

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

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:07CR192

RICHARD F. SCRUGGS,  
DAVID ZACHARY SCRUGGS, and  
SIDNEY A. BACKSTROM  
TIMOTHY R. BALDUCCI  
STEVEN A. PATTERSON

**GOVERNMENT’S RESPONSE TO DEFENDANTS’ MOTION TO SUPPRESS THE  
FRUITS OF THE WIRETAPS AND SEARCHES**

Comes now the United States and files this its response to the defendants’ motion to suppress the fruits of the wiretaps and searches. In support of its response, the government would state as follows:

With the present motion the defendants move the court for a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978). In support of their motion, the defendants argue that the wiretaps and the subsequent search warrant authorized in this case were authorized based on what the defendants describe as “misleading” information. The defendants also suggest that the government omitted from the affidavits provided to support its request for authorization, “numerous specific facts known to the government,” which – according to the defendants – somehow show that no crime was being committed. With their motion, the defendants have taken isolated statements out of context and attempted to show acts clearly indicative of criminal behavior and make them appear as if they were perfectly legitimate. Because even considering the statements to which the defendants refer, there is still more than enough to satisfy the probable cause standard, there is no cause for an evidentiary hearing.

## **I. DISCUSSION**

In *Franks v. Delaware*, the Supreme Court held that a defendant is entitled to an evidentiary hearing to contest the validity of a search warrant if he makes a substantial preliminary showing that (1) allegations in a supporting affidavit were a deliberate falsehood or made with reckless disregard for the truth and (2) the remaining portion of the affidavit is not sufficient to support a finding of probable cause. *Franks*, 4348 U.S. at 156. The Fifth Circuit Court of Appeals has explained that “even if the defendant makes a showing of deliberate falsity or reckless disregard for the truth by law enforcement officers, he is not entitled to a hearing if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause.” *United States v. Privette*, 947 F.2d 1259, 1261 (5<sup>th</sup> Cir. 1991) (quoting *Franks*, 438 U.S. at 171-72).

The Fifth Circuit has applied *Franks* to instances of omission where, as here, an affidavit was provided pursuant to 18 U.S.C. § 2518, the wiretap statute. See *United States v. Tomblin*, 46 F.3d 1369, 1377 (5<sup>th</sup> Cir. 1995) (holding that “[o]missions or misrepresentations can constitute improper government behavior”). When a defendant argues that possibly exculpatory information was omitted, the logic of *Privette* still applies: a defendant is not entitled to an evidentiary hearing if a wiretap authorization would lawfully have issued after correcting the supporting affidavit by supplying any material omissions. Therefore, in determining whether the defendants in the present case are entitled to an evidentiary hearing, the Court need only consider whether an affidavit including the statements to which the defendants refer in their motion satisfies the requirements set out in 18 U.S.C. § 2518.

### **1. Balducci September 25<sup>th</sup> Wire**

If the affidavits supporting the Balducci and Patterson wiretaps along with the affidavit supporting the search warrant for the Scruggs Law Firm were revised to include the omitted information described in the defendants' motion, the affidavits would describe conversations for the most part between Tim Balducci and Judge Henry Lackey. The defendants' descriptions of these conversations, however, is not accurate. To begin, the defendants describe Lackey's requests as "demands" and that Balducci "relented" to such. Putting the hyperbole aside, Judge Lackey asked only once whether Scruggs would help him if he helped Scruggs, to which Balducci replied immediately: "I think, no question that would happen. Yes sir. No question." Judge Lackey then told Balducci to "talk to your man and, just, you know, whatever you need to do holler back at me." Far from "demanding" payment, Judge Lackey went on to tell Tim just to "think about it and get back with him." Two days later Balducci contacted Judge Lackey and told him he would like to meet with him in Calhoun City to determine how much "help" Judge Lackey needed. At that meeting the Judge suggested \$40,000 and Balducci agreed, stating such a payment would be "no problem." Lackey also told Balducci he could bring the order that Scruggs wanted signed. Immediately following the meeting at which Balducci agreed to pay a \$40,000 bribe, Judge Lackey contacted the FBI. It was 10:08 A.M. Also, at 10:08 that morning a telephone call was placed from Balducci's cell phone to The Scruggs Law Firm. In other words, it was perfectly clear that Balducci contacted someone with the Scruggs Law Firm immediately following his meeting with Judge Lackey. All of this information was included in the affidavit in support of the wiretap placed on Balducci's cell phone signed on September 25<sup>th</sup>.

