UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JAN 12 2004
J. T. NOBLIN, CLERK
BY _____ DEPUTY

UNITED STATES OF AMERICA,

Plaintiff,

-against-

3:03CR120WS

PAUL S. MINOR, JOHN H. WHITFIELD, OLIVER B. DIAZ, JR., JENNIFER DIAZ, and WALTER W. "WES" TEEL,

Defendants.

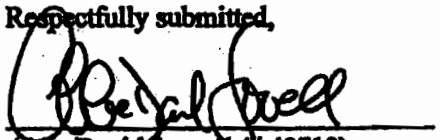
DEFENDANT PAUL S. MINOR'S MOTION TO DISMISS THIS INDICTMENT BASED ON DUE PROCESS VIOLATIONS IN THE INSTITUTION OF CHARGES, EQUAL PROTECTION VIOLATIONS IN SELECTIVE PROSECUTION AND THE UNREMEDIABLE CONFLICT OF INTEREST OF THE U.S. ATTORNEY

Defendant Paul S. Minor, through his undersigned counsel, moves to dismiss the Indictment pursuant to Federal Rule Criminal Procedure 12(b)(3). This motion is based on the attached Memorandum in Support hereof, the Exhibits attached to the Memorandum, the pleadings and papers on file in this action, and upon such other evidence and argument as may be presented at the hearing on this motion.

Mr. Minor respectfully requests that this Motion to Dismiss This Indictment Based On Due Process Violations In The Institution Of Charges, Equal Protection Violations In Selective Prosecution And The Unremediable Conflict Of Interest Of The U.S. Attorney be granted and the Indictment be dismissed in its entirety.

Dated: January 12, 2004.

Respectfully submitted,



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UNITED STATES OF AMERICA,

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v.

3:03CR120WS

PAUL S. MINOR, JOHN H. WHITFIELD, OLIVER E. DIAZ, JR., JENNIFER DIAZ and WALTER W. "WES" TEEL,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PAUL S. MINOR'S MOTION TO DISMISS THIS INDICTMENT BASED ON DUE PROCESS VIOLATIONS IN THE INSTITUTION OF CHARGES, EQUAL PROTECTION VIOLATIONS IN SELECTIVE PROSECUTION AND THE UNREMEDIABLE CONFLICT OF INTEREST OF THE U.S. ATTORNEY

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PAUL S. MINOR'S MOTION TO DISMISS THIS INDICTMENT BASED ON DUE PROCESS VIOLATIONS IN THE INSTITUTION OF CHARGES, EQUAL PROTECTION VIOLATIONS IN SELECTIVE PROSECUTION AND THE UNREMEDIABLE CONFLICT OF INTEREST OF THE U.S. ATTORNEY

Defendant Paul S. Minor submits the following Memorandum in Support of his Motion to Dismiss the Indictment:

INTRODUCTION

Perhaps the most fundamental requirement for every prosecution is that it must result from a decision-making process that is devoid of any improper motive. So essential is this requirement that courts look to insure that there is not even the appearance of impropriety in the decision by a prosecutor to pick one person and charge him with serious offenses. *See, e.g., United States ex rel., SEC v. Carter*, 907 F.2d 484 (5th Cir. 1990) (*sua sponte* reversing convictions where prosecutor not disinterested). This case fails these tests.

Even before the grand jury handed up this Indictment on July 25, 2003, Ex. 1 (U.S. v. Minor, et. al., Indictment), the public already questioned the appearance of impropriety

surrounding the investigation by the U.S. Attorney for the Southern District of Mississippi. The *Biloxi Sun Herald* expressed the following concern:

> Is Mississippi's justice system fair, honest, and just? Are all person's treated equal under the law?
>
> Or is there a parallel universe, unseen by most of us, where a cadre of rich and powerful lawyers are able to tilt the scales of justice in their favor with cash and political influence?
>
> The answer at the moment, is not known, but the questions are on a great many minds, and the reputation of our court system, the judiciary, the bar, and the investigative and prosecutorial branches of justice all stand in the balance as a federal probe seeks to discover the truth.
>
> Yet the probe itself is ensnared by many of the same questions besetting the other institutional pillars. The interconnectivity between so many of the parties involved at the very least raises concerns about whether the appearance of justice can be obtained.

The newspaper went on to review many of the facts set out in this motion and then concluded that the investigation was "suspect on the surface." Ex. 2 (*Biloxi Sun Herald*, "Probe Ensnared In A Web Of Its Own" (June 15, 2003)).

One month later, on July 25, 2003, the concerns expressed in the *Sun Herald* were realized when U.S. Attorney Lampton announced an unprecedented indictment that incomprehensively picked and chose among attorneys and judges in Mississippi. Following the filing of charges, the questions about the motives behind this case have only increased. One Mississippi newspaper reported that, "[s]ome trial lawyers contend the timing of the investigation is politically motivated, possibly driven by a corporation-friendly Republican White House." Ex. 3 (*Biloxi Sun Herald*, "Top Tobacco Lawyers Subject Of Judicial Influence Probe" (Nov. 3, 2002); *see also* Ex. 4 (*Greenwood Commonwealth*, "Witch Hunt Or Real Deal?" (May 21, 2003)) ("Trial lawyers in the state have offered a Republican conspiracy theory of sorts that there is a strong political component to the Bush administration

Justice Department's probe of trial lawyer political donations to a Democratic governor and judges perceived as anti-tort in temperament.").

The media and public, which do not have the benefit of the facts available to this Court, have already raised their own warning signals. With the facts this Court has and could obtain, it is clear that the Indictment is tainted by an improper decision to charge, questionable selectivity, and at least the appearance of fatal conflicts of interest.

FACTS

I. PAUL MINOR HAS BEEN CHARGED WITH THE MOST SERIOUS OF FEDERAL FELONIES FOR WHAT IS AT MOST A STATE ELECTION LAW VIOLATION.

At the core of the 34-page indictment in this case is the basic premise that Paul Minor bribed judges. Mr. Minor vigorously denies the charges and has pleaded not guilty as it is well known that those judges Mr. Minor is alleged to have bribed were friends of his for some time and the so-called benefits for which he gave bribes were in cases where his past success and the merits of the litigation demonstrate that he did not need the help. What the allegations in the federal indictment allege, at most, is that Mr. Minor may not have reported campaign and other support correctly under Mississippi election and attorney discipline rules. *See, e.g.*, Miss. Code Ann., § 23-15-801 *et seq*. Yet, the U.S. Attorney's Office has not only decided to turn these acts into the proverbial "federal case," but has piled on a charge that Mr. Minor is a "racketeer," making his actions on par with the head of an organized crime family or a drug ring. His law firm, which has helped countless people for over 25 years, has been labeled a "racketeering enterprise" again as if it was one of the mob families in New York or the Cali cartel in Colombia.

To begin with, this type of overkill is subject to question. Why would the U.S. Attorney's Office bring such draconian charges for this type of conduct?

II. PAUL MINOR'S ACTIONS ARE CONSISTENT WITH PRACTICE AMONG ATTORNEYS IN MISSISSIPPI BUT HE HAS BEEN SINGLED OUT FOR FEDERAL PROSECUTION.

Unlike many other states in the country, Mississippi continues to have popular elections of state judges. Campaign laws allow attorneys who practice in front of the judges running for election to give campaign contributions and other support. Until just a few years ago, there were no limits on the amount of a contribution a person could make to a judicial candidate. In addition, many of the communities in Mississippi are small enough and close-knit enough so that judges and attorneys are friends, often belonging to the same clubs and religious institutions. In sum, the Mississippi system assumes that these interactions can occur and that judges can still render impartial decisions based on the merits of cases and not the friendships they have or the support they are given.

Under this system, dozens and dozens of attorneys give contributions, provide loan support, give campaign advice, and continue to socialize with judges before whom they practice. Public records reveal that a number of attorneys were involved in providing some of the judges named with this type of help. There are prominent members of the bar included in the list with last names like Frazer, Langston, Pittman, and Scruggs.

None of these attorneys has done anything even remotely meriting criminal charges, let alone a federal RICO charge. None has tried to use his relationship with judges or support for an improper purpose. All have operated within the Mississippi system which presumes, as it should, honesty and integrity in lawyers and judges. One or two have actually engaged in conduct very similar to Mr. Minor.

Yet only Mr. Minor has been charged. The question, again, is "Why?"

III. THE ROLE OF "TORT REFORM" AND NATIONAL POLITICS RAISES QUESTIONS ABOUT MR. MINOR BEING CHARGED.

A. Big Business And The Republican Party Decided To Make Mississippi A Principal Battleground To Defeat Plaintiffs' Attorneys Like Paul Minor.

For years, big business in America has singled out Mississippi for criticism concerning jury verdicts in cases brought against corporations by plaintiffs' attorneys like Paul Minor. Pro-business media have echoed and amplified this argument. For example, the *Wall Street Journal* described the state court system as "a forum-shopping Nirvana for trial lawyers from every part of the U.S. seeking million-dollar verdicts against asbestos, tobacco, HMOs, doctors, drug companies, anything that moves." Ex. 5 (*Wall Street Journal*, "Mississippi Spurning" (May 13, 2002)).

Regardless of whether this perception advanced by national business interests is correct or not, the record is clear that big business interests began contributing large amounts of funds in elections to support tort law reform. According to a *New York Times* article at the time citing James Wootton of the Chamber of Commerce, "to draw voters' attention to candidates who might overrule tort reform legislation favored by business," the Chamber began spending over $1 million for advertising in state Supreme Court races. Ex. 6 (*New York Times*, "U.S. Chamber Will Promote Business Views In Court Races" (Oct. 22, 2000)). According to Mr. Wootton, "Mississippi and other states were attempting to 'waylay' business interests and were posing 'a serious threat to the national economy.'" *Id.*

The political conflict over tort reform naturally migrated to elections for positions in the state judiciary. In the 2000 election cycle, the Chamber of Commerce spent several million dollars on issue ads advocating tort reform in Mississippi and other states having highly contested races for the judiciary and attorney general. Ex. 7 (*Washington Post*, "Businesses Ante Up $30 Million; Last-Minute Bid At High-Stakes Hill And Judicial Races"

(Oct. 26, 2000)). Similarly, the Mississippi Bankers Association, Mississippi Physicians' PAC, and Mississippi Medical PAC, contributed a tens of thousands to judicial candidates during the 2000 election. Ex. 8 (Secretary of State Records) As a result of this national attention, "the 2000 judicial elections were scandalous in the millions of dollars pumped into them by outside special interest groups." Ex. 9 (*Biloxi Sun Herald*, "The Judiciary: What Does It Take To Bring A Change?" (July 30, 2003)).

