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,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM

DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE INTRODUCTION OF EXTRINSIC EVIDENCE PURSUANT TO RULE 404(B) AND MEMORANDUM OF LAW

Defendants Richard F. Scruggs, David Zachary Scruggs, and Sidney A. Backstrom, charged with an alleged attempt to corruptly influence Judge Henry L. Lackey in the case of *Jones v. Scruggs*, hereby move *in limine* to exclude Rule 404(b) evidence concerning an alleged attempt to corruptly influence a *different* judge of a *different* court, in a *different* case, by *different* attorneys, in a *different* year. Defendants emphatically deny this uncharged allegation, which has never been litigated in any court. Admission of this extrinsic evidence will create a "trial within a trial;" will consume perhaps more time even than the trial of the offenses actually charged; will unduly prejudice Defendants, two of whom have nothing to do with the 404(b) material; and will deprive Defendants of a fair trial on the offenses that are charged. This character evidence should be excluded on the grounds that there is no proper purpose for admitting it; the evidence is not relevant under Fed. R. Evid. 402; and 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.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Defendants are charged with an alleged attempt to corruptly influence Third Circuit Court

District Judge Henry L. Lackey in 2007 in connection with a fee dispute then pending before him, *Jones, et al. v. Scruggs, et al*. The indictment in this case alleges that Tim Balducci (i) in the Spring of 2007 made an "overture" to his longtime friend and mentor Judge Lackey to decide the case favorably to the *Jones* defendants; (ii) in the fall of 2007, agreed to Judge Lackey's demand for a $40,000 payment; and (iii) obtained Defendants' ratification of that payment and participated with them in the cover up of that payment through false documentation of legal work in yet another case.

On January 28, 2008, the government filed a notice of its intent to introduce "other act" evidence pursuant to Rule 404(b), identifying the evidence in a subsequent letter to Defendants' counsel as "another attempt to corruptly influence a judicial proceeding," referring to a search warrant application for the Langston Law Firm and the information, factual basis, and plea colloquy in *United States v. Joseph C. Langston*, Case No. 1:08CR003.[1]

On January 7, 2008, former attorney Joseph C. Langston pled guilty to a one-count information charging him with conspiring to attempt in 2006 to corruptly influence First Circuit Court District Judge Bobby DeLaughter in a case then pending before Judge DeLaughter, *Wilson v. Scruggs*. *See* Ex. A.

As the *Wilson* facts are alleged by the government, Richard Scruggs hired the Langston Law Firm to represent Scruggs in the *Wilson* case, a fee dispute case involving asbestos litigation, which was litigated in various courts for approximately ten years.[2] At some point well after Langston began representing Scruggs in the *Wilson* dispute, Langston, according to the government's proffer, retained and paid attorney Ed Peters to provide advice and consultation on the strategy for the *Wilson* case. *See* Ex. C at 17. The government has not alleged that the Defendants in this case had anything to do with Langston's hiring Peters for the purpose of

[1] All Exhibits ("Ex.") cited herein are exhibits to the Declaration of Brook Dooley filed herewith.

[2] The *Wilson* dispute spanned a decade and different aspects of that dispute were litigated in various federal and state courts. Although the government is correct that Langston and Balducci first entered formal appearances in the Hinds County case in January 2006, Langston and Balducci already had been working on the *Wilson* dispute for at least two years by then, and were counsel of record in the federal action, *Wilson v. Scruggs*, 3:02CV525LN (S.D. Miss.). According to the federal docket for the *Wilson* dispute, Langston and Balducci entered appearances on behalf of Richard Scruggs on January 6, 2004. *See* Ex. B.

corruptly influencing Judge DeLaughter or for any other purpose. To the contrary, Special Agent John Quaka's affidavit supporting the Langston search warrant states that Richard Scruggs *expressly* instructed Langston to make sure that he did *not* do anything improper. *See* Affidavit of John Quaka, Dec. 9, 2007, ¶ 27 ("'[L]et's just make sure we keep our skirts clean on this.'").[3]

