

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:07CR192

RICHARD R. SCRUGGS,  
DAVID ZACHARY SCRUGGS,  
SIDNEY A. BACKSTROM,  
STEVEN A. PATTERSON

**GOVERNMENT'S RESPONSE TO  
DEFENDANTS' MOTION FOR DISCOVERY**

Comes now the United States and files this its response to the defendants' motion for discovery. In support of its response, the government states as follows:

With the present motion, the defendants have moved the court for a hearing to address the following discovery-related matters: Statements of Defendants; Defendants' Prior Record; Documents and Objects; Reports and Examination and Tests; *Brady* and *Giglio* Material; Jencks Act; and Federal Rules of Evidence 609 and 404(b). The government will respond to each of these issues in turn.

**A. Statements of Defendants**

Citing Rule 16(a)(1)(B), the defendants first ask the Court to order "the production of all written or recorded statements made by any defendant, at any time and in any context, regardless of the government's intentions with respect to their use at trial." Rule 16(a)(1)(B), however, provides that such statements are to be produced only so long as they are "relevant." The government produced these statements in discovery provided on December 12, 17, and 26. See letters attached as Exhibit A.

Next, the defendants ask for records, etc. related to “any oral statements made by any defendant to the government.” This request includes “internal reports and memoranda or notes or other writings.” On December 26, 2007, the government provided 302 reports drafted by the FBI following interviews with Sidney Backstrom and Steven Patterson. These 302s reflect the notes taken by the agents during those interviews, and the Fifth Circuit has made it clear that “Rule 16(a)(1)(A) does not grant a criminal defendant a right to preparatory interview notes where the content of those notes have been accurately captured in a type-written report, such as a 302 . . . .” *United States v. Brown*, 303 F.3d 582, 590 (5<sup>th</sup> Cir. 2002). As such, the government has produced the documents sought by the defendants.

In addition to the records of oral statements made by defendants, the defendants ask for records of statements made by “Balducci or the (*sic*) Judge Lackey who assisted the government in conducting its investigation.” Because Tim Balducci is not a signatory to the present motion, the government will not produce statements or records of statements made by Balducci that have not already been produced. *See United States v. Roberts*, 811 F.2d 257, 258 (4<sup>th</sup> Cir. 1987) (*en banc*) (holding Rule 16(a)(1)(A) does not pertain to discovery of statements made by co-conspirators). Judge Henry Lackey has never been accused of any wrongdoing, and there is no authority whatever to support the defendants’ motion for statements or records of statements made by him. Again, Rule 16(a)(1)(A) applies to statements of the defendants.

The defendants “further request all recorded testimony of any defendant before any grand jury.” In *United States v. Campagnuolo*, 592 F.2d 852 (5<sup>th</sup> Cir. 1979), the court held that pretrial disclosure of grand jury testimony of government witnesses was barred by the Jencks Act.

*Campagnuolo*, 592 F.2d at 858. The court specifically held that the Jencks Act required the prosecutor to permit defense counsel to examine the witness's grand jury testimony "only after [the witness] had given his direct testimony at the trial." *Id.* Accordingly, the government will provide any grand jury testimony to defense counsel once a witness has given his direct testimony at trial.

Next, the defendants specifically request five items: First, the defendants request "[a]ny written, recorded, or oral statements made on or about November 27, 2007 by defendant Steven A. Patterson." The government has provided these statements to the defense in the form of an FBI 302 of the interview. Second, the defendants request any recording of the November 27, 2007 telephone conversation between Tim Balducci and Steven Patterson. No recording or written record of the conversation was made, however. Third, the defendants request any record of statements made on or about November 27, 2007 by Sidney Backstrom. As with Balducci, the government has provided these statements to the defense in the form of an FBI 302 of the interview. Fourth, the defendants request any record of statements made by Tim Balducci. As mentioned *supra*, Rule 16 does not pertain to discovery of statements made by co-conspirators, and as a result, the government will not produce any statements or records of statements it has not already produced. *See Roberts*, 811 F.2d at 258. Fifth, the defendants ask again for grand jury material, and as mentioned, grand jury material will be provided to the defendants following any witness's direct testimony as dictated by the Jencks Act and Fifth Circuit precedent. *See* 18 U.S.C. § 3500(a); *Campagnuolo*, 592 F.2d at 858.

