. And the question is whether because of the disparity they'll be making decisions about that, not against evidence that is otherwise attributable to Mr. Zach Scruggs or Sid Backstrom. But they'll be making it on the basis of 404(b) or, in the alternative, evidence that would otherwise only be admissible against Mr. Dickie Scruggs.

And that is sort of like saying, if we get to the end and they convict everybody, well, they must have found all the evidence was admissible against them. That's the problem we're trying to avoid, Your Honor. And normally, instructions do provide sufficient evidence.

THE COURT: Well, is the only evidence you're talking about now that you're complaining urging the Court to consider in this motion mainly the 404(b) evidence?

MR. TRAPP: It is primarily 404(b) coupled with this, Your Honor: There is a fundamentally, in a severance, it is an efficiency versus fairness sort of balance thing that this Court has to undertake. In the Crawford case, when they went through that balance, they said the Fifth Circuit found that separate trials would not be judicially uneconomical because they're relatively short.

Because of the disparity in the amount of evidence, Your Honor, that would have to be put in and would be put in, in

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this case, the if Mr. Backstrom goes to trial with the if the Court would give us a severance, Mr. Backstrom can go to trial, and that can be done in a relatively much quicker time than the three of us with 404(b) and all that goes along with it.

THE COURT: Why, if Backstrom were separated, would they not be entitled to put on all the evidence in Backstrom's trial against Richard Scruggs and against Zach Scruggs? Because what they did, with the conspiracy charge Mr. Backstrom would still be charged as a conspirator of theirs, co conspirator. So they could put in evidence of Mr. Richard Scruggs and Mr. Zach Scruggs and make it attributable to Mr. Backstrom. So they would try the whole thing again.

MR. TRAPP: If Your Honor made that decision that they had established a sufficient foundation and relevancy to the case we were trying and I don't believe they can do that when there's a number of conversations going on that Mr. Backstrom doesn't know anything about. Maybe I'm wrong, Your Honor; I don't believe I am.

But the point is, it's all that evidence that doesn't involve him and the small amount that does involve him, which we know will go in. As I said, they won't even call Mr. Patterson in a trial against Mr. Backstrom. Mr. Backstrom had no dealings with him. And

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THE COURT: Well, could they not call him to testify what he knows about Richard Scruggs because he's a co conspirator?

MR. TRAPP: Well, assuming Your Honor found the adequate foundation had been made and it was relevant and it wasn't otherwise confusing or a waste of time or that sort of thing under 403. I mean, you know, I don't believe you would sustain it; but you may. I can't you know, I can't put myself there.

THE COURT: No.

MR. TRAPP: But the point is they really wouldn't do that because it wouldn't be they may say now they would, but they wouldn't. As I said, Mr. Patterson had no dealings with Mr. Backstrom. Your Honor, if the Court would give the severance, we will be prepared to go to trial with this Court at the date designated.

And, so, we ask this Court to give us a severance; and let us go to that trial, subject to the Court's ruling on the motions that have been reserved and the ruling on the venue.

THE COURT: Okay. Thank you. All right. We'll take a 15 minute recess and go into the change of venue motion.

MR. TRAPP: Your Honor, during the recess, I'm going to mark these two things as exhibits.

THE COURT: Very well.

(EXHIBIT NOS. D1(SB) AND D2(SB) WERE RECEIVED INTO EVIDENCE)

(AFTER A SHORT BREAK, THE PROCEEDING CONTINUED)
(CALL TO ORDER OF THE COURT)
THE COURT: All right. We have one motion left, the motion for change of venue, Mr. Keker.
MR. KEKER: Thank you, Your Honor. I want to start by acknowledging, Your Honor, that I haven't made any bets that you're going to grant this motion.
THE COURT: I beg your pardon?
MR. KEKER: I said I haven't made any bets that you're going to grant this motion, and I recognize that it is an unusual motion; and that it is very difficult to get granted. And I've made it in other high profile cases, and I've been unsuccessful. What's different about this one is who's interested in the case.
And I really have been struck I mean, as you sure know, the case has been on the front page of The Clarion Ledger many times in the last few days, big headlines, front page of the Northeast Mississippi Daily Journal the last two days. And I've got them here; I'll mark them. The Oxford Eagle the last two days. My friend Paul Quinn, who's here with us from the University of Mississippi and writes for the Daily Mississippian, has had a front page story the last two days.
The people in Mississippi are fascinated by this case. And people elsewhere aren't. And it's really unusual. I mean, I was involved in the Enron some of the Enron litigation.

