

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

UNITED STATES OF AMERICA

v.

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

RICHARD F. SCRUGGS,
DAVID ZACHARY SCRUGGS,
SIDNEY A. BACKSTROM

**DEFENDANTS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO SUPPRESS THE FRUITS OF ILLEGAL WIRETAPS AND SEARCHES
WITH COMBINED MEMORANDUM OF LAW**

I. INTRODUCTION

Defendants Richard F. Scruggs, D. Zachary Scruggs, and Sidney A. Backstrom hereby respond to the Court's request for supplemental briefing, made during the February 20, 2008 hearing on defendants' Motion to Suppress the Fruits of Illegal Wiretaps and Searches.

The Court first asked defendants to list the specific false or misleading statements and material omissions in the affidavits of Agent William P. Delaney in support of the three wiretap applications and the application for a search warrant for the Scruggs Law Firm. The detailed list below—which includes false or misleading statements and omissions that came to light in the course of Agent Delaney's testimony—establishes that probable cause for the wiretaps and the search of the Scruggs Law Firm was lacking. Accordingly, the Court should suppress the fruits of these unconstitutional intrusions into defendants' privacy.

Another reason to grant defendants' Motion to Suppress is that Agent Delaney repeatedly usurped the role of the Court by unilaterally making his own probable cause determinations. "A police officer cannot make unilateral decisions about the materiality of information, or, after satisfying him or herself that probable cause exists, merely inform the . . . judge of inculpatory

evidence.” *Kohler v. Englade*, 470 F.3d 1104, 113 n.9 (5th Cir. 2006) (quoting *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000)). Indeed, “[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.” *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

Agent Delaney testified time and again that he intentionally excluded material information from his affidavits on the basis of his own, unilateral judgments regarding the weight to be given to the evidence:

- “I didn’t give much weight to that considering what had happened earlier in the day” Suppl. Ex. 1 at 115:9-10.¹
- “I didn’t see where it was material.” *Id.* at 116:22.
- “Based on that, I put much more weight into that incident than what Mr. Balducci said on May 9th.” *Id.* at 117:3-5.
- “Again, I didn’t give a lot of weight to it.” *Id.* at 118:18.
- “I just didn’t give a lot of credibility to what was said in that particular conversation.” *Id.* at 119:16-17.
- “I weighed what information I had in front of me, and I tried to make the best decision I could based on what I believe was probable cause that Mr. Balducci was using his phone to conduct a criminal conspiracy.” *Id.* at 132:25-133:4.

¹ All citations to Supplemental Exhibits (“Suppl. Ex. __”) are to exhibits to the Supplemental Declaration of Brook Dooley in Support of Defendants’ Motion to Suppress the Fruits of Illegal Wiretaps and Searches, filed herewith. All citations to Exhibits (“Ex. __”) are to exhibits to the Declaration of Brook Dooley in Support of Defendants’ Motion to Dismiss Indictment for Outrageous Government Conduct and Motion to Suppress the Fruits of Illegal Wiretaps and Searches, filed February 11, 2008.

- “Again, I didn’t give those statements as much as weight as I gave previous statements.” *Id.* at 160:22-23.

Agent Delaney thus took it on himself to usurp the Court’s role as the neutral arbiter of probable cause. This is improper, and the Court should suppress the fruits of the improperly obtained wiretaps and search warrant.

The Court also asked whether it can suppress the fruits of the Balducci and Patterson wiretaps because the government failed to establish probable cause that anyone beyond Balducci and Patterson was involved in the conspiracy alleged in the Delaney affidavits. The answer is yes—for two reasons. First, to obtain a wiretap, the Fourth Amendment requires the government to establish “probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a *particular offense*.” *Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal quotations omitted; emphasis added). Similarly, Title III requires the government to establish probable cause as to a “particular offense.” 18 U.S.C. § 2518(3)(a). In the Delaney affidavits, the offense described by the government involved an alleged conspiracy between Balducci, Scruggs, Patterson, P.L. Blake, and others. The government also asserted that the wiretaps were necessary to capture conversations between these alleged conspirators. Yet, the affidavits, when viewed properly to exclude all false and misleading statements and to include all material information omitted by the government, fail to establish the existence of the alleged conspiracy. Accordingly, the government failed to meet its burden under the Fourth Amendment and Title III.

