

**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,
STEVEN A. PATTERSON,
TIMOTHY R. BALDUCCI

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR DISCOVERY

I. INTRODUCTION

COME NOW defendants Richard F. Scruggs, David Zachary Scruggs, and Sidney A. Backstrom to reply to the government's Response to defendants' Motion for Discovery. Defendants will continue to meet and confer with the government regarding the issues raised in their Motion in an effort to resolve them without the Court's involvement. At present, however, there remain a number of specific discovery items requested by defendants that the government has not yet produced. In addition, there are requests, including requests for material to which defendants are entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), for which the government does not appear to have produced any discovery. Defendants respectfully request that the Court order the government to produce this missing discovery and grant the further relief requested below.

II. ARGUMENT

A. Statements of Defendants

1. Defendants' Written or Recorded Statements

The Court should order the production of all written or recorded statements made by any defendant that are in the government's possession, custody or control. *See* Fed. R. Crim. P.

16(a)(1)(B)(i); Motion at 4. It is apparent that the government has not produced all such statements. For example, in its October 24, 2007 application for the extension of the pen register/trap and trace on the cellular telephone of Timothy R. Balducci, the government represented that between September 26, 2007 and October 23, 2007, there were 14 calls with the Scruggs Law Firm or employees thereof. *See* October 24, 2007 Extension Application at 3. However, the government has produced only two recordings of conversations between Balducci and Scruggs Law Firm attorneys or employees during this time period.

In its Response, the government states that it has produced defendants' statements "only so long as they are 'relevant.'" Government's Response to Defendants' Motion for Discovery ("Response") at 1. The government, however, has neither explained what it means by "relevant" nor described how it came to conclude that the statements of defendants in its possession are not relevant. Moreover, because the government has not provided any information regarding the statements it is withholding, defendants are unable to challenge the government's relevance determinations and protect their rights under Rule 16.

Accordingly, the Court should require the government to produce *all* written or recorded statements made by defendants that are in its possession, custody or control. In the alternative, the Court should require the government to produce a log of all such statements to defendants that identifies (1) the date and time of the statements, (2) to whom the statements were made, and (3) the subject matter of the statements. Such a log will allow defendants a meaningful opportunity to enforce their right to discovery under Rule 16 and will better enable the Court to rule on defendants' discovery request.¹

¹ Defendants understand that on December 8, 2007, the government mailed copies of the log sheets for the wiretaps of Timothy R. Balducci and Steven A. Patterson. Counsel for all defendants have not yet received these log sheets and thus have not been able to review them. Moreover, to the extent that the government has other recorded or written statements of defendants not reflected on the wiretap logs, it should be ordered to produce a log of those statements.

2. Written Records Reflecting Defendants' Oral Statements

The government has not produced all written records containing the substance of oral statements made by defendants to the government, to government agents, or to persons such as Balducci or Judge Lackey who assisted the government in conducting its investigation. *See* Fed. R. Crim. P. 16(a)(1)(B)(ii). The government produced FBI 302 reports reflecting its interviews with Steven Patterson and Sidney Backstrom. However, the government has not produced FBI 302 reports, or any other written records, reflecting oral statements made by defendants to other government agents, including Balducci and Judge Lackey. For example, the government has not produced any written record of oral statements defendants may have made to Balducci on November 5, 2007 or November 19, 2007, when, defendants believe, the government directed Balducci to visit the offices of the Scruggs Law Firm. The government has also not disclosed the substance of oral statements defendants may have made to Balducci or Judge Lackey. *See* Fed. R. Crim. P. 16(a)(1)(B)(ii). Any FBI 302 reports or other written records that reflect oral statements allegedly made by defendants to government agents such as Balducci and Lackey are also “material to preparing the defense” and thus are subject to discovery under Rule 16(a)(1)(E).

3. Statements of Co-Defendants

Pursuant to Rule 16(a)(1), the Court has the discretion to order the production of statements and records of statements made by co-defendants where such statements are not covered by the Jencks Act. *See United States v. Zarattini*, 552 F.2d 753, 758 (7th Cir. 1977) (“[T]he trial court may, in the exercise of its sound discretion, require the government to produce statements of co-defendants who will not be government witnesses at trial.”). The Court should exercise its discretion here to order the production of all statements or records of statements, including grand jury testimony pursuant to Rule 16(a)(1)(B)(iii), made by co-defendants whom the government does not intend to call as witnesses.

