

**UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
WESTERN DIVISION**

UNITED STATES OF AMERICA

v.

Case No.: 3:07CR192-NBB-SAA

RICHARD F. SCRUGGS,

**SENTENCING MEMORANDUM OF RICHARD F. SCRUGGS**

**I. INTRODUCTION**

Richard F. Scruggs has admitted to conspiring to bribe Circuit Court Judge Henry L. Lackey. Scruggs will be before the Court on June 27, 2008, to be sentenced for his crime. Scruggs has previously provided the Court with a response to the Probation Office's Presentence Investigation Report (PSR). On June 23, 2008, Scruggs received the Amended PSR and the Addendum thereto (PSR Addendum). This Sentencing Memorandum responds to the Amended PSR and includes additional information relevant to the Court's analysis under 18 U.S.C. § 3553(a). For the reasons set forth below, Scruggs respectfully requests that the Court, in the exercise of its discretion, sentence him to 30 months in prison. This sentence is within the range provided by the advisory United States Sentencing Guidelines and comports with the policies stated in Section 3553(a).

**II. THE LIFE OF DICK SCRUGGS**

**A. From Brookhaven to Oxford**

Dick Scruggs was born in Brookhaven, Mississippi, on May 17, 1946. When he was an infant, Scruggs's parents divorced. They reconciled and divorced again when he was six years old. Scruggs never had an ongoing relationship with his father, and he was raised by his mother, Helen Furlow Scruggs, in modest economic circumstances. Mrs. Scruggs worked throughout her adult life, primarily as a secretary, first to an attorney, then an accountant, and finally to the

general counsel of the Ingalls Shipyard in Pascagoula, Mississippi. Suellen Furlow, Scruggs's cousin describes observing Scruggs's love for his mother during her later years:

Family has always been a priority for Dick. As his mother aged and became less able to care for herself, Dick secured excellent care for her so that she could remain in her home. On my trips to the Coast to visit my aunt, it became more and more apparent how deep the love and respect was between Aunt Helen and Dick. His frequent breakfast visits with his mother were one of her most treasured times with her son and one that occasionally allowed me a glimpse at this most special relationship.<sup>1</sup>

Mrs. Scruggs died at the age of 95 in 2005, just days before Hurricane Katrina hit.

Scruggs spent the first 12 years of his life in Brookhaven, where his mother's family lived. Scruggs's maternal uncle William Furlow served as a surrogate father to him. Mr. Furlow's widow Nelda Furlow describes her memories of Scruggs as a child and his relationship with her late husband:

[Dick] was always very bright, very active. He was mischievous, to be sure, but in a childlike way that produced more funny stories than anything else.

Helen's marriage was short-lived. Her husband moved on, and Dick spent almost no time with his father. My husband was his only male role model, and they developed a close bond. It was our family custom for me to take my children to visit my parents in Houston for long stretches during the summer, and Dick and Bill "batched" together for those periods. When Bill died in 1968, Dick was heartbroken.<sup>2</sup>

After her second divorce from Scruggs's father, Mrs. Scruggs moved from Brookhaven to Pascagoula in search of a better paying job. Scruggs stayed behind for two years, living with the Furlows. Scruggs's cousin R. Shaw Furlow describes his memories of growing up with Scruggs in Brookhaven in the late 1950s.

I remember those days as possibly the fondest days of my youth. The three older boys shared a room that looked like a barracks, one single iron bed beside another, barely enough room to walk between the beds....

I'll leave all the philanthropic and legal victories and how he helped thousands of people plus all the citizens of Mississippi to

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<sup>1</sup> Letter to the Court from Suellen Furlow, Ed.S., dated April 12, 2008.

<sup>2</sup> Letter to the Court from Nelda S. Furlow, dated April 10, 2008.

others who are more privy to that information than I. But I can speak of the cousin who showed me how to dress before a blind date he had arranged with a Pascagoula girl. And how to tie a Windsor Knot. I can speak about him teaching me how to eat raw oysters and pointing out the destruction after Camille. I can speak of the times at family gatherings where he made sure everyone got one on one time and their needs were met.<sup>3</sup>

In 1959, Scruggs moved from Brookhaven to Pascagoula to join his mother. Scruggs attended public schools in Pascagoula until his junior year in high school, when he attended the Georgia Military Academy. A competitive swimmer, Scruggs transferred to the Academy because of the reputation of its swimming program. It was at the Academy, that Scruggs focused himself on his academics, and his grades improved dramatically.

After graduation in 1965, Scruggs entered the University of Mississippi here in Oxford. Throughout his time at Ole Miss, Scruggs worked vacations and summers—just as he had while in high school. He worked at a gas station, drove tanker trucks, and was a lifeguard. Some summers during college, Scruggs worked as a “joiner’s helper” in the shipyard, working full days deep in the holds of ships under construction or in for repairs.

## **B. The Navy**

At Ole Mississippi, Scruggs joined the Naval Reserve Officer’s Training Corps (NROTC). Between his junior and senior years in college, Mr. Scruggs attended advanced NROTC training at San Diego, California, aboard the USS *Bonhomme Richard*. It was there that Scruggs realized he wanted to become a Navy pilot. He graduated from Ole Miss in 1969 and was immediately commissioned as an officer in the United States Navy.

Shortly thereafter, Scruggs reported to Pensacola, Florida, where, over the next 18 months of his life, Scruggs underwent intensive training to become a Navy pilot. Scruggs earned his aviator wings in December 1970. Thereafter, he was deployed to an Replacement Air Group in Virginia Beach for training on the A-6A Intruder. Hugh Dixon Wolcott, an F-4 Phantom pilot who trained at Virginia Beach at the same time, describes his memories of the young Scruggs:

What distinguished Dick from many other pilots in training was his

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<sup>3</sup> Letter to the Court from R. Shaw Furlow (undated).

complete absorption in the task. While he was certainly every bit as fun-loving as the next man, he was not given to excesses in behavior which were not uncommon in that setting....

We both married in that first year and moved into the same community. We would often socialize as young military couples did in those days by having a few drinks, something to eat and then play cards. What I still remember is that Dick would have only one drink and always excuse himself early to go to bed. He was getting up each morning at 5 a.m. to study for the LSAT before reporting for squadron duties at 7 a.m. His self-discipline and dedication were truly extraordinary.<sup>4</sup>

In January 1972, after completing his training at Virginia Beach, Scruggs was assigned to Attack Squadron 176 and deployed aboard the aircraft carrier USS *Franklin D. Roosevelt* in the Mediterranean. Skip Hughes, who served in the same squadron as Scruggs, describes Scruggs's prowess as a pilot and the regard in which he was held:

Dickie Scruggs was simply one of the best pilots whom I personally observed during my 26-year naval career. He and the aircraft were "one" in flight. Whether training in air-to-air combat ("dog-fighting"), or in executing a low-level bombing mission, Dickie was unsurpassed among our squadron pilots. But by far the most challenging test of a pilot stationed aboard the *FDR* was landing an aircraft on her small and frequently pitching flight deck. In mastering this extraordinary skill, Dickie was not only tops in the squadron, but the best pilot in the entire FDR air wing....

All of the squadron pilots looked up to him, especially the rookies who were still learning the ropes. Dickie mentored these young pilots, eagerly sharing his knowledge and experience with not only those who actively sought it, but also with those whom he saw as needing such help.....

In a profession where trust is everything, Dickie was solid in his word, exemplary in his conduct, and admired by officers and enlisted alike. Moreover, his light-hearted and cheerful nature was a mainstay of the squadron's ready room; his positive outlook on life made at-sea time spent away from loved ones a lot more bearable while strengthening the bonds of friendship.<sup>5</sup>

During Scruggs's deployments aboard the *Roosevelt*, Scruggs was engaged in Cold War confrontations with naval ships and aircraft of the Soviet Union during the 1973 Yom Kippur War. Scruggs also served for a time as the Tactics Officer of Squadron 176 and developed attack

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<sup>4</sup> Letter to the Court from Hugh Dixon Wolcott, M.D., dated April 7, 2008.

<sup>5</sup> Letter to the Court from K.E. "Skip" Hughes II, dated April 12, 2008.

doctrines that were adopted by the Air Wing and that earned Scruggs a special commendation from the Air Wing Commander.