Second, there is authority that “[a]n application for a wiretap must demonstrate probable cause to believe that the *targets* have committed, are committing, or will commit a crime” *United States v. Hamilton*, No. CRIM. 05-50066-01-08, 2005 WL 3371085, *3 (W.D.La. Dec. 12, 2005) (emphasis added). Defendant Dick Scruggs is identified as a “suspect target” in each of the three challenged wiretap applications. The failure to establish probable cause that Scruggs was involved in the crime that Balducci and Patterson were committing renders Delaney’s affidavits insufficient. The fruits of these improper wiretaps must be suppressed.

II. RESPONSE TO THE COURT'S INQUIRIES

A. The affidavits of Special Agent William P. Delaney contain false or misleading statements and material omissions.

1. September 25, 2007 affidavit in support of the Balducci wiretap

The September 25, 2007 affidavit of Agent Delaney in support of the initial wiretap on Timothy R. Balducci's cellular telephone contains the following false or misleading statements and material omissions.

False Statement: "Mr. Balducci made corrupt overtures to Judge Lackey" at their March 28, 2007 meeting. Ex. 9 at 3. This statement is false because Agent Delaney testified that, as of his first meeting with Judge Lackey on April 24, 2007, Judge Lackey "didn't know whether . . . what had happened with Mr. Balducci rose to the level of criminal action . . ." Suppl. Ex. 1 at 130:19-20. Agent Delaney also testified that, as late as September 2007, Judge Lackey was still not sure that Balducci had intended anything criminal in their first meeting. *See id.* at 146:24-147:2.

False Statement: "At the conclusion of the meeting, Judge Lackey called the U.S. Attorney's office . . ." Ex. 9 at 3. Agent Delaney testified that, at the time he first met with Judge Lackey, they "didn't get into the time frame as to how quickly [Judge Lackey] went and saw the U.S. Attorney's Office" and that all that Delaney knew was that Judge Lackey went to the U.S. Attorney's Office "shortly after Mr. Balducci came down and met with him." Suppl. Ex. 1 at 128:16-17, 10-11. And, when Agent Delaney finally did discuss the timing of Judge Lackey's call to the U.S. Attorney's Office, he found out that Judge Lackey waited two weeks to call. *Id.* at 114:17.

Material Omissions Regarding May 3, 2007 Call: Agent Delaney stated that "On May 3, 2007, Judge Lackey had a telephone conversation with Mr. Balducci." Ex. 9 at 3. This statement omits that it was Judge Lackey, with Agent Delaney sitting next to him, who called Balducci. Suppl. Ex. 2 at 1. This omission is material because it shows that, after nearly five weeks during which there is no evidence that Balducci contacted Judge Lackey, Judge Lackey

reinitiated contact with Balducci. Agent Delaney also omitted that it was Judge Lackey, and not Balducci, who brought up the topic of the *Jones* case during the May 3 call. *See id.*

Material Omissions Regarding May 4, 2007 Call: Agent Delaney states that on May 4, 2007, “Balducci called Judge Lackey, . . . and they discussed the proposed order compelling arbitration” Ex. 9 at 3. Agent Delaney omitted, however, that during the May 4th call, Balducci said that the proposed order was “Just some thoughts, ideas, and suggestions . . . I thought I’d put on paper . . . see if His Honor . . . might be interested in.” Ex. 10 at 2. The statement shows that Balducci did not expect that Judge Lackey was going to enter the order at all. Agent Delaney also omitted that there was no mention of the “of counsel” position during the May 4th call. Suppl. Ex. 1 at 134:6-8.

Material Omissions Regarding May 9, 2007 Meeting: Agent Delaney omitted three material facts from his summary of the May 9, 2007 meeting between Judge Lackey and Tim Balducci. *See* Ex. 9 at 3-4. *First*, Agent Delaney intentionally omitted the fact that, when Balducci asked Judge Lackey whether he thought the Scruggs Katrina Group joint venture agreement required that the parties arbitrate, Judge Lackey responded, “It does . . . It looks like that’s what they agreed to.” Ex. 22 at 32. The fact that Judge Lackey was likely to grant the motion to compel arbitration in any event, and the fact that Balducci knew this as of May 9, 2007, removed Balducci’s motive to offer anything of value to Judge Lackey.

Second, Agent Delaney intentionally omitted the fact that Judge Lackey told Balducci that he wanted to make sure that Balducci got “credit where credit is due” for the order and told Balducci, later in the same conversation, that Balducci was “going to get credit for” the order. Ex. 22 at 34. This statement confirms that Judge Lackey understood that Balducci had asked him for a favor—perhaps to help Balducci impress Dick Scruggs—rather than that Balducci had promised him something of value in exchange for the order.

