

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

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By S. Adams
Deputy

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

**MOTION FOR FURTHER CONTINUANCE OF PRETRIAL MOTIONS DATE
AND TRIAL DATE**

COME NOW defendants Richard F. Scruggs, David Zachary Scruggs, and Sidney A. Backstrom to move for a further continuance of the date for the completion of pretrial motions, and a corresponding continuance of the trial date. The delay in the completion of discovery from the government, coupled with the fact that initial review of the discovery material which has been produced indicates that significant substantive pretrial motions will need to be filed in this case, necessitate this request for additional time in which to prepare pretrial motions. This case has been pending for just six weeks, two weeks of which were the Christmas and New Years holiday weeks. Despite the diligence of both government and defense counsel, more time is needed for the production and review of discovery and the preparation of motions.

I. BACKGROUND

A. Indictment and Initial Scheduling Order

On November 28, 2007, the government filed a six-count indictment against defendants. The indictment charged defendants with criminal conspiracy in violation of 18 U.S.C. § 371; bribery of an agent of a state government in violation of 18 U.S.C. § 666(a)(2); and wire fraud in violation of 18 U.S.C. §§ 2, 1343, 1346. Defendants were arraigned, entered pleas of not guilty, and have been released on bond.

Defendant Timothy R. Balducci pled guilty to a one count information on December 5, 2007.

On December 5, 2007, the Court issued an initial scheduling order setting this case for trial on January 22, 2008. The scheduling order also required that discovery be completed by December 27, 2007, with pretrial motions due on January 7, 2008.

B. The Government Began Producing Discovery Last Month

On December 7, 2007, the government provided defendants with its first item of discovery. It was a copy of a single 90 minute consensual recording made on November 1, 2007, containing statements of four defendants. The government agreed to make the original of this recording available for inspection by defendants and their experts, and defense counsel is currently working with government counsel and agents to make arrangements to do this. The government has not yet provided a transcript of this recording.

On December 12, 2007, the government provided defendants with additional discovery, including two applications for the November 26, 2007 search warrant for the Scruggs Law Firm, three sets of wiretap applications and two out of the three affidavits supporting the wiretap applications. The government also provided defendants with one cassette containing a consensual recording and two CDs containing intercepted telephone communications. The CDs contain a total of 124 recorded telephone conversations. The government has not yet provided any transcripts of any of these recordings.

On December 17, 2007, the government provided additional discovery, including compact discs containing an audio recording of a September 27, 2007 meeting between Balducci and Judge Henry Lackey, video recordings of October 18, 2007 and November 1, 2007 meetings between Balducci and Judge Lackey, and a number of surveillance photographs and other documentary evidence. Again, no transcripts of any of the recorded conversations have been produced.

On December 21, 2007, the Court granted in part defendants' first motion (filed December 17) for continuance of the trial and pretrial motions dates. The court granted a 34 day

continuance of the trial to February 25, 2008, and a 13 day continuance of the then scheduled motions deadline, to January 21, 2008. The brevity of the continuance (defendants had requested a 90-120 day continuance) was attributable to the government's assurances to the Court that "the government has voluntarily made the bulk of discovery in this case" available, such that there existed "no persuasive grounds for a trial continuance based on discovery issues...." The Court did specifically recognize, however, that defendants "certainly have the right to file all pretrial motions they deem appropriate," and that "more time can reasonably be granted between the deadline for discovery completion, and the filing and disposing of all pretrial motions prior to the preparation for trial." The Court reiterated the December 27, 2007 deadline for the government to provide discovery.

On December 26, 2007, the government produced additional discovery, including thirteen cassette tapes containing recorded conversations between Balducci and Judge Lackey, two FBI interview reports regarding interviews of defendants Patterson and Backstrom, a number of telephone records, a compact disc with a lot of pen register and trap and trace data, and thirteen compact discs which contained audio and video recordings of six meetings between Balducci and Judge Lackey, as well as photographic evidence. Again, no transcripts of any of the recorded conversations have been provided.

C. The Government Did Not Complete Discovery by the December 27, 2007 Deadline

On December 28, 2007, the day after the December 27, 2007 deadline set by the Court for the government to have completed discovery, defendants filed a Motion for Discovery and Memorandum of Points and Authorities in support thereof. This motion will be heard by the court next week. In its January 8, 2008 response to this motion:

- The government acknowledged that it has yet to provide transcripts of any of the many hours of approximately 150 recorded conversations. The government said that it will produce such transcripts "once they are completed."