And
THE COURT: Who did you represent, Mr. Fastow?
MR. KEKER: I represented Fastow, yes, sir. And we made a venue motion; we worked real hard on it; and it was a great venue motion. It proved that everybody thought he was guilty; it was a very prejudicial jury venire. But when we went to New Orleans, when we went to Baton Rouge, when we went to other places, same statistics; so it made it a little harder to argue why we'd get a better trial there than here.
In this case, people in Mississippi have been absolutely in a way that has amazed me, because I'm not from here. As one of the commentators said, "Mississippi is so small that just about everyone in the state has some personal interaction with at least one of the players in this tragedy referring to the case so it's compelling on an individual level."
And then he goes on to talk about things that really don't have to do with the case, but this is what the perception seems to be. "It also involves a fall from grace of people who are well known and larger than life. Dickie Scruggs, Jim Hood, Joey Langston, former Attorney General Mike Moore, and Steve Patterson are all household names in Mississippi, and all are intimately involved in this story."
THE COURT: And who are you quoting as authority?
MR. KEKER: I'm quoting the person who wrote this

is a man named John O'Brien who writes a Legal Newsline. And the article is "Blogosphere Becomes Authority, Issue in Scruggs Case." And it's talking about all the people that are blogging. I have a copy of that if you would like me to mark it as an exhibit.
THE COURT: Not unless you want to.
MR. KEKER: But you live here; and you know, I'm sure maybe you don't know. But Governor Barbour was commenting on it, a lot of Mississippi Supreme Court Justices. Lots of people seem to think that seem to be worried about the honor of Mississippi, and so on. There's a lot of discussion in this community.
And there is, as far as we can tell, no discussion in surrounding states and not no; I'm exaggerating. But the Wall Street Journal has run some articles. But certainly in Louisiana or Tennessee or Texas or someplace you might send this case nearby, it's not an issue; and people wouldn't know about it. Here, they do.
They know the names involved, and it's that that has led us to make the motion for a change of venue. We think that the Government, in its response, which says if you'll forgive me, but the obvious, which is there's also you know, there's voir dire, and there's this and that. We know that.
But the cases, Sheppard and Rideau, all the Supreme Court cases that talk about prejudicial publicity, stand for the

proposition that when the defendant makes a showing of community prejudice, which is usually pervasive coverage, plus inflammatory and prejudicial material, that's the end of the story; and there should be a change of venue. It's not just something that can be done by voir dire.
If you deny this motion, then we have some further requests about voir dire. I don't want to minimize that. But we believe that, on the state of the record, because it's been covered so extensively in Mississippi and it would be so easy to get a jury that really doesn't isn't affected at all by that publicity, in a nearby district in the Fifth Circuit or wherever you wanted to take us, that the change of venue is actually quite appropriate here.
We're prepared to go to trial. You've told us we're going to trial on March 31st; we'll go to trial on March 31st. And it's just a question of doing it someplace else. And I hope I'm not going to belabor it. You've read our, I think, good papers written by Mr. Braunig. And you live here, and you know how much attention this has gotten. You know how well known these people are. And you know the difficulty of getting an average jury that doesn't know something about Judge Lackey.
There was just an article in the Oxford paper about how wonderful Judge Lackey is. Well, that makes it kind of tough sometimes if you're going to cross examine a witness and raise some issues that he might not like or one of his fans may not

like. You know how well known Senator Lott is in this state. You know how well known Mr. Patterson is, who is a person who was hoping to run for governor when he was the state auditor, has a long time political history.