After five years of service in the Navy, Scruggs left active duty to attend law school. Scruggs continued flying in the Naval Reserve from 1975-78. Scruggs later flew with the Mississippi Air National Guard from 1982-86.

### **C. Family**

While in training in the Navy, Dick renewed a relationship with his future wife Diane. They had met in junior high school in Pascagoula but did not begin a romantic relationship until after college. They were married in May of 1971. During his last cruise aboard the *Roosevelt*, Scruggs received a letter from Diane informing him they were to have a child. David Zachary Scruggs was born on May 23, 1974.

In 1975, Diane was diagnosed with Crohn's Disease, a debilitating chronic gastrointestinal disorder. Diane has continued to suffer from the effects of the disease and recently underwent extensive and prolonged surgery, during which she suffered from a stroke. Diane's health has consumed Dick, as observed by his assistant Beth Jones.

Dick is obviously a very family oriented man. He is always going to lunch with his wife, Diane, whom he loves more than life itself. When she fell extremely ill these last few months everything in his world stopped. As much as he had going on in his life his main focus was to taking care her. He spent every minute with Diane at the hospital or taking care of her at their home.<sup>6</sup>

Diane is presently recovering from the effects of the stroke and managing her illness. Her longtime doctor describes her prognosis as very guarded.

In 1982, Dick and Diane adopted their daughter Claire as a newborn. Clair and Zach both still live in Oxford. Clair is in school at Ole Miss. Zach is married to Amy Scruggs, and they have two children, Jackson and Augusta. Beth Jones writes that Dick "is always talking about his son, Zach and daughter Claire, [of] whom he is so proud. He especially loves more than anything his two grandchildren, Jackson and Augusta. His office is filled with their

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<sup>6</sup> Letter to the Court from Elizabeth E. Jones, dated April 10, 2008.

pictures.”<sup>7</sup> A friend and neighbor in Oxford writes that she has “seen Dick dress up in cowboy attire and old flight suits for his grandson, Jackson’s, birthday parties” and how “[w]hen Jackson was very young, he always wanted to go see ‘Dickie.’ He just adored Dick and vice versa.”<sup>8</sup>

#### **D. Professional Achievements**

Three months after Zach was born and just weeks after completing his active service in the Navy, Scruggs entered the School of Law at the University of Mississippi. His interest in becoming an attorney had its roots in his mother’s career as a legal secretary. He knew his mother’s employers and admired their work. After graduating from law school in December 1976 and passing the bar exam, Scruggs spent four years working at defense firms. The work did not suit Scruggs, so in 1980, he moved to Pascagoula and opened his own practice.

##### **1. Asbestos**

In 1983, Mr. Scruggs tried a longshot products liability case to a jury and lost. While Scruggs was still licking his wounds from that loss, one of the jurors from that case called him unexpectedly. The juror was a shipyard worker who had been exposed to asbestos on the job. Without funds for a medical exam, the worker could not obtain legal representation. Scruggs offered to pay for an exam and located a local pulmonologist to conduct it. Finding the physical effects of exposure to asbestos, Scruggs took the juror’s case.

Within weeks, Scruggs was being contacted by as many as 20 workers per day seeking his representation. In the end, Scruggs represented over 3,000 workers exposed to asbestos, most of them employees of the Ingalls shipyard, where his mother had worked for many years. Pastor R. Leslie Holmes, formerly of First Presbyterian Church in Pascagoula, describes Dick’s efforts and their effect on the community:

When Dickie first returned to Pascagoula to practice law, no one was really reaching out to help local shipyard workers who were afflicted with Mesothelioma as a result of working in an asbestos-loaded environment. As a pastor, I ministered to many of those men ... as well as their family members as the father, husband, son, and brother suffered through a horrible ordeal and died....

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<sup>7</sup> *Id.*

<sup>8</sup> Letter to the Court from Susan S. Thomas, dated April 15, 2008.

Dickie Scruggs had the compassion, courage, and tenacity to fight for justice for those victims and their loved ones. Almost single-handedly, he took on the cases of those suffering families. It was an uphill legal battle but Dick was tenacious enough to stay the course and work for justice.<sup>9</sup>

Eventually, a consolidated trial involving 10 representative plaintiffs—out of nearly 7,000—was held in 1993. The representative trials helped bring about a substantial settlement that brought relief to Gulf Coast workers and their family members, like Peggy Eley, a classmate of Scruggs’s from Pascagoula High School and the daughter of an Ingalls firefighter:

My father, a firefighter at Ingalls for 32 years, was one of Dickie’s asbestosis clients. Dad lived in declining health for many years. Medical expenses, which were frequent and significant, were made manageable by settlements from asbestos manufacturers obtained by Dickie’s firm. My brothers and I will always be grateful that he was willing to take on such a huge challenge.<sup>10</sup>

Later, Scruggs’s firm was hired by the state of Mississippi to recover the costs of removing asbestos from state facilities. Scruggs was able to recover millions of dollars for Mississippi. That public-private relationship formed the basis for the major tobacco litigation that was to come.

## 2. Tobacco

In 1993, Michael Moore, then the Attorney General of Mississippi, approached Scruggs about pursuing a novel theory against the tobacco industry: seeking to recover from the tobacco companies the costs to the state’s taxpayers of treating sick smokers. The prevailing view at the time was that it was a “fool’s errand” to take on the tobacco industry. “No matter who you asked, anybody you asked whether you can take on tobacco. You get the same answer. You can’t do that.... It’s impossible .... You can’t do that. They’re just too powerful. You can’t take on the tobacco industry.”<sup>11</sup> Richard P. Ieyoub, the former Attorney General of Louisiana, who was actively involved in the tobacco litigation, writes: “We hear over and over about the

<sup>9</sup> Letter to the Court from R. Leslie Holmes, D.Min., Ph.D., dated April 14, 2008.

<sup>10</sup> Letter to the Court from Peggy G. Eley, dated April 7, 2008.

<sup>11</sup> See Interview of Dr. David Kessler, former Commissioner of the Food and Drug Administration, *available at* <http://www.pbs.org/wgbh/pages/frontline/shows/settlement/interviews/kessler.html>.

end result, but who thinks about the extent of the risk that Dick embraced, and the many years in which [the Scruggses] endured the uncertainty of their future? ...[A]n honest person will admit that lottery tickets would have seemed a smarter investment at the time.”<sup>12</sup> Notwithstanding this view, Scruggs agreed to take the case.

In the process of representing first Mississippi and then other states, including Florida, Oklahoma, Idaho, and New York, Scruggs won the respect of his clients and public health officials. W.A. Drew Edmondson, the Attorney General of Oklahoma, writes:

In all of my dealings with Mr. Scruggs I found him to be straightforward and honest. He would give the advantages and disadvantages of each course of action and abide by the decision of the Attorney General. He was very pleasant to work with, diligent in his preparation and professional in his work product.<sup>13</sup>

Matthew L. Myers, the President of the Campaign for Tobacco-Free Kids and a 28-year veteran of the fight to reduce tobacco use, worked closely with Scruggs and Moore on the tobacco litigation from 1994 to 1998.<sup>14</sup> Myers writes that:

While some states and some attorneys were mostly interested in these cases as a way to make money, Attorney General Moore and Dick Scruggs made clear from the very beginning that their top priority was a resolution that would make a fundamental difference in the number of people who smoked and the number of people who died from tobacco use. They were both dedicated to insuring that these cases saved lives and saved as many lives as possible – even when pushing for the strongest possible public health measures put in jeopardy a quicker, lucrative settlement.<sup>15</sup>

Scruggs also won the respect of one of the lead defense lawyers representing the tobacco industry, Phil Carlton. Carlton was retained by five tobacco companies to coordinate their efforts to reach a resolution of the challenges of lawsuits facing the industry. About Scruggs, Carlton writes:

[H]e and I worked together on a daily basis throughout [1996] and for several years thereafter in getting the state settlements executed. Throughout this time, I found him to be honest and

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<sup>12</sup> Letter to the Court from Richard P. Ieyoub, dated April 10, 2008.

<sup>13</sup> Letter to the Court from the Hon. W.A. Drew Edmondson, dated April 29, 2008.