The government claims that "[Richard] Scruggs told Langston to let [Judge DeLaughter] know that if he ruled in [Scruggs'] favor, [Scruggs] would pass [Judge DeLaughter's] name along for consideration regarding [a] federal judgeship . . ." and "in fact DeLaughter's name was submitted for consideration for a federal judgeship." Ex. C at 17-18. The government's theory is somewhat muddled since only the President appoints federal judges, and there is no claim that Judge DeLaughter's name was ever submitted to the President. In any event, the *Wilson* allegations are quite different from the cash-bribe allegations in this case.

II. ARGUMENT

The Court should not permit the introduction of Rule 404(b) evidence arising from the alleged *Wilson/DeLaughter* allegations. The Fifth Circuit recognizes "a cardinal principle of the common law that evidence of the commission of a wholly separate and independent crime is inadmissible as part of the case against the defendant. The reason for this rule is, of course, that the guilt or innocence of the accused should be established by the evidence relevant to the alleged offense being tried, not because the jury may believe the defendant to be a person of bad character or because he committed a similar offense." *United States v. Taglione*, 546 F.2d 194, 199 (5th Cir. 1977) (citing *Michelson v. United States*, 335 U.S. 469, 475-76 (1948)). Thus, there is a presumption that extrinsic evidence "of a wholly separate and independent crime is inadmissible as part of the case against the defendant." *Taglione*, 546 F.2d at 199.

Fed. R. Evid. 404(b) codifies this common law principle, recognizing only limited "carved out" exceptions. *Id.* Specifically, Rule 404(b) provides:

> 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 . . . .

[3] Defendants respectfully request that the Court take judicial notice of this quotation from Special Agent Quaka's affidavit.

Before evidence of other crimes, wrongs, or acts may be admitted by a Court pursuant to Rule 404(b): (1) the evidence must have a proper purpose under Fed. R. Evid. 404(b), that is it must be relevant to an issue other than the character of Defendants (e.g., identity, knowledge, or plan); (2) it must be relevant under Fed. R. Evid. 402; (3) its probative value must not be substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading material; and (4) the Court must charge the jury to consider the evidence only for the limited purpose for which it is admitted. *See Huddelston v. United States*, 485 U.S. 681 (1988); *see also United States v. Griffin*, 324 F.3d 330, 360 (5th Cir. 2003) (as amended). Further, the Court should state specifically, prior to its decision to admit Rule 404(b) evidence, the purpose for which it is admitting the evidence. *See United States v. Youts*, 229 F.3d 1312 (10th Cir. 2000).

A. The only conceivable purpose for admitting the *Wilson/DeLaughter* extrinsic evidence pursuant to Rule 404(b) is the forbidden purpose: to suggest Defendants' bad character.

The government cannot be permitted to introduce extrinsic evidence related to the *Wilson* case to prove that Defendants have a propensity to "attempt to corruptly influence a judicial proceeding" in violation of 18 U.S.C. § 666. Rule 404(b) precludes the introduction of evidence of uncharged wrongful acts to prove the character of a person "in order to show action in conformity therewith", *i.e.*, to suggest an individual's propensity to engage in certain criminal conduct. *See Old Chief v. United States*, 519 U.S. 172, 181-82 (1997); *United States v. Ridlehuber*, 11 F.3d 516, 521 (5th Cir. 1993). Rule 404(b) "follows the venerable principle that evidence of extrinsic offenses should not be admitted solely to demonstrate the defendant's bad character," even when the extrinsic evidence is relevant, because such evidence is inherently prejudicial. *United States v. Beechum*, 582 F.2d 898, 910 (5th Cir. 1978) (*en banc*).