The remaining conversations described by the defendants show nothing more than

Balducci attempting to put Judge Lackey at ease with what had clearly been inappropriate suggestions. It is undisputed that Balducci was talking with Judge Lackey over a period of months on an *ex parte* basis to discuss a ruling in a case in which Balducci was not counsel of record. Balducci's initial overtures to Judge Lackey included two instances in which he told the Judge once he decided to retire that he wanted the Judge to consider becoming "of counsel" in Balducci's law firm. These offers were both made contemporaneous with discussions related to Judge Lackey's role in the *Jones et al. v. Scruggs, et al.*, with Balducci telling the Judge that he would consider it a personal favor if the Judge would enter an order dismissing the case against Scruggs.

It is true that Balducci told Judge Lackey that he believed the decision he sought was the "right one," but Balducci was there as an advocate. Of course, he said what he believed would convince Judge Lackey to rule in Scruggs's favor. Referring to this language the defendants attempt to make it appear as if Judge Lackey's decision was a foregone conclusion; that the omitted language showed "Balducci had no motive to engage in the alleged scheme." Again, the language provided shows nothing of the sort. Indeed, it shows the decision was not as straightforward as the defendants contend. Actually, Balducci said: "Frankly, I *think* we're right and I *think* that the law is on our side and I think *probably* had I never even approached you, we'd *probably* had the right . . . result for us on this thing . . . my goal was simply to . . . tell you where, that I *had an interest in this thing*, and, if I could to help guide you to where I *thought* this thing . . . legally could come." All this language provides is that Balducci was doing what he could to influence the judge in an illicit manner. It certainly does nothing to dispel probable cause when it is seen alongside every other conversation before the Court, including specific discussions related

to the bribe and the amount to be paid.

Finally, the revised affidavit would include Judge Lackey making certain that Tim would get credit for a decision rendered in favor of Scruggs. It is unclear how the defendants believe this would have an effect on whether the court would find probable cause that a crime was being committed, had been committed, or was likely to be committed. Indeed, even the defendants concede that Judge Lackey wanted to make certain Scruggs was aware of what was taking place. The defendants refer to the following statement made by Judge Lackey to Balducci: "I just want to hear you say it again . . . . You and Scruggs [are the] only one[s] who] know anything about this?" While the defendants contend omission of this statement conceals Lackey's "aggressive" efforts to target Balducci, it does nothing of the sort, and inclusion of the language in the affidavit would have done nothing to change the fact that probable cause existed that a crime either had been committed, was being committed, or would be committed in the future.

## **2. Patterson Wire**

With regard to the Patterson wire authorized on October 16, the defendants point to only three additional instances in which they allege the government omitted "exculpatory" information. The first two instances to which the defendants refer took place on September 27. First, the defendants point to a statement provided to the Court referring to P.L. Blake's possible involvement in the crime taking place. The defendants argue that the language provided was done in such a way as somehow to hide the fact that P.L. Blake did not know why the \$40,000 was needed. To emphasize that this was simply not the case, the government quotes the entire paragraph from the affidavit addressing this issue:

(12) On the morning of September 27, 2007, Steve Patterson called Timothy R. Balducci at approximately 8:51 A.M. while

Balducci was en route to Oxford, Mississippi with intentions to pick up a “document” at the Scruggs Law Firm before traveling south to meet with Circuit Judge Henry L. Lackey. Patterson called using the target telephone. Patterson tells Balducci that he has talked with “P.L.” and that he (Patterson) had a “problem” and that he (Patterson) was gonna go ahead and solve the problem, and “P.L.” told Patterson to solve it and if he needed any help let him know. Balducci responds, that “well, that’s exactly what I was gonna tell him today, is that I was just gonna tell him that I’ve taken care of something you and I have gotten it handled . . . and that I was gonna get, you to talk to “P.L.” and that he (“P.L.”) knows the amount. Balducci asks Patterson “What did you tell him?” Patterson responds “forty”. Patterson tells Balducci that “P.L.” told him to go ahead and take care of it and Patterson responds that “I said, well we’ve already taken care of half of it.” Balducci says to Patterson that he is going to reinforce that this morning and plans to return back through Oxford and meet with Scruggs and states that “I’m gonna lead with this issue and then I’m gonna tell him I need you (Scruggs) to make two calls.”