<sup>14</sup> See Letter to the Court from Matthew L. Myers, dated June 23, 2008.

<sup>15</sup> *Id.* at 1.

forthright in representing his clients and I never had any indication that he was anything less than wholly professional.<sup>16</sup>

The tobacco litigation culminated in 1998 in the Master Settlement Agreement (MSA) between the states and the largest tobacco companies. Myers details the ways in which the MSA has contributed to a dramatic decline in tobacco use, particular among youth:

The settlement gave billions of dollars in payments to the states.... [N]ew spending on programs to reduce tobacco use, especially among children has reached hundreds of millions of dollars per year. Research shows an independent impact of program spending on youth and adult smoking....

The settlement resulted in payments to the American Legacy Foundation. The Foundation's media campaign has had a documented impact on reducing smoking rates among youth.

The MSA placed restrictions on tobacco company marketing, such as the removal of large tobacco billboards and a limit on the number of brand sponsorships. This, too, has contributed to a reduction in tobacco use by children.

The documents that Dick Scruggs and the other lawyers brought to light through discovery have disclosed decades of tobacco industry wrongdoing and have served as the basis for the development of new policies and programs to reduce tobacco use.

Even the tobacco company payments have played an important public health role. These payments forced the companies to raise their prices. Research is clear that increasing the prices of cigarettes reduces smoking, especially among kids.<sup>17</sup>

In fact, the years since the tobacco lawsuits and the MSA have seen dramatic declines in the prevalence of tobacco use. From 1997 to 2007, high school smoking prevalence has declined from 36.4% to 20%, and adult smoking prevalence has declined from 24.7% to 20.8%.<sup>18</sup>

The historic tobacco settlement would not have been achieved without Scruggs. Myers writes that “[w]ithout Dick Scruggs’[s] efforts, the tobacco litigation would not have happened and would not have been structured to place saving lives a priority.”<sup>19</sup> Indeed, according to

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<sup>16</sup> Letter of to the Court from J. Phil Carlton, dated May 2, 2008.

<sup>17</sup> Letter to the Court from of Matthew L. Myers, dated June 23, 2008 at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 1.

Myers, “[i]t is not an exaggeration to say that the efforts of Dick Scruggs and his colleagues have saved millions of people from a premature death caused by tobacco. There are few cases and even fewer lawyers who have had such a profound and positive impact on the lives and health of so many....”<sup>20</sup>

### **3. Lehman Brothers**

In the years following his success in the tobacco case, Scruggs and the Scruggs Law Firm continued to pursue ambitious mass tort litigation, including cases against the managed care industry, against non-profit hospitals, and on behalf of welders exposed to toxic fumes. Scruggs also successfully represented nearly 5,000 elderly borrowers against Lehman Brothers for aiding and abetting mortgage fraud perpetuated by First Alliance Mortgage Company, a notorious sub-prime lender. The journalist Lowell Bergman writes:

In litigation that received few headlines, but remains unprecedented, Mr. Scruggs managed to bring and certify a class action in federal court in Southern California against a predatory lender and their Wall Street backers. It was and remains a unique case. The litigation produced a number of lessons that had they been heeded by regulators might have saved all of us from the current meltdown in the mortgage marketplace.

Mr. Scruggs financed and personally tried that case. It did not get him the kind of astronomical reward that one might expect given the kind of cases he has brought. But it did demonstrate his prescience and his dedication.<sup>21</sup>

After a trial lasting months, a jury returned a verdict holding Lehman responsible in part for First Alliance’s fraud. *See In re First Alliance Mortg. Co.*, 471 F.3d 977 (9th Cir. 2006).

### **4. Sulzer**

Scruggs took on a different role in a massive complex tort case in 2001—counsel for the defendant. In 2000, Sulzer, a leading manufacturer of prosthetic devices, recalled thousands of hip implants, leading to lawsuits across the country that threatened certain bankruptcy for the

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<sup>20</sup> *Id.*

<sup>21</sup> Letter to the Court from Lowell Bergman, dated April 9, 2008.

company. Scruggs engineered a settlement worth more than \$1 billion that kept the company out of bankruptcy and also provided fair and just compensation for class members.

In so doing, Scruggs won the respect of his opposing counsel R. Eric Kennedy, who writes that Scruggs “always took the high road.” Kennedy goes on:

He put principle over monetary gain on more than one occasion and in each instance, he drew criticism from those with different priorities. He did not back down. Often, in a room full of lawyers, many motivated only by the prospect of fees, Dickie would remind everyone that as lawyers, we were engaged in a noble pursuit – that our efforts must always be dedicated to helping the people we represent.<sup>22</sup>

## **5. Katrina**

In 2003, Scruggs relocated from Pascagoula to Oxford, Mississippi, to be nearer to his children and grandchildren, but he still maintained his home in Pascagoula. In 2005, Hurricane Katrina hit and the Scruggses lost their home on the Coast. In the aftermath of Katrina, Scruggs formed the Scruggs Katrina Group to represent homeowners. Scruggs and the SKG negotiated large settlements for many of their clients and brought hope to many Gulf Coast residents. Paul Leonard describes how in the aftermath of Katrina, Scruggs represented him and his family “with great support and integrity.”<sup>23</sup> “Never being negative and sticking to only the facts at hand. Dick held him self with dignity and strength and set the example for us to follow during the court proceedings. We were stronger because of him and survived a time in our lives we hope to never repeat.”<sup>24</sup>

## **E. Generosity**

Over the years, Dick and Diane Scruggs have been generous donors to educational and community organizations across Mississippi. Their contributions reflect their deep love for this State and their desire to share the wealth that it has been their good fortune to acquire.

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<sup>22</sup> Letter to the Court from R. Eric Kennedy, dated April 14, 2008.

<sup>23</sup> Letter to the Court from Paul Leonard (undated).

<sup>24</sup> *Id.*

The University of Mississippi stands out as the greatest beneficiary of the Scruggses' generosity. They have donated millions of dollars to Ole Miss—and have pledged millions more—principally earmarked to fund salaries for the faculty in the College of Liberal Arts.

Professor Vaughn Grisham describes the effect of the Scruggses' gift:

[Ole Miss] has benefited enormously because of the generosity of Dick and his wife, Diane, in providing funds for the College of Liberal Arts. In the entire history of the University of Mississippi, *no one* has given so generously to the Liberal Arts, which is the heart and soul of our school. Because of their gifts, we have been able to retain distinguished professionals and add to their numbers. When I thanked Dick personally, he deferred with good humor by saying, "... well, much of the money was Diane's."<sup>25</sup>

The Scruggses' contribution also helped the University secure a chapter of Phi Beta Kappa, which has raised the profile of the University and enhanced the ability of its students to compete academically with students across the country.

The Scruggses' support of educational institutions extends beyond Ole Miss. They have donated hundreds of thousands of dollars to The Piney Woods School, which was founded nearly a hundred years ago in Rankin County and remains one of only four African-American boarding schools left in the United States. According to a School official, Scruggs "made the lead gift for a \$3 million addition to the school's Zilpha Chandler Library. That gift was instrumental in providing disadvantaged students from Mississippi, and from across the United States, with a state-of-the-art media center."<sup>26</sup> The Scruggses have also long supported the Mississippi School for the Arts located on the Whitworth College campus in Scruggs' hometown of Brookhaven. In fact, the administration building at the School bears the name of Scruggs' late mother, Helen Furlow Scruggs.<sup>27</sup>

The Scruggses have also donated generously to other community institutions around Mississippi. They have donated hundreds of thousands of dollars to the Boys and Girls Club of Jackson County, whose mission is "to inspire and enable all young people, especially those from

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<sup>25</sup> Letter to the Court from Vaughn L. Grisham, dated April 6, 2008.

<sup>26</sup> Letter to the Court from Kay W. Garrett, dated April 9, 2008.

<sup>27</sup> See letter to the Court from Suellen Furlow, dated April 12, 2008.

disadvantaged circumstances, to realize their full potential as productive, responsible and caring citizens.” And the Scruggses gave \$100,000 to help establish an endowment at the Greater Oxford Community Foundation, dedicated to making the Oxford-Lafayette County area a better place to live and work.<sup>28</sup>

Another focus of Scruggs’s generosity has been the preservation of historic Mississippi homes. In 2000, Scruggs bought the Nelson House, a historic home in Moss Point listed on the National Register of Historic Places. Scruggs put approximately \$2 million into restoring the building and then donated it to the town of Moss Point. Scruggs also bought and restored the historic Longfellow House on the beachfront in Pascagoula. Scruggs then donated the home—valued at more than \$3 million—to the University of Mississippi. Locally, Scruggs donated generously to the effort to restore Rowan Oak.

