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
INSPECTION OF THE GRAND JURY MINUTES

Defendant, **BOBBY B. DELAUGHTER**, by and through his attorneys, **THOMAS ANTHONY DURKIN**, **JOHN D. CLINE,** and **LAWRENCE L. LITTLE,** pursuant to the Due Process and Grand Jury Clauses of the Fifth Amendment, and Rules 2 and 6(e)(3)(C)(ii) of the Federal Rules of Criminal Procedure, respectfully moves this Court for the entry of the following orders: (1) Requiring disclosure and production of the entire minutes of the proceedings before the grand jury which returned the indictment in this matter; or in the alternative; (2) Requiring production of said minutes to the Court for its *in camera* inspection so as to determine whether the decision to indict was substantially influenced by improper instructions on the law, or the product of insufficient evidence, and/or prejudicial influence on the grand jury as a result of violations of the grand jury secrecy provision of Rule 6(e); or, (3) Any other relief this Court, in the exercise of its supervisory powers, deems appropriate.

In support of this Motion, Defendant, through counsel, shows to the Court the following:

1. Counsel have filed simultaneously herewith a motion to dismiss the "honest services" mail fraud charges set forth in Counts Two, Three and Four on the grounds that these counts fail to charge a federal offense. Counsel have also filed a motion to dismiss Count One on

the same grounds. The allegations, argument and authorities set forth in those motions are respectfully incorporated herein by reference. As the motion to dismiss Counts Two, Three, and Four demonstrate in considerable detail, the government has again attempted to stretch its intangible rights mail fraud theories to create federal criminal liability in the context of patent local governmental activity – in this instance, in the realm of state court judicial ethics, heretofore the sole province of the Mississippi Judicial Performance Commission and the Mississippi Supreme Court. Nor can Count One withstand scrutiny as that motion to dismiss likewise demonstrates.

2. In addition to the legal problems with the indictment advanced in both motions to dismiss, counsel have also filed simultaneously herewith a pleading captioned "Defendant DeLaughter's Motion For Pretrial Hearing Concerning Co-Conspirators' Statements." Like the motions to dismiss, counsel would request that the allegations and arguments set forth therein be incorporated by reference in this pleading so as to avoid redundancy. As is advanced in the request for a hearing regarding these co-conspirator declarations, however, the oral argument regarding the admissibility of the 404(b) evidence before Judge Biggers in *Scruggs I* demonstrates the shifting sands of the government's theory of prosecution in this case and, in and of itself, points out the legal confusion resulting from the government's attempt to turn state court judicial ethics issues into federal criminal liability.

3. Further, it is quite clear from Judge Biggers' written order explaining the basis for his denial of Scruggs' Motion *In Limine*, that Judge Biggers did not find that the government's evidence amounted to a *crime* for purposes of Rule 404(b). A copy of said four page written order is attached hereto as Exhibit A. Instead, Judge Biggers ruled that the extrinsic evidence the government was offering regarding Judge DeLaughter and Ed Peters constituted a *similar act* for

purposes of the rule insofar as it pertained to the *Scruggs* Defendants. Exhibit A, p. 4. (Emphasis added) While Judge Biggers did explain that he believed that certain facts were substantially the same elements charged in the Scruggs' case before him, his failure to adopt the government's argument that it had, indeed, presented sufficient evidence to show a crime is noteworthy for the purpose of this motion and the relief sought. *Id.*

4. This very issue as to whether this charged conduct constitutes a federal crime rather than merely a "bad act" – or an alleged violation merely of judicial ethics as advanced in our motion to dismiss – presents the very real danger that the Grand Jury that returned this indictment was not properly instructed on the law, and that it indicted, instead, on improper bases – including, but not limited to, these erroneous instructions or prejudicial publicity created by violations of the secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure.

5. This fear that the Grand Jury returned an indictment on an improper basis or was otherwise improperly influenced is, indeed, real and exacerbated by what appears to be a flagrant violation of the grand jury secrecy provisions of Rule 6(e) of the Federal Rules of Criminal Procedure. On February 24, 2008, *The Clarion-Ledger* of Jackson ran an article in its print and on-line editions, purportedly describing the fact that, as the report stated, "Officials from the Justice Department's Public Integrity Division in Washington are investigating DeLaughter's actions in the [Wilson] case and spent last week in Mississippi interviewing witnesses." See, the aforementioned article, marked as Exhibit B, attached hereto and also made part hereof.