This battle between big business and the plaintiffs' bar took on national political dimensions when the Republican Party, including President Bush, made it a priority in their national economic proposals. Ex. 10 (Speech: George W. Bush, San Bernadino California (Oct. 16, 2003) (advocating tort reform)); Ex. 11 (President Bush's Six Point Plan for Economy posted at <<www.whitehouse.org>> (advocating tort law reform)); Ex. 12 (*Washington Post*, "Battle Over Court Awards Takes More Partisan Turn" (August 10, 2003) (setting forth Republican Party stance advocating tort reform)).

One of the fiercest battles in this war between big business and plaintiffs' counsel was in the 2000 re-election campaign of Justice Oliver Diaz, one of the defendants in this case. Among the four candidates for the Supreme Court supported by the Chamber of Commerce, one was Keith Starrett in his run against Justice Diaz. Ex. 13 (*National Law Journal*, "Mixed Results For C of C" (Nov. 20, 2000)). The Chamber's support "'marks an increased commitment' by businesses to play a part in the selecting of judges," said a representative of the Chamber of Commerce. *Id.* "The contest became controversial when the U.S. Chamber of Commerce stepped into the race, spending about $1 million on ads that promoted Circuit Judge Keith Starrett of McComb and attacked Diaz. Diaz won, raising more

than $800,000 in contributions to help with his campaign and runoff election." Ex. 14 (*Clarion Ledger*, "Judicial Probe Intensifying" (May 2, 2003).

This very race and the funds involved in the election are at the heart of the allegations in this case.

B. Paul Minor And Other Plaintiffs' Attorneys Were Vigorous Opponents Of Big Business' Attempts To Change The Mississippi Judiciary.

Against this effort by outside big business, many Mississippi trial attorneys, including Mr. Minor, became energized to fight back, and they became vocal opponents against the efforts of big business and the Republican Party to change the state's judiciary. To do so, Mississippi lawyers assisted in the election of judges who they believed had philosophies akin to their own, without any intent to improperly influence such judges in specific cases. Attorneys contributed significant amounts to state judicial candidates who shared their political philosophies, without expecting or receiving a case-specific *quid pro quo*. For example, attorney Crymes Pittman contributed $14,800 to judicial candidates during the 2000 election, Ex. 15 (Secretary of State records), and Shane Langston contributed $19,900 to judicial candidates during the same race. Ex. 16 (Secretary of State records). Crymes Pittman's wife and son also contributed $14,800 to judicial candidates in 2000. Ex. 17. (Secretary of State records). During the same election cycle, Attorney T. Roe Frazer and his wife contributed $15,000 to candidates for the Mississippi Supreme Court. Ex. 18 (Secretary of State records). And there are many other instances which could be listed.

Mr. Minor was a vocal supporter and long-time contributor to Justice Diaz. In addition, Mr. Minor and Justice Diaz "have been friends for years." Ex. 19 (*Clarion Ledger*, "Justice Investigation May End This Week" (July 23, 2003)); *see also* Ex. 14 (*Clarion Ledger*, "Judicial Probe Intensifying"). It was completely natural and logical for Mr. Minor

to help Justice Diaz in what now had become an election race with important state and national implications.

Those from the side of big business would say that their support for specific judges was for the purpose of changing the overall judicial philosophy of the state and not so that a specific judge would be beholden to them in any case. Those individual attorneys who supported different judges did so for the same reason. This is the tug-of-war when there are popular elections of judges in which attorneys and those with case interests can participate. In the midst of this keen political debate about Mississippi judges and the future of how elections would be influenced by outside business interests, the U.S. Attorney decided to seek an indictment converting Mr. Minor's actions not as his desire to take part in the political process but as his attempt to corrupt judges for his own personal benefit.

Again, others were not treated in this fashion, and the question remains "Why?"

IV. PARTISAN POLITICS ENTERED OR APPEARS TO HAVE ENTERED INTO THE DECISIONS THAT FORMED THE BASIS OF CHARGES AGAINST PAUL MINOR.

A. Mr. Minor's Political Positions Repeatedly Conflicted With Those Of The Republican Party In Which U.S. Attorney Lampton Has Run For Office And Sought Support.

Paul Minor is a Democrat. He is not just a registered Democrat, but he is an active Democrat, participating in campaigns and speaking out on behalf of candidates with whose positions he agrees. He gives political contributions to these candidates and lends his name to them as well. For example, Mr. Minor and his law firm contributed $100,000 to the Democratic Party in 2001-02. Ex. 20 (FEC Records). Moreover, in contrast to the Republican Party platform advocating enactment of tort reform, Mr. Minor has been an outspoken critic of tort reform. *Compare* Ex. 10, 11, 12, *supra, with* Ex. 21 (*Biloxi Sun Herald,* "Lawyer Claims Public Misled" (May 19, 2002) ("Minor estimates he spends 25

percent of his professional time keeping informed about issues surrounding the tort reform debate.")). In this same vein, Mr. Minor has been an active member and supporter of the American Trial Lawyers Association, an organization that advocates on behalf of plaintiffs' counsel and their clients, and he himself has testified before the Mississippi State Legislature and been widely quoted in the press opposing this initiative. Ex. 22 (*Clarion Ledger*, "Tort Reform" (Aug. 14, 2002)).[1]

U.S. Attorney Dunn Lampton is a Republican. One can presume he was recommended for this position by the Republican U.S. Senators to be nominated by a Republican President because he agreed with basic Republican policies as they would affect his role as chief federal law enforcement officer in his district. There is absolutely nothing wrong with this process that allows each party that wins a national election to have individuals hold office who share the party's views. The only issue arises if partisan differences influence prosecutorial decisions or appear to do so. That is what exists in this case.

Mr. Lampton is not simply a registered Republican; he is an active partisan who has even run for federal office on two occasions. In these elections, Mr. Minor and other Democrat attorneys have supported Mr. Lampton's opponents. There is nothing wrong with a U.S. Attorney being appointed who previously has run for political office. The only issue arises if that U.S. Attorney then directs or participates in an investigation in which his

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[1] In fact, when the FBI executed a search on Mr. Minor's law office, agents seized the records of Mr. Minor's files describing his advocacy against tort reform and other work on behalf of the American Trial Lawyers Association. There could be no legitimate reason for the government's taking this type of first amendment-related material.

opponents or those who supported his opponents are the subject. That is what exists in this case.

It turns out that as a candidate for federal office, Mr. Lampton through his political committee, violated various federal campaign laws by the improper receipt of contributions and for misstating the financial activity of the committee. The Federal Election Commission cited his committee for these violations and also fined it for others. Ex. 23 (FEC records of administrative fines and audit report). There is nothing wrong with a U.S. Attorney having run for federal office and, like so many others, having a campaign committee which violated contribution and other election laws. The only issue is if that same U.S. Attorney directed an investigation and decided to bring serious felony charges against others while he was able to address his or his committee's violations as administrative and civil fines. This exists in this case as well.

The conflict between U.S. Attorney Lampton and Mr. Minor runs deeper than differing political affiliations and positions on tort reform.[2] It also involves the 2000 race for Supreme Court Justice between Oliver Diaz and Keith Starrett referred to above. Mr. Starrett is a personal friend of U.S. Attorney Lampton and for many years worked as an Assistant District Attorney under U.S. Attorney Lampton when he (Lampton) was the District Attorney of Pike County. Ex. 27 (*Biloxi Sun Herald*, "Web Of Connections" (June 8, 2003)). In

[2] Not only is there this political difference between the U.S. Attorney and Mr. Minor, Mr. Minor has also represented individuals and has obtained two separate multi-million dollar results in suits against a company owned by the U.S. Attorney's relatives. In 1989 and again in 2002, Mr. Minor represented people who sued and collected money damages from Ergon, Inc. and its subsidiary, Magnolia Marine Transport Company. Ex. 24 (*Daniel v. Ergon, Inc.*, 892 F.2d 403 (5th Cir. 1990); Ex. 25 *England v. Ergon Inc., et al.*, Cause No. 37,742 (Hinds Co. Circuit Court). It each case, on behalf of his clients, Mr. Minor alleged negligence or other wrongdoing against the Lampton family's entities. Ex. 26 (Secretary of State records). These suits no doubt caused the relatives embarrassment and money, one of which included the assessment of punitive damages.

contrast, Minor was a vocal supporter and friend of Justice Diaz. In fact, his friendship and support began as early as when Mr. Diaz was a member of the State House of Representatives. Ex. 28 (Secretary of State records). There is nothing wrong with the U.S. Attorney directing or participating in an investigation in which there are allegations that improper influence has been asserted in judicial elections. The only issue is if that U.S. Attorney began and supervised this investigation notwithstanding the fact that it involved a race for a judicial position in which he was closely identified with the candidate who lost to one of the defendants (Justice Diaz) in large part through the support of another of the defendants (Mr. Minor). This too exists in the case.

In a system that seeks to protect against even the appearance of a conflict of interest, the political aspects of this investigation and its resulting charges create blinding questions of improper involvement by the U.S. Attorney.

B. Prominent Democrat Paul Minor Is Charged With Racketeering While Prominent Republican Supporters Are Given Far Different Consideration.

Mr. Minor again asserts that he has not violated federal laws in his interaction with the judges named in the indictment. He also asserts that other attorneys who have had the same types of contacts also have not violated any federal law. However, the benefit of the doubt that others have received has not been given to him. Pointing out the differences does not indicate that the others have committed any offense; it points out the troubling manner in which Mr. Minor has been treated.

The charges filed against Mr. Minor must be compared with the manner in which U.S. Attorney Dunn Lampton has addressed conduct by those of his own party and the friends of those in that party. The public record establishes multiple personal, political, and professional connections that exist between and among U.S. Attorney Lampton, Senator Trent

Lott, and the prominent Republican supporting trial lawyer Richard "Dickie" Scruggs. These connections made it absolutely clear that the U.S. Attorney and his office[3] had no business directing and participating in a federal investigation of corruption in Mississippi, but that is exactly what he did, and the resulting charges against only those of a different party are troubling.