The Scruggses have also contributed on a smaller scale, offering support and assistance to countless friends, family members, and strangers in need. Carol and André Gautier, neighbors of the Scruggses in Pascagoula describe how Scruggs has always been “a compassionate and giving friend” and describe, as an example of “Dick’s kindness” how “he helped a close friend who has suffered with alcohol addiction for years. Dick personally paid for his expenses for treatment.... Without Dick’s help our friend may have never recovered from this horrendous disease. He has been in recovery for over 6 years and doing very well.”<sup>29</sup>

Scruggs is also well-known for lending the use of his airplane to people in need. One such instance is described in a letter from Elizabeth Smith of Pascagoula.

My name is Elizabeth Smith and I am the wife of the late Emerald Smith.

.... On Oct. of 2002 my husband had open heart surgery in Birmingham, Ala. He could not come home because he couldn’t ride in a car. Mr. Scruggs heard of our dilemma & provided the service of his private plane.

Before this time Mr. Scruggs did not know my husband but my husband had the opportunity to meet and thank him personally

<sup>28</sup> See letter to the Court from Campbell McCool, dated April 8, 2008.

<sup>29</sup> Letter to the Court from Carol and André Gautier, dated April 8, 2008.

before he passed away on 1/4/2007.

My family respects him for the good deed he did for us [and] other people that we know of.<sup>30</sup>

Scruggs also used his plane to help after Hurricane Katrina. Pilot Jesse Ellis describes how he and Scruggs spent days ferrying supplies to the Coast:

After hurricane Katrina hit the Gulf Coast ... I took people hot lunches, tools, money, generators, air conditioners, food, water, medical supplies and anything else the people on the coast needed. I flew people from the coast to Memphis Tennessee so they could see a doctor. Some days I made several trips back and forth to do whatever was needed. My copilot, for every trip, of every day, was the same man who personally financed these goods and missions, Richard Scruggs. This man worked tirelessly to help every single person he could in the time that we had there every day. I saw what a difference this man made to so many people.<sup>31</sup>

Scruggs has also provided mentoring and guidance to countless young people across Mississippi. Robert Allen Blackwell describe how he “went to work at Dick’s office as a recent college graduate who was insecure about [his] abilities and had little or no direction in [his] life.”<sup>32</sup> Scruggs helped change that:

Dick showed faith in me that I did not have in myself at the time. Because he gave me this chance, I became exposed to many new experiences and ideas, greatly enhancing my worldview. Through time, hard work, and Dick’s guidance, I soon began to realize my potential.

When I finally decided to attend law school in 2000, I could not have completed it without Dick’s financial support. He helped me with little fanfare or expectations. ... If I am ever able to do a fraction of the good that Dick has done in his life, I will consider my life a success.<sup>33</sup>

Renee Lee Burchard tells a similar story of how Scruggs provided guidance and direction to her at vulnerable time in her life:

I first began to work for Dick in 1983, as a junior at Pascagoula High School....

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<sup>30</sup> Letter to the Court from Elizabeth Smith, dated April 12, 2008.

<sup>31</sup> Letter to the Court from Jesse G. Ellis Jr., dated April 10, 2008.

<sup>32</sup> Letter to the Court from Robert Allen Blackwell, dated April 11, 2008.

<sup>33</sup> *Id.*

My freshman year in college, I became pregnant and returned home to live with my parents. I also went back to work in Dick's law office. I even cleaned the offices at night while going to school at a local junior college. One afternoon I picked Dick up at the airport in Mobile and he asked me what my plans were for the future. I told him that I had every intention of finishing my degree....

Dick offered his financial support so I wouldn't have so much pressure while I was raising a baby and trying to earn my degree. His support allowed me to focus on school and my daughter ... instead of working two or three jobs.

His support was not only financial but it was the vote of confidence that I needed to continue on the path to a college degree and the life that I knew I could create by reaching that goal.

...

I couldn't list all the ways that his simple act of kindness affected me, much less my daughter and now my entire family. The encouragement and support that he gave to me is the cornerstone of my life. I met my husband during college, started a successful career with my degree, have 3 other happy children and I have a fabulous life. All my success would not have been possible without the self confidence and faith that Dick had in me a long time ago.

...

I know that I'm just one of many lives that Dick has touched in such a meaningful way.<sup>34</sup>

### III. AN APPROPRIATE SENTENCE

“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.” *Gall v. United States*, 128 S.Ct. 586, 596 (2007); *United States v. Williams*, 517 F.3d 801, 810 (5th Cir. 2008). While “the Guidelines should be the starting point and the initial benchmark,” they “are not the only consideration.” *Gall*, 128 S.Ct. at 596; *see also Williams*, 517 F.3d at 810. The district court must “consider all of the [18 U.S.C.] § 3553(a) factors” and “must make an individualized assessment based on the facts presented.” *Gall*, 128 S.Ct. at 596-97; *see also Williams*, 517 F.3d at 810. The ultimate task before the Court is to fashion a reasonable sentence based on the Guidelines, the Section 3553(a) factors, and the

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<sup>34</sup> Letter to the Court from Renee Lee Burchard, dated April 5, 2008.

application of the Court's considerable discretion. *Kimbrough v. United States*, 128 S.Ct. 558, 576 (2007).

Scruggs respectfully requests a custodial sentence of 30 months. As discussed below, when properly calculated, Scruggs's advisory Guidelines sentence is 30-37 months. Taking this advisory range as the "initial benchmark," Scruggs asks that the Court take into account his long history of service, his good character, and his family circumstances and sentence him at the low end of the range.

**A. Objections to the Description of the Offense Conduct in the Amended PSR**

Scruggs reiterates his objections to the Probation Office's one-sided and factually inaccurate description of the offense conduct in the PSR. The Probation Office is supposed to be "an impartial entity that reports not to the U.S. Attorney's Office but to this [C]ourt." *United States v. Roberson*, No. CRIM. 03-50002-01, 2005 WL 3448049, \*7 (W.D.La. Dec. 15, 2005). "The probation officer's duty is to compile information which then takes the form of a neutral written recommendation to the judge . . . in order to enable the judge to make an informed decision." *United States v. Belgard*, 894 F.2d 1092, 1097 (9th Cir. 1990). "The purpose of the presentence report . . . is neither prosecutorial nor punitive. It is essentially neutral.... The probation officer acts as an agent of the court for the purpose of gathering and classifying information and informing the court...." *United States v. Rogers*, 921 F.2d 975, 979 (10th Cir. 1990).

The Amended PSR here falls short of being an "impartial" and "neutral" recommendation designed to "inform[] the court." The PSR fails to include undisputed facts that are (a) crucial to understanding the events that lead up to Scruggs's criminal conduct and (b) directly relevant to determining Scruggs's role in the offense. The Amended PSR fails to state that:

- During the March 2007 meeting at the Scruggs Law Firm, Scruggs only asked that Balducci "go see Judge Lackey and see if Judge Lackey would be amenable to move the case to arbitration," and Scruggs specifically cautioned Balducci that "he was not asking [him] for anything illegal."<sup>35</sup>

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<sup>35</sup> See Position of Defendant Richard F. Scruggs With Respect To Sentencing Factors ("Objections"), Exhibit A at 2 (11/2/07 302). For the Court's convenience and to avoid