Dickie Scruggs himself, as I have found out, in this state is a very well known figure for better or worse. People who are you mentioned tort reform; I think we mentioned tort reform yesterday. But that's been a big issue in this state for a long time. And, so, there's and trial lawyers are the epitome of plaintiffs bar, trial lawyers, that's been an issue. The tobacco litigation. All of those things that are very, very well known.

And people have as you've seen opinions, both about the case and about the impact on the judicial system of Mississippi because of the case; and the aspersion of Mississippi's good name because of the case. So I think it would be better to do this with a panel of jurors not from Mississippi. That's our fundamental position.

THE COURT: In your research on this it appears to be fairly thorough. Do you find all the opinions given are negative or are they both ways? Have you done a calculation of how many

MR. KEKER: We haven't it's impressionistic, but I haven't seen much. What people say Governor Barbour said yesterday, I hope it's not true. I've known him since we were

in school together at Ole Miss. But if it is true, then I'm paraphrasing it it's a real blight on the honor of Mississippi and the judicial system.

People seem to be saying, Whether or not it's true, this is an embarrassment to the judicial system, this what we're talking about, what goes on. And then they segue into what's wrong with plaintiffs lawyers, what's wrong with the way we elect judges. There's been an awful lot of talk about changing the way the state it's had a political impact, we should appoint rather than elect judges.

And then you'll remember a couple of weeks ago when there was a big brouhaha about getting Attorney General Hood on the stand in a case. I think the hearing was over in Natchez. State Farm is heavily involved in this. They were in a big fight with Attorney General Hood. And all of the stories mentioned campaign contributions from Mr. Scruggs and then went on and talked about this case and repeats the Government allegations.

That's the other thing that I've learned about my beloved friends in the press. I mean, if you these stories tend to be something new may be in the first paragraph, and then the next six or seven paragraphs repeat what the allegations are from what's been written before. And, so, the allegations get repeated over and over and over.

And then you can read The Clarion Ledger, for example,

article yesterday. Down at the bottom it says, "By the way, Mr. Scruggs denies it." But you don't get, in these stories, the defendant's point of view. And the answer is, no, my impression is there aren't people who've stepped up. The best they say is, "I hope it's not true." But just having to deal with it, is a terrible thing.

THE COURT: You don't see any statements in the press quoting somebody who says, I don't believe he did it, or I think he's innocent?

MR. KEKER: The expert on this is Mr. Braunig, and he's shaking his head. I think our impression is and Mr. Braunig is the one whose been through every article. We've looked for them and put all this together. No, there's not people and you can understand why; it's a very serious charge.

The United States Government has come forward and has brought this indictment. One of the greatest things in the law that is most not followed by civilians, as far as I'm concerned, is the presumption of innocence. The Government you tell people the Government has charged somebody and immediately people think that, well, they're probably guilty.

And nobody seems to have been willing to step up and say, I know Dickie Scruggs, and I know this isn't true. What they say is, Dickie Scruggs at best, they say, I know Dickie Scruggs; I admire him; he's done a lot for this, that, or the

other thing. I certainly hope this isn't true.

But people don't know. They haven't been on the inside. You know a lot more about this case at this point than all these reporters and all the people writing the stories and the general public. And that's really not out. The allegations just get repeated over and over again.

THE COURT: Well, I want to tell you, it was one of the most thoroughly researched motions I've ever seen. There must have been hundreds of news media filings, statements that were footnoted in this motion, and all kinds of newspapers, magazines, televisions, statements. And I know a lot of work went into it.

But I just it's hard for me to believe that there weren't some statements in all those reportings that said, Well, he's I don't think he's guilty, or he's not he couldn't have done this, that he had no reason to do this. Something, you know, talking about implying that their belief was he's not guilty.

But I don't I haven't I don't know if I've read any like that. Just seems to me like all hundred statements that there would have been some on the other side.