Here, the only conceivable purpose for admitting extrinsic evidence related to the *Wilson* case would be for the government to suggest Defendants' propensity to attempt to corruptly influence judicial proceedings -- that Defendants, having previously engaged in similar conduct, are the *type* of people who attempt to corruptly influence judicial proceedings. The introduction of this extrinsic evidence does not help the government prove any element or consequential facts *in this case*. It should be excluded.

B. There is no permissible purpose for admitting the *Wilson/DeLaughter* extrinsic evidence pursuant to the exceptions carved out in Rule 404(b).

Nor is the *Wilson* evidence admissible for one of the proper "other purposes" contemplated by the carefully carved-out exceptions to Rule 404(b), "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b). When considering whether to permit the introduction of extrinsic evidence of similar acts pursuant to Rule 404(b), the Fifth Circuit has advised district courts "that the various categories of [Rule 404(b)] exceptions -- intent, design or plan, identity, etc. -- are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names. To the contrary, each exception has been carefully carved out of the general rule to serve a limited judicial and prosecutorial purpose." *United States v. Goodwin*, 492 F.2d 1141, 1155 (5th Cir. 1974) (emphasis added). Here, the government cannot establish that its introduction of the *Wilson/DeLaughter* extrinsic evidence would be permitted by one of the "carefully carved" Rule 404(b) exceptions to the general rule that evidence of a wholly separate and independent crime is inadmissible. *Id.*

1. Motive and opportunity.

Rule 404(b) permits the introduction of extrinsic evidence of similar acts where the *motive* for the charged crime can be proved by prior or subsequent crimes, wrongs, or acts. *See United States v. Cook*, 592 F.2d 877 (5th Cir.), *cert. denied*, 422 U.S. 921 (1979). No reasonable juror could conclude that Defendants' motive or opportunity in allegedly ratifying Balducci's agreement to Judge Lackey's demand for $40,000 resulted from, or was otherwise connected to, an alleged non-monetary offer to Judge DeLaughter, a year earlier, that he could be considered for nomination as a federal judge. The *Jones* and *Wilson* cases have nothing to do with each other.

2. Criminal intent, knowledge, absence of mistake, or accident.

Nor may the *Wilson* evidence be offered for the purpose of establishing criminal intent, knowledge, absence of mistake, or accident[4] because the acts of the Defendants that are alleged

[4] Because each of these "other purposes" goes to a defendant's *mens rea*, they are all discussed

in this case and in the *Wilson* case are not sufficiently similar for a reasonable juror to conclude by a preponderance of the evidence that the *Wilson* extrinsic evidence is probative of any of these 404(b) bases for admission. *See Huddleston*, 485 U.S. at 690 (defining applicable standard as "whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence."). For extrinsic evidence of intent to be admitted, that evidence must allow a reasonable juror to conclude that Defendants' *intent* to commit the charged offenses *in this case* is more probable as the result of the admission of evidence of the alleged extrinsic offense. *See id.*; Fed. R. Evid. 401 & 402.

The differences between the extrinsic offense alleged in the *Wilson* case and the offenses the government must prove in *this* case are such that no reasonable juror could conclude that the *Wilson* evidence has a tendency to help prove the element of specific intent required in this case. Among the differences between this indictment and the alleged uncharged extrinsic offense are (i) the nature of the alleged bribes, (ii) the Defendants alleged to be involved (there is no allegation that Zach Scruggs and Sid Backstrom are involved in the DeLaughter situation), and (iii) the witnesses alleged to be involved: attorneys Joey Langston and Ed Peters, Judge DeLaughter, and members of the United States Senate and their staff who are involved in the recommendation and nomination process for federal judges, have nothing to do with this case.

Given these and other substantial differences between the allegations in this case and the uncharged conduct in the *Wilson* case, it would be unreasonable for any juror to conclude from evidence relating to the *Wilson* case anything about Defendants' specific intent to conspire or attempt to influence Judge Lackey in this case. That Richard Scruggs allegedly told attorney Langston to tell attorney Peters to tell Judge DeLaughter that Scruggs would recommend Judge DeLaughter to be considered for a federal judgeship is not probative of whether Richard Scruggs, Zach Scruggs, and Sid Backstrom had the intent to conspire and attempt to pay money to Judge Lackey, *after* Judge Lackey requested the payments and *after* the payments to Judge Lackey had been made. The evidence should be excluded. *See Huddleston*, 485 U.S. at 689-90.