- Both Balducci and Patterson have testified that they do not—and did not—think a crime was contemplated at the March 2007 meeting.<sup>36</sup>
- “There was no money mentioned in relation to giving Judge Lackey money in exchange for a favorable order” at the March 2007 meeting.<sup>37</sup>
- Balducci did not meet with Judge Lackey in March 2007 to bribe him or to offer him any kind of *quid pro quo*, and Balducci did not intend his offer of the “of counsel” position to Judge Lackey as an incentive or bribe for Judge Lackey to rule in favor of arbitration.<sup>38</sup>
- Between early May and mid-September 2007, Judge Lackey and Balducci were in repeated contact but during that time Balducci never said or suggested that Scruggs would give or offer anything to Judge Lackey in exchange for an order sending the *Jones* case to arbitration.<sup>39</sup>
- During that same time period, Balducci repeatedly told Judge Lackey that he was *not* trying to influence Judge Lackey improperly and that Judge Lackey should decide the arbitration motion according to the law.<sup>40</sup>
- It was not Scruggs—or even Balducci—who first proposed a payment in exchange for a favorable ruling on the arbitration motion.<sup>41</sup>
- Balducci told Judge Lackey three times on September 27, 2007, that Scruggs was not aware of the payment arrangement.<sup>42</sup>

The Amended PSR also includes flatly incorrect statements. For example, the Amended PSR states that, during an October 18, 2007 conversation between Patterson and Scruggs, Scruggs “directed Patterson to get Balducci to come to the Scruggs Law Firm when he left Calhoun City, Mississippi, and to bring the order and put it on Scruggs’ [sic] desk.”<sup>43</sup> In fact, the recording of this conversation shows that it was Patterson who said, “I will just tell [Balducci] to

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duplication, Scruggs refers to the exhibits attached to his objections to the PSR which were submitted to the Court on June 10, 2008.

<sup>36</sup> See Objections, Exhibit B at 30:12-18, 53:2-6 (2/20/08 Hearing Transcript); Exhibit C at 92:2-12 (1/15/08 Hearing Transcript).

<sup>37</sup> Objections, Exhibit B at 30:14-25.

<sup>38</sup> See Objections, Exhibit B at 54:10-13, 36:24-28.

<sup>39</sup> See Objections, Exhibit F at 5, 7 (5/21/07 Recording Transcript), Exhibit G at 3, 6 (5/29/07 Recording Transcript), Exhibit H at 15-16 (8/9/07 Recording Transcript).

<sup>40</sup> *Id.*

<sup>41</sup> See Objections, Exhibit J at 5, 7 (9/18/07 Recording Transcript).

<sup>42</sup> See Objections, Exhibit L at 8, 18, 19, 20 (9/27/07 Recording Transcript).

<sup>43</sup> Amended PSR ¶ 23.

leave what he's got for you on your desk.”<sup>44</sup> In addition, the Amended PSR includes—in quotation marks as if to suggest a direct quote—a statement that was allegedly made during the November 1, 2007, meeting with Backstrom and Zach Scruggs recorded by Balducci.<sup>45</sup> In fact, the statement that appears in the Amended PSR appears nowhere in the transcript of that recording. The Amended PSR also states that “arbitration cannot award any punitive damages as asked for in the circuit court [*Jones*] case.”<sup>46</sup> In fact, an “arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties.”<sup>47</sup>

The Probation Office failed to respond to these—and other—objections to the unfair and incomplete description of the Offense Conduct.

## **B. The Advisory Guidelines Sentence**

### **1. Base Offense Level**

The Base Offense Level for a conspiracy to violate 18 U.S.C. § 666(a)(2) is 12. U.S. Sentencing Guidelines Manual §§ 2X1.1, 2C1.1 (2007).

### **2. Specific Offense Characteristics**

#### **a. The Benefit to Scruggs**

The Probation Office's calculation of the value of the benefit Scruggs was to receive in return for the payments to Judge Lackey is unreasonable, unrealistic, and unsupported by any reliable evidence. Section 2C1.1(b)(2) of the Sentencing Guidelines provides that, “[i]f the value of the payment, the benefit received or to be received in return for the payment, the value of anything obtained or to be obtained by a public official ..., or the loss to the government from the offense, whichever is greatest, exceeded \$5,000,” the defendant's offense level shall be increased by the number of levels dictated in the loss table in Section 2B1.1. U.S. Sentencing

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<sup>44</sup> See Objections, Exhibit O at 2 (10/18/07 (4:21 p.m.) Recording Transcript).

<sup>45</sup> Amended PSR ¶ 26.

<sup>46</sup> Amended PSR ¶ 32.

<sup>47</sup> See Objections, Exhibit Q (AAA Commercial Arbitration Rule 43(a)).

Guidelines Manual § 2C1.1(b)(2). Here, the Probation Office assumes that the value of the “benefit to be received” by Scruggs “in return for the payment” was \$5.3 million and recommends the corresponding 18-level enhancement in Section 2B1.1. The Court should reject this recommendation because it is wholly unsupported by fact and based only on improper speculation. Instead, the Court should follow the commentary to Section 2C1.1, which provides that “[i]n a case in which ... the value of the benefit cannot be determined, the value of the bribe is used....” U.S. Sentencing Guidelines Manual § 2C1.1 cmt. background (2007). Based on the value of the bribe, the Court should apply a 6-level increase.

**(i) The Probation Office’s calculation of the value of benefit of the bribe is neither reasonable nor supported by accurate and reliable evidence.**

“[W]hen a sentencing factor has an extremely disproportionate impact on the sentence relative to the offense of conviction, due process requires that the government prove the facts underlying the enhancement by clear and convincing evidence.” *United States v. Jordan*, 256 F.3d 922, 930 (9th Cir. 2001); *see also McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (a standard higher than a preponderance of the evidence is required where sentencing fact is the “tail which wags the dog of the substantive offense”); *United States v. Mergerson*, 4 F.3d 337, 344 (5th Cir. 1993) (same). Here, the Probation Office’s finding that the value of the benefit to Scruggs from the bribery conspiracy was \$5.3 million would increase Scruggs’s guidelines range from 46-57 months to 168-210 months. Because the calculation of the value of the benefit of the bribe has such a dramatic effect, it must be supported by clear and convincing evidence.

Furthermore, the estimate of the value of the benefit must be (1) “reasonable,” U.S. Sentencing Guidelines Manual § 2B1.1 cmt. n.3(C); (2) based on evidence that is materially true, accurate and reliable, *United States v. Angulo*, 927 F.2d 202, 205 (1991); and (3) based on a “realistic, economic approach” that excludes benefits not brought about by the defendant’s criminal conduct, *United States v. Olis*, 429 F.3d 540, 546 (5th Cir. 2005) (reversing sentence where loss calculation did not take account of the portion of the drop in stock price caused by extrinsic factors); *United States v. Griffin*, 324 F. 3d 330, 366-67 (5th Cir. 2003) (clear error to

include in the calculation of the benefit to be received from a bribe amounts that would have been received without the bribe).

The Probation Office's calculation of the value of the benefit to be received by Scruggs is based on three assumptions. *First*, the Probation Office assumes that an order from Judge Lackey granting the motion to compel arbitration would have "resolv[ed]" the *Jones* case and "remov[ed]" and "eliminate[ed]" the defendants' exposure in the case.<sup>48</sup> *Second*, the Probation Office assumes that, absent the bribery scheme, the defendants would not have prevailed on the arbitration motion. *Third*, the Probation Office assumes that the value of prevailing in arbitration would have been \$5.3 million apparently because that is the amount that the Jones, Funderburg firm demanded in its complaint.<sup>49</sup>

None of the Probation Office's assumptions is reasonable, supported by accurate and reliable evidence, or realistic. *First*, an order granting the motion to compel arbitration would *not* have "resolved" the *Jones* case in Scruggs's favor. Rather, the order would have sent the *Jones* matter to a neutral arbitrator under the auspices of the American Arbitration Association. The arbitrator would then have decided the case on its merits and might have resolved the fee dispute in favor of the Jones, Funderburg firm. In other words, the *Jones* defendants' chances of success were the same in arbitration as they had been in Circuit Court, and it is only speculation to imagine how the case would have turned out had it gone to arbitration.

*Second*, the assumption that, absent the bribery conspiracy, the motion to compel arbitration would not have been granted is contrary to the evidence. The Scruggs Katrina Group Joint Venture Agreement is crystal clear: any dispute between the various parties "arising under or relating to the terms of this agreement shall be resolved by mandatory binding arbitration."<sup>50</sup> And we know that Judge Lackey told Balducci that he agreed that the Agreement called for

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<sup>48</sup> See Amended PSR ¶¶ 30, 32.

<sup>49</sup> See Amended PSR ¶¶ 32.