MR. KEKER: Your Honor, the people Ms. Bringola, she has a bad back, so I will leave her seated. Come on this is Warren Braunig, who is a lawyer in our office. If he can why don't you address that, if that's all right with the

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Court.
THE COURT: Yes.
MR. BRAUNIG: Afternoon, Your Honor. I think the fact of the matter, it's telling that in response to this you don't have from the Government coming back and saying, No, no, Your Honor. Look how fair this coverage is. You don't have that; but you have, instead, the Government coming in and saying, This case is not quite like all of these other cases where venue was actually granted.
And I think I think we've been through we've been following the media very closely, and what we've found consistently is people piling on, supreme court justices of the State of Mississippi talking about how they're horrified by this, that they're nauseated by it, local lawyers, Mr. Merkel and Mr. Tollison, for example, just to take two examples.
People in the community, people who are respected in the community, going out of their way to pile on and say, you know, I've always known this about Dickie Scruggs and finding, you know, the notion being that at last he's getting his comeuppance.
And I think that that's in what we've found, that's unique to the press coverage outside of Mississippi is an occasional AP story that gets picked up on Page B11 or A13, way down at the bottom of the page that says, you know, so and so in Mississippi did this. But obviously, as Your Honor is

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aware, here it's a different situation.
THE COURT: Okay.
MR. KEKER: And that's not to say that Mr. Scruggs doesn't have a lot of friends and admirers but, therefor his work in the past, they're not in these newspapers; they're not coming to the fore. Sometimes when a man find himself in a situation like this where he's really sort of fighting for his life, it turns out that his friends kind of take a step back and wait and see how it's going to work out. And that seems to be what's happening.
But again, Mr. Braunig's point is tremendous negative publicity in a compacted area that isn't a problem when you cross the state lines.
THE COURT: Where or do you have any suggestion as to where would be a place to try it?
MR. KEKER: Well, I my favorite city in the world and they need the business is New Orleans; but I figured you'd decide where we would.
THE COURT: Well, I would; but I'm always open to what you might say.
MR. KEKER: Let's go to New Orleans. We'll try it in New Orleans. They've got a beautiful courthouse. They've got people who need some distraction, and they need the business.
THE COURT: They do. Okay. Well, that's
MR. KEKER: They have good restaurants; there's

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hotels; there's everything. Court staff would appreciate it. But Your Honor, that's we didn't want to impose like we thought we were going to go someplace that we thought was particularly favorable; that's not the issue.
THE COURT: New Orleans is, what, 50 miles or so from the Mississippi State line?
MR. KEKER: Yes, sir, just across Lake Pontchartrain.
THE COURT: You don't think that's too close?
MR. KEKER: No. We've looked at the Times Picayune and have friends down there and talked to people. They don't know about this case. They've got other things that they've been worrying about.
THE COURT: Well, I'll tell you, I was in Montana during the Christmas holidays; and I had some lunch with lawyers out there; and they knew all about it.
MR. KEKER: They're probably plaintiffs' lawyers. If plaintiffs' lawyers I represented Mr. Bill Lerach, who is a plaintiffs' lawyer; and plaintiff lawyers knew about that case; but nobody else did.
THE COURT: One lawyer asked me if Mr. Scruggs is the character that John Grisham patterned The King of Torts after. He said, Is he the one so he'd heard that. And he said he'd read the book, and it sounded like Mr. Scruggs. But I told him I didn't know. I think Grisham has denied that.
MR. KEKER: I take it I now remember. There's one

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highly favorable comment about Mr. Scruggs in The New York Times that came from John Grisham, I remember. And he stood up and said very kind things about Mr. Scruggs.
THE COURT: Well, his opinion is very well respected in this area.
MR. KEKER: This was in The New York Times, so people in New York heard about it.
THE COURT: Well, that statement has probably been quoted here, I would think. All right. Thank you, sir.
Mr. Dawson?
MR. DAWSON: Your Honor, I couldn't help but notice that one of the jurisdictions that Mr. Keker stayed away from was the Northern District of Alabama. So
MR. KEKER: We'll go there. I mean, that's fine. Northern District of Alabama is just fine. Nothing bad happened there, Mr. Dawson.
MR. DAWSON: I would say that the reference to the Government's response as being obvious is correct because in addition to being obvious it is the correct view when you consider motions for change of venue. The test is not whether or not there's been extensive pretrial publicity or even pervasive pretrial publicity. The test is not even whether a certain percentage of people have read the pretrial publicity and have been affected by it or either formed opinions.
The test for a change of venue is whether or not those

that have been exposed to pretrial publicity can set aside that pretrial publicity and follow and make their decision based on the evidence they hear in the courtroom and follow the instructions on the law given to them by the Court.