**B. Defendants' Prior Record**

At present, the government is unaware of any felony convictions of any defendant. However, if the defendants are aware of any jurisdiction where a criminal record may exist and will provide the government with an approximate date of any such criminal record, we will make inquiry and provide copies of any records found.

**C. Documents and Objects**

Under the heading "Documents and Objects," the defendants provide a laundry list of requests, and the government will respond to each of these requests. 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.

1. A copy of the September 25, 2007 affidavit of Special Agent William P. Delaney related to the government's application for a Title III wiretap.

The government has produced this document to the defendants.

2. Signed copies of the October 24, 2007 application and affidavit related to the extension of the Balducci wiretap.

The government has produced these documents to the defendants.

3. Copies of the application and affidavit related to the Search Warrant of the Langston Firm.

These documents concern an entirely separate investigation, and thus, cannot be produced.

4. Any and all ten-day reports related to the wiretaps for both the Balducci and Patterson telephones.

Ten-day reports aid the district judge issuing an order for electronic surveillance to determine “what progress has been made toward achievement of the authorized objective (of the wiretap) and the need for continued interception.” 18 U.S.C. 2518(6). The authorizing statute does not require that such reports be filed, and the judge issuing an order for interception has complete discretion in determining at what intervals he wishes the reports submitted. *See United States v. Orozco*, 108 F.R.D. 313, 315-16 (D.C. Cal. 1985). Moreover, reports that are submitted are solely for consideration of the authorizing judge. *Orozco*, 108 F.R.D. at 316 (citing *United States v. Iannelli*, 430 F. Supp. 151, 156 (W.D. Pa. 1977) and *United States v. Brodson*, 390 F. Supp. 774, 777-78 (E.D. Wis. 1975)).

Virtually every court that has considered a motion for production of ten-day reports has denied the motion. *See, e.g., United States v. Chimera*, 201 F.R.D. 72, 78 (W.D.N.Y. 2001) (citing *United States v. Wright*, 121 F. Supp. 2d 1344, 1349-50 (D. Kan. 2000); *United States v. Birdman*, 1992 WL 203318 (E.D. Pa.); *United States v. Orozco*, 108 F.R.D. 313, 315-16); *United States v. Brodson*, 390 F. Supp. 774, 777-78 (E.D. Wis. 1975)). Accordingly, because the ten-day reports requested are not subject to the rules of discovery, and because the defendants have shown this request to be nothing more than a “fishing expedition,” the request for the reports should be denied.

5. All audio and video recordings of meetings between Tim Balducci and Judge Henry Lackey.

The government has produced these recordings to the defendants.

6. All audio and video recordings of any of the defendants not previously produced.

The government has produced all recordings of the defendants subject to the rules of discovery.

7. Replacement copies of audio recordings.

The government has produced these recordings to the defendants. With the present motion, the defendants contend that these recordings are “not decipherable.” While the recordings may be less than perfectly clear, the discussions are certainly decipherable, and the copies provided to the defendants are identical to those possessed by the government.

8. Replacement copies of audio recordings between Tim Balducci and Judge Henry Lackey.

These recordings have been produced on disc, but each side of the conversation is separately recorded. This recording is simply a technical problem that could not be solved, and it occurred only when a call was made to Tim Balducci’s cell phone from Judge Henry Lackey’s telephone. While both sides of the conversations are clear, they are under separate files. However, Judge Henry Lackey also recorded these calls, and cassette tapes of those recordings were provided to the defendants on December 26. The October 4 call can be found on exhibit 1D18; the October 16 call can be found on exhibit 1D22; the October 18 call at 1:18 can be found on exhibit 1D30. The only call that Judge Henry Lackey did not record was the October 18 call at 11:16. Both sides of this call can be heard on disk, but of course, are under separate files. Regardless, this call is nothing more than a twenty-seven-second call from Judge Lackey’s secretary to Tim Balducci, telling Balducci that Judge Lackey is running late at the doctor’s office, and he will call Balducci later.

9. Complete copies of audio recordings of specific calls recorded from the wiretaps of Balducci and Patterson because the recordings either “ended abruptly” or were incomplete..