U.S. Attorney Lampton was appointed by President George W. Bush, reportedly upon the recommendation of Senator Lott. Ex. 27 (*Biloxi Sun Herald*, "Web of Connections"). Senator Lott and U.S. Attorney Lampton became acquainted during the latter's twice failed Republican campaigns for a seat in the U.S. House of Representatives. *Id.* During the pendency of the investigation, Senator Lott was the Republican leader in the U.S. Senate, the body that had to confirm Mr. Lampton. In terms of professional ties, Stan Harris, who is the ethics adviser and Chief of Staff to U.S. Attorney Lampton was a former staff member of Senator Lott, *id.* and was brought on only after the Senator recommended Mr. Lampton.

Mr. Scruggs and/or his law firm were, according to one report, the state's largest contributors of political "soft money" to the Republican Party; his law firm donated $250,000 to the Republican Party in 2000. Ex. 29 (The Center for Responsive Politics, Mississippi 1999-2000, Top Soft Money Donors (<<www.opensecrets.org>>)); *see also* Ex. 4 (*Greenwood Commonwealth*, "Witch Hunt or Real Deal?). Additionally, records of the U.S.

[3] The U.S. Attorney cannot run from his role in this case by pointing to the involvement of others from his office or from the Criminal Division of the Department of Justice in Washington, D.C. His office began and supervised the investigation, and that could not have occurred without his approval and direction. He has stayed actively involved, including pre-indictment meetings with defense counsel and appearances when the charges were filed and in subsequent court proceedings. He signed the indictment in the case and actually announced it to the media. Case pleadings, filed even as recently as the past few week, continue to bear his name.

Federal Elections Commission establish that Mr. Scruggs' wife contributed $250,000 to the Republican National Committee in August 2000. Ex. 30 (FEC Report, Republican National State Election Committee (Sept. 15, 2000)). In addition to shared politics, Senator Lott and Mr. Scruggs have maintained close personal ties. They are married to sisters and are neighbors, having residences on the same waterfront street in Pascagoula, Mississippi. Ex. 27 (*Biloxi Sun Herald*, "Web of Connections").

1. Mr. Scruggs' Proper Campaign And Other Support For State Office Holders Is Correctly Viewed As Appropriate While Mr. Minor's Is Treated As Federal Crimes.

Mr. Minor is charged with having a corrupt and improper purpose for guaranteeing loans to sitting state judges. Ex. 1 (Indictment at 4, ¶ 11). Among the allegations in the indictment is that he provided for principal/interest payments on the loans he guaranteed. *Id.*, at 13, ¶ 14. Also charged is that he used an intermediary to pay off one of the guarantees. *Id.*, at 15, ¶ 32. Yet another allegation is that he provided the use of an apartment to Justice Diaz, *Id.*, at 20, ¶ 16, as it turns out so that the latter could visit his children while separated from his wife. For these and the others allegations, Mr. Minor has been charged with 13 federal felonies.

Federal and state campaign records, as well as media reports, and the documents that U.S. Attorney Lampton has now made available from his own investigation indicate that Mr. Scruggs engaged in very similar conduct. Yet U.S. Attorney Lampton's and Mr. Scrugg's actions and reactions to this conduct are starkly different from Mr. Minor's predicament.

While Mr. Minor was notified that he was a target of a grand jury and would be indicted, Mr. Scruggs stated publicly that he "does not have an immunity agreement with the prosecutors and that he doesn't need one," Ex. 27 (*Biloxi Sun Herald*, "Web of

Connections"), and said that "I don't have an attorney. I don't need an attorney." Ex. 3 (*Biloxi Sun Herald*, "Top Tobacco Lawyers").

Although paragraph 20 of the Indictment charges Mr. Minor with the "racketeering act" of guaranteeing a loan to Oliver and Jennifer Diaz in the amount of $75,000, Ex. 1 (Indictment at 26, ¶ 20), it turns out that Mr. Scruggs guaranteed and paid off a loan for $80,000 on behalf of Justice Diaz in 2000. Mr. Scruggs has admitted to financing the payoff of the loan to Justice Diaz. Ex. 31 (*Corporate Legal Times*, "High Jury Awards In Mississippi Spark FBI Investigation" (Sept. 2003)). In addition, the U.S. Attorney has provided documents that indicate that Mr. Scruggs arranged for the payoff of this loan by using an intermediary, just as Mr. Minor is accused of doing.

While Mr. Minor is subject to a draconian indictment under RICO and other similarly serious federal statutes, the indictment written by or with the assistance of U.S. Attorney Lampton and his office carefully avoids the use of Mr. Scruggs' name, even where Messrs. Scruggs and Minor participated in the same financial transaction with candidates for the bench. For example, paragraph 16 of the indictment alleges that "OLIVER E. DIAZ, JR. lived rent free in a condominium in Biloxi, Mississippi, which was owned, in part, by PAUL S. MINOR." Ex. 1 (Indictment at 20, ¶ 16) (emphasis added). What the indictment fails to allege is who owned the other "part" of the condominium. In fact, the Warranty Deed for the condominium in question demarcates as owner "M&S ENTERPRISES, a Mississippi Partnership c/o Richard Scruggs." Ex. 32 (County of Harrison, Second Judicial District, Book 269, Page 116).

Similarly, paragraph 17 of the indictment alleges that "[o]n or about February 23, 2000, an individual ("Intermediary #2") sent a check in the amount of $27,500.00 to

WALTER W. "WES" TEEL to pay off the $25,000.00 loan, thereby causing the People's Bank to no longer show an outstanding loan balance." Ex. 1 (Indictment at 25-6, ¶ 17). Paragraph 18 of the indictment further alleges that "[o]n or about February 23, 2000, WALTER W. "WES" TEEL signed a promissory note promising to repay Intermediary #2 within thirty days." Ex. 1 (Indictment at 26, ¶ 18). It was subsequently reported that Mr. Scruggs is, in fact, Intermediary #2. Ex. 33 (*Biloxi Sun Herald*, "Scruggs' Ad Criticizes Sun Herald" (July 31, 2003)). After Mr. Scruggs was identified as Intermediary #2, it was reported that "Mr. Scruggs told the grand jury that he loaned Judge Walter Teel $27,000 and was repaid by Mr. Minor." Ex. 34 (*Biloxi Sun Herald*, "Mississippi Mud: All That Money Is Corrupting The Judiciary" (Aug. 19, 2003)); *see also* Ex. 35 (*Biloxi Sun Herald*, "Scruggs Unamed Figure In Indictments" (sic) (July 29, 2003)).

No one should ascribe improper motives to Mr. Scruggs' assistance to sitting judges or others in the state with whom he agreed or whom he supported.[4] No one should ascribe improper motives to Mr. Minor for his support either. Yet, the treatment and consideration each received is different, even when there are additional facts that make the distinctions dubious.

Mr. Minor had *no* case pending before the Mississippi Supreme Court in which Justice Diaz sat during the time that he was helping the Diazes. Mr. Scruggs, on the other hand, had at least two cases pending before the Supreme Court during the pendency of the

[4] In fact, Mr. Scruggs, as did Mr. Minor and others, provided perfectly proper campaign and other support, including loan guarantees to other state office holders, including a loan for $510,000 in support of Lieutenant Governor Amy Tuck's 1999 Campaign. The *Greenwood Commonwealth* has directly quoted Scruggs stating "[s]he [Ms. Tuck] called and asked me if I would guarantee a loan for her through BancorpSouth. I did, and there were a couple of loans totaling $500,000." Ex. 36 (*Greenwood Commonwealth*, "Scruggs Backed Loans to Tuck" (June 25, 2003)).

Jennifer Diaz loan where Mr. Scruggs' law firm was actually named a party. In *Johnson v. Scruggs, Millette, Bozeman & Dent, PA et al.*, No. 2000-CA-01231, Justice Diaz signed an order in December 2000 granting Scruggs' motion to remand the case to the trial court. Ex. 37 (Slip Opinion, Dec. 4, 2000). In *Scruggs, Millette, Lawson, Bozeman & Dent, P.A. v. Merkel & Cocke, P.A.*, No. 1999-CA-00406, Justice Diaz concurred in a 7-0 decision in favor of Scruggs, reversing the trial court's findings. Ex. 38 (Slip Opinion, Aug. 4, 2000).

Mr. Scruggs has proven time and again that he is a hard-working attorney, an honest member of the bar, and someone who has earned his success. When the Republican U.S. Attorney looks at Republican supporter Mr. Scruggs' actions he sees them in a way that avoids any criminal overtone. When the same U.S. Attorney looks at Democrat Paul Minor's actions, he sees racketeering. This is just not right.

2. The U.S. Attorney's Apparent Coordination With Or Providing Investigative Information To The Republican U.S. Senator Also Demonstrates Improper Partisan Involvement.

Given the sensitivity of any investigation into public office holders, the U.S. Attorney's active involvement in the Republican Party, and other relationships that exist with high-ranking Republican officials, one might expect that Mr. Lampton would keep an extra amount of distance from Mississippi public officials. This would seem even more logical as the conduct under review by the U.S. Attorney included conduct by other prominent Republicans. In yet another example of acts that should give this Court and the public great concern, there seems to have been coordination or the exchange of information between the U.S. Attorney and Senator Lott.

As already noted, Mr. Lampton was a political ally of Senator Lott, and Senator Lott has political and person relationships with Mr. Scruggs. Statements by Senator Lott about the investigation underscore the use of unusual investigatory procedures utilized by the

U.S. Attorney. As early as October 2002, Senator Lott made statements that suggested that federal and state authorities had provided him with information about the investigation, including the identity of the investigation's focus. Perhaps realizing the problem with this contact or speaking of it to the press, the Senator later denied such a communication occurred in May of 2003.

In October 2002 after it was reported that Mr. Scruggs had been questioned by federal authorities, Senator Lott told the press that he had spoken to both state and federal investigators and that "his family had nothing to worry about regarding an investigation of connections between Mississippi judges and lawyers." Ex. 39 (*Biloxi Sun Herald*, "Lott Asked Investigators About Scruggs" (May 31, 2003)). The Washington, D.C. political newspaper *Roll Call* reported that the Senator had "spoken to investigators and been assured the focus is on 'a particular judge' and 'a particular lawyer' -- neither of whom have anything to do with [Mr.] Scruggs." *Id.* The *Biloxi Sun Herald* reported that *Roll Call* directly quoted Senator Lott saying, "I've been assured that's the case by state and federal officials." *Id.* However, on May 29, 2003, Senator Lott contradicted his earlier statement when he told the *Biloxi Sun Herald*, "I have no connection in this case," and "I haven't talked to anybody with the Justice Department. I would not do that, and I don't appreciate the inference." Ex. 40 (*Biloxi Sun Herald*, "Lott, Moore Deny Influencing Probe" (May 30, 2003)).