<sup>50</sup> See Objections, Exhibit P at 3 (Scruggs Katrina Group Joint Venture Agreement).

arbitration<sup>51</sup>; thus it is likely he would have granted the Jones defendants' motion to compel arbitration in any event. Finally, Judge William C. Coleman, who was appointed to hear the *Jones* case after Judge Lackey recused himself following the Indictment, held that the Agreement requires the parties to arbitrate their dispute.<sup>52</sup>

*Third*, there is no accurate or reliable evidence that supports the assumption that prevailing in the *Jones* case in arbitration would have saved Scruggs \$5.3 million. The Probation Office's calculation (1) assumes a 100% chance that Scruggs would have lost in the Circuit Court; (2) assumes that Jones, Funderburg would then have been awarded 100% of the damages it sought; (3) assumes that Scruggs would have been responsible for the full amount of whatever was due to Jones, Funderburg (even though Scruggs is only one of six defendants in the *Jones* case), and (4) fails to account for the amount that Scruggs had already tendered to Jones, Funderburg. In short, the estimate in the PSR regarding the benefit of the bribery scheme is nothing more than speculation.

The other rationales offered by the Probation Office to support its calculation are similarly flawed. The Probation Office suggests that one benefit of arbitration was that an arbitrator "cannot award any punitive damages as asked for in the circuit court case."<sup>53</sup> As noted above, this is incorrect. Arbitrators operating under the AAA rules have the authority to award any relief or remedy applicable in the circuit court.<sup>54</sup> The Probation Office also states that "a default judgement [sic] in the amount of \$5.3 million has been entered against the defendants in the *Jones* case."<sup>55</sup> Again, this is incorrect. *Default* has been entered against the defendants, but not a *default judgment*.<sup>56</sup> Thus, Judge Coleman has yet to determine the amount owed to Jones, Funderburg. Moreover, even if Judge Coleman had entered a default judgment, it would be

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<sup>51</sup> See Exhibit B at 57:16-19, 58:2-4, 115:19-116:1.

<sup>52</sup> See January 15, 2008 Opinion in *Jones v. Scruggs*.

<sup>53</sup> Amended PSR ¶ 32.

<sup>54</sup> See Objections, Exhibit Q.

<sup>55</sup> PSR Addendum at 31.

<sup>56</sup> See Exhibit 1 attached hereto (April 16, 2008 Order in *Jones v. Scruggs*).

irrelevant to calculating the benefit of going to arbitration. The fact that Judge Coleman entered default as a sanction for the bribery conspiracy tells us nothing about how the defendants would have fared on the merits of their case had the *Jones* case proceeded to trial in the Circuit Court.

Finally, the Probation Office improperly suggests that the Court should adopt the \$5.3 million figure to “adequately reflect[] the degree of seriousness of the offense.”<sup>57</sup> However, the Court’s obligation under Section 2C1.1.(b)(2) is to make a “reasonable estimate”—based on accurate and reliable evidence—of the benefit that Scruggs was to receive in return for the payments to Judge Lackey. *Angulo*, 927 F.2d at 205. This is a factual determination that must be supported by clear and convincing evidence. *Jordan*, 256 F.3d at 930. The Probation Office would have the Court adopt the \$5.3 million figure not because it is supported by the facts but rather because it conforms to the Probation Office’s view of the seriousness of the offense. This results-driven logic is wholly improper.

**(ii) The benefit to be received from the bribe was that the *Jones* case would be decided in private arbitration.**

As discussed above, there is no evidence to support the Probation Office’s theory that the benefit to Scruggs from enforcing the arbitration clause in the Scruggs Katrina Group Joint Venture Agreement was that he would prevail in the *Jones* case. Instead, the evidence shows that the benefit to be received from going to arbitration was that the *Jones* case would be heard and resolved privately. Balducci testified to “a discussion about a fear among the members of the Scruggs Law Firm that Mr. Tollison was going to use the case as a vehicle to draw media attention to the dispute that had been filed here in Lafayette County; that it was an attempt to embarrass Mr. Dick Scruggs and the members of his firm locally; and that they were very concerned about ... that issue.”<sup>58</sup> Thus, the Amended PSR correctly states that “[i]t was the goal of the conspiracy to get a guarantee of arbitration rather than risk a public civil trial ... which

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<sup>57</sup> PSR Addendum at 31.

<sup>58</sup> See Objections, Exhibit B at 46:16-22.

could result in negative publicity and embarrassment for Scruggs and members of his law firm.”<sup>59</sup>

**(iii) The value of the benefit should be the amount of the bribe.**

The Guidelines provide that “[i]n a case in which ... the value of the benefit cannot be determined, the value of the bribe is used....” U.S. Sentencing Guidelines Manual § 2C1.1 cmt. background (2007); *see also United States v. Floyd*, 84 F.3d 433,\*2 (5th Cir. 1996) (unpublished opinion) (“[I]n the absence of any reliable evidence concerning the amount of the benefit conferred on Gaubert, the value of the bribe would have been proper to be considered”). Here, the evidence shows—and the PSR properly concluded—that the benefit the conspirators expected to receive from the bribe was to send the *Jones* case to arbitration as called for in the Scruggs Katrina Group Joint Venture Agreement where the case would proceed in private. Because the value of this benefit cannot readily be determined, the Court should use the value of the bribe—\$50,000—for purposes of applying the loss/gain table in Section 2B1.1. *Id.*

Moreover, using the amount of the bribe reflects a “realistic, economic approach” to valuing the benefit to Scruggs, *Olis*, 429 F.3d at 546, and is consistent with Fifth Circuit law on how intangible benefits should be valued in bribery cases. In Section 666 bribery cases involving intangible benefits, the court is to determine the value of the benefit “in the same way that an appraiser would value an asset—by looking at how much a person in the market would be willing to pay for them.” *United States v. Marmolejo*, 89 F.3d 1185, 1194 (5th Cir. 1996). In *Marmolejo*, the defendants—two sheriffs—took \$6,000 per month and \$1,000 per visit from a prisoner in exchange for allowing him conjugal visits. *Id.* The court concluded that because the prisoner was willing to pay that amount, it reflected the value of the benefit he received from the bribery scheme. *Id.* Here, the conspirators have admitted to paying \$50,000 to ensure that the *Jones* case would be sent to arbitration. Under the Fifth Circuit’s reasoning in *Marmolejo*, amount the conspirators paid for this benefit is the best evidence of its value.

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<sup>59</sup> Amended PSR ¶ 13.

For all the foregoing reasons, the Court should reject the Probation Office's recommendation and use \$50,000—the amount that was to be paid to Judge Lackey in exchange for an order sending the *Jones* case to arbitration—as the measure of the benefit to be received by Scruggs for purposes of Section 2C1.1(b)(2). This translates into a 6-level increase in Scruggs's offense level. U.S. Sentencing Guidelines Manual § 2C1.1(b)(1)(D).

**b. Public Official**

Because Scruggs's offense involved an elected public official, his offense level is increased by four levels. U.S. Sentencing Guidelines Manual § 2C1.1(b)(3).

**3. Role in the Offense**

The Probation Office has recommended that the Court adjust Scruggs's offense level upward by four levels under Section 3B1.1(a) on the grounds that Scruggs was the “organizer or leader” of the conspiracy. Indeed, the Probation Office asserts that Scruggs was “the prime mover” in the conspiracy.<sup>60</sup> The Court should reject the Probation Office's findings and its recommendation because they are not supported by the evidence.<sup>61</sup>

The Probation Office claims that the organizer/leader adjustment is warranted because “Scruggs laid out the conspiracy strategy to influence Judge Lackey beginning in March 2007” and because Scruggs, “Backstrom, and Zach Scruggs recruited Balducci and Patterson to the conspiracy.”<sup>62</sup> The evidence in the case shows, however, that at the time of the March 2007 meeting at the Scruggs Law Firm, there was no criminal conspiracy. There was no discussion of providing a bribe or anything of value to Judge Lackey.<sup>63</sup> Both Balducci and Patterson now

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<sup>60</sup> PSR Addendum at 34.