And the Fifth Circuit has made it plain that the best vehicle for doing that is the voir dire process. And the Court has many options to it in preparing voir dire. For example, the Court could do extensive voir dire, maybe even written questionnaires.

We have to keep in mind, too, that most all of the cases I think with one exception that are cited by the defense are state cases of horrific crimes from where the jurors are brought in from very limited areas, state murders, state rapes, and robberies and serial killers and that sort of thing. They're tried from a jury selected from a county or the parish from where the crime took place. The Sheppard case, for example, Murphey v. Florida, those cases that are cited both by us and opposing counsel.

THE COURT: In the Oklahoma City bombing case, they moved that, didn't they?

MR. DAWSON: They did. They moved it to Denver, Your Honor; but I don't see how the Oklahoma City bombing case, killing 163

THE COURT: No, I'm just thinking about some cases, federal cases that have been moved. That was one I believe.

MR. DAWSON: That was one of them. Of course, that, as you say, was the second largest attack

THE COURT: I'm not analogizing it to this. I was just thinking about ones that have been moved. Do you know of any other federal cases that have been moved out of the state?

MR. DAWSON: I know of none that have ever been moved from this from this state. I do know because I participated in it the collapse of the North Mississippi Savings and Loan Associations in '85 or '87, along in there, there were 14 branches in the Northern District of Mississippi, hundreds and hundreds, if not thousands, of people who lost money when the saving and loans collapsed.

We were able to get a jury selected before one o'clock in the afternoon, so of course, there was an extensive change of venue motion filed in that case.

THE COURT: Did you get a conviction?

MR. DAWSON: Yes, sir. Not on all counts, but we did get a conviction. Now, the other options that the Court has, the obvious one is the our juries do not come from one county. They come from a number of counties in each division. The Court also has an option of a district wide jury. In fact, we have prepared a motion, and it is ready for filing for other avenues that the Court may consider.

But it was premature to file in view of this particular motion here. It calls for the consideration for various forms

of anonymous jury, district wide juries, sequestered jury, and with the brief and supporting documentation, all of which I think is within the Court's discretion according to the authority.

As I say, we thought it was premature to file that motion until this motion had been resolved. We do not believe that just the mere citing of extensive pretrial publicity is sufficient as a matter of law to take the drastic step of change of venue. And we think that voir dire would suffice.

MR. KEKER: May I respond on a few things, Your Honor?

THE COURT: Yes.

MR. KEKER: Some practical issues. I have participated in cases where venue motions have been denied, and we've gotten into voir dire, the judge has realized that he can't get a panel that is fair or and ends up having to grant the change of venue motion. It is terrifically inconvenient and cause a big problem if that's what happens.

So if this idea of, let's just go ahead with it and that's without any cost is we will be raising this motion again and again and again as long as we need to because we feel fairly strong about it. The thing I just heard really bothers me. In support of this motion, the Government is filing some motion I heard the word anonymous jury, which the Fifth Circuit has recognized is extremely prejudicial.

THE COURT: Well, let's don't get into that.

MR. KEKER: If that's how we're going to solve this problem

THE COURT: You know, if the motion is not before the Court, don't argue against it.

MR. KEKER: What I'm saying is the alternatives extreme alternatives like that or counting on voir dire to solve the problem and then finding out we really do have a problem with too many people knowing too much about the case first of all, extended jury selection process which I know you're not particularly use to because if you are going to have to talk to these people individually rather than in front of a whole panel and where we can anticipate that, wouldn't it be better to just bite the bullet right now and make arrangements to try this case in a place where I think everybody agrees?

