

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

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:07CR192

RICHARD F. SCRUGGS and  
SIDNEY A. BACKSTROM

**SENTENCING MEMORANDUM**

Comes now the United States and submits this its Sentencing Memorandum:

On May 23, 2008, the United States Probation Service submitted its Presentence Reports concerning both Richard F. Scruggs and Sidney A. Backstrom. This Court then set a sentencing hearing to be held on June 30, 2008. Because the presentence reports were so detailed and because the objections made by the defendants so extensive, the government believes it would assist all involved to provide an explanation as to its position concerning the major point at issue, namely the amount utilized by the probation service to calculate the sentences pursuant to the United States Sentencing Guidelines.

In its presentence report, because the defendants pleaded guilty to crimes involving 18 U.S.C. §§ 371, 666, and 1343, the probation service utilized U.S.S.G. § 2C1.1 to establish a base offense level of 12. The base offense level is not disputed. However, the probation service then looked to § 2C1.1(b)(2), which provides, “[i]f . . . the benefit to be received in return for the payment . . . exceeded \$5,000,” the base offense level is to be increased in accordance with the loss table found at U.S.S.G. § 2B1.1. Looking to § 2B1.1, the probation service determined the approximate benefit to the defendants in this case to be \$5.3 million and added 18 levels to the base offense level of 12. While there are other findings at issue, it is this amount chosen by the probation service – \$5.3 million – that has caused the defendants the most grief. According to

the defendants, such a figure is too speculative, and as such, it is an inappropriate figure to utilize in the probation service's calculation. According to the defendants, it follows therefore that because this figure is too speculative, the Court should fall back to the amount of the bribe itself and calculate the defendants' sentences using \$50,000. Assuming the remaining objections are without merit, the calculation concerning Richard Scruggs's sentence would drop from a recommended range of 168-210 months to 46-57 months.

As to Sidney Backstrom, his sentence would drop from 135-168 months to 37-46 months, but because his plea agreement provided an 11(c)(1)© agreement effectively capping his sentence as 30 months, his objection as to this issue is essentially moot.

#### **BURDEN OF PROOF**

Generally, the burden of proof is on the government to establish the initial offense level, then shifts to the defendant who seeks any adjustments to that level. *United States v. Alfaro*, 919 F.2d 962, 965 (5<sup>th</sup> Cir. 1990). A presentence report bears sufficient indicia of reliability to be considered as evidence by the Court. *Alfaro*, 919 F.2d at 966. The defendant bears the burden of showing the information contained in the presentence report "cannot be relied on because it is materially untrue, inaccurate or unreliable." *United States v. Cothran*, 302 F.3d 279, 286 (5<sup>th</sup> Cir. 2002). "In general the PSR bears sufficient indicia of reliability to be considered as evidence by the district court, especially when there is no evidence in rebuttal." *Cothran*, 302 F.3d at 286. "Mere objections do not suffice as competent rebuttal evidence." *Id.*

In the present case, the defendants' main objection is one directly related to a guideline calculation. It is well established that the burden of proof at sentencing is by a preponderance of the evidence. *See United States v. Solis*, 299 F.3d 420, 453 n.17 (5<sup>th</sup> Cir. 2002). Citing *United States v. Mergerson*, 4 F.3d 337 (5<sup>th</sup> Cir. 1993), however, the defendants argue that the

government must prove its position in the present case by clear and convincing evidence. In support of their position, the defendants point to instances in which a particular sentencing factor so dramatically alters the calculation of a sentence that a defendant is in effect put at a disadvantage and unfairly so. *See Mergerson*, 4 F.3d at 343 (citing *United States v. Kikumura*, 918 F.2d 1084, 1101 (3<sup>rd</sup> Cir. 1990)) (requiring finding by clear-and-convincing evidence standard); *United States v. Julian*, 922 F.2d 563, 569 n.1 (10<sup>th</sup> Cir. 1990).

The government does not dispute that there may be instances in which a clear and convincing standard may be used, but the government does dispute that the present case is such a situation. As discussed *supra*, while the guideline calculations for Richard Scruggs came to 168-210 months using the \$5.3 million figure, using \$50,000 came to 46-57 months, and the statutory cap is 60 months. Consequently, the disparity faced by Richard Scruggs is far less than depicted by the defendant. In other words, because Richard Scruggs faces a maximum of 60 months, any amount of time over and above that statutory barrier is moot.

Also as discussed *supra*, the disparity as it pertains to Backstrom is moot. In other words, should the Court decide to accept Backstrom's plea agreement, his thirty-month cap is below the calculation done with either \$5.3 million or \$50,000.