- The government further acknowledged that it has not yet made the original recordings available, and said it will do so “at a mutually convenient [but unspecified] time.”
- The government further acknowledged that it has not yet provided the items seized from the Scruggs Law Firm and noted that it cannot delay for an “unreasonable amount of time” and would provide the material when it could.
- The government further acknowledged that its “taint team” is still working with these seized materials.
- The government indicated that it had provided the defense with the FBI affidavit in support of the September 25, 2007 application for the wiretap on Mr. Balducci’s phone (the first wiretap). However, the government did not mail this affidavit to defense counsel until January 8, 2008, and some defense counsel did not receive it until January 10, 2008 after 4:00 p.m.¹

In addition to the still outstanding material listed above, which the government acknowledges it has not provided but intends to provide at some later date, the government has refused to provide certain other materials requested by defendants. These materials are the subject of the motion to be heard next week, and include material seized during the December 10, 2007 search of the offices of one of the defendants’ former counsel in this matter, relevant statements of co-conspirators, and other materials. A complete list of the missing discovery is set forth in the Defendants’ Reply in Support of Motion for Discovery, filed this day January 11, 2008.

¹ The discovery mailed by the government on January 8, 2008 also included a signed affidavit and wiretap application that had previously not been produced and copies of log sheets for the Balducci and Patterson wiretaps.

II. MORE TIME IS NEEDED FOR THE PREPARATION OF SIGNIFICANT SUBSTANTIVE PRETRIAL MOTIONS

A. Introduction

Defendants now move for a continuance of the currently set January 21 pretrial motions date in order to permit them sufficient time to inspect adequately the discovery material which has been produced, to receive and then review other discovery which has not yet been produced, and to research and brief pretrial motions. Under the Speedy Trial Act, the Court has the discretion to grant a continuance where the “ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C.A. § 3161(h)(8)(A). In particular, the Court may grant a continuance where “the failure to [do so] ... would deny counsel for the defendant[s] ... the reasonable time necessary for effective preparation ...,” 18 U.S.C.A. § 3161(h)(8)(b)(iv), and where the “case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section,” 18 U.S.C.A. § 3161(h)(8)(b)(ii). Given that the discovery which has already been produced to date is voluminous, and given that other discovery is still outstanding, some of which the government agrees it will produce and some of which is subject still to motion practice, and given that the defense anticipates filing significant substantive pretrial motions, the January 21, 2008 pretrial motions date is too soon to allow defendants sufficient time to complete preparation of motions.

B. Anticipated Pretrial Motions

Based on the limited review conducted to date of the voluminous (yet partial) discovery produced to date, defense counsel anticipates filing a number of pretrial motions, including but not limited to the following:

1. Motions to Suppress

The Defense anticipates filing motions to suppress all materials seized from the Scruggs law firm and all wiretapped conversations under *Franks v. Delaware*, 138 US 154 (1978)

including a request for an evidentiary hearing. These motions would be made on the grounds that the affidavits submitted in support of the search and wiretap applications were false and misleading in their failure to disclose to the authorizing Court material and significant exculpatory facts, which, if known to the Court, would have vitiated a finding of probable cause, including:

- The extent to which Judge Lackey created the alleged crime by suggesting, urging, and constructing a bribe;
- The extent to which Judge Lackey, not Balducci, suggested a link between the created bribe and Richard Scruggs;
- The numerous protestations by Balducci that Scruggs was not involved, and that Scruggs did not know of any corrupt agreement; and
- Balducci's numerous protestations that he, and only he, was responsible for any corrupt arrangement.