<sup>61</sup> In order for the four-level upward adjustment to apply, the criminal activity must have “involved five or more participants.” U.S. Sentencing Guidelines Manual, § 3B1.1(a). For the reasons articulated in Scruggs's Objections to the presentence report, Scruggs submits that there were only four members of the conspiracy to bribe Judge Lackey: himself, Balducci, Patterson, and Backstrom. Zach Scruggs was not part of the bribery conspiracy. He testified at his plea allocution—and the government did not dispute—that he “had no knowledge that Tim Balducci bribed Judge Lackey...” See Objections, Exhibit R at 15-16 (3/21/08 Hearing Transcript).

<sup>62</sup> PSR Addendum at 34.

<sup>63</sup> See Objections, Exhibit B at 30:14-15.

testified before this court that they did not believe that a criminal conspiracy was formed as of the March 2007 meeting.<sup>64</sup> And Balducci told the FBI that at the March 2007 meeting, Scruggs specifically cautioned him against doing anything illegal.<sup>65</sup>

Next, the Probation Office asserts that “Scruggs was the one who approved the payments” to Judge Lackey.<sup>66</sup> Scruggs did approve payments to Balducci and Patterson to reimburse them for payments they made to Judge Lackey, but this statement is incorrect to the extent it suggests that Scruggs was the *only* one who approved payments to Judge Lackey or the *first* one to do so. The evidence from the recordings demonstrates that Balducci agreed to Judge Lackey’s request for payment without consulting Scruggs; indeed, at their September 27, 2007 meeting, when Balducci delivered the first payment to Judge Lackey, Balducci told the Judge repeatedly that Scruggs did not know about the payment arrangement.<sup>67</sup> The evidence that Balducci agreed to Judge Lackey’s request for a payment and delivered the first installment without Scruggs’s knowledge is fatal to the notion that Scruggs was the organizer or leader of the conspiracy—indeed, the evidence shows that conspiracy had begun without Scruggs’s knowledge<sup>68</sup>

Next, the Probation Offices claims that “[d]ue to his position as the leader of the Scruggs Law Firm, [Scruggs] exercised control over other participants and stood to benefit more from the fruits of the crime—whether they be monetary or intangible.”<sup>69</sup> As a legal matter, the fact that Scruggs was the leader of the *Scruggs Law Firm* is irrelevant to the question of whether he was an “organizer or leader” of the *criminal conspiracy*. *United States v. Lewis*, 476 F.3d 369, 389

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<sup>64</sup> See Objections, Exhibit B at 30:12-18, 53:2-6, Exhibit C at 9:2-12.

<sup>65</sup> See Objections, Exhibit A at 2.

<sup>66</sup> PSR Addendum at 34.

<sup>67</sup> See Objections, Exhibit L at 8, 18, 19, 20.

<sup>68</sup> It is true that Scruggs “prepared paperwork to cover up reimbursement payments to Balducci.” PSR Addendum at 34. Scruggs does not dispute that this was an act in furtherance of the conspiracy, but this fact does not tend to show that Scruggs was the organizer or leader of the conspiracy—much less the “prime mover.”

<sup>69</sup> PSR Addendum at 34.

(5th Cir. 2007). As a factual matter, the fact that Scruggs was the leader of the Scruggs Law Firm did not mean that he could “exercise[] control over” Balducci and Patterson, who were not attorneys at the Scruggs Law Firm. Moreover, there is no evidence to support the Probation Office’s assertion that Scruggs “stood to benefit more from the fruits of the crime.” As discussed above, the “fruit” here was to have the *Jones* case sent to arbitration where it would be resolved privately. There is no evidence that the benefits of having the case sent to arbitration would flow to Scruggs than any other defendant.

Finally, the Probation Office claims that Scruggs “could have terminated the conspiracy at any time.”<sup>70</sup> This claim is directly contradicted by the evidence. The evidence shows that the bribery conspiracy had been set in motion and that the first payment had been delivered by Balducci to Judge Lackey before Scruggs knew anything about it. Scruggs could not have “terminated the conspiracy” at a point at which he did not know that it existed.

The evidence shows—and Scruggs has admitted—that he joined the criminal conspiracy to bribe Judge Lackey. The evidence, on the other hand, does not show that Scruggs was “the prime mover” in the conspiracy. Accordingly, the Court should not apply the four-level “organizer or leader” adjustment.

#### **4. Acceptance of Responsibility**

The Probation Office has properly recommended that Scruggs receive a 3-level decrease in his offense level based on his acceptance of responsibility. *See* U.S. Sentencing Guidelines Manual § 3E1.1(b). Scruggs pleaded guilty and made clear to the Court he understands his culpability and the criminal nature of his conduct in furnishing funds to Judge Lackey in exchange for an order in his favor on the arbitration motion. Moreover, those who know Scruggs have observed that he has accepted responsibility for his criminal conduct and is deeply ashamed for what he has done. William Reed, a law school classmate and friend, writes:

It is beyond me to understand how a man of integrity, compassion and generosity could have made the poor decisions that Dickie admittedly made. However, I have talked at length to Dickie and

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<sup>70</sup> PSR Addendum at 34.

believe that he fully accepts responsibility for those decisions and understands that he will be punished for doing so.<sup>71</sup>

Rex Deloach, a longtime friend and colleague of Scruggs's, observes that Scruggs "is truly shamed and disgraced."<sup>72</sup> Scruggs's offense level should be reduced by three levels.

## **5. Calculation of the Guidelines Sentence**

Based on the foregoing, Scruggs's Total Offense Level is 19.<sup>73</sup> Scruggs has no criminal history, so his criminal history category is I.<sup>74</sup> Accordingly, Scruggs's Guidelines Sentence is 30-37 months. *See* U.S. Sentencing Guidelines Manual § 5A (Sentencing Table).<sup>75</sup>

### **C. Section 3553(a)**

Section 3553(a) of Title 18 provides that the Court "shall impose a sentence sufficient, but not greater than necessary" "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocation training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a), (a)(2). In determining the appropriate sentence to achieve these purposes," the Court "shall" consider (1) "the nature and circumstances of the offense" and (2) "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

#### **1. Nature and Circumstances of the Offense**

Scruggs has admitted that he committed a serious crime. He agreed and conspired to pay a bribe to Judge Lackey, a Mississippi Circuit Court Judge. In furtherance of the conspiracy, Scruggs agreed to and did furnish funds to be paid to Judge Lackey in exchange for a favorable

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<sup>71</sup> Letter to the Court from William N. Reed, dated April 8, 2008.

<sup>72</sup> Letter to the Court from Rex. M. Deloach. dated April 11, 2008.

<sup>73</sup> 12 (Base Offense Level) + 6 (Benefit) + 4 (Public Official) – 3 (Acceptance) = 19 (Total)

<sup>74</sup> *See* Amended PSR ¶ 58.

<sup>75</sup> If the Court determines that the "organizer or leader" adjustment applies, Scruggs's Total Offense Level would be 23, which corresponds to an advisory Guidelines sentence of 46-57 months.

order, and he prepared false paperwork to cover up the existence of the criminal conspiracy. Scruggs makes no excuse for this conduct and there can be none.

Without making excuses for his conduct or minimizing the significance of his actions, Scruggs respectfully asks that the Court consider all the available evidence regarding the context in which the criminal conduct arose as it determines the “just punishment for the offense.” 18 U.S.C. § 3553(a)(2). Specifically, Scruggs asks the Court to bear in mind three mitigating facts. *First*, at the March 2007 meeting at the Scruggs Law Firm at which the prospect of Balducci speaking with Judge Lackey was first raised, there was no discussion of paying Judge Lackey or otherwise offering him something of value in exchange for an order. *Second*, from March to September 2007, Balducci never proposed or offered a bribe to Judge Lackey. *Third*, Balducci repeatedly told Judge Lackey during their September 27, 2007, meeting that Scruggs was not aware of their payment arrangement at that time. These facts show that the conspiracy to bribe Judge Lackey was not extensive in nature and that Scruggs’s role—while indefensible—was limited.

Scruggs submits that, in light of the seriousness of his conduct and the nature and circumstances of the offense, a sentence at the low end of the advisory Guidelines range will provide just punishment. Indeed, before spending a moment in prison, Scruggs has already been punished. He has lost the privilege of practicing the profession to which he has devoted his life, and he has suffered shame and disgrace beyond measure.