Third, the affidavit fails to state that there was no discussion between Judge Lackey and Balducci during the May 9, 2007 meeting about doing anything further with respect to the *Jones* case or the “of counsel” position. Suppl. Ex. 1 at 136:25-137:4. This fact is material because it

shows that Balducci thought that he was finished with the *Jones* matter and Judge Lackey as of May 9, 2007.

Material Omissions Regarding May 21, 2007 Call: There are four material omissions in Agent Delaney's summary of the May 21, 2007 call from Judge Lackey to Balducci. *See* Ex. 9 at 4. *First*, Delaney's affidavit omits that Judge Lackey called Balducci three times on May 21, 2007, and that Balducci did not call the Judge back after the first two calls. *See* Ex. 13 at 2-3. This fact shows that the alleged criminal conspiracy was manufactured and sustained by Judge Lackey, particularly in light of the fact that, at their previous meeting on May 9, 2007, Judge Lackey and Balducci made no plans to speak about the *Jones* matter again.

Second, Delaney stated in his affidavit that "Balducci assured Judge Lackey that nobody other than Balducci and Scruggs know of the arrangement suggested by Balducci to Judge Lackey." Ex. 9 at 4. However, Delaney failed to reveal that it was Judge Lackey who prompted Balducci to discuss Scruggs's involvement, saying "I just want to hear you say it again You and Scruggs [are the] only one[s who] know anything about this?" Ex. 13 at 4. This omission again conceals Judge Lackey's aggressive efforts to target Scruggs.

Third, Agent Delaney failed to disclose that, during the May 21st call from Judge Lackey, Balducci said a number of times that he did not want the Judge to do anything improper. For example, Agent Delaney omitted that Balducci told Judge Lackey, "you do what you feel comfortable with" and "I don't mean to make you uncomfortable; . . . if it's not something that you feel right about, you do what your heart tells you I've got complete confidence that that is completely fine I would never put . . . you nor me in that position I have complete confidence that it's fine." *Id.* at 5, 7.

Fourth, Agent Delaney's affidavit also fails to disclose that Balducci said during this conversation that "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." *Id.* at 4, 5. Thus,

Agent Delaney omitted evidence showing that Balducci had no motive to engage in the alleged scheme; Balducci thought Judge Lackey was going to rule in favor of the *Jones* defendants anyway.

Material Omission of Judge Lackey's Recusal: Agent Delaney omitted from his affidavit any mention at all of the fact that, on May 21, 2007, after his conversation with Balducci, Judge Lackey recused himself from the *Jones* case. *See* Ex. 14; *see also* Suppl. Ex. 3 at 1. Agent Delaney also omitted the fact that on May 22, 2007—the next day—he met with Judge Lackey to discuss his recusal. Suppl. Ex. 1 at 140:2-141:1. And Agent Delaney omitted the fact that, after he met with Judge Lackey and “discussed with him . . . what the options were,” Suppl. Ex. 1 at 121:7,² Judge Lackey got back in the *Jones* case. *See* Ex. 15.

Judge Lackey's recusal and the government's response to it are critical to determining whether probable cause existed to conclude that Balducci was engaged in a conspiracy to improperly influence Judge Lackey. The fact that Judge Lackey, who was then a government agent involved in an ongoing investigation, voluntarily took himself out of the case suggests that Judge Lackey did not actually think that a crime—or anything else worth investigating—had occurred. And the fact that Agent Delaney met with Judge Lackey the day after his recusal and that Judge Lackey thereafter decided to withdraw his notice of recusal strongly suggests that the government encouraged Judge Lackey to stay in the case and thus improperly sustained an alleged criminal conspiracy.

Material Omission of May 29, 2007 Call: Agent Delaney's affidavit does not mention at all a recorded call on May 29, 2007, during which Balducci told Judge Lackey that he wanted Judge Lackey to do only what the Judge thought the law required, saying: “I damn sure didn't want to do anything to jeopardize my relationship with you I didn't want to do anything in the world ever to do that relationship any harm I want to make sure that you and I are

² The FBI 302 prepared by Agent Delaney regarding his meeting with Judge Lackey on May 22, 2007, contains no summary of the “options” that Agent Delaney talked about with Judge Lackey. *See* Suppl. Ex. 3 at 1. Agent Delaney also failed to summarize in his 302 his discussions with Judge Lackey about why he recused himself and whether he might get back in the case. *See* Suppl. Ex. 1 at 120:8-20; 121:7-19; Suppl. Ex. 3 at 1.

okay” and that “it would break my heart if I thought I had put you in a bad position . . . when you called the other night I could tell that you were troubled by it. That’s why I told you ‘do what your heart tells you’” Suppl. Ex. 4 at 2, 3, 6. The omission of this call is material because it occurred after Judge Lackey had recused himself, yet Balducci did not once encourage Judge Lackey to withdraw his recusal and re-enter the *Jones* case. *See generally* Suppl. Ex. 4.