(Patterson Aff. at 4-5). There is nothing in the preceding paragraph to suggest to the Court that P.L. Blake knew anything about why Patterson and Balducci needed \$40,000. Moreover, this was an affidavit in support of authority to place a wiretap on *Steve Patterson’s* telephone, not P.L. Blake’s telephone. The affidavit included P.L. Blake as a potential subject because he was clearly talking to other subjects about the money offered to bribe Judge Lackey, and information subsequently obtained reinforced this belief. Patterson’s statement that Blake did not know why Patterson and Balducci needed \$40,000 was made on September 27. The affidavit was provided to the Court on October 16. By October 16, it appeared even more likely that Blake was involved in the crime. As provided in the affidavit, on October 10, Patterson called Balducci and asked when he thought the order would be signed. When Balducci asked if there was a problem, Patterson responded that P.L. wanted to know. Based on this information, there was certainly probable cause to believe that Blake would “supply the remaining cash to be paid and delivered by Balducci on behalf of Scruggs.”

The defendants next argue that omitting statements Balducci made on September 27 “gut[s] the government’s theory that Scruggs was a knowing member of the alleged conspiracy.” Specifically, these statements are statements Balducci made to Judge Lackey that only he and Judge Lackey know “about this.” Again, these are statements omitted from an affidavit in support of authority to place a wiretap on *Steve Patterson’s* telephone, not Richard Scruggs. The affidavit also provided the above-quoted conversation that took place before Balducci made these statements to Judge Lackey, so the government knew at the time Balducci made them they were untrue. Also again, this affidavit was submitted on October 16. By then, it was certainly probable that at least Balducci, Patterson, Blake, and Scruggs were aware of the crime.

Next, the defendants contend that the government omitted exculpatory evidence when they failed to include statements made by Balducci describing the actual payment of the bribe as “that other deal.” In support of this argument, the defendants contend that because Balducci called the payment “that other deal,” apart from Judge Lackey actually signing the order, this somehow shows that “Balducci did not understand Lackey’s request for the payment to be connected to the order.” The defendants’ argument is without merit based on the numerous instances provided to the Court in which Judge Lackey makes specific reference to Scruggs and his case in conjunction with payment of the bribe. To suggest that Balducci did not realize the \$40,000 was in connection with Judge Lackey’s order is nonsense.

### **3. Balducci Extension and Search Warrant**

Finally, as to the October 24 extension of the wiretap authorization on Balducci’s telephone and the affidavit in support of the search warrant of the Scruggs Law Firm, the defendants simply rely on the arguments made with respect to the initial Balducci wiretap and the

Patterson wiretap. As a result, the government will not address these argument except to say the arguments provided *supra* apply to the Balducci extension and the search warrant.

## **II. CONCLUSION**

An application for a wiretap must demonstrate probable cause to believe that the target has committed, is committing, or will commit a crime, as well as “probable cause for belief that particular communications concerning that offense will be obtained through such interception.” 18 U.S.C. § 2518(a), (b). The Court determines whether probable cause exists utilizing a totality of the circumstances test. *See United States v. Dickey*, 102 F.3d 157, 162 (5<sup>th</sup> Cir. 1996). In support of their motion, the defendants point to very few isolated portions of conversations during which a practicing attorney and a sitting judge discuss a ruling to be made by the judge in a multimillion dollar lawsuit. The lawyer is not counsel of record and initiated the entire conversation when he called and requested a private meeting with the Judge on March 28; the lawyer then offered the Judge a position of counsel with his firm; explained to the Judge that a ruling in Scruggs’s favor would be a personal favor to him; and later faxed the Judge a proposed order sending the case to arbitration when “they” had decided to change their strategy; the lawyer then explained to the Judge that he would keep these matters secret; and eventually agrees to pay the Judge \$40,000 for a favorable ruling. Despite the overwhelming evidence, the defendants contend that the few instances in which Tim Balducci attempted to put Judge Lackey at ease would have caused the Court to refuse to authorize the wiretap, arguing that the language to which they refer shows that a crime was not even being committed. While the defendants may want the Court to see Judge Lackey’s request as a “demand” and Balducci’s immediate acceptance as having “relented,” the totality of the circumstances shows otherwise. Prior to

September 27, 2007, the defendants had not yet bribed Judge Henry Lackey, but criminal activity was very much afoot and had been since March.

Therefore, in light of the numerous instances in which discussions clearly related to illegal activity took place and the context with which the statements referred to by the defendants are made, the reconstructed affidavit would more than establish sufficient probable cause to authorize the electronic surveillance at issue and the subsequent search warrant of the Scruggs Law Firm. Accordingly, no evidentiary hearing is required in this matter, and the defendants' motion should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, DAVID A. SANDERS, Assistant United States Attorney, hereby certify that I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO SUPPRESS THE FRUITS OF THE WIRETAPS AND SEARCHES** with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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This the 19th day of February, 2008.

/s/ David A. Sanders  
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