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herein under the rubric of "intent."

3. Identity.

Defendants' identity is not in issue in this case. This exception does not apply.

4. Plan, scheme, or design.

Evidence of other crimes, wrongs, or acts can be admissible to prove "plan, scheme, or design" where the "other acts" evidence is "inextricably tied" in with the offense charged. *See United States v. Carrillo*, 561 F.2d 1125, 1127 (5th Cir. 1977); *United States v. Blewitt*, 538 F.2d 1099 (5th Cir. 1976). That exception does not apply here, because there is no reasonable argument that Richard Scruggs's conduct in the *Wilson* case is intertwined with Defendants' alleged acts in connection with the *Jones* case, which are at issue in this case. *See Carrillo*, 561 F.2d at 1127. The *Wilson/DeLaughter* extrinsic evidence also is not admissible for one of the "common scheme" purposes, because it does not establish *res gestae* -- the common scheme or history of the crime, of which the other crimes constitute a part. The alleged offenses at issue in this case are not part of some larger scheme, nor do they constitute a continuing scheme or conspiracy. *See United States v. O'Connor*, 580 F.2d 38 (2d Cir. 1978) (rejecting introduction of evidence under a "common scheme" basis that defendant had accepted previously accepted bribes); *United States v. Restrepo*, 417 F.2d 927 (5th Cir. 1969).

5. The *Wilson/DeLaughter* case evidence is inadmissible.

In sum, the *Wilson/DeLaughter* extrinsic evidence does *not* show Defendants' motive, or opportunity, or intent, or identity, or plan, or scheme, or design in this case. Because the *Wilson/DeLaughter* extrinsic evidence could be intended only to show that Defendants are the kind of people who corruptly influence judicial proceedings, it is "character evidence" falling squarely within Rule 404(b)'s prohibition, and should therefore be excluded.

C. Admitting the *Wilson/DeLaughter* extrinsic evidence would be unfairly prejudicial to Defendants, would confuse the issues, would mislead the jury, and would unduly prolong the trial of this case.

Because the only conceivable purpose for admitting the *Wilson/DeLaughter* evidence is to show Defendants' bad character, which Fed. R. Evid. 404(b) prohibits, the Court can exclude this evidence for that reason alone. However, even if the Court determines that this extrinsic evidence is somehow probative for "other purposes" recognized by Rule 404(b), the probative

value of that evidence must substantially outweigh the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence, before it may be admitted. *See Ridlehuber*, 11 F.3d at 522-23; Fed. R. Evid. 403.

Here, the overwhelming prejudicial impact of the introduction and admission of this evidence is readily apparent. *First*, because the *Wilson/DeLaughter* allegations have not been charged and will be vehemently disputed by Defendants, the Court would be burdened with the task of conducting a time-consuming mini-trial on those allegations. The *Wilson/DeLaughter* mini-trial would complicate the issues in this case and substantially increase the potential for juror confusion as well as the time that it would take to try this case. *Second*, it would take Defendants a substantial amount of time to investigate the *Wilson/DeLaughter* allegations and to develop a defense to them. *Third,* admission of evidence related to the uncharged *Wilson/DeLaughter* allegations would create a significant danger that the jury might convict Defendants for their conduct in connection with the *Wilson* case, rather than this case. *Fourth*, the *Wilson/DeLaughter* allegations have nothing to do with two Defendants in this case, Zach Scruggs and Sid Backstrom. *Finally,* admission of the 404(b) evidence related to an ongoing investigation that is extensively covered in the Mississippi press would magnify the effect of prejudicial press on the Defendants' case, before and during trial. Accordingly, admission of this extrinsic evidence would be unfairly prejudicial to Defendants, would confuse the issues, would mislead the jury, and would unduly prolong the trial of this case.