The Senator's first media statement is troubling in two ways. First, the federal authorities had breached the confidentiality of the investigation by disclosing any information, let alone the identity of, the targets of the probe. More troubling is the fact that, as early as October 2002, the authorities already had focused on "a particular attorney" who appears to have been Mr. Minor (and certainly not Mr. Scruggs). Clearly, this communication nine

months before charges were filed indicated that Mr. Minor was already a target while the Senator's brother-in-law was given different consideration. The second media statement is troubling insofar as a U.S. Senator seems to have tried to take back his earlier statements about the inner-workings of a grand jury investigation, the proceedings of which he should not have been privy.

The circumstances surrounding what the U.S. Attorney or others were communicating and what influence Republican officials had with respect to who was, or who was not, the "focus" of the investigation bear careful Court scrutiny.

C. The Mississippi Republican Party Has Used The Filing Of Charges Against Paul Minor In Its Campaigns Against Democratic Candidates, Further Calling Into Question The Motives Behind The Case.

Just two months ago, in the midst of the gubernatorial campaign in Mississippi, the Republican Party and supporters of Governor-elect Haley Barbour (himself a former chair of the Republican Party) used the filing of charges against Mr. Minor in its efforts to taint Democratic Governor Ronnie Musgrove. Mailings to voters and advertisements on television mentioned how the Democratic Governor was close to and had accepted contributions from Paul Minor who was described as a "trial lawyer under indictment for bribery." Ex. 41 (TV Script, Haley Barbour for Governor Commercial). The campaign mailer, re-printing articles about the charges filed against Mr. Minor, claimed that electing Governor Musgrove would be a "Sweetheart Deal For Trial Lawyers" Ex. 42 (Campaign Mailer, Haley Barbour for Governor).

Some news reports described the use of Mr. Minor's indictment in the campaign. For example, one story said the indictment "has provided political fodder for the governor's race, with state Republican leaders calling for [Governor] Musgrove to return all of his contributions from Minor, one of Musgrove's top contributors. 'To avoid the appearance of

impropriety, he should refund the money,' said Jim Herring, state Republican Party Chairman, during a news conference Tuesday." Ex. 43 (*Biloxi Sun Herald*, "GOP Questions Minor's Links To Governor" (July 30, 2003)). (Ironically, Mr. Herring has not returned the political contribution Mr. Minor made to him when he ran for office.)

The statements of tort reform lobbyists, gloating about the charges filed and declaring that the case proved that decisions for plaintiffs had not been legitimate, provide additional evidence of improper purpose or the perception of an improper purpose behind the indictment. "'In Mississippi, the courts were setting national policy,' said Mike Hora, spokesman for the American Tort Reform Association. 'Those cases were not being reversed on appeal to the Supreme Court of Mississippi. That, I think, brought national focus to what was happening in Mississippi .... Many of the counties were really over the line in being unabashedly pro plaintiff.'" Ex. 44 (*Biloxi Sun Herald*, "Indictments Cast Doubt on Justice System Fairness: Business Leaders Hail News Of Indictments" (July 26, 2003)). The *Sun Herald* further reported that "[b]usiness leaders, who allege that trial lawyers have controlled the state's judiciary for too long, hailed the news of Friday's indictments." *Id.* However, the comment markedly displaying the political animus of the indictment came from Dick Wilcox, president of the Business and Industry Political Education Committee, "[t]his really makes trial lawyer money radioactive for candidates now ...." *Id.*

Were it not suspicious enough for people in different parties to be given different considerations in this case, how convenient was it that, after this case was investigated for a year or more, charges could be brought in time for the Republican Party to use them as part of its efforts against Democratic Governor Musgrove?

V. THE UNUSUAL PROCEDURES USED BY FEDERAL INVESTIGATORS ALSO EVIDENCE FATAL FLAWS WITH THE FILING OF CHARGES IN THIS CASE.

A. FBI Special Agent Campbell's Removal From The Case Raises Additional Questions Concerning The Filing Of Charges.

Matthew Campbell, a Special Agent with the Federal Bureau of Investigation ("F.B.I."), was a key investigator into possible corruption in the Mississippi judicial system. He had this role until, according to press accounts, he reportedly started asking questions about other prominent attorneys and public officials, including connections between Mr. Scruggs, Senator Lott, and state Attorney General Mike Moore. Ex. 45 (*Associated Press*, "FBI Agent Reassigned After Questioning Ties In Judge-Attorney Probe" (May 29, 2003)). As lead or a principal agent, Special Agent Campbell would have been able to trace whatever financial connections existed among any subject of the inquiry because he: (a) was a former chief financial officer of credit union before joining the F.B.I. in the late 1990's; (b) was one of the first investigators assigned to the matter; (c) had already traced financial connections among several involved individuals; and (d) was the principal agent in a prior investigation of corruption at NASA's Stennis Space Center, yielding more than a dozen convictions. Ex. 46 (*Biloxi Sun Herald*, "FBI Agent Taken Off Judicial Probe" (May 29, 2003)).

Apparently, once this investigation had been started, Special Agent Campbell wanted to follow leads that might involve others than Paul Minor. According to reports, the agent wanted to look further into the activities of other attorneys, including Mr. Scruggs and the agent even questioned U.S. Attorney Lampton as to whether Attorney General Moore should be involved in the "federal-state judicial probe, because of his relationship with

Scruggs . . . ." *Id.*[5] The next thing reported about Special Agent Campbell after these inquiries were suggested is that he was "reassigned" to a counter-terrorism unit. Ex. 2 (*Biloxi Sun Herald*, "Probe Ensnared In A Web Of Its Own"). The cause and effect for this transfer, under the circumstances, is highly suspicious.

B. FBI Special Agent Kevin Rust's Assignment To The Case Only Cements The Appearance Of Partisan Decisionmaking.

When Special Agent Campbell was reassigned and was no longer involved, the U.S. Attorney needed another investigator. The criteria for this selection now seem odd. The new agent was Special Agent Kevin Rust from Pike County. Unlike Agent Campbell, Agent Rust did not possess the background to lead the investigation: he had no institutional knowledge of the investigation, the location of his duty station was remote from Jackson and the Gulf Coast, and his apparent expertise was in the area of civil rights violations rather than banking. Ex. 47 (*Clarion Ledger*, "Justice Department Attorney Observes Grand Jury Testimony" (Feb. 9, 2000)). What Agent Rust did have was partisan political involvement in a matter directly involved in this inquiry — he had actually participated in a judicial election which forms the basis for some of the charges.

[5] The cited article and much of the public information on the investigation in the media cite as support "sources close to the investigation." These leaks, although important to informing the public as to the unlawful nature of this investigation, establish the disregard for law with which this investigation was conducted. *See* Fed. R. Crim. P. 6(e) (making it a crime for a governmental agent to disclose matters occurring before the grand jury). The timing of grand jury hearings, the identity of witnesses and the substance of their testimony have also been leaked to the media. *See, e.g.*, Ex. 27 *supra* at 1 (A federal grand jury . . . "is expected to reconvene in late July."); Ex. 34 *supra* ("Scruggs told the grand jury that he loaned Judge Walter Teel $27,500 . . . ."); Ex. 40 *supra* (disclosing identities of persons under investigation and the fact that the grand jury had subpoenaed banking records from The People's Bank in Biloxi and Merchants & Marine Bank in Pascagoula). These leaks of grand jury material are alone enough to cause the Court's inquiry into improper procedures in the case.

Records of the Mississippi Secretary of State show that on July 13, 2000, Agent Rust contributed $100 to the Friends of Keith Starrett. Ex. 48 (Secretary of State Record). Moreover, on July 18, 2000, Agent Rust contributed another $370 to Mr. Starrett's campaign. Ex. 49 (Secretary of State Record). Although it is unknown why Agent Rust structured his contribution into two separate transactions within one week, it is public record that Mr. Starrett was running against Oliver E. Diaz, Jr. for a seat on the Mississippi Supreme Court. It was certainly well-known in the legal community and should have been easily discovered by any competent investigator that Mr. Minor had been friends for some time with Justice Diaz. It was big business', specifically the U.S. Chamber of Commerce's, involvement in support of the candidacy of Starrett, that became the focus for Mr. Minor's 2000 support for Justice Diaz. Nevertheless, U.S. Attorney Lampton appointed or approved the assignment of an agent to investigate Justice Diaz, who was the person this agent's candidate had run against. The inquiry also was against Mr. Minor, one of the principal supporters of Agent Rust's candidate's opponent. Were that not enough to create the appearance of a lack of independence, it is also clear from the public record that for many years Mr. Starrett served as an Assistant District Attorney under then Mr. Lampton when he was the District Attorney in Pike County. How could it not be clear that any action against Mr. Minor would look like some payback for his opposition to the U.S. Attorney's former colleague and the F.B.I. Agent's candidate?

C. U.S. Attorney Lampton's Coordination With The Mississippi State Attorney General's Office In The Case Creates Additional Questions of His Proper Involvement In And Handling Of The Case.

It appears that the investigation underlying this indictment was initially conducted by the offices of the U.S. Attorney and the state Attorney General. Ex. 50 (*Associated Press*, "Moore Says That He Has Nothing To Do With Federal Judge-Attorney Probe") (May 30,

2003)). Attorney General Moore made statements reflecting his role. Ex. 27 at 2 (*Biloxi Sun Herald*, "Web of Connections") ("Moore first referred to his role in the judicial probe as a prominent one, with his office serving as co-investigator with the U.S. Attorney."). Then, when it became clear that the Attorney General had personal relationships which might create at least the appearance of a conflict or improper influence[6], the Attorney General did the right thing by recusing himself and presumably his office. Ex. 53 (*Greenwood Commonwealth*, "AG Distances Himself From Conflict In Judicial Probe" (May 29, 2003)) (Attorney General Moore stated that he distanced himself from any aspect of the investigation "to avoid even the appearance of some special influence"). At the least, this is what the U.S. Attorney should have done from the very start.