Material Omission of May 30, 2007 Meeting: Agent Delaney omitted completely the fact that, on May 30, 2007, he equipped Judge Lackey with a body recorder and sent him to have lunch with Balducci and other members of the Patterson & Balducci firm in New Albany but nothing improper was discussed. Suppl. Ex. 1 at 141:14-22.

Material Omission of June 28, 2007 Meeting: Agent Delaney also omitted entirely the fact that, on June 28, 2007, he again equipped Judge Lackey with a body recorder and sent him to the offices of the Patterson & Balducci firm but nothing improper was discussed. Suppl. Ex. 1 at 141:23-142:7.

Material Omission of August 3, 2007 Call: Agent Delaney omitted the fact that, on August 3, 2007, Judge Lackey called Balducci but Balducci did not call him back. Suppl. Ex. 1 at 143:10-19. This is material because it shows, again, Judge Lackey’s pursuit of Balducci.

Material Omission of August 9, 2007 Call: Agent Delaney omitted the fact that, on August 9, 2007, Judge Lackey again called Balducci. Suppl. Ex. 1 at 143:20-22. In particular, the affidavit omits that Balducci specifically rejected Judge Lackey’s attempt to implicate Dick Scruggs in a criminal conspiracy. Judge Lackey tried to implicate Scruggs by asking whether “Dicky” “wants this thing in mediation? I mean arbitration.” Ex. 11 at 15. Balducci responded, “yes, . . . if that’s how you [see] it after you’ve taken a look at it, if you [see] it that way, that would be terrific.” *Id.* at 16. Agent Delaney thus omitted specific evidence that neither Balducci nor Scruggs had any criminal or corrupt intent.

Material Omission of August 27, 2007, and September 11, 2007 Calls: Agent Delaney omitted the fact that, on August 27, 2007, Judge Lackey called Balducci twice but Balducci did

not call him back, Suppl. Ex. 1 at 144:11-14, and the fact that on September 11, 2007, Judge Lackey again called Balducci twice but Balducci did not call him back, *id.* at 144:15-20.

Material Omissions Regarding the September 18, 21, and 24, 2007 Calls: The Delaney affidavit omits several material facts regarding Judge Lackey's demand for \$40,000 on September 18, 2007. *First*, Agent Delaney omitted entirely the fact that, after Judge Lackey asked "if I help them, will they help me," Balducci did not respond with any specific offer of help; rather, it was only days later that Judge Lackey had to specify his demand. *See* Suppl. Ex. 1 at 148:19-150:2. *Second*, Agent Delaney left out the fact that Judge Lackey pressured Balducci to agree to the payment by suggesting that he (Judge Lackey) owed the money to people who were pressuring him for it. On September 18th, Judge Lackey told Balducci that he needed the money to "help me over a little hump I've got." Ex. 12 at 7. On September 21st, Judge Lackey told Balducci that his deadline for getting the money was October 1st but that, if he had half of it, "I could delay my misery . . . I think I can get them to put it off" Ex. 16 at 12. Then on September 24th, Judge Lackey called Balducci and asked him, "Can I commit to my folks that are pressurin' me, something . . . by the weekend?" Ex. 17 at 4. *Third*, Agent Delaney omitted the fact that on September 18, 2007, Judge Lackey pressured Balducci to accept his demand for "help" by telling him that Grady Tollison, counsel for the plaintiff in the *Jones* case, "was puttin' some pressure . . . to get this thing done." Ex. 12 at 6.

Summary: If Agent Delaney had not included the false statements described above and *had* included the many pieces of exculpatory information he omitted, the resulting accurate affidavit would not have established probable cause that Balducci and Scruggs were engaged in the conspiracy alleged in the affidavit. An accurate affidavit would have shown that Balducci approached Judge Lackey on March 28, 2007, for a personal favor and that whatever Balducci said to Judge Lackey was so innocuous that it took Judge Lackey weeks to decide to call the U.S. Attorney's office. A complete affidavit would also show that, early on, Judge Lackey indicated that he was inclined to agree that the *Jones* case should go to arbitration. The complete and accurate version of Agent Delaney's affidavit would then detail the multiple attempts on Judge