#### **INTENDED LOSS/BENEFIT<sup>1</sup>**

The amount of loss is a fact finding issue for the Court to determine at sentencing. *See United States v. Cmielewski*, 196 F.3d 893, 894 (7<sup>th</sup> Cir. 1999). The loss at issue also includes the "intended loss," which includes "intended pecuniary harm that would have been impossible or unlikely to occur." U.S.S.G. § 2B1.1 cmt. 3(A)(ii). The District Court need not determine the

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<sup>1</sup>While some opinions address intended benefit and others intended loss, for our purposes, these numbers are, of course, the same; the terms vary depending only on whether one sees the matter through the eyes of a single defendant or a victim.

value of the loss with precision. *United States v. Landers*, 68 F.3d 882, 884 n.2 (5<sup>th</sup> Cir. 1995) (addressing approximate benefit). In fact, in determining the amount of loss, courts may consider the expected loss, not only the actual loss itself. *See United States v. Griffin*, 324 F.3d 330, 366 (5<sup>th</sup> Cir. 2003). The commentary to § 2B1.1 of the guidelines provide in pertinent part:

The court need only make a reasonable estimate of the loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court's loss determination is entitled to appropriate deference.

U.S.S.G. § 2B1.1 cmt.3©.

In the present case, the defendants contend that the \$5.3 million figure is too speculative to utilize in calculating their respective sentences. As this Court is well aware this figure came from the amount sought by the plaintiff Johnny Jones in the lawsuit against the defendants herein and others. The defendants contend they bribed the judge assigned to that case only to have him send the case to arbitration, and thus, there is no way to determine what loss, if any, Jones would eventually suffer as a result. The government does not agree.

At the outset the government concedes that the defendants could not have intended that Jones lose everything he sought. While the defendants argue that Jones was not entitled to everything he sought, it has never been argued that he was entitled to nothing. Consequently, the entire amount sought – \$5.3 million – does not appear accurate. This is not to say, however, that a reasonable estimate of the intended loss cannot be determined; far from it. Indeed, unlike cases cited by the defendants in which the courts have found insufficient evidence to support an estimate, the present case has very definite figures this Court may utilize. *See, e.g., United States v. Olis*, 429 F.3d 540, 546 (5<sup>th</sup> Cir. 2005) (reversing sentence where calculation did not consider drop in stock caused by extrinsic factors); *but see United States v. Muhammad*, 120 F.3d 688, 701 (7<sup>th</sup> Cir. 1997) (affirming sentence where jury verdict utilized). Specifically, the

government points to the amount initially offered to Johnny Jones for his role in the Scruggs Katrina Group, \$1,235,848.86.

It was that figure that Johnny Jones declined that lead eventually to the lawsuit filed in Lafayette County Circuit Court. The initial agreement was essentially as follows: Five entities, one of which was The Scruggs Law Firm, agreed to form the Scruggs Katrina Group to sue State Farm Insurance Company for actions following Hurricane Katrina. The group also agreed that once the lawsuits were concluded and attorneys' fees determined, the group would then decide how best to divide the fees based on each entity's role. The fees, as this Court is well aware, amounted to approximately \$26.5 million (\$20,597,480.96 after expenses), and four of the five groups determined Jones share to be 6% or \$1,235,848.86. Jones disagreed and eventually filed suit, arguing he was entitled to approximately \$5.3 million. It seems clear, therefore, that once the defendants faced a \$5.3 million lawsuit, their exposure – or Jones' potential gain – increased at the very least \$4,064,151.14. It is reasonable to assume that once in arbitration, the defendants would have argued Jones was entitled to \$1,235,848.96, precisely what all four of the remaining partners determined after the fees were calculated. Clearly, the defendants believed this to be a likely result at arbitration because they were willing to pay Judge Lackey \$50,000 to send it there.

The defendants argue that such figures may not be used because speculation is required to determine how precisely an arbitrator would have ruled. Such an argument is unavailing, however, because the issue is not how an arbitrator would have ruled but what loss the defendants intended. *See United States v. Edwards*, 303 F.3d 606, 645 n.27 (5<sup>th</sup> Cir. 2002) (“[N]othing in [§2B1.1] . . . requires that the defendant be capable of inflicting the loss he intends.”). It is reasonable to assume that the defendants believed Johnny Jones was entitled to

\$1,235,848.86 – they offered it to him. It is equally clear that Johnny Jones felt entitled to \$5.3 million – he filed the lawsuit. It follows, therefore, that by bribing Judge Lackey, the defendants intended to cause Johnny Jones to lose at the very least \$4,064,151.14.

Whether the defendants expected an arbitrator to rule in their favor is also not an issue.

As the Fourth Circuit explained:

[E]xpectation is not synonymous with intent when a criminal does not know what he may expect to obtain, but intends to take what he can. While [the defendant] may not have expected to get it all, he could be presumed to have wanted to. In such situations, a sentencing court may rely on the prosecution's prima facie showing as sufficient evidence that the face amount was the intended loss.