For some reason, the U.S. Attorney seems to have ignored Attorney General Moore's decision to remove himself from the investigation. When he announced the filing of charges, the U.S. Attorney made sure he included the Attorney General. Ex. 52 (U.S. Attorney, Southern District of Mississippi, Press Release (July 25, 2003)) ("Dunn Lampton acknowledged the contributions made in the initial stages of the investigation by officials of the Mississippi Attorney General's Office . . . .").

But matters creating unusual appearances as to what the U.S. Attorney was continuing to tell the Attorney General or his office came to a boil when it was reported that

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[6] Mississippi Attorney General Mike Moore and Scruggs "have been friends since law school at the University of Mississippi, and Moore chose Scruggs to lead the state's precedent-setting lawsuit against the tobacco industry in the 1990's." Ex. 50. *See also* Ex. 27 (*Biloxi Sun Herald*, "Web Of Connections") ("Moore and Scruggs grew up in Pascagoula and attended law school together at Ole Miss."). The relationship between Messrs. Moore and Scruggs also involved substantial campaign contributions. Records of the Mississippi Secretary of State establish that Scruggs' law firm or those with whom it worked contributed more than $100,000 to Moore's election campaign in 1999. Ex. 51 (Secretary of State records).

Mr. Moore was actually involved when Mr. Scruggs was called to the federal grand jury. A reporter from the *Biloxi Sun Herald* witnessed the Attorney General giving Mr. Scruggs a ride in his automobile to this federal courthouse for his testimony before the grand jury. Ex. 27. (*Biloxi Sun Herald*, "Web of Connections"). In response to public questions about this, the Attorney General stated, "I can't imagine what the impropriety would be," explaining that he was merely giving Mr. Scruggs, who had just arrived at the airport from out of state, a ride on his way to work at the state Justice Department. Ex. 50 (*Associated Press*, "Moore Says That He Has Nothing To Do With Federal Judge-Attorney Probe"). Moore added, "[w]hen I go to Pascagoula and fly in many times [Scruggs] comes and picks me up at the airport and takes me to my mama's house." *Id.* Needless to say, the U.S. Attorney's release, the Attorney General's statements, their actions, and explanations created more questions than they answered. Ex. 54 (*Greenwood Commonwealth*, Letter to the Editor, "Something Smells About Mike Moore's Explanation" (June 3, 2003)).

Whatever its purpose or intended effect, having the U.S. Attorney involve the Attorney General and then the Attorney General accompanying one person to the grand jury certainly could be interpreted as a statement of support for this person and a tacit request that this person be viewed or treated favorably. Needless to say, not everyone who went to the grand jury arrived in this fashion. So, whether this was a joint investigation to start and then became separate, what information the U.S. Attorney shared with the Attorney General's Office, and why the Attorney General was accompanying Mr. Scruggs to the grand jury are among the questions that must be answered.

Ex. 42 (*The Federal Prosecutor*, An Address By Robert H. Jackson, Attorney General of the United States (April 1, 1940)) (emphasis added); *see also Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting) (quoting same).

Similarly, the Fifth Circuit has recognized similar principles with respect to the important and delicate role held by the prosecutor:

> The prosecutor occupies a distinctive position in the criminal justice system: he is the hammer that sparks fire on the anvil of justice. He can strike a devastating blow to the career of a recidivist; he can release the shackles on an innocent victim of the system. But with great power comes great responsibility -- responsibility that easily can be abused. Justice is served only when convictions are sought and secured in a manner consistent with the rules that have been crafted with great care over the centuries. The Government's representative may prosecute with earnestness and vigor -- indeed he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. Because the prosecutor wields such great power, the opportunities for him to strike foul blows are many.

United States v. Diaz-Carreon, 915 F.2d 951, 956 (5th Cir. 1990) (quotations omitted).

Mr. Minor, as does any accused, has the constitutional due process right to criminal process that is fundamentally fair. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 257 (1988). Preservation of the "structural protections of the grand jury" is foremost among such fundamental rights. *Id.* Among the grand jury's structural protections is the "requirement of a disinterested prosecutor." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987); *see also United States v. Wallach*, 870 F.2d 902, 906 (2d Cir. 1989).

It is fundamental that a prosecutor who is not disinterested eviscerates the grand jury's structural protections because his interest calls into question the very decision to prosecute. Perhaps more than at any other stage of the criminal process, prosecutors are and

must remain the gatekeepers of fundamental fairness before the grand jury. As the Supreme Court has explained, the "modern" grand jury system has come to depend on "the assistance of the prosecutor's office and the investigative resources it commands." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983).

Accordingly, the prosecutor appearing before the grand jury must serve the interests of justice, rather than his or her own interests. In *Berger v. United States*, 295 U.S. 78 (1935), the Court explained:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Id. at 88; *see also Diaz-Carreon*, 915 F.2d at 956 n.6; *United States v. Goff*, 847 F.2d 149,164 (5th Cir. 1988).

As the Third Circuit has explained, the prosecutor must not only actually pursue the ends of justice, but appear to do so as well. After noting that the prosecutor controls presentation of evidence and argument to the grand jury, it held that "[w]here the potential for abuse is so great . . . the obligation of the judiciary to protect against even the appearance of unfairness [is] correspondingly heightened." *United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979) (emphasis added). The D.C. Circuit has similarly held that an independent prosecutor is "essential to the administration of justice." *In re Olson*, 818 F.2d 34, 43-44 (D.C. Cir. 1987).

To ensure criminal proceedings are fundamentally fair, the courts have invalidated criminal proceedings on due process grounds whenever, due to a variety of circumstances, a prosecutor has established some prior interest which might color his dealings in a case. *See, e.g., Carter*, 907 F.2d at 488 (reversing convictions where prosecutors on loan from SEC were

not disinterested); *Brotherhood of Locomotive Firemen and Engineers v. United States*, 411 F.2d 312 (5th Cir. 1969) (reversing contempt conviction on due process grounds where a party's civil attorney also prosecuted the contempt); *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967) (overturning state assault conviction where prosecutor concurrently represented the defendant's wife, the alleged assault victim, in a concurrent divorce proceeding). The Ninth Circuit in *Martin v. United States*, 335 F.2d 945, 950 (9th Cir. 1964) noted that it had summarily reversed the convictions of certain alleged co-conspirators after a prosecutor who had represented another severed co-conspirator served on the Government's prosecution team for the non-severed defendants.

Courts have protected individuals from prosecutorial conflicts of interest even in the investigative stage of case. For instance, the Sixth Circuit in *In re Grand Jury Subpoenas*, 573 F.2d 936 (6th Cir. 1978) reversed on due process grounds the district court's refusal to grant an order protecting General Motors from a grand jury investigation because the IRS attorney deputized to conduct the criminal investigation "ha[d] an axe to grind and [w]as more interested in justifying his previous [IRS] investigations, his recommendations, and the conduct of IRS agents than in protecting GM against unfounded criminal prosecution." *Id.* at 943.

Moreover, because "justice must satisfy the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)), these courts granted the relief requested without finding it necessary to examine or conclude in fact whether the prosecutor could set aside his or her own interests and pursue simply the ends of justice. Accordingly, the Supreme Court in *Young* found that an impermissible conflict of interest arises if the prosecutor's extra-prosecutorial interest

"theoretically could have created temptation" to serve that other interest. *Young*, 481 U.S. at 806 (emphasis added). Indeed, where a diverting influence "created opportunities for conflicts to arise, [they] . . . create[] at least the appearance of impropriety." *Id.* (emphasis in original). Thus, in short, as a public prosecutor, U.S. Attorney Lampton is subject to "standards of conduct more stringent than those applied to private lawyers." *United States v. Judge*, 625 F. Supp. 901, 902 (D. Hawaii 1986); *see also Carter*, 907 F.2d at 488 (reversing convictions where there existed "a potential for conflict and an appearance of impropriety").

In a similar vein, the Fifth Circuit aptly stated:

> No one would suggest now that in any way these fine lawyers submerged one interest over the other. But that is not the point. The point is that those conflicting claims of undivided fidelity present subtle influences on the strongest and most noble of men. The system we prize cannot tolerate the unidentifiable influence of such appeals.

Locomotive Firemen, 411 F.2d at 319 (emphasis added).[7]

U.S. Attorney Lampton's actual and apparent interests set forth herein provide the textbook example of a very interested prosecutor whose resulting investigation and charges violate the due process clause.

Discerning prosecutorial bad acts to support a conflict charge is obviously difficult in that the conflict may play out more through acts the prosecutor does not undertake (*e.g.*, not expanding the investigation to others allied with the prosecutor, not seeking a settlement on reasonable terms, not seeking to charge the accused as others have been charged for similar acts), rather than through acts the prosecutor did undertake. *See Young*, 481 U.S. at 807

[7] Indeed, so fundamental are the accused's right to a fair criminal process and the attendant preservation of the grand jury's "structural protections," that the Supreme Court has held that no error compromising these rights can be harmless. *See, e.g., Bank of Nova Scotia*, 487 U.S. at 256-57; *cf., Rose v. Clark*, 478 U.S. 570, 578 (1986), *on remand*, 822 F.2d 596 (6th Cir. 1987) ("harmless-error analysis thus presupposes" a fundamentally fair trial).

(prosecution "exercises considerable discretion" to make such decisions "outside the supervision of the court"). This "non-conduct" exists throughout this investigation. Nonetheless, there are also the actions that U.S. Attorney Lampton and others actually did undertake that reflect or have the appearance of reflecting decisions made for other than the impartial pursuit of justice. That conclusion is inescapable:

- when Senator Lott could state he was assured that the investigation did not implicate his family; or
- when Mr. Scruggs stated he did not need an immunity agreement or an attorney in the face of potentially serious charges; or
- when those making political contributions other than Mr. Minor have not been prosecuted; or
- when the lead agent was transferred off the case after apparently inquiring about relationships closer to the U.S. Attorney than Mr. Minor enjoyed; or
- when the new FBI agent assigned to the case was a financial supporter of the opponent of Judge Diaz; or
- when the U.S. Attorney's family had been sued by Mr. Minor; or
- when Attorney General Moore accompanied Mr. Scruggs to the grand jury hearing; or,
- finally, when the U.S. Attorney wrote an indictment charging draconian RICO violations against Mr. Minor and other serious felony charges against three members of the bench, but has asked for no indictments against anyone else and was able to handle his own campaign committee's election law violations as administrative and civil fines.