**The Balducci phone:**

The September 26 phone call ended abruptly because Tim Balducci was talking to his father about matters unrelated to the present case. In that event, FBI agents are instructed to minimize the intercept. In other words, when such a situation arises and the agents are certain the conversation is personal, for instance, the agents will temporarily minimize the recording. When this is done, the calls cannot be heard. Agents typically wait a uniform period of time and then return to the call to determine whether the conversation has turned to a relevant topic. If not, agents will again minimize the conversation. When the conversation is minimized, it is not recorded, the government has not heard the conversation, and thus the conversation cannot be produced to defense counsel.

The September 27 call simply broke up as Tim Balducci lost service on his cell phone.

The September 28 call also simply broke up as Tim Balducci lost service on his cell phone.

The September 29 call was minimized, and the call dropped during the period it was minimized.

The October 2 call was minimized when it became clear that Tim Balducci was talking to an associate from his law firm about matters unrelated to the present action. Specifically, the associate was discussing finding a way to repair a gas leak to his hot water heater.

The October 4 call was minimized when it became clear that Tim Balducci was talking to someone about a political campaign, and the discussion was unrelated to the present action.

**The Patterson phone:**

The November 3 call was minimized when it became clear that Steven Patterson was talking to an employee of the law firm about litigation unrelated to the present action.

The November 4 call was minimized also when it became clear that Steven Patterson was talking to an employee of the law firm about litigation unrelated to the present action.

10. Replacement copies of video recordings.

With this request the defendants are asking for replacement copies of discovery items 1D2 and 1D14. The government is presently making duplicate copies for the defendants and will produce them immediately

11. Transcripts of all audio recordings.

While nowhere in the rules is it suggested that the government should produce transcripts, the government will produce transcripts of audio recordings it plans to use at trial once they are completed.

12. Access to originals of all recordings.

The government will make the originals of all recordings subject to discovery available at a mutually convenient time for all parties.

13(a). All documents and objects taken from the Scruggs Law Firm following the November 27 search.

The government is aware that even when lawfully seized it may not retain possession of the property for an unreasonable amount of time. In the present case, however, the search warrant was executed less than four months ago on September 27, 2007, and trial is set for February 25, 2008. Clearly, an unreasonable amount of time has not passed and will not pass before the trial date.

Moreover, the government may retain possession of seized items when it can show a specific nexus between the property and its interest. *See Interstate Cigar Co. v. United States*, 928 F.2d 221, 224 (7<sup>th</sup> Cir. 1991). “This continuing interest can include a criminal . . . investigation in progress.” *Sovereign News Co. v. United States*, 690 F.2d 569, 577 (6<sup>th</sup> Cir. 1982). Because the defendant has made no showing as to why they need the items seized and because the items are the subject of an ongoing criminal matter, the motion should be denied.

13(b). The defendants request that before the “taint team” provides to the government any documents taken during the November 27 search, that it be allowed to examine the documents and be given an opportunity to object.

The government is not aware of any rule mandating such a procedure. The “taint team” exists solely for the purpose of keeping privileged documents from those prosecuting the present action. Should the government be given documents and determine those documents were subject to the rules of discovery, it would provide them to the defendants immediately.

14. All phone records obtained by the government.

The government has provided these records to the defendants. There may be additional phone records not yet obtained by the government, and once those records are obtained, they will be produced to the defendants immediately.

**D. Reports of Examinations and Tests**

With this request, the defendants seek all reports or results of physical, mental, or scientific tests done by agents of the government, including the results of any polygraph examinations done.

No such tests have been done by the government.

**E. Brady and Giglio Material**

The government has produced any *Brady* or *Giglio* material that exists. As for the six specific requests under this section of the defendants' motion, numbers one through five appear to repeat requests already made. Again, the defendants are not entitled to grand jury material at this time; nor are the defendants entitled to statements, oral or recorded, made by Balducci in addition to those already provided.

2. As for Judge Lackey, the defendants have been provided with every recorded statement Judge Lackey made with respect to the present action.

3. The government has provided all audio and video recordings of conversations or meetings between Tim Balducci and Judge Lackey.

4. The government does not possess any audio or video recordings of conversations or meetings "between and among any of the defendants;" nor are there any "written records concerning the substance of such conversations or meetings."