Lackey's part over the next five-and-a-half months to enmesh Balducci in a criminal scheme and the many occasions on which Lackey tried unsuccessfully to get Balducci to implicate Scruggs. The accurate affidavit would also show that over this time, Balducci repeatedly made explicit the fact that he was not asking Judge Lackey to do anything improper and that he was asking him to do only what the law required. A fully accurate affidavit would also show that Judge Lackey recused himself from the *Jones* case on May 21, 2007, but that he re-entered the case after meeting the next day with Agent Delaney, the FBI agent in charge of investigating Balducci and Scruggs. Finally, the fully accurate affidavit would detail the fact that when Judge Lackey finally requested payment, he pressured Balducci to agree, hinting that if he did not, the Judge was prepared to rule in favor of the plaintiffs. Such an accurate affidavit would not have supported probable cause to believe that Balducci was engaged in a crime, much less engaged in the conspiracy with Scruggs described in Agent Delaney's faulty affidavit.

2. October 16, 2007 affidavit in support of the Patterson wiretap

With respect to events occurring prior to September 25, 2007, the October 16, 2007 affidavit of Agent Delaney in support of the wiretap on Steven A. Patterson's home telephone is nearly identical to Agent Delaney's September 25, 2007, affidavit in support of the wiretap on Timothy R. Balducci's cellular telephone. Accordingly, defendants incorporate here the false and misleading statements and material omissions in the September 25, 2007 affidavit listed above as they are repeated in the October 16, 2007 affidavit.

In addition to the false and misleading statements and material omissions carried over from the September 25, 2007 affidavit, Agent Delaney's October 16, 2007 affidavit contains the following additional false and misleading statements and material omissions:

Material Omission Regarding September 27, 2007 Call Between Balducci and Patterson:
Agent Delaney's October 16, 2007 affidavit blatantly omits a statement that directly shows that P.L. Blake—an alleged co-conspirator—had no knowledge that Balducci had agreed to Judge Lackey's request for \$40,000. Agent Delaney described a conversation at 8:51 a.m. on September 27, 2007, between Balducci and Patterson in which Patterson tells Balducci that he

(Patterson) had talked to Blake, that he had told Blake that he had a problem that he was going to solve, and that Blake had told him to go ahead and solve it. *See* Ex. 19 at 5. According to Delaney's affidavit, Patterson then told Balducci that "he's already talked to 'P.L.' and that he ('P.L.') knows the amount." *Id.* What Patterson actually said during this conversation was: "I've already done that. P.L. doesn't know what it's about or anything." Ex 35 at 3. Agent Delaney thus blatantly failed to include in his affidavit the fact that Blake did not know what the \$40,000 was for.³

Material Omission Regarding September 27, 2007, Meeting between Balducci and Judge Lackey. Agent Delaney similarly omitted statements made by Balducci during his September 27, 2007, meeting with Judge Lackey that directly disproved his sworn assertion that Dick Scruggs was a knowing member of the alleged conspiracy. Agent Delaney's affidavit contains a short description of the September 27th meeting between Balducci and Judge Lackey. *See* Ex. 19 at 6. Agent Delaney, however, completely fails even to mention the following statements by Balducci made during the September 27, 2007 meeting:

Balducci:	. . . I want you know, though, . . . this is just between me and you . . .
Lackey:	Ok.
Balducci:	Ok? This is just between me and you.
Lackey:	Alright.
Balducci:	There ain't another soul in the world that knows about this, ok? And this is, this is, this is taken care of . . .
Lackey:	Yeah.

³ Agent Delaney's explanation for his failure to include evidence that directly contradicted his sworn statement that Blake was involved in the alleged crime was that he concluded that a later conversation "establish[ed] the probable cause that Mr. Patterson and Mr. Blake . . . were involved in this conspiracy." Suppl. Ex. 1 at 159:23-25. However, as noted at the outset, a government agent "cannot make unilateral decisions about the materiality of information." *Kohler*, 470 F.3d at 113 n.9. The protection of the Fourth Amendment "consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson*, 333 U.S. 10, at 13. Thus, Agent Delaney improperly assumed the Court's role in deciding for himself that there was probable cause here.

Balducci: . . . ok?

Lackey: You don't, now I would think Mr. SCRUGGS would have to know something . . .

Balducci: Well, here. . .

Lackey: . . . about it.

Balducci: . . . here's how it works, just so you'll have some, some comfort, some understandin' of how it works. Um, they'll come a time where I'll sit him down in private and I'll tell him that I solved a problem for him.

Lackey: Alright

Ex. 18 at 10.