B. Only A Disinterested Prosecutor Can Insure That A Grand Jury Is Impartial, Again Something That Did Not Occur In This Case.

The Supreme Court has held that an impartial grand jury is integral to the Fifth Amendment's mandate that a federal felony case be brought only by indictment, stating:

> [W]e have insisted that the grand jury remain "free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." . . . Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge' . . . ."

United States v. Williams, 504 U.S. 36, 48-49 (1992) (emphasis in original omitted) (citations omitted).

The prosecutor must preserve the grand jury's impartiality even though he or she has a multitude of opportunities to do otherwise. As the Supreme Court explained in *Sells Engineering*, the prosecutor ordinarily tells the grand jury what to investigate, gathers the evidence and witnesses for the grand jury, "draw(s) up and supervise(s) the execution of subpoenas" and "commands the investigative forces" on the grand jury's behalf, and even is expected to "advise the lay jury on the applicable law." *Sells Engineering*, 463 U.S. at 430 & 430 n.13. Moreover, "[a] prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation . . . ." *Young*, 481 U.S. at 807. Notably, therefore, the prosecutor's power to direct the grand jury's investigation toward certain matters commands an attendant ability to direct the grand jury's attention away from certain other matters or individuals. "These decisions, critical to the conduct of a prosecution, are all made outside the supervision of the court." *Id.* Nonetheless, as the Supreme Court has explained that in a federal criminal case, "[i]f [the Court] has any duty to perform . . . it is to see that the waters of justice are not polluted." *Mesaroh v. United States*, 352 U.S. 1, 14 (1956).

The Supreme Court has long recognized that a grand jury may be twisted to personal, political, and partisan ends in derogation of an accused's constitutional right to an impartial grand jury. As Chief Justice Warren explained, "[p]articularly in matters of local political corruption and investigations is it important that . . . the real issues not become obscured to the grand jury." *Wood v. Georgia*, 370 U.S. 375, 390 (1962). The Supreme Court in *Wood* reversed a sheriff's contempt conviction when his jurisdiction's judges

attempted to employ criminal contempt procedures to divert local judicial and public scrutiny to the sheriff and away from themselves and their political interests. *Id.* at 379-82. Here, too, the evidence lends reasonable credence to the appearance that U.S. Attorney Lampton may have attempted to divert the grand jury's attention from his and his associates' personal, political, and reputational interests.

Further, a district court also dismissed for, inter alia, grand jury bias reasons an indictment where the specially deputized prosecutor's actions rendered tangible his conflict of interest. *See United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979). In that case, the prosecutor's affiliation with the Environmental Protection Agency and his actions as a special prosecutor which appeared to further the interests of the EPA (as opposed to Department of Justice) interests and "led him to disregard his duties he owed . . . to the United States Department of Justice . . . and to the defendants in this case as to their rights secured by the Constitution of the United States." *Id.* at 1351; *see also In re November 1979 Grand Jury*, 616 F.2d 1021, 1026 (7th Cir. 1980) ("the heart of *Gold* was a concern that a biased and errant prosecutor had improperly manipulated the grand jury investigation in order to reach a predetermined result . . . ."); *see also Carter*, 907 F.2d at 488.

U.S. Attorney Lampton's appearance of serving other masters (his party or his former colleagues or political associates) has similarly, fundamentally skewed the grand jury proceedings in derogation of Mr. Minor's Fifth Amendment right to an impartial grand jury.[8]

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[8] Additionally, as was the case with the due process violations addressed above, Mr. Minor's right to an impartial grand jury is so "fundamental" (*Rose*, 478 U S at 577), that the error cannot be harmless. *Bank of Nova Scotia*, 487 U.S. at 257; *Cf. United States v. Fisher*, 871 F.2d 444 (3rd Cir. 1989) (claim that prosecutor vitiated the grand jury's independence by allegedly violating the ethical rules' confidentiality provisions in presentation of the evidence to the grand jury "goes to the fundamental fairness of the criminal proceedings" and thus cannot be rendered harmless under *United States v.*

(Cont'd on following page)

Thus, as did the courts in *Wood* and *Gold*, this Court should terminate these proceedings and dismiss the indictment as irreparably tainted[9].

C. U.S. Attorney Lampton's Lack Of Impartiality And Disinterest Is Evidenced By The Fact That His Conduct In This Case Violates Specific Justice Department Rules.

It may be difficult in some cases to show that a prosecutor's involvement in an investigation and case is so biased or interested or has the appearance of such partiality that a due process violation has occurred. This is not one of those cases. The Department of Justice's own rules and regulation and various codes of professional ethics provide clear lines which the U.S. Attorney crossed over when he opened, supervised, participated, drafted charges for and appeared in this case despite his political and professional relationships.

Section 45.2(a)[10] of Title 28 of the Code of Federal Regulations, the Department of Justice's principal set of rules, provides that no prosecutor "shall participate in a criminal investigation or prosecution if he has a personal or political relationship" with:

> (1) Any person or organization substantially involved in the conduct that is the subject of the investigation or prosecution; or

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(Cont'd from preceding page)
Mechanik, 475 U.S. 66 (1986), by a subsequent petit jury guilty verdict); *United States v. Taylor*, 798 F 2d 1337 (10th Cir. 1986) (same); *Wallach*, 870 F.2d at 906 (same).

[9] At this juncture, it is thus the indictment itself, not merely Mr. Lampton's involvement, that aggrieves Mr. Minor. Indeed, U.S. Attorney Lampton's leading role in this investigation in directions dictated by or appearing to involve his own interests have tainted all those who have followed his direction. At some earlier point, Mr. Lampton might have been able to recuse himself and allowed his office to have handled the case. *See, e.g., In re Grand Jury Proceedings*, 700 F. Supp. 626, 630 (D.P.R. 1988) (United States Attorney timely recused himself based on potential emotional conflict of interest), and *Caggiano v. United States*, 660 F.2d 184, 187-88 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) (AUSA properly preemptively walled from participation). The time for any corrective action by Mr. Lampton to be effective, however, has long since passed.

[10] The Department of Justice's "Ethical Standards for Attorneys for the Government" reflect this high standard. In 28 C.F.R. § 77.1(a), those standards state that "[t]he Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards."

> (2) Any person or organization which he knows has a specific and substantial interest that would be directly affected by the outcome of the investigation or prosecution.

For the purposes of Section 45.2(a):

> (1) 'Political relationship' means a close identification with an elected official, a candidate (whether or not successful) for elective, public office, a political party, or a campaign organization, arising from service as a principal adviser thereto or a principal official thereof; and
>
> (2) 'Personal relationship' means a close and substantial connection of the type normally viewed as likely to induce partiality . . . . Whether relationships (including friendships) of an employee are 'personal' must be judged on an individual basis with due regard given to the subjective opinion of the [prosecutor].

28 C.F.R. § 45.2(c) (emphasis added).

Applying these standards to the investigation underlying the indictment, U.S. Attorney Lampton should have disqualified himself at the outset of the investigation. As one starting point, the U.S. Attorney himself was involved in a political campaign in which is campaign committee was cited for contribution and other violations and yet he was able to address these law violations as civil and administrative matters. How can it ever appear correct that he was involved (let alone leading) an investigation where he made decisions to handle allegations of political wrongdoing by his party's opponents in a different fashion?

Were that not a conflict enough, it has to be the case that the U.S. Attorney knew that Mr. Minor had represented plaintiffs against business interests held by the Lampton family. *See infra* IV., A., at 10, n. 2. Obtaining multi-million results for clients in two separate cases in which negligence and other wrongdoing was alleged by Mr. Minor against Mr. Lampton's family's interest is reason all by itself to require Mr. Lampton to stay out of

any decision concerning Mr. Minor, but there he stood announcing how his family's nemesis was a federal felon.[11]

Furthermore, the case involved officials in the State where the U.S. Attorney had run for office himself, a particular judicial election in which a candidate was closely aligned to him, a grand jury subject who was the candidate who had opposed his ally, another subject who was an attorney who had provided a great deal of support against his ally, and others still with whom he was politically connected. Individually or together, these associations and connections falls squarely within the definition of "personal relationship" contained in § 45.2(c).

To begin with, there can be little doubt that U.S. Attorney Lampton's relationship with Keith Starrett was "a close and substantial connection of the type normally viewed as likely to induce partiality." *See* 28 C.F.R. § 45.2(c)(2). While District Attorney, Mr. Lampton and Assistant District Attorney Starrett worked for years together in Pike County. One of the subjects of the investigation, Justice Diaz, was Mr. Starrett's opponent, and another subject, Mr. Minor, was a close friend and substantial supporter of Mr. Starrett's opponent. How can it pass any actual or appearance test for Mr. Lampton to be involved in a case with these individuals?

Second, the case involved other subjects, ostensibly other members of the Mississippi bar with whom U.S. Attorney Lampton had political or personal relationships. No doubt the investigation reviewed the conduct of Mr. Scruggs. Whether precisely the same

[11] U.S. Attorney Lampton was well aware that the DOJ Manual for U.S. Attorneys directed someone in his position to avoid being in situations in which he had a personal interest. *See* U.S.A.M. 3-2.170 ("If a conflict of interest exists because a United States Attorney has a personal interest in the outcome of the matter or because he/she has or had a professional relationship with parties or counsel, or for other good cause, he/she should recuse himself/herself.").

or simply analogous to Mr. Minor's conduct, Mr. Scruggs signed loan guarantees to a judge before whom he had a matter pending, made payments of principal/interest, paid off some or all of that guaranty, used an intermediary to pay back a loan to that judge, was co-owner of the condo used by Justice Diaz, and was involved in the loan to Judge Teel. As previously noted, Mr. Scruggs is a very avid supporter of the national and state Republican Party. Mr. Lampton himself ran for high office in Mississippi as a Republican. Mr. Scruggs is also related to Senator Lott, who felt close enough to this investigation that he felt compelled to comment on it to the press. Independently of Mr. Scruggs, U.S. Attorney Lampton has a "personal relationship" with Senator Lott.[12] The two campaigned together during Lampton's twice-failed run for the U.S. House of Representatives. Significantly, Lampton would not hold his position as U.S. Attorney without the support (if not the nomination to the White House) of Senator Lott. Lampton's Chief of Staff and ethic adviser, Stan Harris, is a former aid to Senator Lott. The Senate, where Mr. Lott was Leader, had to confirm Mr. Lampton. It is readily apparent that any investigation about which Senator Lott felt compelled to comment and which had a possible impact on his political party and a family member was one in which there was a specific and substantial interest that would be effected such that Mr. Lampton should not have been involved.