Moreover, the government is obligated to produce all statements or records of statements by co-defendants which tend to exculpate defendants, or which may be favorable or useful to the defense as to either guilt or punishment, which tend to affect the weight or credibility of

evidence to be presented against defendants, or which would impeach government witnesses. *See Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

4. Statements of Alleged Co-Conspirators and Co-Participants

The Court should grant defendants' request for statements of any non-testifying agent, co-conspirator, or co-participant of the defendants involved in the conduct alleged in the indictment so situated as to have been able legally to bind the defendant by his statement, activity, or testimony. *See United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir. 1985) (“[T]he defendant is entitled to disclosure of statements of co-conspirators if the co-conspirator is not a prospective government witness and disclosure does not unnecessarily reveal sensitive information.”); *see also United States v. Konefal*, 566 F.Supp. 698, 707 (N.D.N.Y. 1983) (same).² The Court should also order the production of any written records of such statements. *See Konefal*, 566 F.Supp. at 707 (granting request for memorandum summarizing statements of alleged co-conspirators). Defendants specifically request statements—or written records of statements—made by any alleged co-conspirators or co-participants identified in the wiretap and search warrant affidavits.

B. Documents and Objects

The government has not directly responded to defendants' request for documents pursuant to Rules 12 and 16. Defendants requested that the government:

- produce copies of, and the right to inspect, all books, papers, documents, data (including electronic data), photographs, and tangible objects which are material to the preparation of the defense, are intended for use by the government at trial, or were obtained from or belong to any defendant. *See Fed. R. Crim. P. 16(a)(1)(E)*;
- provide a description of, and permit defendants to inspect and photograph, all tangible objects, buildings, or places which are material to the preparation of the defense, are intended for use by the government at trial, or were obtained from or belong to any defendant. *See Fed. R. Crim. P. 16(a)(1)(E)*; and
- specifically designate all evidence intended for use by the government in its case in chief. *See Fed. R. Crim. P. 12(b)(4)*.

² Defendants are not aware of any published decisions in the Fifth Circuit bearing on defendants' right under Rule 16 to statements of co-conspirators.

See Motion at 5-6. The government has not provided the requested documents, descriptions or designations. Accordingly, the Court should order the government to produce this discovery.

In addition, the Court should order the production of the following specific items.³

1. Affidavit and Application for the Search Warrant of the Langston Law Firm

The government has still not produced the affidavit and the application for Search Warrant of the offices of defendant Richard F. Scruggs's former attorney Joseph C. Langston. "[A]n attorney's clients have a legitimate expectation of privacy in their client files" such that they are entitled to assert their Fourth Amendment rights when those files are searched. *DeMassa v. Nunez*, 770 F.2d 1505, 1508 (9th Cir. 1985); see also 6 LaFare Search & Seizure § 11.3 (4th ed.) ("[I]t has quite properly been held that the client of an attorney, though he has no expectation of privacy generally in the attorney's office and has no possessory or ownership interest even in his own file, has standing to object to a government intrusion into that file."). The search warrant for the Langston Law Firm specifically calls for the search and seizure of "all records relating" to two cases in which the Langston Law Firm represented Scruggs. Moreover, at the time of the December 10, 2007 search of the Langston Law Firm, Scruggs was represented by Joseph Langston in this matter. Accordingly, in order that Scruggs may protect his privacy interests in the files of the Langston Law Firm protected by the Fourth Amendment, the Court should order the government to produce the affidavit and search warrant application.

³ In their Motion, defendants requested a copy of the September 25, 2007 affidavit of Special Agent William P. Delaney and signed copies of the October 24, 2007 wiretap extension application and the affidavit of Agent Delaney in support thereof. In its Response, the government writes that "It appears as if the present motion was written before the discovery deadline had passed because many of these documents were included with the December 26 production" and then writes, with respect to the missing affidavits, that "[t]he government has produced these documents to the defendants." Response at 4. The government thus creates the impression that it produced the September 25, 2007 Delaney affidavit and the signed extension application and affidavit on December 26th. However, the government did not produce the September 25, 2007 Delaney affidavit, the signed October 24, 2007 wiretap extension application, or the signed October 24, 2007 affidavit on December 26th. See Ex. A (December 26, 2007 letter from Sanders to Kecker, et al.). The government did not mail these documents to Defendants until January 8, 2008.