Agent Delaney's affidavit also fails to mention that Judge Lackey tried again later in the same conversation to implicate Scruggs in the payment arrangement he had instigated with Balducci but that Balducci directly denied Scruggs's involvement:

Lackey: When you tell Mr. Scruggs or . . . Dickie or . . . whatever I ought to call him . . . You tell him that . . . this is a first time venture for me . . .

Balducci: He is not even involved at that level judge . . .

Lackey: Oh alright . . .

Balducci: Frankly . . . I mean he doesn't even . . . like I said, the way this will work is I'll just go to him at some point in time and say that I cured a problem that you had and you need to recognize the problem that I have cured you've had . . . that's how it works.

Lackey: Alright

Balducci: He is not involved in a direct manner . . . doesn't want to be, doesn't need to be . . .

Id. at 22, 23. Finally, Agent Delaney fails to mention that, at the conclusion of their September 27, 2007 meeting, Balducci tells Judge Lackey, "you take comfort that this is between me and you. This doesn't go any further than this right here." *Id.* at 24, 25.⁴

⁴ At the hearing, Agent Delaney offered the same explanation for his failure to include this directly exculpatory evidence as he did for his failure to include the exculpatory information regarding Blake: he evaluated other evidence and concluded that the balance of the evidence established probable cause. *See* Suppl. Ex. 1 at 160:22-162:18. Not only did Delaney thus impermissibly take the judicial role, but none of the evidence he cited was direct evidence of

Summary: A proper October 16, 2007, affidavit that included the exculpatory information described above—and remedied the errors carried over from the September 25, 2007 affidavit—would not have supported probable cause with respect to the conspiracy described in Agent Delaney’s affidavit. Specifically, such an affidavit would have made clear that Scruggs was not a party to Balducci’s payments to Judge Lackey, and it would have shown that Blake likewise had no knowledge of the payments to Lackey. This accurate and complete affidavit would also have disproved the necessity of tapping Patterson’s telephone, which was predicated on the need to obtain “the contents of the conversations between the co-conspirators.” Ex. 19 at 7. In short, had the Court been provided the directly exculpatory information that Agent Delaney chose to exclude, the Court would have denied the government’s wiretap application.

3. October 24, 2007 affidavit in support of the Balducci wiretap extension

With respect to events occurring prior to September 25, 2007, the October 24, 2007 affidavit of Agent Delaney in support of the extension of the wiretap on Timothy R. Balducci’s cellular telephone is identical to Agent Delaney’s September 25, 2007 affidavit in support of the initial wiretap on Balducci’s telephone. Accordingly, defendants incorporate here the false and misleading statements and material omissions in the September 25, 2007 affidavit listed above as they are repeated in the October 24, 2007 affidavit. Moreover, Agent Delaney’s October 24, 2007 affidavit repeats the two material omissions in the October 16, 2007 Delaney affidavit described above. Defendants incorporate those omissions here.

4. November 26, 2007 affidavit in support of the Scruggs Law Firm search

The November 26, 2007 affidavit of Agent Delaney in support of the government’s application for a warrant to search the Scruggs Law Firm offices repeats the false and misleading statements and material omissions detailed above. For example, the November 26, 2007 affidavit omits every communication between Judge Lackey and Balducci that occurred between May 21, 2007, and September 18, 2007, including Judge Lackey’s recusal from the *Jones* case

Dick Scruggs’s knowledge of the \$40,000 payment. *See id.* Thus, not only did Agent Delaney improperly take on the judicial task of balancing the evidence, but his conclusion was not supported by any evidence he cited.

and his re-entry into the case after a meeting with Agent Delaney. Also, even though Agent Delaney continued to assert that there was probable cause to believe that Dick Scruggs was engaged in criminal conduct, the November 26, 2007 affidavit still omits the exculpatory statements of Balducci on September 27, 2007.

In addition to these false and misleading statements and material omissions copied from his previous affidavits, the November 26, 2007 affidavit contains the following statements that are false or misleading in light of the information that Agent Delaney had obtained from Balducci, who, by the time of the November 26, 2007 affidavit, was a government witness and had met with Agent Delaney a number of times.