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[12] In addition to Mr. Minor's own quarrels with the Republican Party, Mr. Minor's father, a noted journalist and columnist, has often taken public issue with and criticized Senator Lott. *See, e.g.*, Ex. 55 (*Enterprise Journal*, "Lott Friend Sentenced" (April 21, 1993)). U.S. Attorney Lampton chose to include reference to a defamation case involving Mr. Minor's father in the indictment even though Mr. Minor was not himself involved in that case. Ex. 1 (Indictment, ¶ 12, at 20). His decision to do so seems gratuitous and retributive and is something else he should explain to the Court.

Depending on the extent to which he worked with or coordinated with the State Attorney General Mike Moore, U.S. Attorney Lampton certainly knew of Mr. Moore's relationship with Mr. Scruggs. It was enough to cause Mr. Moore to do the right thing by removing himself from the case. Yet, the U.S. Attorney did not take that same course and may have continued to share information with the Attorney General. He certainly could have known that it was the Attorney General who brought Mr. Scruggs to the grand jury.

That U.S. Attorney Lampton erred by staying involved and thereby tainted this case is underscored by the decision he made to recuse himself when conflicts of interest questions arose in the investigation of WorldCom, a Mississippi corporation. Mr. Lampton disqualified himself because of "conflicts" that arose because he had received campaign contributions from WorldCom employees in his unsuccessful bid for Congress. The case was then moved to another office. Ex. 56 (*USA Today*, "N.Y. Prosecutors to Lead WorldCom Case" (July 11, 2002)). The conflicts in this matter are more aggravated that the WorldCom case, due to the many personal interests involved other than campaign contributions.

D. U.S. Attorney Lampton's Participation In The Investigation Also Violated The State Disciplinary Rules Of Professional Conduct.

The Mississippi Disciplinary Rules of Professional Conduct (2002 ed.) prohibited U.S. Attorney Lampton's involvement in this investigation as well. Department of Justice regulations, 28 U.S.C. § 508B(a), provide that "[a]n attorney for the Government shall be subject to the State laws and rules, and local Federal rules, governing attorneys in each State where such attorney engages in that attorney's duties . . . ."[13] Mississippi Rule 3.8 (Special

[13] The Supreme Court in *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), applied these ethical provisions to federal prosecutors (*id. at* 804 n.14), and, as described herein, reversed a defendant's contempt conviction based on their breach. *Id.* at 814.

Responsibilities On The Prosecutor) places heightened requirements on prosecutors. The Commentary to Rule 3.8 provides:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

As part of the prosecutor's special responsibilities, the Commentary to Rule 3.8 further provides that the prosecutor comply with "Rule 3.3(d), governing *ex parte* proceedings, among which grand jury proceedings are included." *Id.* (emphasis added). In that regard, Rule 3.3 (Candor to the Tribunal) (emphasis added) provides, in part:

> In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Finally, the Commentary to Rule 3.8 (Special Responsibilities On The Prosecutor) provides that "[a]pplicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4 (Professional Misconduct).

In light of the substantial body of evidence set forth herein, it is beyond peradventure that U.S. Attorney Lampton failed to inform the grand jury of all adverse facts known to him that would enable the grand jurors to make an informed decision on whether or not to single out Mr. Minor for prosecution. These adverse facts to the prosecution — which mitigate against indictment of Mr. Minor — include, but may not even be limited to:

(a) the extent of political contributions by pro-business organizations to tort reform candidates and Mr. Minor's activism against this issue;
(b) how the debate over "tort reform" was involved in the races in question in light of Mr. Minor's strong opposition and the strong support of President Bush, Senator Lott, and the Republican Party, all of whom or which Mr. Lampton was connected;
(c) Mr. Lampton's relationship with judicial candidate Starrett, Justice Diaz's opponent;

(d) the reasons for the transfer of Special Agent Campbell off the investigation and his replacement by Special Agent Rust;
(e) Special Agent Rust's political contributions to the Starrett campaign against Justice Diaz;
(f) the Republican ties between and among Mr. Lampton, Mr. Scruggs, and Senator Lott;
(g) the relationship that existed between the Attorney General Moore and Mr. Scruggs;
(h) the fact that Mr. Minor had sued businesses connected to the Lampton family;
(i) the critical columns Mr. Minor's father had written about Mr. Lampton's patron Senator Lott; and
(j) Mr. Lampton's own brush with FECA violations and the civil and administrative treatment he received versus the felony charges he was seeking.

The extent of such omissions to the grand jury is systemic and substantial and would constitute violations of Mississippi Disciplinary Rules of Professional Conduct.

E. This Court May And Should Employ Its Supervisory Power To Dismiss This Indictment Based On Mr. Lampton's Lack Of Disinterest And The Resulting Taint That Has Permeate The Charges In This Case.

The Supreme Court in *United States v. Williams*, 504 U.S. 36, 48-49 (1992), comprehensively examined federal courts' authority to employ their inherent supervisory powers and confirmed that there are circumstances in which a court should employ these powers to remedy violations of federal and local rule ethical standards applicable to prosecutors. These supervisory powers authorize a court to "prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself . . . ." *Williams*, 504 U.S. at 46 (citations omitted). A federal court exercising its supervisory powers further "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress", *Bank of Nova Scotia*, 487 U.S. at 254 (citation omitted); provided, the court does so as a "means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury . . . ." *Williams*, 504 U.S. at 46-47 (emphasis added).

A federal prosecutor's ethical obligations established and applicable pursuant to the federal law, Department of Justice regulations, and state bar rules comprise precisely such "legally compelled standards of prosecutorial conduct." Thus, the Supreme Court authorizes this Court to "enforce[e]" violations of these rules which effect the grand jury pursuant to its supervisory power. *Id.* Indeed, the Supreme Court in *Young* reversed the defendant's contempt conviction pursuant to its supervisory powers because of the prosecutor's conflict of interest (and appearance thereof) under applicable disciplinary rules. *See Young*, 481 U.S. at 809. The U.S. Attorney's lack of disinterest in this case should fair no better.

II. THE CHARGES FILED AGAINST MR. MINOR EVIDENCE AN EQUAL PROTECTION VIOLATION AS UNCONSTITUTIONAL SELECTIVE PROSECUTION AND MUST BE DISMISSED.

From an interested prosecutor can come decisions that do not hold up to court or public scrutiny. None is a better example than when a prosecutor sees conduct by those with whom he is aligned as proper but sees that same conduct committed by his opponents and adversaries as crimes. This is what occurred in this case.

A. Following Supreme Court Direction The Fifth Circuit Prohibited The Type Of Selective Prosecution That Occurred In This Case.

By definition, a prosecutor has discretion to charge, but a selective prosecution claim, based on concepts of equal protection, asks a court to exercise judicial power over what has been called "the special province" of the executive. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). Accordingly, if a defendant demonstrates that the administration of criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" then that prosecution amounts to "a practical denial" of equal protection under the law. *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886); *see also United States v. Armstrong*, 517 U.S. 456, 464 (1996).

The existing prohibition against selective prosecution in the Fifth Circuit has its origins in a Second Circuit decision, *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974). In *Berrios*, the Second Circuit considered a claim of selective prosecution on the grounds that the defendant was chosen for prosecution because he was among the few Teamsters officials who were outspoken in their support of Senator McGovern for President against President Nixon. The defendant also claimed that he was singled out for prosecution because at the time of his indictment he was leading an effort to unionize the Marriott restaurant chain, a business that apparently had close ties to the Nixon Administration. *Id.* at 1210. The Second Circuit opined that "[n]othing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." *Id.* at 1209 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). With interesting reference to the facts in this case, the court stated that "[s]elective prosecution then can become a weapon used to discipline political foe and the dissident. *Id.* (citing *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (emphasis added); *United States v. Steel*, 461 F.2d 1148 (9th Cir. 1972)). Finally, "[t]he prosecutor's objective is then diverted from the public interest to the punishment of those harboring beliefs with which the administration in power may disagree." *Id.* This motion involves exactly such a circumstance.

The Fifth Circuit, in its most detailed analysis of the grounds for prohibition of selective prosecution, noted the importance of judicial intervention in such cases as a basic part of our constitutional form of governance. In *United States v. Johnson*, 577 F.2d 1304, 1307 (5th Cir. 1978), the court held "the judiciary has always borne the basic responsibility

for protecting individuals against unconstitutional invasions of their rights by all branches of government." (quoting *Falk*, 479 F.2d at 624). The court observed that "[t]he concept that the Constitution limits the prosecutor's discretion is not new to our jurisprudence. Nearly a century ago the Supreme Court concluded that the administration of laws 'with an evil eye and an unequal hand, so as [to] practically to make unjust and illegal discrimination between persons in similar circumstances' constituted a denial of equal protection of the laws." *Id.* (quoting *Yick Wo*, 118 U.S. at 373-74). Following an historical analysis, the court held "[t]herefore in the rare situation in which the decision to prosecute is so abusive of this discretion as to encroach on constitutionally protected rights, the judiciary must protect against unconstitutional deprivations." *Id.*

In *Johnson*, the Fifth Circuit refused to defer to abusive prosecutorial discretion and reiterated that it was "emphatically the province and duty of the judicial department to say what the law is." *Id.* The court then expressly recognized the *Berrios* two-part test for selective prosecution claims:

> (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. These two essential elements are sometimes referred to as 'intentional and purposeful discrimination.'

Johnson, 577 F.2d at 1309 (quoting *Berrios*, 501 F.2d at 211).

B. The Prosecution Of Paul Minor Is Impermissibly Selective Because Others Committing The Same Acts Have Been Overlooked, Leaving Mr. Minor's Being Targeted As A Result Of His Political And Policy Advocacy.

