

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

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 3:07CR192-B

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

**GOVERNMENT'S SUPPLEMENTAL MEMORANDUM RELATED TO THE  
DEFENDANT'S MOTION TO SUPPRESS THE FRUITS OF THE WIRETAPS AND  
SEARCHES**

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

On February 20, the Court heard evidence related to the defendants' motion to suppress the fruits of the wiretaps and searches. At that hearing, the government called Special Agent William Delaney, and he was questioned with respect to the affidavits filed in support of the wiretap authorization applications entered on September 25, October 16, September 26, 2007, and the search warrant authorized on November 26. After hearing the testimony of Agent Delaney and argument from both sides, the Court asked both sides to file an additional brief. The Court ordered the additional briefs following argument made by the defendants that probable cause did not exist as it applied to them to support the orders authorizing the wiretaps on the telephones of Tim Balducci and Steve Patterson. Specifically, the Court asked for authority

supporting or failing to support the concept that probable cause must exist as to all interceptees named in an affidavit filed in support of an application. The answer is clear: Probable cause need not exist as to all interceptees either named or not named in an affidavit filed in support of an application for a wiretap.

The specific issue now before the Court has been addressed by both Circuit Courts and District Courts. *See, e.g., United States v. Figueroa*, 757 F.2d 466, 475 (2d Cir. 1985) (citing *United States v. Tortorello*, 480 F.2d 764, 775 (2d Cir. 1973) for the proposition that “the government need not establish probable cause as to all participants in a conversation. If probable cause has been shown as to one such participant, the statements of the other participants may be intercepted if pertinent to the investigation.”); *United States v. Domme, Jr.*, 753 F.2d 950, 954 n.2 (11<sup>th</sup> Cir. 1985) (“A wiretap application need not provide probable cause of criminal activity for each person named in an application. . . . *What is required is sufficient information so that a judge could find probable cause to believe that the telephone in question is being used in an illegal operation.*”) (emphasis added); *United States v. Pappas*, 298 F. Supp. 2d 250, 254 n.4 (D.Ct. 2004) (“the Government is not required to establish probable cause as to every named Interceptee in a wiretap application”); *United States v. Trippe*, 171 F. Supp. 2d 230, 235 (S.D.N.Y. 2001) (holding that “the issuing Judge was not required to find that there was probable cause that [the defendant] himself engaged in criminal activity to issue the warrant,” and denying defendant’s motion to suppress because the wiretap application “provided sufficient probable cause as to the other individuals named as interceptees”); *United States v. Marcy* 777 F. Supp. 1400, 1402 (N.D. Ill. 1991) (“The government need not establish probable cause with respect to

each and every person named in a wiretap order.”); *United States v. Rodriguez*, 606 F. Supp. 1363, 1370 (D.Mass. 1985) (“Probable cause need not be shown for each person named in an application so long as it is shown with respect to at least one individual.”).<sup>1</sup>

In other words, it is clear the government need only show probable cause that the telephone at issue would be used, was being used, or had been used to commit a crime. *See United States v. Edwards*, 124 F. Supp. 2d 387, 402 (M.D. La. 2000). Indeed, there is no mandate that the government have named the objecting defendant *at all*. The defendants argued that because the government named Richard Scruggs, for instance, as an interceptee in the wiretap affidavits that there must have been probable cause to show that *he* was going to commit, was committing or had committed an offense. While the government contends there was more than sufficient probable cause at the time of each application to make such a showing, the law is clear that such a showing is not necessary. As the Court put it succinctly in *United States v. Ambrosio*, 898 F. Supp. 177, 184 (S.D.N.Y. 1995), “it would be anomalous to punish the government by suppressing the wiretap evidence for naming [the movant] in the affidavit when it could constitutionally have not named him and still intercepted his calls.”

The defendants also contend that the government included information in the affidavits that was intentionally misleading, and that the government omitted material facts from them.

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<sup>1</sup>While unpublished, the District Court for the Eastern District of Louisiana has also addressed the issue now before the Court. Referring to the wiretap statute, the court explained: “The statute only requires that the government demonstrate that probable cause exists with respect to “an individual” and it does not expressly require such a showing with respect to each person named in the application. . . . It is sufficient that probable cause existed to wiretap the telephone.” *United States v. Lutcher*, 2004 WL 1274457 at \*1 (E.D. La. June 4, 2004).

The Court ordered the defendants to submit a list of the facts the defendants allege were omitted and were material by February 25. As it pointed out in its response to the defendants' initial motion to suppress and as was shown by Agent Delaney's testimony, the government submits that there was nothing misleading in the affidavits submitted, intentionally or otherwise. Moreover, any omissions to which the defendants refer were not material, and as discussed *supra*, certainly these facts do nothing to dispel probable cause as to the telephones at issue.<sup>2</sup>

As it noted in its initial brief, the applications were submitted to intercept conversations on the telephones of Tim Balducci and Steve Patterson. Clearly, even if the conversations to which the defendants refer were added to the affidavits submitted as per *United States v. Tomblin*, 46 F.3d 1369, 1377 (5<sup>th</sup> Cir. 1995) the reconstructed affidavit would more than establish sufficient probable cause as to either Balducci or Patterson and thus to authorize the electronic surveillance at issue and the subsequent search warrant of the Scruggs Law Firm. Accordingly, the defendants' motion to suppress the fruits of the wiretaps and searches should be

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<sup>2</sup>For example, the defendants make much of the fact that the government omitted Balducci's statement that only he and Judge Lackey knew of the payments being made. Balducci made these statements on September 27, and the affidavit to which the defendants referred was submitted October 16 for Steve Patterson's telephone, when it was more than clear that Patterson knew of the bribe as far back as the 27th when Balducci made the statements. At the hearing the defendants attempted to argue that such an omission negated probable cause as it applied to them, but as discussed, the law does not require such a showing.

denied.

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

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**CERTIFICATE OF SERVICE**

I, DAVID A. SANDERS, Assistant United States Attorney for the Northern District of Mississippi, hereby certify that on February 25, 2008, I electronically filed the foregoing GOVERNMENT'S SUPPLEMENTAL MEMORANDUM RELATED TO THE DEFENDANT'S 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 25<sup>th</sup> day of February, 2008.

/s/ David A. Sanders

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