Some specific examples of ways in which the affidavit submitted in support of the November 26, 2007 search warrant was misleading include the following:

a) Misleading summary of May 21, 2007 conversation. Where the affidavit describes the recorded conversation between Balducci and Judge Lackey on May 21, 2007, the affidavit fails to reveal that it was Judge Lackey who introduced the idea of Scruggs's involvement, saying "I just want to hear you say it again ... you and Scruggs are the only ones who know anything about this?"² The affidavit also fails to disclose that in this May 21 conversation, Balducci says a number of times that indeed he does not want Judge Lackey to do anything improper, telling Judge Lackey for example "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 this is completely fine ... I would never put ... you nor me in that position ... I have complete confidence that it's fine." The affidavit also fails to disclose that Mr. Balducci said in 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

² We do not yet have government transcripts of the taped conversations. What is summarized in this motion is the Defense's best efforts to document what is said on the tapes.

approached you, we'd have 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." Nor does the affidavit mention that during a consensual recording twelve days earlier, on May 9, 2007, when Balducci asked Judge Lackey whether he thought the agreement between Jones and Scruggs required that the parties arbitrate, Judge Lackey responded "It does . . . It looks like that's what they agreed to." The affidavit also fails to disclose that on the same day as the May 21, 2007 conversation, Judge Lackey actually recused himself from the *Jones* case.

b) Omission of May 29, 2007 call. The affidavit does not mention at all a recorded call on May 29, 2007, during which Balducci further tells Judge Lackey that he only wants what Judge Lackey thinks is right, 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 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 . . .'".

c) Omission of non-corrupt meetings and exculpatory statements from May – August 2007. The affidavit further fails to disclose that taped meetings occurred on May 30 and June 28, 2007, during which no discussion related to the *Jones* case occurs, even though Judge Lackey had "unrecused" himself on June 4. Indeed, the affidavit completely eludes the summer, failing to point out that nothing corrupt happened in June, July and August. To the contrary, in an August 9 recorded call (also not disclosed or discussed in the affidavit), it is Judge Lackey who re-introduces the topic to Balducci and asks whether "Dick" "wants this thing in mediation I mean arbitration." Balducci responds "yes, . . . *if that's how you sees it after you've taken a look at it, if you sees it that way, that would be terrific.*" (emphasis added). No suggestion of a bribe is made.

d) Omission of any mention that the "of counsel" position was not connected to the *Jones* matter. In the affidavit, the government asserts that the "benefits and rewards"

originally offered to Judge Lackey consisted of an “of counsel” position in Balducci’s firm. Yet the government omits that, during the September 21, 2007 consensual recording in Judge Lackey’s chambers, when Balducci raised the matter of the “of counsel” position after a discussion of the *Jones* case, Balducci explains “They’re not connected - one thing is not connected to the other.”

e) Misleading summary of September 27, 2007 meeting. While the affidavit discloses that in a September 27 recorded meeting Balducci paid Lackey \$20,000, the affidavit does not disclose that Mr. Balducci specifically distances Scruggs from the process. During this meeting, Judge Lackey suggests that “if this is not Mr. Scruggs’ money, I don’t want a nickel of it” and Balducci responds as follows: “I want you to know ... this is between me and you, and just between me and you ... this is just between me and you ... there ain’t another soul in the world that knows about this” When Judge Lackey again tries to interject Mr. Scruggs, saying “I would think Mr. Scruggs would have to know something about it,” Balducci again disclaims Mr. Scruggs’ knowledge or involvement, explaining “well, here’s how it works ... there *will* come a time where I will sit him down in private and I will tell him that I’ve solved a problem for him ... that’s how that’ll work.” (emphasis added). Later in the conversation when Judge Lackey again mentions “Mr. Scruggs or Dickie or Dick whoever or whatever I should call him,” Mr. Balducci again responds even more explicitly that Mr. Scruggs is not involved, saying “he is not even involved at that level, Judge ... frankly he doesn’t even ... like I said, the way this will work is I’ll just go to him at some point and say I have cured a problem that you had, and you need to recognize the problem that I have cured for you; that’s how it works. ... He is not involved in a direct manner, doesn’t want to be, doesn’t need to be. ... You take comfort in knowing this is between me and you; this doesn’t go any further than right here ... this is between me and you, between two old friends, helping each other.” None of Mr. Balducci’s protestations of Mr. Scruggs’ lack of involvement in the scheme are included in the description of this meeting in affidavits and applications presented to the Court.