The two-part test to find selective prosecution has been applied to defendants asserting that they were prosecuted for their constitutionally protected political activity. In

United States v. Green, 697 F.2d 1229 (5th Cir. 1983), for example, the defendants argued that they were the subject of selective prosecution because they were only six individuals out of approximately three hundred air traffic controllers who were indicted for striking against the government. *Id.* at 1234. The court applied the two-part test as follows: "To prevail on a selective prosecution challenge a defendant must first make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not." *Id.* (citing *United States v. Rice*, 659 F.2d 524, 526 (5th Cir. 1981); *United States v. Tibbetts*, 646 F.2d 193, 195 (5th Cir. 1981); *United States v. Lichenstein*, 610 F.2d 1272, 1281 (5th Cir. 1980), *cert. denied*, 447 U.S. 907 (1980)). The court further held that "[i]f a defendant meets this first showing, he must then demonstrate that the government's discriminatory selection of him for prosecution has been invidious or in bad faith and that is rests upon such impermissible considerations as race, religion or the desire to prevent his exercise of constitutional rights." *Id.* (citing cases).

The *Berrios* test has been applied to defendants exercising their rights in a variety of contexts. *See United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (indictment dismissed against vocal opponent of federal census); *Falk*, 479 F.2d 616 (indictment dismissed against vocal opponent of Vietnam conflict); *United States v. Hastings*, 126 F.3d 310 (4th Cir. 1997) (defendant a prominent Republican Party supporter). On this record, Mr. Minor's "crime" appears not to be racketeering, but being an active Democrat and a vocal critic of tort law reform who made political contributions and provided help to judicial candidates in accordance with his philosophy, but who did not have sufficient personal and political ties to public office holders, including the U.S. Senator or the U.S. Attorney.

In *Greene*, 697 F.2d at 1235, the Fifth Circuit observed that it is unclear what the "precise nature of the showing" should be to make *prima facie* showing of discriminatory purpose. For guidance, the court turned to two cases in which indictments were dismissed for impermissible selectivity, *Falk*, 479 F.2d 617 and *Steele*, 461 F.2d 1148. After close examination of the facts and holdings in those cases, the court held "[i]n *Steele* and *Falk*, the defendants established that they had engaged in protected first amendment activity, that they had been singled out for prosecution although the government was aware that others had violated the law, and that the government had followed unusual discretionary procedures in deciding to prosecute." *Id.* at 1236 (emphasis added).

In *United States v. Hoover*, 727 F.2d 387, 391 (5th Cir. 1984), the Fifth Circuit reiterated its holding that evidence of "unusual discretionary procedures" was a sufficient showing of invidious intent. There, the court distinguished the successful selective prosecution claims in *Steele* and *Falk* in holding against Hoover's selective prosecution claim. "Unlike the defendants in *Steele* and *Falk*, and like the defendant in *Greene*, Hoover has failed to show that the government followed any special or unusual procedures in deciding to prosecute him rather than the other strike leaders initially targeted." *Id.* (emphasis added).

1. Mr. Minor Was Singled Out For Prosecution Although The Government Was Aware of Others Who Engaged In The Same Conduct.

We have put before this Court a record showing "the 2000 judicial elections were scandalous in the millions of dollars pumped into them," Ex. 36, in campaign contributions to candidates to the bench during the pitched contest over Mississippi tort law reform. The record has illustrated multiple forms of contributions: the Chamber of Commerce's million dollar issue advocacy contributions, numerous other trial attorneys with interests before the court making thousands of dollars of contributions in judicial elections, Mr. Scrugg's record

setting soft-dollar contribution to the Republican Party and additional contributions from members of his family, Special Agent Kevin Rust's contribution to the political opponent of Oliver Diaz, etc. The record even establishes that Mr. Scruggs participated in some of the very transactions for which Mr. Minor is under indictment.

Had the prosecutors wanted to filter the conduct of others through the same view of corrupt motives they used for Mr. Minor, there were plainly many other individuals who were similarly situated, but none of them was prosecuted. While the government can never prosecute all the people who commit a certain offense, "the credibility of a stated desire to maximize deterrence by 'creating an example' is severely undercut by the subsequent failure to seek prosecution of those similarly situated." *United States v. Correa-Gomez*, 160 F. Supp. 2d 748, 754 (E.D. Va. 2001) (indictment dismissed for selectivity). By any legal standard, Mr. Minor's being singled out satisfies the first prong of the prohibition against selective prosecution.

2. Mr. Minor Has Demonstrated "Special Or Unusual" Procedures Underlying The Prosecutorial Decision To Indict Him.

As the existence of "special or unusual" procedures is the red flag for improper prosecutions, one can hardly fathom an investigation that utilized more special or unusual procedures. At the outset, the experienced F.B.I. agent who may have wanted to broaden the inquiry to all those involved seems to have been taken off the case and replaced by a less experienced agent who had made political contributions to one of Mr. Minor's and Oliver Diaz's political opponents — Keith Starrett. The federal prosecutors either did or did not coordinate with the State Attorney General who at some point appears to have accompanied a subject of the investigation to the grand jury. The U.S. Senator who was instrumental in selecting the U.S. Attorney and a relative of one of the subjects spoke about the investigation

and case to the media as if he had a pipeline to the prosecutors. The U.S. Attorney strained mightily to keep Mr. Scruggs' name out of the indictment and described him generically despite the fact that Mr. Scruggs was involved in the actions forming the basis for the charges against Mr. Minor. Finally, the U.S. Attorney reached deep in the statute books to turn alleged state campaign misdemeanors into federal RICO counts when his own campaign violations were treated administratively.

As a recent case dismissing an indictment for selectivity makes clear, "[t]he question of discriminatory purpose is difficult to probe." *Correa-Gomez*, 160 F. Supp. 2d at 753. However, "[t]he inquiry is practical . . . . [and what] any official entity is 'up to' may be plain from the results its actions achieve or the results they avoid." *Id.* at 751 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). Here, it is clear even from the indictment itself, what the U.S. Attorney was "up to": insuring that an investigation that began broadly, encompassing many attorneys from both parties, ended up with an indictment solely against Mr. Minor.

3. Mr. Minor Has Established Reasonable Doubt As To The Constitutionality Of The Indictment Against Him Requiring, At The Very Least, An Evidentiary Hearing.

"A district court should grant a hearing on a defendant's selective prosecution claim if the defendant alleges sufficient facts to take the question past the frivolous state, and raises a reasonable doubt about the prosecutor's purpose." *United States v. Wellver*, 976 F.2d 1148, 1155 (8th Cir. 1992) (quotation omitted) (emphasis added).[14] While explaining that an

[14] The *Armstrong* court also observed that the Courts of Appeals had considered the required showing to establish entitlement to discovery, and had described this showing with a variety of phrases such as "colorable basis", "substantial threshold showing", "substantial and concrete basis" or "reasonable likelihood". *Armstrong*, 517 U.S. at 468. However, the court observed that the courts of appeals

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evidentiary hearing is not granted automatically, the Fifth Circuit has held that such a hearing should occur where a defendant present facts "sufficient to create a reasonable doubt about the constitutionality of his prosecution resulting from selective prosecution . . . ." *United States v. Webster*, 162 F.3d 308, 334 (5th Cir. 1998) (quotation omitted); *see also United States v. Jennings*, 724 F.2d 436, 445 (5th Cir. 1984); *United States v. Hayes*, 589 F.2d 811, 819 (5th Cir. 1979), *cert. denied*, 444 U.S. 847 (1979). The definitions of "reasonable doubt" that normally apply in criminal cases provide more than enough basis for the present motion to dismiss.[15] Would a person have a reason to at least question how Mr. Minor was selected, why others were left alone, why the U.S. Attorney stayed in when the Attorney General bowed out, why FBI agents were shifted around, and why campaign issues became racketeering? To ask the question is to answer it.

Following the reasoning of *Armstrong*, *Webster* and *Hayes*, and the Fifth Circuit's guidance on the meaning of "reasonable doubt," to avoid a hearing and the presumptions which flow from it, this Court would have to be "firmly convinced" of the procedures and decisions utilized in bringing this indictment and similarly convinced that there was "no real

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exhibit a degree of consensus regarding the amount of evidence necessary to meet the requirement. The court held that "[t]he courts of appeals 'require some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent." *Id.* (quoting *Berrios*, 501 F.2d at 1211). The court went on to hold that the required threshold is "a credible showing of different treatment of similarly situated persons." *Id.* at 470. Under any standard, Mr. Minor has provided more than necessary to merit a full inquiry.

[15] For example, the 2001 Fifth Circuit Pattern Jury Instructions states:

> A 'reasonable doubt' is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, herefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

United States Fifth Circuit District Judges Association, Pattern Jury Instructions (Criminal Cases) 16 (1990) (instruction 1.06).

possibility" of impermissible selectivity for a defendant. Such a finding could not be more contrary to this record including escalated charges, disparate treatment of people with similar conduct, distinctions which appear politically motivated, and a host of strange investigative acts from reassigned FBI agents to public pronouncements by the U.S. Senator. This is far from the case where "conclusional allegations of impermissible motive" are not sufficient to demonstrate the government acted in bad faith. *United States v. Ramirez*, 765 F.2d 438, 440 (5th Cir. 1985).

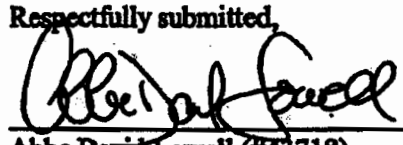
On this record, there is enough to actually dismiss the case. There certainly is enough to warrant a full evidentiary hearing to explore the disparities and curiosities.

CONCLUSION

Rather than taking the appropriate and prudent action, transferring the investigation of possible judicial corruption to an impartial office, U.S. Attorney Lampton and his office carried forward to charge Mr. Minor. They did so turning a blind eye to others similarly situated, but with better connections. They did so with actions ranging from transferring an FBI agent who asked the "wrong" questions to making alleged state campaign misdemeanors into a federal RICO charge. They did so coordinating with, or providing information to, others interested in the outcome of the case. This record demonstrates that an impermissibly interested prosecutor filed an impermissible selective prosecution. The actuality of these events or their strong appearance undermines confidence in the impartiality that occurred in this case, and confidence in the criminal justice system depends upon judicial intervention in this matter by dismissing the indictment, with or without a full evidentiary hearing.

Dated: January 12, 2004

Respectfully submitted,



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I hereby certify that on this 12th day of January, 2004, a true and correct copy of the foregoing Motion To Dismiss and Memorandum in Support thereof was served as set forth below to the following:

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