*United States v. Miller*, 316 F.3d 495, 505 (4<sup>th</sup> Cir. 2003) (quoting *United States v. Geever* 226 F.3d 186, 193-94 (3<sup>rd</sup> Cir. 2000)).

In the end, intended loss may be too speculative to utilize in cases with no numbers to consider at all. Or in cases like *Griffin* where it appears the numbers may well have existed, but were not put before the court, the amount of the bribe may be considered. *See Griffin*, 324 F.3d at 366 (finding “no evidence in the record”). However in the present case, the numbers are clear and before the Court. This is not a case where the numbers are simply “plucked from the air.” Here, it is not disputed that the defendants believed Jones was entitled to \$1,235,848.86, and it is not disputed that once he sued them for \$5.3 million, they bribed Judge Henry Lackey to send the case to an arbitrator. Clearly, the defendants intended to do anything they could to make certain Jones did not receive any amount over that to which they believed he was entitled. Whether it was likely they would have prevailed before the auditor is not an issue. *See* U.S.S.G. § 2B1.1 cmt. n.3(A)(ii) (providing that intended loss “includes intended pecuniary harm that would have been impossible or *unlikely* to occur”) (emphasis added). “The court need only make a reasonable estimate of the [intended] loss.” U.S.S.G. § 2B1.1 cmt. n.3©. It is more than

reasonable in the present case to estimate that the defendants had every intention to cause Johnny Jones at the very least a loss in the amount of \$4,064,151.14.

### **AMOUNT OF THE BRIBE**

Finally, the government contends that should the Court choose to utilize the \$50,000 figure, the government would argue that the court should look to Application Note 7 of § 2C1.1 of the guidelines. That note provision directs courts to depart upward when a bribe or the benefit/loss to be received from a bribe does not adequately reflect the seriousness of the offense. *See* U.S.S.G. § 2C1.1, cmt. n.7 (“in cases in which the seriousness of the offense is . . . not adequately reflected, an upward departure is warranted”). The Seventh Circuit Court of Appeals addressed this issue in *United States v. Muhammad*, 120 F.3d 688, 700-01 (7<sup>th</sup> Cir. 1997).

In *Muhammad*, the defendant, a juror sitting on a civil case in which the plaintiff sought \$1.8 million, contacted defense counsel prior to closing arguments and attempted to solicit a bribe of \$2,500 for his assistance in obtaining a favorable verdict. *Muhammad*, 120 F.3d at 691-92. Defense counsel subsequently contacted the U.S. Attorney’s office, and the defendant’s attempt failed, but a verdict was returned for the plaintiff (without Muhammad) for \$933,000. While the court in that instance was provided with a definite figure to use to calculate the sentence, the Seventh Circuit, affirming the district court’s sentence, addressed the defendant’s argument that the amount of the \$2,500 bribe should be utilized to calculate his sentence:

Muhammad’s argument overlooks the purpose of § 2C1.1, which is to measure the true harm from the crime – *i.e.*, the greater of the bribe or the benefit. In this regard, Muhammad conveniently avoided a vital part of § 2C1.1’s Background section: “Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.” In this case, Muhammad cannot credibly claim that the \$2,500 bribe was at all commensurate with the benefit [the defendant] would have received in avoiding plaintiff’s substantial damage claim. Significantly, Muhammad’s post-arrest statements reveal that he was

aware that [the plaintiff] sought more than \$1 million in damages. Muhammad plainly knew the benefit he was attempting to confer upon [the defendant] in soliciting the bribe, and we accordingly find no error in the district court's eleven-point enhancement.

*Muhammad*, 120 F.3d at 701.

Like the defendant in *Muhammad*, the defendants in the present case knew very well how much money was at stake. Also as in Muhammad's case, the defendants in this case cannot credibly claim that the \$50,000 bribe is at all commensurate with the loss they intended Jones to suffer. As discussed *supra*, the defendants felt Jones was entitled to \$1,235,848.86, and they were being sued for \$5.3 million. They surely intended that Jones not receive more than \$1,235,848.86, and in that case, the intended loss to Jones would have been \$4,064,151.14. To find such a figure too speculative and resort to \$50,000 instead would thwart the ends of justice. Consequently, the government would submit that if the Court chooses to utilize \$50,000 that it depart upward as provided by the guidelines and sentence Richard Scruggs to 60 months and Sidney Backstrom to 30 months incarceration.

**CONCLUSION**

For the foregoing reasons and authorities, the United States submits that the Court should make findings consistent with the United States Probation Service presentence report and addendum.

Respectfully submitted,

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*/s/ David A. Sanders*

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CERTIFICATE OF SERVICE

I, DAVID A. SANDERS, certify that I electronically filed the foregoing **Sentencing Memorandum** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 25<sup>TH</sup> day of June, 2008.

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