

**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' MOTION FOR DISCOVERY
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

I. INTRODUCTION

COME NOW, defendants Richard F. Scruggs, David Zachary Scruggs, Sidney A. Backstrom, and Steven A. Patterson (collectively, "defendants") to move for discovery pursuant to Federal Rules of Criminal Procedure 16 and 26.2, Federal Rules of Evidence 404(b) and 609, *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jencks Act, 18 U.S.C. 3500.

II. REQUEST FOR HEARING

The trial date in this matter is currently set for February 25, 2008 and the deadline for all pretrial motions is January 21, 2008. Accordingly, defendants respectfully request that the court set a hearing on this matter as soon as possible so that defendants will have a sufficient and fair amount of time to review the requested discovery in advance of these deadlines.

III. BACKGROUND

On November 28, 2007, the government filed a six-count indictment against defendants. The indictment charges 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 and entered pleas of not guilty to each count of the indictment. Defendants have all been released on bond.

On December 5, 2007, the Court issued a scheduling order setting this case for trial on January 22, 2008. The scheduling order also required that discovery be completed by December 27, 2007 and that pretrial motions and plea agreements be submitted to the Court by January 7, 2008.

On December 7, 2007, the government provided defendants with initial discovery in this matter. The government provided defendants with a copy of a single consensual recording made in the course of its investigation. The approximately 90-minute recording contains statements by four defendants. The government has agreed to make the original of this recording available for inspection by defendants and their experts.

On December 12, 2007, the government provided defendants with additional discovery. Pursuant to this Court's order of December 10, 2007, the government provided defendants with two applications and accompanying affidavits for a search warrant for the Scruggs Law Firm's offices and three sets of applications for authority to intercept wire communications under Title III. The government provided two of the three affidavits accompanying the Title III applications. The government also provided defendants with one cassette containing a consensual recording and two compact discs containing intercepted telephone communications.

On December 17, 2007, the government provided defendants with compact discs containing an audio recording of a September 27, 2007 meeting between Timothy R. Balducci and Judge Henry Lackey, video recordings of October 18, 2007 and November 1, 2007 meetings between Balducci and Judge Lackey, and photographic and documentary evidence.

On December 20, 2007, the government responded to defendants' motion for continuance. The government represented that it had "voluntarily made discovery of most of the discoverable materials in this case at this time" and suggested that only discovery left to be produced was "relatively minor." Doc. 40 at 2, 2-3. On December 21, 2007, Judge Biggers granted in part defendants' motion for continuance based on the need for additional time to

review discovery and prepare pre-trial motions. *See id.* Judge Biggers moved the deadline for pre-trial motions to January 21, 2008 and moved the trial date to February 25, 2008. Doc. 42 at 1-2. However, Judge Biggers relied on the government's representations regarding the state of its production of discovery to conclude that there was "no persuasive grounds for a trial continuance based on discovery issues...." Doc. 42 at 1.

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, telephone records, a compact disc with pen register and trap and trace data, and thirteen compact discs containing photographic evidence and audio and video recordings of meetings between Balducci and Judge Lackey.

While the government has undertaken efforts to produce certain discoverable items in a timely fashion, many significant discoverable items have yet to be produced. For instance, the government has not produced the affidavit of Special Agent William P. Delaney in support of the September 25, 2007 application for the wire tap on Timothy Balducci's telephone; the government has not provided defendants with any material seized during the November 27, 2007 search of the offices of The Scruggs Law Firm; and the government has not provided defendants any material seized during the December 10, 2007 search of the offices of one of the defendants' counsel in this matter.

Furthermore, the government has not produced transcripts of any of the recordings it has produced. So far, the government has produced approximately 150 separate recordings, many of which are hard to understand, some of which are more than 15 minutes in duration and one of which is more than an hour-and-a-half long.

IV. ARGUMENT

The government is still holding evidence material to defendants' defense and their preparation of pre-trial motions. With trial now less than two months away, and the deadline for pretrial motions currently set for January 21, 2008, each day of delay in producing this evidence

prejudices defendants. Accordingly, the Court should order the government to produce the following discovery immediately.

A. Statements of Defendants

Defendants request that the Court 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. *See* Fed. R. Crim. P. 16(a)(1)(B).