## **2. History and Characteristics of the Defendant**

The Court is also to consider “the history and characteristics of the defendant” in setting a “sentence sufficient, but not greater than necessary.” 18 U.S.C. § 3553(a), (a)(1). In reaching its decision on an appropriate sentence, Scruggs asks the Court to consider his long service to others in the military, as an attorney, and through his generosity; his character; and his love for his family.

**a. Service to Others**

The Court should consider Scruggs's long history of service to others as it crafts an appropriate sentence. The Supreme Court has noted that among the factors encompassed by Section 3553(a)(1) are the defendant's "military, civic, charitable, or public service." *Rita v. United States*, 127 S.Ct. 2456, 2473 (2007); *see also Kimbrough*, 128 S.Ct. at 575 (approving district court's consideration of defendant's military service).

As detailed above, Scruggs has led a life of service. Scruggs served his country during the Cold War as a pilot in the Navy, flying dangerous missions off of an aircraft carrier day-in and day-out for two years. During his Navy service, he was commended by his superiors and—as described above—respected by his fellow pilots. Scruggs has served others through his career as an attorney. Robert Khayat, Chancellor of the University of Mississippi, who has known Scruggs since Scruggs was in the ninth grade, writes:

If you review the cases he was involved in, such as asbestos, tobacco, and insurance claims arising out of Katrina, you will see that his client was always the public good and in each instance his involvement was morally based. Although he derived great personal benefit from his success, the more important outcome was the benefit received by thousands of claimants who would never have been compensated....<sup>76</sup>

The letter from Matthew L. Myers of the Campaign for Tobacco-Free Kids details the incredible impact that Scruggs's work in the tobacco litigation has had over the years. Indeed, Myers credits Scruggs and the tobacco settlement with saving "millions of people from a premature death caused by tobacco." The letters of Peggy Eley and Paul Leonard, quoted above, describe the tangible and intangible impacts that his work has had on individual clients and their families. Finally, Scruggs has served the State of Mississippi through the generosity that he and his family have shown to educational, civic, and cultural institutions across the State. Scruggs's years of service do not excuse his criminal conduct. However, Scruggs's positive contributions to society should weigh as a factor mitigating his sentence.

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<sup>76</sup> Letter to the Court from Robert C. Khayat, dated April 30, 2008.

### b. Character

Scruggs also asks the Court to consider the descriptions of his character offered by those who know him well—his friends, family members, and professional colleagues and adversaries. While many have written and spoken about Scruggs recently, those who actually know him describe a kind and generous man who is honest, straightforward, ethical, and humble regarding his accomplishments. Three letters are illustrative of Scruggs’s character.

- Evan Borges, who was counsel opposite Scruggs in the First Alliance/Lehman Brothers matter and had extensive dealings with Scruggs, writes that “every time I needed to get Mr. Scruggs’ position on his side of the case, I could count on him being straight, honest and forthright with me.”<sup>77</sup> Borges also writes that, “To this day, I try to model my behavior after what I observed and saw in Mr. Scruggs, and I believe I am a better, more honest and more humble lawyer as a result of having known Richard Scruggs professionally.”<sup>78</sup>
- Michael Mann, who worked with Scruggs on the movie *The Insider* about the tobacco litigation, writes that “it’s very common for [consultants] to embellish their experiences or try to expand their roles in a project, especially when they get starstruck. This was not the case with Dick. Even though Richard Scruggs was a character in the movie, in all the research we did, Dick never talked himself up to be more of a hero than was accurate. He is simply not a boastful man.”<sup>79</sup>
- Chancellor Khayat writes, “From the outset, I have known that Dick is a remarkable human being and truly extraordinary. He is smart, kind, loyal, compassionate, and generous. All of these positive qualities were evident long before he became a wealthy, well known and influential person.”<sup>80</sup>

Scruggs respectfully asks the Court to take account of these testimonials to his character and submits that they are evidence that his admitted conduct represents an aberration in an otherwise exemplary life.

### c. Family

Finally, Scruggs asks that the Court, in sentencing him, take account of the impact of his sentence on his family. As Scruggs’s friend and colleague Rex DeLoach notes, “in punishing Dick there are at least two innocent people that bear punishment as well. Those are his wife,

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<sup>77</sup> Letter to the Court from Evan C. Borges, dated May 5, 2008.

<sup>78</sup> *Id.*

<sup>79</sup> Letter to the Court from Michael Mann, dated May 13, 2008.

<sup>80</sup> Letter from Robert C. Khayat to the Court, dated April 30, 2008.

Diane, and his daughter Claire.”<sup>81</sup> In particular, as the Court is aware, Diane Scruggs is in poor health and dependent on Scruggs for her care. Scruggs asks for a sentence at the low end of the advisory Guidelines range so that he may return quickly to her side.

#### IV. CONCLUSION

For the foregoing reasons, Scruggs respectfully requests a sentence at the low end of the advisory Guidelines range of 30-37 months as calculated above.

Respectfully submitted, this the 25<sup>th</sup> day of June 2008.

By: /s/ John W. Kecker

John W. Kecker (*Pro Hac Vice*)  
Jan Nielsen Little (*Pro Hac Vice*)  
Brook Dooley (*Pro Hac Vice*)  
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*Counsel for Defendant*  
*Richard F. Scruggs*

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<sup>81</sup> Letter to the Court from Rex M. Deloach, dated April 11, 2008.

**CERTIFICATE OF SERVICE**

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Sentencing Memorandum of Richard F. Scruggs** with the Clerk of the Court using the ECF system, which sent notification for such filing to Thomas W. Dawson, Assistant United States Attorney, Robert H. Norman, Assistant United States Attorney, David Anthony Sanders, Assistant United States Attorney, Frank W. Trapp, J. Rhea Tannehill, Jr., Todd P. Graves and Nathan F. Garrett.

This, the 25th day of June 2008.

/s/ Brook Dooley  
Brook Dooley

# **EXHIBIT 1**

IN THE CIRCUIT COURT OF LAFAYETTE COUNTY, MISSISSIPPI

JONES, FUNDERBURG, SESSUMS,  
PETERSON & LEE, PLLC

PLAINTIFF

V.

CIVIL ACTION NO. L07-135

RICHARD SCRUGGS, ET AL.

DEFENDANTS

ORDER ON PLAINTIFF'S MOTION FOR SANCTIONS

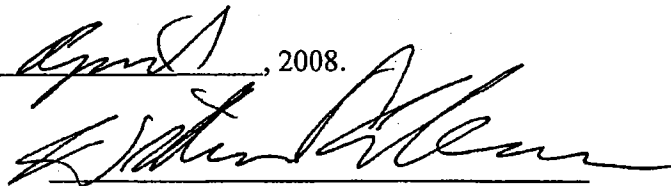
Having considered the pleadings, the evidence and the arguments of counsel, the court finds the plaintiff's motion for sanctions is well taken and should be granted as follows:

IT IS ORDERED that the defendants' answer to the complaint and their motion to stay proceedings and compel arbitration are hereby stricken from the record, and that default shall be entered against the defendants. The court will conduct a hearing to take an account and to determine the amount due the plaintiff under the joint venture agreement, said hearing being necessary to the entry of judgment by default and to carry it into effect. This ruling is made without prejudice to any party's right to raise issues of law, such as whether the facts establish a legal basis for recovery. The parties may conduct discovery regarding the issue of the amount of plaintiff's damages, as well as regarding issues connected to the plaintiff's claim for punitive damages. ~~The default entered does not extend to plaintiff's claim for punitive damages as stated in its First Amended Complaint.~~

IT IS ORDERED, FURTHER, that the defendants shall pay the plaintiff's reasonable attorney fees and expenses incurred since July 17, 2007 until and including the date of this Order, said amount to be determined by the court at the hearing on the plaintiff's damages. This Order is without prejudice to the Plaintiff's claim for attorney's fees as stated in the First Amended Complaint.

FILE THIS THE 16 DAY OF April, 2008  
MINUTE BOOK 14 PAGE 531-540  
MARY ALICE BUSBY, CIRCUIT CLERK  
BY AVodets D.C.

SO ORDERED, this the 16<sup>th</sup> day of April, 2008.



HONORABLE WILLIAM F. COLEMAN,  
CIRCUIT JUDGE