1. Creation of a time-consuming mini-trial.

Admitting the *Wilson/DeLaughter* extrinsic evidence would substantially complicate the issues in this case and substantially increase the potential for juror confusion. Unlike cases where the government seeks to introduce extrinsic evidence of a similar act for which the defendant has already been convicted, or cases where the extrinsic act is considered by all to have taken place, none of the Defendants in this case has been charged for conduct with respect to the *Wilson* case, and all emphatically deny the government's allegations in this regard. To permit Defendants to challenge the government's allegations and to assist the jury with resolving

this dispute, this Court would be burdened with the task of having to conduct a "mini-trial" about the *Wilson* proceeding, and attorneys Langston's and Peters' involvement, and about what, if anything, Judge DeLaughter obtained or was improperly offered.

Other courts put in the similar position of having to hold mini-trials as a result of the introduction of 404(b) evidence have concluded that the probative value of the extrinsic evidence is outweighed by the potential confusion of the issues and the unfair prejudice to the defendant. *See United States v. Lentz*, 282 F. Supp. 2d 399, 437 (E.D. Va. 2002) (requiring defendant to prove the falsity of the other-act would be unfairly prejudicial and would risk mounting a "trial within a trial"); *United States v. Hawkins,* Case No. No. 93-00221-01, 1995 U.S. Dist. LEXIS 6525, *4 (E.D. Pa. 1995) (refusing to admit evidence of other bank robberies "because such evidence would require the Court to hold a mini-trial on each of the prior bank robberies, and the probative value of such evidence was substantially outweighed by the danger that it would confuse the issues, mislead the jury and result in undue delay and waste of time"). As the court explained in *United States v. Gilbert*, 229 F.3d 15 (1st Cir. 2000):

> we think that the court was warranted in having concerns about the extent to which the attempt on Glenn Gilbert would have to be litigated during the course of the trial. This is not a situation where the "extrinsic act" is conceded by all to have taken place. Indeed, Gilbert vehemently denies having attempted to murder her husband. It is thus nearly certain that there would be a mini-trial on whether the attempt actually took place. And in the course of the mini-trial, Gilbert likely would find herself obliged to introduce into evidence the tawdry details leading to the bitter divorce and child custody proceedings to explain Glenn Gilbert's hostility and thus attempt to undermine his credibility. We think that the potential for confusion of the issues and for unfair prejudice in such a scenario is manifest.

229 F.3d at 24 (citation omitted). The *Gilbert* court's reasoning is equally applicable here.

Defendants vehemently deny that they attempted to corruptly influence Judge DeLaughter in connection with the *Wilson* case. This Court, being the first to try this issue, would be put with the unenviable task of litigating within the trial of this case a separate, uncharged, alleged attempt to corruptly influence a different judge of a different court in a different case. Among the evidence that would have to be put before the jury would be:

- evidence about the federal funding received by Hinds County, the First Judicial Circuit, and the Administrative Office of Courts for the years 2005 through 2007;

- evidence concerning the recommendation and appointment process for federal judges and for the federal judgeship at issue in this case, including testimony from Senator Thad Cochran and former Senator Trent Lott;
- evidence regarding the procedural and substantive history of the *Wilson* case, which was litigated for over ten years;
- evidence concerning Joey Langston and Ed Peters and their conduct of the *Wilson* litigation with Tim Balducci;
- evidence of payment arrangements made with and work performed by Ed Peters;
- evidence of Ed Peters' and Judge DeLaughter's long-standing history and relationship.