Defendants further request all records, reports, memoranda, notes or other written records containing the substance of any oral statement made by any defendant to the government, to government agents or authorities, or to persons such as Timothy R. Balducci or the Honorable Henry L. Lackey who assisted the government in conducting an investigation in contemplation of or in furtherance of cooperating with or providing information to the government. *See* Fed. R. Crim. P. 16(a)(1)(A); 16(a)(1)(B)(iii). This request includes internal reports and memoranda or notes or other writings prepared by government agents, attorneys, or investigators or persons working for or on behalf of the government, to the extent that any defendant's statements are related or described. Where any statement of any defendant is contained in more than one writing, defendants request each such writing.

In addition to requesting any written records of such oral statements, defendants hereby request that the government be ordered to disclose the substance of any oral statements made by any defendant to the government, to government agents or authorities, or to persons such as Balducci or the Judge Lackey who assisted the government in conducting its investigation. *See* Fed. R. Crim. P. 16(a)(1)(A).

Defendants' request for statements of defendants includes not only statements of the defendants themselves but also statements of any alleged agent, co-conspirator, or co-participant of the defendants involved in the alleged conduct constituting the offense so situated as to have been able legally to bind the defendant by his statement, activity, or testimony. Accordingly, defendants request all written, recorded, or oral statements of any alleged agent, co-conspirator, or co-participant, including all records, reports, memoranda, notes or other written records

containing the substance of any oral statement by any alleged agent, co-conspirator, or co-participant of the defendants.

Defendants' request not only includes statements which the government intends to introduce at trial, but also statements which the government may use for impeachment or other purposes.

Defendants further request all recorded testimony of any defendant before any grand jury. *See* Fed. R. Crim. P. 16(a)(1)(B)(iii).

Without limiting the above requests, defendants specifically request the following discovery:

1. Any written, recorded, or oral statements made on or about November 27, 2007 by defendant Steven A. Patterson.
2. Any recording of the November 27, 2007 telephone conversation between Balducci and Patterson that occurred while Patterson was in custody, or any written record containing the substance of this conversation.
3. Any written, recorded, or oral statements made on or about November 27, 2007 or November 28, 2007 by defendant Sidney A. Backstrom.
4. Any written, recorded, or oral statements made at any time by Balducci, or any written record containing the substance of such statements.
5. Any grand jury testimony of any defendant, including Balducci.

B. Defendants' Prior Record

Defendants request each defendant's prior criminal record, if any, including any records maintained by the Federal Bureau of Investigation, Interpol, or by any domestic or foreign law enforcement authority. *See* Fed. R. Crim. P. 16(a)(1)(D).

C. Documents and Objects

Defendants request 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). Defendants further request that the government 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). Defendants further request the government specifically designate all evidence intended for use by the government in its case in chief. *See* Fed. R. Crim. P. 12(b)(4).

Without limiting the above requests, defendants specifically request the following discovery:

1. A copy of the September 25, 2007 affidavit of Special Agent William P. Delaney of the FBI, filed in support of the government's application for a Title III wiretap of Timothy R. Balducci's telephone. On December 11, 2007, the Court ordered the unsealing of "applications and affidavits for a search warrant and orders authorizing the interception of wire communications ... for the purpose of allowing the United States to comply with its discovery obligations under Rule 16 ... and for use at trial." Doc. 35 at 1. On December 12, 2007, the government produced all of the affidavits in support of its search warrant and wiretap applications *except* the September 25, 2007 affidavit of Special Agent Delaney.
2. Signed copies of the October 24, 2007 application for an extension of the wiretap on Balducci's telephone and the affidavit of Special Agent Delaney in support thereof.
3. Copies of the application and affidavit for the Search Warrant of the Langston Law Firm, P.A., executed on December 10, 2007.
4. Any and all ten-day reports provided by the government to the Court regarding any wire interceptions authorized in connection with the investigation of this case.
5. All audio or video recordings of conversations or meetings between Balducci and Judge Lackey not previously produced, and, to the extent such conversations or meetings occurred but were not recorded, all written records concerning the substance of such conversations or meetings.
6. All audio or video recordings of conversations or meetings between and among any of the defendants in this case not previously produced, and, to the extent such conversations or meetings occurred but were not recorded, all written records concerning the substance of such conversations or meetings.
7. Replacement copies of audio recordings that are not decipherable, including the November 1, 2007 consensual recording made by Balducci and recordings made from Patterson's telephone on October 18, 2007 at approximately 4:21 p.m., October 19, 2007 at approximately 10:35 a.m., and October 19, 2007 at approximately 10:39 a.m.
8. Replacement copies of audio recordings that are otherwise not useable, including replacement copies of the recordings of telephone conversations between Balducci and Judge Lackey on October 4, 2007 at approximately 3:49 p.m., October 16, 2007 at approximately 7:26 p.m.; October 18, 2007 at approximately

11:16 a.m.; and October 18, 2007 at approximately 1:18 p.m. The government has not provided recordings that capture both sides of these conversations; rather, the government has produced separate recordings of the two sides of these conversations.