I haven't heard any argument from the Government that outside of Mississippi this isn't particularly well known, or you're not going to find many jurors who have ever heard of Scruggs or know the people involved or have any of the problems that a local jury would. And this is not any criticism on of anybody. It is simply it's just that it's an incredibly intense local story for reasons that I'm not even completely understanding of. But boy, is it an intense local story.

And it's not very interesting to other people, except

maybe some plaintiff lawyers in Montana and some other ones. But we wouldn't have any of these problems you wouldn't have to talk about fancy jury matters. I mean, you wouldn't have to talk about extended voir dire; I don't think, and so on. You could just go ahead and have a normal trial if we went somewhere else.

So I would ask that you consider our suggestion and move us wherever you choose. And let's make that decision now and everybody can start making arrangements because it will take some logistical arrangements, obviously.

MR. TRAPP: Your Honor, I know the Court's ruling on supplementation. If I might make one tiny comment?

THE COURT: All right. One tiny comment.

MR. TRAPP: The Judge Lackey district covers six of the counties of the eleven counties, if I counted them right, that are in the middle district. And I'd just ask the Court to keep that in mind.

THE COURT: Six of the eleven counties that are in, what, this division?

MR. TRAPP: Yes, Your Honor.

THE COURT: All right. Thank you.

All right. As I mentioned, the defendants motion for change of venue is one of the most thoroughly researched motions that I've seen in a long time as far as the information that was gathered from news media that exists about this

particular case. A lot of articles, dozens if not hundreds of articles, were footnoted and referred to.

There have been these articles came from newspapers in this state and some other states. Counsel quoted from The Clarion Ledger and is quoted from the I don't know how many people in this district subscribe to The Clarion Ledger. There's been no evidence presented to the Court about whether 100 or 1,000 or one million subscribe to it. I have no information on which I can base how prevalent that information is among the citizens of this district.

I don't know what the percentage what the subscription rate is or number is of the Tupelo Journal. I believe it's the Northeast Mississippi Journal. I know there have been a lot of articles in that; but as far as how many people read those papers, how many people out there on the street read them, no information has been presented to the Court. There's been no survey taken. And, so, whether it's 1 percent or 10 percent or more, I don't know.

I do know, generally, that people get most of their information now from television, more so than they used ever have before; and only a few not as many people read the newspaper as used to. You see that because newspapers are losing money all over the country. Some are going out of business.

But be that as it may, I have no basis on which to judge

the percentage of people in this district who might be called for jury duty who subscribe to any of these newspapers that have been cited, including the local paper. So I cannot, in good faith, base a change of venue on the fact that some newspapers have printed numerous stories about this case.

There might be some people you could walk up to on the street and ask them about this case and they wouldn't know what you were talking about. I've had people tell me that. But I'm not basing any judgment on that either, because that's not before the Court. It's not on the record.

But the mere fact that there have been numerous newspaper articles and I grant, as I said, this is a very well researched and documented motion that mere fact that newspapers have printed it does not, in effect, militate on this Court to move this case out of this state.

So for those reasons and also, there's been no testimony by anyone who thinks that these defendants could not get a fair trial from jurors in this district. So there's really nothing on the record before the Court on this particular motion other than a lot of several newspapers have printed a lot of articles about this case.

And I cannot segue from that into a conclusion that we cannot get a fair jury panel from the counties of this district to hear this case. And certainly, when they are summonsed to be here, we'll ask them about their opinions, about their

knowledge, if they heard about it, if they formed an opinion.

Merely hearing about the case is not sufficient grounds to disqualify a person from sitting on a jury. They may have heard good things about the defendants. That they know about the case is not, in itself, grounds to disqualify. They can be questioned about whether they have formed an opinion about the guilt or innocence, if they formed it either way.

Some people may have formed an opinion about the innocence. Some people may say they've formed an opinion about the guilt. But that's what they've got to say in order to disqualify them from sitting on this particular case. And even if they have formed an opinion, a proper question would be then, Is that opinion a fixed opinion or is it one that you can lay aside and listen to the evidence with an open mind?

So I think jurors generally answer those questions truthfully. If counsel believe they haven't answered them truthfully which I don't want to even get into that but of course, counsel have peremptory challenges that they can exercise if they feel someone is not does not have an open mind.