2. Ten-Day Reports

The government has still not produced any of the ten-day reports it provided to the Court regarding the wire interceptions authorized in connection with the investigation of this case. The government cites no binding authority prohibiting the production of these reports, and the Court has the discretion and authority to order their production. *See United States v. Mares-Martinez*, 240 F.Supp.2d 803, 817 (N.D. Ill. 2002) (“The Court orders the government to produce to the defendants ... all ten-day reports submitted to Chief Judge Aspen that have not heretofore been produced.”). The government’s wiretap recordings appear to constitute the bulk of its case. The government should therefore produce the ten-day reports to defendants in order that the defendants have an opportunity to review whether the government complied with its obligations under Title III in obtaining this material evidence.

3. Balducci–Judge Lackey Recordings

The government states that it has produced all audio and video recordings of meetings between Balducci and Judge Lackey. However, defendants have not been provided with recordings of the following conversations or meetings between Balducci and Judge Lackey, which appear to have been recorded.

- The telephone conversation between Balducci and Judge Lackey which, according to the Indictment, occurred on May 3, 2007. *See* Indictment at 4. According to the Indictment, during this conversation, Balducci said “they had changed their strategy.” The use of quotation marks in the Indictment suggests this conversation was recorded.⁴
- The conversation or meeting between Balducci and Judge Lackey during which, according to the November 26th affidavit of FBI Special Agent William Delaney, Balducci used the words “got ready to lay down the gavel, hang up your robe.” The November 26th Delaney affidavit uses quotation marks, which suggests that this conversation was recorded. The November 26th Delaney affidavit suggests that this meeting or conversation occurred on, or shortly after, March 28, 2007.
- The conversation or meeting between Balducci and Judge Lackey during which, according to the November 26th affidavit of FBI Special Agent William Delaney, Balducci used the words “vicious and almost slanderous and personal allegations

⁴ In its December 26, 2007 production, the government produced a recording labeled as the May 3, 2007 telephone call between Balducci and Judge Lackey. *See* Ex. B at 1. However, the recording identified as the May 3, 2007 conversation (ID3) is identical to the recording identified as the May 4, 2007 conversation (ID4).

or complaints.” The November 26th Delaney affidavit uses quotation marks, which suggests that this conversation was recorded. The November 26th Delaney affidavit suggests that this meeting or conversation occurred on, or shortly after, March 28, 2007.

In addition, defendants have not been provided with any written records containing the substance of conversations or meetings that occurred between Balducci and Judge Lackey that occurred but were not recorded. For instance, defendants have not been provided with any written record of the substance of the alleged March 28, 2007 telephone call from Balducci to Lackey nor any written record of the substance of the alleged March 28, 2007 meeting between Balducci and Lackey. The Court should order the production of all missing recordings and written records of meetings or conversations that were not recorded.

4. Recordings of Defendants

Defendants requested all audio or video recordings of conversations or meetings between and among any of the defendants in this case and, to the extent such conversations or meetings occurred but were not recorded, all written records concerning the substance of such conversations or meetings. The government has not produced any recordings of defendants made on November 5, 2007 or November 19, 2007 when, defendants believe, the government directed Balducci to visit the offices of the Scruggs Law Firm. To the extent such recordings were made, the government should be ordered to produce them.

5. Transcripts

The government has still not provided defendants with a transcript of any of the recordings that it has produced.

6. November 27, 2007 Search of the Scruggs Law Firm

The Court should order the government to provide defendants with copies of all books, papers, documents, data (including electronic data), photographs, and tangible objects seized from the Scruggs Law Firm on November 27, 2007. Under Rule 16(a)(1)(E), the government is obligated to produce copies of such items if they are “material to preparing the defense” or they

were “obtained from or belong[] to the defendant[].”⁵ To date, nothing identified in the November 26, 2007 search warrant or seized during the November 27, 2007 search has been produced to defendants, including the alleged May 4, 2007 email from Backstrom to Balducci. *See* Indictment at 4.