6. As if that were not enough of a violation of the grand jury's secrecy provisions under Rule 6(e), the article's very first sentence stated boldly, and we quote: "Circuit Judge Bobby DeLaughter has told federal authorities he became aware in 2006 that some people were trying to improperly influence him to rule in favor of Dickie Scruggs in a Hinds County legal

dispute. DeLaughter told authorities he didn't know whether he was influenced but says he's followed the law in all his rulings." Exhibit B.

7. Several serious matters concerning the propriety of the grand jury investigation, and thus the granting of the relief requested in this motion, jump from this page of *The Clarion-Ledger*. Foremost is the very question of how it is that the business of this Grand Jury made it to the front page of the paper in the first place. The answer to this question, sadly, is rather obvious. Only a government leak in violation of Rule 6(e)'s secrecy provisions could have created the basis of this story. And, upon information and belief, it is undersigned counsel's understanding that the government attorneys have acknowledged that they have investigated the source of this leak. Counsel are not privy to what the result of that investigation concluded, but it is counsel's understanding that the government made certain statements to Judge DeLaughter's previous counsel indicating that all fingers appear to point towards a leak somewhere within the government, as is almost obvious from the article in any event.

8. Second, and equally serious from the perspective of whether this Grand Jury was properly advised on the law or otherwise so tainted so as to have effectively denied Judge DeLaughter his Fifth Amendment right to be indicted by a full and fair grand jury, it is undersigned counsel's understanding that between the time of the publication of this *Clarion-Ledger* article and the return of the indictment in this matter on January 6, 2009, the Public Integrity Division of the Department of Justice abandoned this prosecution. It is undersigned counsel's understanding that at the time of the *Clarion-Ledger* article, and as so reported, the Department of Justice Public Integrity Division was in fact either leading the grand jury's investigation, or supervising the Oxford U.S. Attorney's Office. While counsel are, of course, not privy to the reasons behind why the Public Integrity Division decided not to participate

further with the Oxford U.S. Attorney, one might well take an educated guess based upon all the deficiencies set forth in our pleadings attacking the indictment and its legal basis.

9. Finally, counsel would submit that a good faith basis might also exist to inspect the grand jury minutes so as to determine whether any agents of the Federal Bureau of Investigation's Oxford Resident Agency testified or otherwise participated in the grand jury's investigation. Counsel would request leave to supplement this motion upon receipt of further discovery regarding this potential issue from the government.

10. As such, counsel would also submit, therefore, that this case presents one of those rare situations where this Court could, and should, exercise its supervisory powers over the conduct of the grand jury, and at least insure itself that the grand jury was not misinstructed, misused or manipulated. Defendant is mindful that review of facially valid indictments on the grounds of sufficiency of the evidence is not warranted. *United States v. Williams*, 504 U.S. 36, 112 S.Ct 1735, 118 L.Ed.2d 2352 (1992); *citing*, *Costello v. United States*, 350 U.S. 359 (1956). However, in light of the constitutional questions presented, and the serious irregularities raised herein, it is submitted that a serious doubt might exist with respect to whether the grand jury's very decision to indict was not influenced by erroneous instructions on the law, and, indeed, by the very improper violation of grand jury secrecy under Rule 6(e). *See, United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986); *The Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988).

11. Accordingly, counsel would request an evidentiary hearing to develop these allegations further, and that upon the conclusion of the same, ask that this Court exercise its supervisory powers and grant the relief requested.

Respectfully submitted,

/s/ Thomas Anthony Durkin
THOMAS ANTHONY DURKIN,

/s/ John D. Cline
JOHN D. CLINE,

/s/ Lawrence L. Little
LAWRENCE L. LITTLE, Attorneys for the Defendant, Bobby B. DeLaughter.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant DeLaughter's Motion For The Inspection Of Grand Jury Minutes 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.