2. Motion to Dismiss the Indictment Based on Outrageous Government Conduct

Defendants anticipate filing a motion to dismiss the indictment based on outrageous government conduct. The significant exculpatory facts discussed above were not disclosed in the affidavit submitted to support the September 25, 2007 wiretap on Balducci's phone. Evidence obtained for that wiretap was then in turn used, together with a similarly misleading affidavit, to obtain the October 16, 2007 order authorizing a wiretap on Patterson's phone. That evidence in turn led to the confrontation of Balducci on November 1, 2007, and secured his cooperation. And that in turn led to further tainted evidence used to secure a grand jury indictment. This chain of tainted interceptions and searches will be grounds for a motion to dismiss due to government misconduct.

3. Severance Motions

Defendants are considering severance motions, which cannot be fully investigated and researched until all discovery has been provided.

4. Motions Regarding the Accuracy/Reliability of Tape Recordings

The defense anticipates filing motions regarding the accuracy/reliability of tape recordings. The defense has yet to analyze the integrity of audio recordings received to date. We cannot evaluate the need for motions regarding the integrity/reliability of the tapes until that analysis is done. In addition, a review of the recordings which have been received suggests that a number of conversations occurred for which no recordings have been disclosed. Either those conversations were not recorded, as a result of mechanical failures or intentional decisions not to record, or recordings made and subsequently destroyed, or recordings were made and the government is refusing to disclose the recordings. As noted above, on January 10, 2008, the government mailed to defense counsel a wiretap log sheets, which will facilitate this analysis. However, some defense counsel have not yet received these log sheets, and there has been no time to analyze them. However, our initial review has revealed some discrepancies already, as noted at pages 2 and 6 of defendants' Reply in Support of Their Motion for Discovery (missing

recordings of calls allegedly made to/from the Scruggs Law Firm and its employees between September 26 and October 23, 2007, and missing recordings of other pertinent conversations). We are continuing to try to analyze and understand the scope and magnitude of issues regarding the tape recorded conversations. Finally, once we get the transcripts, litigation concerning the accuracy of government transcripts will undoubtedly be necessary.

5. Motion to Dismiss Counts 2, 3 and 4

Defendants anticipate filing a motion to dismiss Counts 2, 3 and 4. There is a significant legal question whether attempted bribery of a state court judge as charged in this case satisfies the jurisdictional requirements of 18 U.S.C. §666(a)(2). Resolution of this issue will require evidence and possibly testimony concerning the nature and extent of federal funding of the Third Circuit Court District, as well as legal briefing.

6. Motions Relating to Conspiracy Issues

Defendants are researching and evaluating possible motions relating to conspiracy issues. Significant and complex legal questions concerning conspiracy issues are present in this case, including the admissibility of co-conspirator statements (and the potential need for a pretrial hearing to determine same), under *United States v. James*, 590 F.2d 575, 581 (5th Cir. 1979) (en banc), and substantive liability theories under *Pinkerton v. United States*, 328 U.S. 640 (1946). Defendants will not be in a position to fully evaluate or brief these issues until discovery is complete and has been further analyzed.

7. Motion Regarding Jury Selection and Voir Dire

The defense anticipates filing a motion regarding jury selection and voir dire. The extraordinary publicity attendant to this case will require briefing on how to conduct jury selection and voir dire in order to insure a fair trial.

Some of these motions may necessitate that the Court conduct pretrial hearings, including possible evidentiary hearings. The current motion deadline of January 21, 2008 does not provide counsel for defendants with sufficient time to analyze these many and important issues, conduct factual and legal research, and prepare the required briefing. The current trial date of

February 25 similarly does not provide counsel for defendants with sufficient time to review and analyze the discovery (much of which has not even been received yet) and to prepare for trial.


Accordingly, defendants respectfully request that the Court grant the requested continuance so that counsel have adequate time to prepare pretrial motions, to have them heard and decided, and to receive and review discovery and prepare for trial. Defendants' requested continuance will serve the "ends of justice," and given that the case has been pending just six weeks, the interest in permitting defendants to prepare their defense of this matter adequately "outweigh[s] the best interest of the public and the defendant[s] in a speedy trial." 18 U.S.C.A. § 3161(h)(8)(A).

III. CONCLUSION

WHEREFORE, PREMISES CONSIDERED, defendants respectfully request that the Court grant their motion for a continuance of the currently set pretrial motions deadline of January 21, 2008, and for a continuance of the currently set trial date of February 25, 2008.

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

Dated: January 11, 2008

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