The Court should also order that, before the “taint team” that is reviewing the material collected during the November 27, 2007 search of the Scruggs Law Firm offices discloses any material to any government attorney or agent working on the prosecution of this investigation, defense counsel be permitted to review the material proposed to be disclosed and be given an opportunity to object. This procedure will provide defendants with an opportunity to raise privilege objections—particularly acute in the context of a search of a law firm—before any documents or communications are provided to the government’s prosecution team and the damage of disclosure cannot be undone. Indeed, where the government has seized records from a subject attorney’s office, the United States Attorney’s Manual specifically encourages the government to provide “copies of all seized materials” to the attorney so that he or she “is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege.” United States Attorney’s Manual § 9-13.420. The government should follow this procedure here.

The government’s proposed procedure has been rejected as providing insufficient protection to privilege holders. The government indicates that the “taint team” is going to send all documents and data it identifies as non-privileged directly to the prosecuting attorneys without any opportunity for review by defense counsel. Response at 9. This approach was specifically rejected in *In re Grand Jury Subpoenas*, 454 F.3d 511, 515 (6th Cir. 2006), where the government similarly proposed that its “taint team would send documents it deemed not to be

⁵ The cases cited by the government for the proposition that it is entitled to retain the Scruggs Law Firm’s records are inapplicable because they involve Rule 41(e) requests for the return of seized property, not discovery requests under Rule 16. *See Interstate Cigar Co. v. United States*, 928 F.3d 221, 224 (7th Cir. 1991) (reversing order granting summary judgment to the government on plaintiff’s complaint for the return of seized property); *Sovereign News Co. v. United States*, 690 F.2d 569, 578 (6th Cir. 1983) (remanding motion for return of seized property).

protected by appellants' privilege directly to the grand jury, and ... would not provide appellants with any opportunity to review or challenge the team's privilege determinations with respect to those documents." The Court held that there was "an obvious flaw in [this] taint team procedure: the government's fox is left in charge of the appellants' henhouse, and may err by neglect or malice, as well as by honest differences of opinion." *Id.* The Court rejected the government's proposal because it could not find "any check in the proposed taint team review procedure against the possibility that the government's team might make some false negative conclusions, finding validly privileged documents to be otherwise." *Id.* The Court should similarly reject the government's proposed review procedure here.

7. Documents Obtained From Other Sources

The government did not respond to defendants' request for copies of, and the right to inspect, all books, papers, documents, data (including electronic data), photographs, and tangible objects in the government's control that were obtained from any alleged co-conspirator of defendants or any other third party, including Balducci, Judge Lackey, and any person working for, or on behalf of, Timothy R. Balducci, Attorney at Law or Patterson & Balducci PLLC. Defendants specifically request copies of the documents provided by Balducci to the government referenced on the recording of the November 5, 2007 telephone call between Balducci and Special Agent Delaney. Defendants further request any documents or records regarding the Third Circuit Court District's receipt of federal funds, including any written or oral statements made at an time by any Mississippi public official or agent or any written record containing the substance of such statements. To the extent that such documents are "material to preparing the defense," Rule 16(a)(1)(E)(i), defendants are entitled to them and they should be produced forthwith.

C. *Brady* and *Giglio* Material

The government represents that it "has produced any *Brady* or *Giglio* material that exists." Response at 10. However, the government did not respond specifically to defendants'

requests for the following categories of information to which they are entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972):

- All statements by witnesses, documents, or information reflecting favorably on defendants' characters or reputations for truthfulness.
- Statements of any persons having relevant information about this case, whether sworn or unsworn, whether or not the government believes in the credibility of the statement or not, that are exculpatory and helpful to the defense.
- The names and addresses of all people whom the government asked whether they would and/or could implicate defendants in any criminal wrongdoing and who would not and/or could not so implicate defendants.
- The names and addresses and statements of all people whether indicted or not who have confessed to acts that form the basis for the indictment.
- A detailed description of all discussions of potential criminal or civil liability, or the potential consequences of same, or the potential resolution or avoidance of same, or any discussion of or promises or grants of immunity, lenience, financial assistance, or any other assistance to any person the government intends to or may call as a witness or upon whose statements the government will or may rely.
- A detailed description of any situation where a prosecution witness could be named as a defendant or co-conspirator in this or any other case but has not as yet been charged, and any threat to charge or prosecute this witness or promise not to charge or prosecute the witness.
- All information relevant to the credibility of government witnesses and which may be used as the basis for impeachment of such witnesses.