9. Complete copies of audio recordings that either start in the middle of a conversation, appear to have material missing in the middle, or end abruptly, including recordings made from Balducci's telephone on September 26, 2007, at approximately 10:11 p.m. (ends abruptly), September 27, 2007, at approximately 8:36 a.m. (breaks up at the end), September 28, 2007, at approximately 5:03 p.m. (ends abruptly), September 29, 2007, at approximately 4:56 p.m. (starts in the middle of a conversation), October 2, 2007, at 5:31 p.m. (ends abruptly), and October 4, 2007 at approximately 2:50 p.m. (material missing in the middle), and recordings made from Patterson's telephone on November 3, 2007 at approximately 11:10 a.m. (ends abruptly) and November 4, 2007 at approximately 8:40 p.m. (ends abruptly).
10. Replacement copies of video recordings that are not usable, including video of the September 21, 2007 meeting between Balducci and Judge Lackey (video not viewable), and the May 9, 2007 meeting between Balducci and Judge Lackey (video and audio not properly synchronized).
11. Transcripts of all audio recordings. To date, no transcripts of any recording have been provided to any defendant.
12. Access to the originals of all recordings made in the course of the government's investigation of this matter to permit defendants' experts to analyze such recordings.¹
13. All books, papers, documents, data (including electronic data), photographs, and tangible objects seized from the Scruggs Law Firm on November 27, 2007. Defendants further request that, before the "taint team" that is reviewing the material collected during the November 27th search discloses any such material to any government attorney or agent working on this investigation, defense counsel be permitted to review the material proposed to be disclosed and be given an opportunity to object.
14. All phone records obtained by the government in connection with this investigation.

Defendants further request 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,

¹ In connection with numbered requests 5-12 in this section, defendants specifically reserve the right to seek additional discovery once the government has provided decipherable copies of all recordings made in connection with this investigation, transcripts of these recordings, and access for defendants' experts to the originals of these recordings.

Timothy R. Balducci, Attorney at Law or Patterson & Balducci PLLC. Without limitation, 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.

D. Reports of Examinations and Tests

Defendants request all reports or results of any physical or mental examination or any scientific tests or experiments conducted by the government or its agents, including but not limited to negative test results. *See* Fed. R. Crim. P. 16(a)(1)(F). Without limitation, defendants specifically request the results of any polygraph examination that is or has been administered to any defendant or government witness, including the polygraph examination provided for in the plea agreement of Balducci. Doc. 19, ¶ 3.

E. Brady and Giglio Material

Defendants request the Court order the government to provide all documents, books, papers, photographs, tests or experiments, objects, statements of witnesses, and other evidence and information which tends to exculpate defendants, or which may be favorable or useful to the defense as to either guilt or punishment, which tends 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). This request applies to evidence which is within the possession, custody, or control of the government, or which is or could by the exercise of due diligence become known to the government. *See Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady*, 373 U.S. at 83; *A.B.A. Standards for Criminal Justice*, Prosecution and Defense Function 3-3.11(a) (3d ed. 1993).

Defendants further request any statements by witnesses, documents, or information reflecting favorably on defendants' characters or reputations for truthfulness.

Defendants further request the statements of all 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. This request

includes, without limit, statements that are exculpatory and helpful to defendants; 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; and 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.

Defendants further request 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. The request includes but is not limited to any help or promise to help the witness in his profession or business or any promise not to jeopardize his profession or business. This request also includes all help or promises of help (including but not limited to money and leniency) given to such person for his work, information, or testimony in this case or any other case. This request includes all correspondence, email, or notes of conversations between attorneys or agents of any branch of the government, on the one hand, and any potential government witness or cooperating person or entity or counsel therefore, on the other hand, regardless of whether such potential witness or cooperating person or entity will in fact testify for the government. This request also include all proffers of any witness and all information that reveals the process by which any witness and the government reached a leniency agreement.

Defendants further request 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. *See Giglio*, 405 U.S. at 150; *United States v. Sutton*, 542 F.2d 1239, 1242 (4th Cir. 1976); *United States v. Gerrard*, 491 F.2d 1300, 1304 (9th Cir. 1974).