/s/ Thomas Anthony Durkin
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

V. CRIMINAL CASE NO. 3:07CR192-B-A

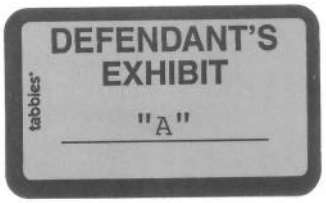
RICHARD F. "DICKIE" SCRUGGS,
DAVID ZACHARY SCRUGGS, AND
SIDNEY A. BACKSTROM

ORDER DENYING DEFENDANTS' MOTION IN LIMINE

The court has before it the motion of the defendants to prohibit the introduction of extrinsic evidence of alleged prior similar bad acts pursuant to Rule 404(b) of the Federal Rules of Evidence. The court has considered the arguments and authority cited by counsel and is ready to rule.

On January 28, 2008, the government served notice upon the defendants of its intention to introduce extrinsic evidence of alleged prior similar bad acts at the trial of this cause. The government has identified the evidence as relating to *United States v. Joseph C. Langston*, Cause No. 1:08CR003, in which Langston, a former attorney, pled guilty to an information charging him with conspiring with Richard F. Scruggs, Steven A. Patterson, and others to attempt to influence state circuit court judge Bobby DeLaughter for favorable rulings in the case of *Wilson v. Scruggs*. The government properly noticed all defendants of its intention to introduce this evidence; however, the government revealed at the hearing of the present motion on February 21, 2008, that the evidence only implicates defendants Richard Scruggs and Zachary Scruggs and not defendant Sid Backstrom.

The defendants object to the offer of the extrinsic evidence on the grounds that its admission will create a "trial within a trial"; will unduly prejudice the defendants, "two of whom



have nothing to do with the 404(b) material"[1]; and will deprive the defendants of a fair trial. The defendants assert that no proper purpose exists for admitting the evidence and that "any minimal probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, misleading the jury, and unduly prolonging the trial of this case."

Rule 404(b) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

In the case of *U.S. v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), the Fifth Circuit noted that "[w]hat the rule calls for is essentially a two-step test." First, the court must determine "that the extrinsic-offense evidence is relevant to an issue other than the defendant's character." *Beechum*, 582 F.2d at 911. Second, the court must find that the evidence possesses "probative value that is not substantially outweighed by its undue prejudice." *Id. See also, U.S. v. Bentley-Smith*, 2 F.3d 1368, 1377 (5th Cir. 1993). "Similarity of the extrinsic offense to the offense charged is the standard by which relevancy is measured under Rule 404(b). *U.S. v. Duffaut*, 314 F.3d 203, 209 (5th Cir. 2002) (citing *U.S. v. Gordon*, 780 F.2d 1165, 1173 (5th Cir. 1986)). "If offered to show intent, relevancy of the extrinsic evidence is determined by comparing it to the state of mind of the defendant in perpetrating the respective offenses." *Id.*

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[1]As mentioned above, the government has revealed that the evidence implicates Zachary Scruggs as well as Richard Scruggs, and the court finds that the defendants have received adequate notice pursuant to Rule 404(b).

There is no question that the extrinsic evidence offered in the present case constitutes a similar alleged act within the meaning established by the aforementioned case law. The 404(b) evidence reveals (1) the employing of a person not an attorney of record to approach a state court judge (2) with the intent to corrupt the state court judge in regard to (3) a fee dispute (4) involving two of the defendants herein as well as two others who have already entered guilty pleas in this case – all substantially the same elements as charged in the conspiracy count before the court in the present case.

The defendants have cited case law which they urge would prohibit the introduction of this extrinsic evidence in this case; however, the law is clear in this circuit that such similarity, as exists here, between the 404(b) evidence and the offense charged amounts to relevancy sufficient to allow introduction of the evidence as long as the probative value of the evidence is not substantially outweighed by its undue prejudice. The crime charged in this case requires the proof of "intent." The case of *United States v. Duffaut*, 314. F.3d at 209, held that by pleading not guilty, the defendants have placed this intent in issue; therefore, the extrinsic evidence offered by the government herein has significant probative value. The court finds that the probative value is indeed not substantially outweighed by undue prejudice and finds that the two-part test promulgated by *U.S. v. Beechum* is met in this case. Further, the court will give to the jury an instruction limiting the jury's consideration of the 404(b) evidence to permissible purposes, and the court is of the opinion that reasonable jurors will have no problem understanding – and acting in accordance with the understanding – that the evidence is to be considered only against Richard Scruggs and Zachary Scruggs and only for consideration by the jury in determining the intent issue.