Admitting the *Wilson/DeLaughter* evidence would at least double the work of all those involved in this trial – judge, jury, and attorneys – and at least double the evidence to be argued over and presented to the jury. *See United States v. Brown*, 2001 WL 238183, *2 -3 (E.D. La. March 7, 2001) (refusing extrinsic evidence because it "will increase exponentially the time and effort required to try the instant case"). This is a far cry from the "straight forward" and "not sufficiently complex" case that the government in December represented to the Court that this would be. Gov't Bench Memo., Doc. 40. Indeed, the *Wilson/DeLaughter* allegations threaten to "distort[] the emphasis at trial away from the crimes covered by the indictment to those not so charged." *O'Connor*, 580 F.2d at 43. This evidence should be excluded because it will significantly complicate the issues in this case, substantially increase the potential for confusion of the issues and the jury in this case, and unduly prolong the trial of this case.

2. Inability of Defendants to prepare and meet the evidence.

Permitting the government to introduce the *Wilson/DeLaughter* evidence would unfairly prejudice Defendants who would now have to fully litigate a wholly independent and entirely separate case which has nothing to do with the allegations in *this* case. Defendants would not only have to investigate and develop defenses to the charges in this case, but they would also

have to investigate and develop defenses to the charges that could be brought as a result of the *Wilson/DeLaughter* allegations. To adequately investigate and defend themselves against those allegations, Defendants would need discovery from the government, access to the *Wilson* case files, and third-party subpoenas. To date, other than Special Agent Quaka's affidavit, no discovery concerning the *Wilson/DeLaughter* allegations has been produced to Defendants, leaving them completely unprepared to mount a defense against this uncharged conduct. Also, the government hampered Defendants' access to the client files from the *Wilson* case when it seized them during the search of the Langston Law Firm.

Additionally, to defend themselves adequately, Defendants would need authorization from this Court to obtain subpoenas for third party documents, including Balducci's bank records, Langston's plane records, the records of Mercury Air, Hinds County accounting records, Hinds County court records, legal files of counsel involved, phone records, and documents from Peters and Judge DeLaughter, and Senate and Congressional documents, to name a few. Not only would it be a substantial challenge for Defendants to acquire the necessary materials to support their defense, but it would take substantial time for Defendants to review these documents, since the underlying litigation proceeded for approximately ten years and was filed in various iterations in approximately five separate courts.

The defense of this case also is hampered by the fact that key witnesses to the *Wilson/DeLaughter* allegations may invoke privileges not to testify. For example, Judge DeLaughter and Peters may invoke the Fifth Amendment and Senators Cochran and Lott may invoke the Speech or Debate privilege. *See* U.S. Const., art. I, § 6, cl. 1. It would be fundamentally unfair to allow the government to put on evidence that Defendants committed the alleged extrinsic crime while the Defendants are substantially limited in their ability to access the documents necessary to defend themselves (which are now exclusively in the government's possession) or to obtain the testimony of the key witnesses, all of whom are cooperating with the government or are potential targets in any criminal investigation of the *Wilson* case (and would therefore likely refuse to testify in this case). In sum, admitting the *Wilson* extrinsic evidence would substantially complicate the defense of this case, substantially increase the time that

Defendants would need to investigate the case, and would unfairly prejudice Defendants because they would not be able adequately to investigate and defend against the alleged extrinsic offense.

3. The jury may feel a responsibility to convict for the uncharged conduct.

Defendants have not been charged with any offense in connection with the *Wilson* case. Because Defendants have not been charged with any offense related to *Wilson*, the Court should be especially cognizant of the danger that the jury might convict Defendants "not for the offense charged but for the extrinsic offense." *Beechum*, 582 F.2d at 914. "This danger is particularly great where, as here, the extrinsic activity was not the subject of a conviction; the jury may feel that the defendant should be punished for that activity even if he is not guilty of the offense charged." *Id.*; *see United States v. Sumlin*, 489 F.3d 683, 689 (5th Cir. 2007).