So at this point, the Court has is of the opinion that the prudent course of action will be to select a jury from the Northern District of Mississippi which has over a million people in it. And not any particular I'm not saying that any particular section of this district should be more

prevalent than others or that it should be from the whole district.

But just because the Court is here and just because Mr. Scruggs and Mr. Zach Scruggs and Mr. Backstrom are residents of this town, this small town, this is a very minor, minor part of this district; and it's a very minor part of the population is a very minor part of the citizens from this district who could be called to sit on this jury. So for those reasons, the Court declines to grant a change of venue to outside the state.

As to the other motions that the Court has under advisement, the two motions for severance and the motion for the 404(b) material I believe counsel are going to furnish the Court some other information on the motion to suppress the wiretaps by Monday. And the Court will give you a ruling on all of these at the same time; I think by Tuesday. We can go from there.

MR. KEKER: Your Honor, could I be heard on a couple of, I guess, housekeeping matters?

THE COURT: You may.

MR. KEKER: Thank you. We had anticipated the possibility, at least, that you would not grant the motion to change venue and, as an alternative, wondered if you would consider the use of a jury questionnaire, which we told the Government about and provided them a copy of on Tuesday, not to

rehash it now.

But with the Court's permission, what I'd like to do is submit to you a jury questionnaire for you to maybe think about whether or not you'd be interested or be willing to use it. We're requesting it.

THE COURT: All right. That'll be fine. Give it to the clerk.

MR. KEKER: Two copies.

THE COURT: You want to talk about this jury questionnaire at this time?

MR. KEKER: I would like to talk about it; but since we're just handing it up now actually, that segues into my next question. We're hoping that there are a number of matters that we consider to be still open. There's going to be in limine motions, I'm sure. There's issues you said at the discovery hearing that, when we would get the Jencks material in relation to when the witness finished testifying is something that you would discuss with the Government at some point. And I understand it's often the practice that we get it a little bit ahead of time; we don't wait till the last minute.

And certain things like that. And we were just wondering again, we don't have to schedule it now; but we would like to get that done before the trial starts. And then there's also the jury selection issues. We'd like to understand your process. We'd like to talk to you about the

use of the questionnaire.

We'd like to talk to you about what happens if somebody does raise their hand and says, yes, I know some of these witnesses, or just a large number of housekeeping issues.

There's also depending on your ruling on the 404(b) material, there is a nascent dispute with the Government. I'm not sure if we have a dispute, but we sent them a letter saying we believe that the evidence comes in the Rule 16 has to apply to it. We've gotten some material, but we certainly don't have all.

Certainly, that would be everything they took from Joey Langston, might be I think since it relates everything related to the Wilson/Scruggs case that they took out of Joey Langston's office would be Rule 16 material, would be our position. So all of that is premature. I'm just saying there are a number of things we hope we can get done in a pretrial conference or something in advance to make the trial work efficiently and smoothly.

THE COURT: All right. Well, I would suggest you put all that in writing and present it maybe with your other information by Monday or shortly after. I'd like to have it early next week.

MR. KEKER: We'll get it Monday, Monday afternoon.

THE COURT: All right. And then we'll schedule a day to hear all that.

MR. KEKER: All right. Thank you, Your Honor.

THE COURT: All right. Thank you.

All right, gentlemen, lady, if there's nothing further anything further from the Government?

MR. DAWSON: No, Your Honor.

THE COURT: If not, then thank you very much. We'll be in recess.

(THE HEARING ENDED AT 3:22 p.m.)

C E R T I F I C A T E

I, Rita Davis Sisk, RPR, BCR, CSR #1626, Official Court Reporter for the United States District Court, Northern District of Mississippi, was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I, Rita Davis Sisk, RPR, BCR, CSR #1626, have caused said stenographic notes to be transcribed via computer, and that the foregoing pages are a true and accurate transcription to the best of my ability.

Witness my hand, this 22nd day of February, 2008.

RITA DAVIS SISK, RPR, BCR, CSR #1626
Official Court Reporter