False Statement Regarding March Meeting: Agent Delaney's November 26, 2007 affidavit states that, in March 2007, Balducci, Dick Scruggs, Patterson, Zach Scruggs, and Backstrom "met in the offices of the Scruggs Law Firm . . . for the purpose of discussing ways and means of corruptly influencing the outcome of" the *Jones* case. Ex. 25 at 1. This statement is false, and Agent Delaney knew it at the time he wrote his affidavit. On November 2, 2007, as reflected in an FBI 302 prepared by Agent Delaney and as reflected in Delaney's original notes, Balducci specifically told Agent Delaney that, at the March 2007 meeting, Dick Scruggs "said he was not asking [Balducci] for anything illegal" Suppl. Ex. 5 at 2. Agent Delaney also knew that Scruggs had said that "Judge Lackey ought to move the case to arbitration, since it was the correct thing to do." *Id.*

False and Misleading Statements Regarding March 28, 2007 Meeting Between Judge Lackey and Balducci: The November 26, 2007 affidavit also states that, at the March 28, 2007, meeting with Judge Lackey, Balducci "made corrupt overtures to Judge Lackey." Ex. 25 at 1. This is also false. As Agent Delaney knew, Balducci did not offer anything of value to Judge Lackey at their March 28, 2007 meeting. Instead, Balducci told Judge Lackey that "it would be considered a personal favor if Judge Lackey rule for arbitration and that arbitration was the correct legal way to settle this matter." Suppl. Ex. 5 at 3.

Moreover, the November 26, 2007, affidavit suggests that Balducci offered Judge Lackey the “of counsel” position in return for a favorable ruling in the *Jones* case. *See* Ex. 25 at 2. This suggestion is highly misleading because Balducci specifically told Agent Delaney that “[t]he offer of ‘of counsel’ was not related to or offered as an incentive to rule as [Balducci] asked.” Suppl. Ex. 5 at 3.

Material Omission Regarding November 1, 2007 Meeting Between Judge Lackey and Balducci: Agent Delaney also omitted from his November 26, 2007 affidavit the fact that, during the course of his meeting with Judge Lackey on the morning of November 1, 2007, Balducci proposed an entirely separate bribe in a case completely unrelated to any of the other defendants in this case. Agent Delaney failed to disclose that Balducci proposed to Judge Lackey—and Judge Lackey agreed—that they would split \$20,000 in order to dismiss a vehicular manslaughter case in which Balducci was representing the defendant. *See* Suppl. Ex. 6 at 20-36. Balducci proposed a plan whereby Judge Lackey would first grant a continuance in the case and then dismiss the case, and the two would split \$20,000 that Balducci planned to get from his client. *See id.* This omitted evidence directly undercuts the government’s theory that Balducci was working on behalf of anyone else; indeed, it shows that Balducci alone sought to influence Judge Lackey.

Summary: Had Agent Delaney corrected the false and misleading statements and material omissions from his earlier affidavits that he incorporated into his November 26, 2007 affidavit and also included the material omissions described above, this hypothetical corrected affidavit would have shown the government’s case against defendants for what it is: an alleged criminal scheme constructed out of nothing and sustained by Judge Lackey and the government. The corrected information regarding the March 2007 meeting with defendants would have shown that there was never a conspiracy to bribe or otherwise corruptly influence Judge Lackey and that there was no “corrupt overture” by Balducci to Judge Lackey on March 28, 2007. This information, combined with the omitted facts regarding the stretch from May to September when Judge Lackey was pursuing Balducci—and Scruggs—would have disproven the government’s

theory that Dick Scruggs, Zach Scruggs, and Sid Backstrom ever participated in the conspiracy to influence Judge Lackey as asserted in the Delaney affidavit. Accordingly, there would have been no probable cause to search the Scruggs Law Firm.

B. The Court should suppress the fruits of the wiretaps because the Delaney affidavits fail to establish probable cause for the alleged conspiracy.

1. The government failed to establish probable cause as to the conspiracy described in the affidavit.

Before the government may obtain a wiretap, it must identify an offense and establish probable cause to believe that the offense is being committed. The Fourth Amendment requires the government to establish “probable cause to believe that the evidence sought will aid in a particular apprehension or conviction for a *particular offense*.” *Dalia v. United States*, 441 U.S. 238, 255 (1979) (internal quotations omitted; emphasis added). Similarly, Title III requires the government to provide the court with a “full and complete statement of the facts and circumstances” of the facts that it contends justify a wiretap, “including . . . details as to the particular offense that has been, is being, or is about to be committed.” 18 U.S.C. § 2518(1)(b). Title III also requires the government to establish probable cause as to a “particular offense.” 18 U.S.C. § 2518(3)(a). Thus, the government must describe a particular offense and establish probable cause to believe that it occurred or is ongoing.