4. The uncharged conduct has nothing to do with two out of three of the Defendants.

Defendants Zach Scruggs and Sid Backstrom do not appear to have any connection with the alleged extrinsic offense, nor has the United States identified them as having anything to do with that case. The unfair prejudice of presenting this extrinsic evidence in a joint trial of Defendants is obvious. *See also United States v. Cardall*, 885 F.2d 656, 671 (10th Cir. 1989) ("We do not believe that the relevance requirement under Rules 404(b), 402, and 104(b) can be met with respect to one defendant by introducing evidence of the bad acts of the defendant's other associates.").

5. The magnified effect of publicity.

Like this case, the *Langston* plea and the ongoing investigation of the *Wilson/DeLaughter* allegations are now receiving an abundance of coverage in the press. To permit this evidence to be admitted amplifies potential jurors' exposure to prejudicial press that would be related to this case and increases the risk that the jurors will be unable to distinguish between Langston's guilty conduct and Defendants' innocent conduct. Also, there is the possibility of the impact of prejudicial press during trial, since there are on-going federal and state investigations involving Judge DeLaughter. *See United States v. Richardson*, 651 F.2d 1251, 1253 (8th Cir. 1981). Where, as here, the United States has not charged any of the Defendants with the alleged

extrinsic offense, and the factual basis connecting Defendants to the alleged extrinsic offense is slim or too remotely attenuated, the Court should exclude the evidence on the ground that its probative value is substantially outweighed by the unfair prejudice to Defendants.

6. This extrinsic evidence should be excluded.

The government represented to the Court in December that this is a "straight forward" and "not sufficiently complex" case. *See* Gov't Bench Memo., Doc. 40. The government's own representation demonstrates the minimal probative value of the *Wilson/DeLaughter* extrinsic evidence. *See United States v. Dolliole*, 597 F.2d 102 (7th Cir.), *cert. denied*, 442 U.S. 946 (1979). Given all the consequences of permitting the government to introduce the *Wilson/DeLaughter* extrinsic evidence, there can be no reasonable question that the prejudicial effect of that evidence would overwhelm any minimal probative value and would substantially complicate an otherwise "straight forward" case. Accordingly, the Court should exclude any 404(b) evidence related to the *Wilson* case.

D. Defendants are entitled to discovery and a continuance if the Court admits the *Wilson/DeLaughter* extrinsic evidence.

Although the *Wilson/DeLaughter* evidence should be excluded for the reasons discussed above, if the Court denies this motion *in limine*, Defendants respectfully request that the Court should order the government immediately to provide discovery, including (1) access to the *Wilson/DeLaughter* files that the government seized during the search of the Langston Law Firm (which belong to Richard Scruggs, the client in the *Wilson* case); (2) Fed. R. Crim. P. 16 discovery of the *Wilson/DeLaughter*-related materials that the government has within its possession, custody, or control; and (3) all materials that contain information which exculpates Defendants of the alleged *Wilson/DeLaughter* offense or which tends to impeach government witnesses. *See United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); Fed. R. Crim. P. 16. Defendants also request a delay in the trial to permit them to receive the discovery, evaluate and investigate it, and prepare their defense.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court exclude the Rule 404(b) evidence related to the *Wilson* case, because this evidence is irrelevant to this case, is prohibited character evidence, and will have a substantial prejudicial impact that outweighs its minimal probative value. If, however, the Court denies this motion *in limine*, Defendants respectfully request that the Court order the government immediately to provide them with the requested discovery, which they need to defend themselves against the government's uncharged allegations, and order a continuance of the trial.

Defendants respectfully request oral argument on this motion.

Respectfully submitted, this 11th day of February, 2008.

Dated: February 11, 2008

By: /s/ John W. Keker

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CERTIFICATE OF SERVICE

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Defendants' Motion in Limine to Exclude Introduction of Extrinsic Evidence Pursuant to Rule 404(B) and Memorandum of Law** 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., Nathan F. Garrett, and Todd P. Graves.

This, the 11th day of February, 2008.

/s/ Brook Dooley
Brook Dooley