Defendants further request any and all information relevant to the credibility of government witnesses and which may be used as the basis for impeachment of such witnesses.

Such information includes but is not limited to (1) evidence of prior convictions; (2) evidence of past or ongoing criminal conduct which has not been prosecuted but of which the government is, or should with reasonable diligence, be aware; (3) evidence of any professional misconduct or disciplinary infractions; (4) any and all benefits provided by the government to the witness or members of his or her family, including any benefits conferred pursuant to the Witness Security Reform Act of 1984; (5) instances, including amounts and dates, of payments made to, or on behalf of, the witness or members of his or her family for any purpose, including rewards, subsistence, salary, commissions, housing, medical and dental treatment, as well as treatment for counseling and substance abuse; (6) any information suggesting that the witness is mentally ill or has in the past suffered from or been treated for mental illness; (7) instances of intervention by the United States, or other law enforcement agencies, on the witness' behalf with local, state, federal or foreign police, prosecution, regulatory, correctional or paroling authorities; (8) any cooperation agreements; and (9) instances where the witness has made prior statements – whether currently reduced to writing or not – which are inconsistent with later statements or the witness's anticipated trial testimony. Defendants further request that the government be ordered to preserve all rough interview notes of potential witnesses, including any such notes prepared by state or federal agents, attorneys or regulatory authorities, for potential disclosure under *Brady* or the Jencks Act, 18 U.S.C. § 3500. See *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio*, 405 U.S. at 150.

Without limitation, defendants specifically request the following discovery:

1. All written, oral, or recorded statements made by Balducci, including any grand jury testimony and including all records, reports, memoranda, notes or other written records containing the substance of any statements made by Balducci. Such statements will likely be material to the defense and relevant to impeachment of Balducci, who is likely to be a significant government witness. Defendants' request includes any written, oral, or recorded statements made by Balducci during or regarding any visits to the offices of the Scruggs Law Firm, including all written regarding Balducci's visits to the offices of the Scruggs Law Firm.
2. All written, oral, or recorded statements made by Judge Lackey, including any grand jury testimony and including all records, reports, memoranda, notes or other written records containing the substance of any statements made by Judge Lackey. Such statements will likely be material to the defense and relevant to

impeachment of Judge Lackey, who is likely to be a significant government witness.

3. All audio or video recordings of conversations or meetings between Balducci and Judge Lackey not previously produced, and, to the extent such conversations or meetings occurred but were not recorded, all written records concerning the substance of such conversations or meetings.
4. All audio or video recordings of conversations or meetings between and among any of the defendants in this case not previously produced, and, to the extent such conversations or meetings occurred but were not recorded, all written records concerning the substance of such conversations or meetings.
5. All written, oral, or recorded statements made by any third party, including any grand jury testimony and including all records, reports, memoranda, notes or other written records containing the substance of any oral statement made by a third party.
6. All telephone conversations recorded during the course of the Balducci and Patterson wire taps, including those that were not deemed "pertinent" by the government. In the alternative, the government should be ordered to provide defendants with 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.

F. Jencks Act

Defendants request that the government be ordered to produce forthwith all witness statements, documents, and information required to be produced under the Jencks Act, 18 U.S.C. § 3500, including but not limited to handwritten and other informal or rough notes. Defendants request that the government be ordered to produce the requested information required by the Jencks Act one week before commencement of the trial in this matter. Early disclosure of Jencks Act materials is necessary to permit defendants to prepare effectively for trial and will minimize the likelihood that any defendant will need to move to continue the deadlines set out in the Court's December 21, 2007 order.

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

Defendants request any evidence or information regarding any "prior similar act" or any other alleged uncharged misconduct evidence, covered by Rules 609 or 404(b) of the Federal Rules of Evidence, that the government may seek to introduce at trial and the theory of its admissibility. In addition, defendants request any allegations of misconduct that the government may seek to use for impeachment or other purposes at trial.

CONCLUSION

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

Respectfully submitted, this the 28th day of December, 2007.

Dated: December 28, 2007

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CERTIFICATE OF SERVICE

I, Brook Dooley, do hereby certify that I have electronically filed the foregoing **Defendants' Motion for Discovery and Memorandum of Points and Authorities in Support Thereof** 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, Joseph C. Langston, William M. Quin, II, Anthony L. Farese, Frank W. Trapp, J. Rhea Tannehill, Jr., Timothy R. Balducci, and Hiram Eastland, Jr.

This, the 28th day of December, 2007.

/s/ Brook Dooley
Brook Dooley