In each of Agent Delaney’s affidavits in support of the Balducci and Patterson wiretaps, he described an offense that involved an alleged conspiracy between Balducci, Scruggs, Patterson, P.L. Blake, and others. For example, in the September 25, 2007 affidavit in support of the original Balducci wiretap, Agent Delaney stated there was a “connection between Mr. Balducci and Mr. Scruggs with respect to the violations of federal law,” and he characterized Balducci and Scruggs as “co-conspirators.” Ex. 9 at 5. Similarly, in the October 16, 2007, affidavit in support of the Patterson wiretap, Agent Delaney swore that there was “significant evidence of [a] conspiracy” involving Patterson, Balducci, Scruggs, and Blake. Ex. 19 at 5. Furthermore, Delaney testified that “the allegation . . . was that the conspiracy included Dick Scruggs.” Suppl. Ex. 1 at 165.

Moreover, the government specifically stated that the Balducci and Patterson wiretaps were necessary in order to capture conversations between these alleged conspirators. To obtain a wiretap, the government must show, and the court must find probable cause, that a wiretap is necessary and that other investigative methods would not be likely to succeed. 18 U.S.C. §§ 2518(1)(c), (3)(c). In his September 25, 2007, affidavit, Agent Delaney stated that the wiretap of Balducci's telephone was necessary because "it is the contents of the conversations between Mr. Balducci and other potential co-conspirators that is needed" Ex. 9 at 5. Agent Delaney made similar representations in his affidavit in support of the Patterson wiretap, *see* Ex. 19 at 7, and in his affidavit in support of the extension of the Balducci wiretap, *see* Ex. 31 at 7-8.

The Court should suppress the fruits of the Balducci and Patterson wiretaps because the affidavits of Agent Delaney, when read in light of the false and misleading statements and material omissions described above, did not establish probable cause that there was a conspiracy that would necessitate government wiretapping. Among other information, Agent Delaney omitted evidence that Balducci had no criminal or corrupt intent before Judge Lackey demanded the \$40,000 payment; omitted specific evidence that P.L. Blake—an alleged co-conspirator—had no knowledge of the payment; and omitted direct evidence from Balducci denying that Dick Scruggs knew anything about the payment. Having applied for wiretaps on the explicit representation that a conspiracy existed that included Dick Scruggs and others and having sworn that probable cause existed that Dick Scruggs and others were involved in Balducci and Patterson's offense, Agent Delaney was obligated to provide the Court with all evidence material to evaluating these assertions. Because he failed to do this, and because his false and misleading statements and material omissions negate probable cause with respect to the offense described in the affidavits, the Court should suppress the fruits of the government's wiretaps.

2. The government failed to establish probable cause that the individuals identified as targets in its wiretap applications committed any offense.

Although the Fifth Circuit has not decided the issue, there is authority that "[a]n application for a wiretap must demonstrate probable cause to believe that the *targets* have

committed, are committing, or will commit a crime” *United States v. Hamilton*, No. CRIM. 05-50066-01-08, 2005 WL 3371085, *3 (W.D.La. Dec. 12, 2005) (emphasis added); *see also United States v. Barrios*, 994 F.Supp. 1257, 1271 (D.Colo. 1998) (“The focus of the probable cause determination is the targets of the wiretaps.”); *but see United States v. Lucher*, No. CRIM.A. 03-338, 2004 WL 1274457, *1 (E.D. La. June 4, 2004). Dick Scruggs was identified as a “suspect target” along with Balducci in each of the three challenged wiretap applications. Accordingly, Agent Delaney’s failure to establish probable cause that Scruggs was involved in the crime that Balducci and Patterson were committing (as detailed above) renders his affidavits insufficient, and the Court should suppress the fruits of the improper wiretaps.

III. CONCLUSION

For the foregoing reasons, and for the reasons articulated before the Court on February 20, 2008, and in Defendants’ Motion to Suppress the Fruits of Illegal Wiretaps and Searches with Combined Memorandum of Law, defendants Richard F. Scruggs, D. Zachary Scruggs, and Sidney A. Backstrom respectfully request that the Court grant their requested relief and suppress the fruits of the government’s unlawful wiretaps and search.

Dated: February 25, 2008

By: /s/ John W. Keke

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CERTIFICATE OF SERVICE

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Defendants' Supplemental Memorandum of Law in Support of Motion to Suppress the Fruits of Illegal Wiretaps and Searches With Combined Memorandum of Law** with the Clerk of the Court using the ECF system, which sent notification for such filing to Thomas W. Dawson, Assistant United States Attorney, Robert H. Norman, Assistant United States Attorney, David Anthony Sanders, Assistant United States Attorney, Frank W. Trapp, J. Rhea Tannehill, Jr., Nathan F. Garrett, and Todd P. Graves.

This, the 25th day of February, 2008.

/s/ Brook Dooley
Brook Dooley