To the extent that the government is in possession, custody, or control of any of the foregoing material, and to the extent the government could by the exercise of due diligence learn of such material, the Court should order its production to defendants.

The government's Response states that it has provided a log of all calls recorded during the course of the Balducci and Patterson wiretaps. Response at 11. Defendants understand that such a log was mailed on January 8, 2008, but all counsel for defendants have not yet received the log. Without having seen the log or having reviewed its contents, defendants cannot further specify their requests for additional recordings not deemed "pertinent" by the government. Defendants therefore reserve the right to seek additional discovery of recorded calls after such time as they have reviewed the government's log.

D. Jencks Act

Fifth Circuit precedent cited by the government in its Response makes clear that the Jencks Act “does not prohibit the prosecutor from disclosing Jencks Act material before trial.” *United States v. Campagnuolo*, 592 F.2d 852, 858 n.2 (5th Cir. 1979). Indeed, the Fifth Circuit specifically noted the “prevailing practice by government attorneys of delivering Jencks Act material to defense counsel sufficiently in advance of the conclusion of direct examination to obviate trial interruptions to permit defense counsel to study the disclosures.” *Id.* (quoting *United States v. Murphy*, 569 F.2d 771, 773 n.5 (3d Cir. 1978)). The Fifth Circuit concluded “that ‘that is a salutary practice and we encourage it.’” *Id.* (quoting *Murphy*, 569 F.2d at 773 n.5). In this spirit, defendants request that Court similarly encourage the government to produce Jencks Act material sufficiently in advance of trial to minimize the possibility of trial interruptions.

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, defendants respectfully request that the Court order the government to produce forthwith the discovery described above.

Respectfully submitted, this the 11th day of January, 2008.

Dated: January 11, 2008

By: /s/ John W. Kecker

John W. Kecker (*Pro Hac Vice*)
Jan Nielsen Little (*Pro Hac Vice*)
Brook Dooley (*Pro Hac Vice*)
Travis LeBlanc (*Pro Hac Vice*)
Warren A. Braunig (*Pro Hac Vice*)
KEKER & VAN NEST, LLP
710 Sansome Street
San Francisco, California 94111
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Counsel for Defendant
Richard F. Scruggs

Dated: January 11, 2008

By: /s/ Frank W. Trapp

Frank W. Trapp, MSB #8261
PHELPS DUNBAR
P.O. Box 23066
Jackson, Mississippi 39225-3066
Telephone: (601) 352-2300

*Co-Counsel for Defendant
Sidney A. Backstrom*

Dated: January 11, 2008

By: /s/ J. Rhea Tannehill, Jr.

J. Rhea Tannehill, Jr., MSB #10449
TANNEHILL & CARMEAN, PLLC
829 North Lamar Boulevard, Suite 1
Oxford, Mississippi 38655
Telephone: (662) 236-9996
Facsimile: (662) 234-3949

*Co-Counsel for Defendant
Sidney A. Backstrom*

CERTIFICATE OF SERVICE

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Defendants' Reply in Support of Their Motion for Discovery** with the Clerk of the Court using the ECF system, which sent notification for such filing to:

David Anthony Sanders
david.a.sanders@usdoj.gov

Robert H. Norman
bob.norman@usdoj.gov

Thomas W. Dawson
tom.dawson@usdoj.gov

Frank W. Trapp
trappf@phelps.com

J. Rhea Tannehill, Jr.
jrt@tannehillcarmean.com

Ronald Dale Michael
rmichael@rmichaellaw.com

Anthony L. Farese
tony@fareselaw.com

Hiram Eastland, Jr.
eastlandlaw@bellsouth.net

This, the 11th day of January, 2008.

/s/ Brook Dooley
Brook Dooley