For the foregoing reasons, the court finds that the defendants' motion *in limine* to exclude introduction of extrinsic evidence pursuant to Rule 404(b) is not well taken, and the same should be and is hereby **DENIED**.

SO ORDERED AND ADJUDGED, this the 26th day of February, 2008.

/s/ Neal Biggers

NEAL B. BIGGERS, JR.
SENIOR U.S. DISTRICT JUDGE

February 24, 2008
Section: Main
Edition: Metro
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Judge: Efforts to sway made

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By Jerry Mitchell

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Circuit Judge Bobby **DeLaughter** has told federal authorities he became aware in 2006 that some people were trying to improperly influence him to rule in favor of lawyer Dickie Scruggs in a Hinds County legal-fees dispute.

DeLaughter told authorities he didn't know whether he was influenced but says he's followed the law in all his rulings.

In 2006, **DeLaughter** rejected a special master's recommendations that could have paid Scruggs' former law partner, William Roberts Wilson Jr., about $15 million in fees. **DeLaughter** eventually ruled that Scruggs didn't owe any more than the $1.5 million he had belatedly paid Wilson.

Officials from the Justice Department's Public Integrity Division in Washington are investigating **DeLaughter**'s actions in the case and spent last week in Mississippi interviewing witnesses.

DeLaughter told The Clarion-Ledger he never was approached in the case and, if he had been, he would have reported it to authorities. He has denied any wrongdoing.

His lawyer, Cynthia Speetjens of Madison, would not comment Saturday.

The rules for Mississippi lawyers and judges require them to report any ethical violation "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

The Rules of Professional Conduct apply to both lawyers and judges, said Bobby Bailess, a Vicksburg lawyer and president of the Mississippi Bar Association. "If you have information that reflects an attorney has committed misconduct, you have a duty to report it to the appropriate authorities."

Informed of what **DeLaughter** told federal authorities, Bailess replied, "That sickens me."

U.S. District Judge Neal Biggers is expected to rule this week whether federal prosecutors can introduce evidence regarding this Hinds County case as proof of another alleged "bad act" against Scruggs when Scruggs goes on trial March 31 on bribery charges along with his son, Zach Scruggs, and law partner Sidney Backstrom.

All three insist they are innocent, saying authorities have created a crime.

Both New Albany lawyer Timothy Balducci and his business partner, former state Auditor Steve Patterson, have pleaded guilty in the scandal, saying they schemed to pay a $40,000 bribe to Circuit Judge Henry Lackey to rule in Dickie Scruggs' favor in a Lafayette County legal-fees dispute. Balducci, Patterson and Lackey are all expected to testify in the trial.

In a hearing last week, Balducci testified that **DeLaughter** was "offered the influence of Mr. Scruggs to contact his brother-in-law, (U.S.) Sen. Trent Lott, to be put on a list for consideration for an open federal judgeship" in exchange for ruling in Scruggs' favor in the Hinds County case.

Balducci said Lott called **DeLaughter** at Scruggs' request.

Asked how he knew this happened, Balducci said he was told this by Scruggs and Langston before and after it took place.

Lott announced his retirement in November and left the Senate in **December**. Federal prosecutors say they plan to call him as a government witness.

Booneville lawyer Joey Langston, who was lead counsel for Scruggs in the Hinds County case, already has pleaded guilty to his part in a scheme that involved paying **DeLaughter**'s close friend, Ed Peters, $1 million to influence **DeLaughter**. Langston said that money came from Scruggs.