5. The government does not possess any records of statements made by a "third party."

6. Here the defendants request "[a]ll telephone conversations recorded during the course of the Balducci and Patterson wire taps, including those that were not deemed 'pertinent' by the government." The government has provided the defendants with recordings of every relevant

phone call recorded. The defendants' request for "all" conversations recorded is inappropriate, and such calls are not subject to discovery. The defendant provides no explanation as to why they would be entitled to such recordings, and the law is clear that such a request cannot be made only speculating as to what they may find. *See, e.g., Murphy v. Johnson*, 205 F.3d 805, 814 (5<sup>th</sup> Cir. 2000) (holding that allegations supporting a need for discovery "must be specific as opposed to merely speculative or conclusory"); *see also United States v. Brown*, 289 F.3d 989, 994 (7<sup>th</sup> Cir. 2002) (explaining criminal defendants are not entitled to embark on "fishing expedition[s] through government files").

In the alternative, the defendants request "a log of all such calls, listing the identity of the parties on the call, the date and time of the call, and the topic(s) discussed during the call." The government has provided this log.

#### **F. Jencks Act**

Here, the defendants again request Jencks Act material in advance of trial, but as discussed *supra*, such a request is premature. The Act provides in pertinent part:

(a) in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective government witness (other than the defendant) shall be the subject of subpoena, discovery or inspection *until said witness has testified on direct examination in the trial of the case.*

18 U.S.C. § 3500(a) (2007) (emphasis added).

The Senate Report which accompanied Senate adoption of the Jencks Act made it clear that the specific intent of the Act was to prevent disclosure of the statements of government witnesses before the witnesses had testified.

One of the causes of misinterpretations (of the Jencks decision) is the

fact that there appears to be great uncertainty as to when the statements of witnesses are to be produced . . . . The committee is of the opinion, and the bill so provides, that statements of witnesses should not be subject to production until the Government witness, who is the putative source of such statements, has himself testified. In other words, it is the specific intent of the bill to provide for the production of statements, reports, transcriptions or recordings, as described in the bill, after the Government witness has testified against the defendant on direct examination in open court, and *to prevent disclosure before such witness has testified.*

S. Rep. No. 981, 85<sup>th</sup> Cong., 1<sup>st</sup> Sess. 4 (1957), reprinted in [1957] U.S. Code Cong. & Admin. News 1863, quoted in *United States v. Algie*, 667 F.2d 569, 571 (6<sup>th</sup> Cir. 1982).

The plain wording of the statute precludes any defense right to statements of witnesses until the witness has completed his direct testimony at the trial of the case. Therefore, there is no pre-trial discovery right concerning the statements of government witnesses or prospective government witnesses. This has long been the rule in the Fifth Circuit. *See, e.g., United States v. Campagnuolo*, 592 F.2d 852, 858 (5<sup>th</sup> Cir. 1979) (holding that pretrial discovery order was invalid to extent it allowed discovery beyond the limitations of the Jencks Act); *United States v. Ramirez*, 506 F.2d 742 (5<sup>th</sup> Cir. 1975). Moreover, the Supreme Court held that “statements of a government witness made to an agent of the government which cannot be produced under the terms of Title 18 U.S.C., Section 3500, cannot be provided at all.” *Palermo v. United States*, 360 U.S. 343, 351 (1959).

Although in some cases the government voluntarily discloses Jencks Act material to the defendant in advance of trial, the government may not be required to do so. *United States v. White*, 596 F.2d 696, 701 (5<sup>th</sup> Cir. 1979); *United States v. White*, 750 F.2d 726, 728 (8<sup>th</sup> Cir. 1984).

Accordingly, because neither the rules, the statutes, nor the intent of Congress provide support for the defendant's request, the request should be denied.

**G. Federal Rules of Evidence 609 and 404(b)**

At present, the government is unaware that any evidence or information covered by Rules 609 and 404(b) exists; however, investigations are ongoing, and should such evidence or information become available, the government will notify the defendants immediately.

This the 8<sup>th</sup> day of January 2008.

Respectfully submitted,

JIM M. GREENLEE  
United States Attorney

By: \s\ David A. Sanders  
DAVID A. SANDERS  
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**CERTIFICATE OF SERVICE**

I, DAVID A. SANDERS, Assistant United States Attorney, hereby certify that I electronically filed the foregoing GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION FOR DISCOVERY 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 8th day of January, 2008.

/s/ David A. Sanders  
DAVID A. SANDERS  
Assistant United States Attorney