Asked in **December** about the allegation that Peters had been paid more than $900,000 to influence him, **DeLaughter**

responded that sounded "like a bunch of bullcrap to me."
He welcomed the scrutiny, he said. "If I were the prosecutor, I would do the same thing."
DeLaughter said his reaction would have been the same as that of Judge Lackey, who reported the offer of a possible bribe to federal authorities.
Lackey also stepped down at that time from hearing the case.
The Code of Judicial Conduct requires judges to step down in cases in which "their impartiality might be questioned by a reasonable person knowing all the circumstances."
DeLaughter didn't step down from the Hinds County case.
Aaron Condon, professor emeritus at the University of Mississippi School of Law, said he supposed a judge could report the matter and still continue to be impartial in a case but that it might not look that way.
In a hearing last week, Scruggs' lawyer, John Keker of San Francisco, suggested the scheme to influence **DeLaughter** was something Balducci and Langston "cooked up" on their own.
"Mr. Scruggs strongly denies any corruption," Keker said.
And as for **DeLaughter**, "Every decision in that case was correct on the law," Keker said.
As for Peters' involvement in the case, Keker said the other side already had hired Jackson lawyer Bill Kirksey, who had been a law partner with **DeLaughter** in the 1980s.
Scruggs' legal team wanted **DeLaughter** to "shade the law," said Assistant U.S. Attorney Bob Norman. "There was every reason to believe the Scruggs law firm would prevail, ... but that wasn't good enough. They had to have an edge."
Balducci testified the Scruggs' legal team previewed a number of filings and "draft copies of orders Judge **DeLaughter** was going to enter."
In a May 29, 2006, e-mail obtained by federal authorities, Zach Scruggs told his father's attorney in the case, John Jones of Jackson, that "you could file briefs on a napkin right now and get it granted." Jones responded in his e-mail, "You have misconceptions about Joey and Tim that I hope ultimately do not need to be explored. ... If we win, it will be because the law says we win."
Keker responded that prosecutors were wrong in their assessment: "There was no law shaded."
While **DeLaughter** did rule favorably several times on Dickie Scruggs' behalf, there also were many rulings the other way, Keker said.
In terms of Public Integrity's look into possible criminal charges, Condon said he supposed **DeLaughter** "has some wiggle room, depending on what he told authorities."
Defense lawyers complained last week about the widespread negative publicity the case has received in Mississippi.
Citing the guilty pleas that have taken place so far, Ron Rychlak, professor at the University of Mississippi School of Law, said the case has given the state's legal system a black eye.
"The legal system, to a large extent, relies on public confidence that you believe you're going to get justice," he said. "Ihope the perception is not so widespread as to reshape the public's confidence in the system."

To comment on this story, call Jerry Mitchell at (601) 961-7064.

WHO'S WHO

THE DEFENDANTS

Dickie Scruggs: Based in Oxford and formerly on the Mississippi Gulf Coast, the trial lawyer is among the wealthiest in Mississippi, making millions off asbestos and tobacco litigation. A federal grand jury has indicted him on judicial bribery charges involving a lawsuit over $26 million in legal fees connected to litigation on behalf of Hurricane Katrina victims.
Zach Scruggs: Dickie Scruggs' son and law partner. He's been indicted on the same charges as his father.
Sidney Backstrom: The Scruggs' law partner also is facing the same federal bribery charges.

PLEADING GUILTY

Timothy Balducci: A New Albany lawyer indicted with the partners in the Scruggs law firm, he has pleaded guilty. He told authorities he gave the judge in the Katrina legal fees lawsuit a $40,000 bribe to rule in Scruggs' favor.
Steve Patterson: A former state auditor forced to resign from office in 1996 over a misdemeanor charge, he was part of Balducci's law firm, although he's not a lawyer. He has pleaded guilty to what prosecutors called a "minor role" in the bribery scheme.
Joey Langston: A Booneville lawyer whose firm briefly represented Dickie Scruggs in the bribery case, he has pleaded guilty to corruption charges. He admitted that he tried to influence Hinds County Circuit Judge Bobby **DeLaughter** to rule in Scruggs' favor in a lawsuit over attorney fees related to asbestos litigation.

THE JUDGES

Bobby **DeLaughter**: A Hinds County circuit judge and former assistant district attorney, he is mentioned in court documents as being the target of a bribery effort to get a favorable ruling for Scruggs in the lawsuit over attorney fees related to asbestos litigation.