

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CR. NO. 2:10cr186-MHT
)	
RONALD E. GILLEY,)	
)	
Defendant.)	

**DEFENDANT RONALD GILLEY'S SUBMISSION IN FURTHER SUPPORT OF
HIS MOTION FOR PARTIAL RECONSIDERATION OF DETENTION ORDER**

Defendant Ronald Gilley submits the following as separate and independent grounds supporting his Motion for Partial Consideration of Detention Order (Doc. 815). This supplemental submission arises from the Government's extensive pattern of misconduct relating to the pending wiretap suppression motions that has caused Mr. Gilley and his counsel to lose a month of invaluable trial preparation time. Given the already tenuous circumstances surrounding Mr. Gilley's ability to adequately prepare for trial while incarcerated, the Government's misconduct exacerbated the situation to such an extent that Mr. Gilley has been denied his Constitutional right to have an opportunity to adequately prepare for trial. The only manner that may remedy such violation and not reward the Government for its misconduct is to immediately release Mr. Gilley under the proposed revised conditions.

INTRODUCTION

Following Mr. Gilley's detention on February 7, 2011, he has consistently expressed grave concerns about his ability to adequately prepare for trial while

incarcerated. Your Honor recognized such concerns and directed the Government and the defense to file a joint statement regarding Mr. Gilley's conditions "to assure that Defendant Gilley is able to prepare adequately for trial while incarcerated." (Doc. 644). That Order came on February 22, 2011, during the same period of time the Court was considering motions to continue the trial from its original April 4, 2011 trial setting. The issue of whether the Court would have an adequate amount of time to consider the suppression motions was a principal factor considered during the hearing on the second Motion to Continue that was ultimately granted. (Exhibit A, Motion to Continue Tr. pp. 7-23).¹

By March 7, 2011, the date the Court heard oral argument on Mr. Gilley's appeal of the Detention Order, the trial had been continued to June 6, 2011. While appreciating Mr. Gilley's contention that his detention had impaired his and his counsel's ability to prepare for trial, the Court seemed satisfied *at the time* Mr. Gilley could overcome the stated obstacles and adequately prepare for trial. (Doc. 763, March 10, 2011 Order, pp. 24-25). Since that time, however, the circumstances have greatly changed. Namely, the Government has engaged in a series of egregious acts of misconduct arising from both their failure to obey Judge Capel's clear and concise orders to produce documents relevant to the Motions to Suppress and their inability to recognize their basic duties pursuant to *Brady v. Maryland* and The Jencks Act. Such conduct has not only resulted in a series of post-hearing document productions by the Government, but also five additional hearings on March 18, March 22, March 23, March 24 and April 1. Mr.

¹ Mr. Gilley filed two motions to continue (before he was detained) citing the need for additional time to review the massive amount of discovery including over 3000 wiretap conversations and hours of consensual recordings. Even after Defendant was detained, Mr. Gilley continued to seek a delay in his trial in order to adequately prepare for it.

Gilley's counsel has had to prepare for those hearings, including extensive preparation for the March 24 hearing involving the reexamination of Agent Carr. Accordingly, through no fault of their own, Mr. Gilley and his attorneys have lost almost a full month of invaluable trial preparation time while they have been forced to continuously focus their attention on the litany of unexpected and unanticipated issues resulting from the Government's misconduct.

ARGUMENT

Judge Capel originally scheduled three days - February 28-March 2 - for hearings on the Defendants' Motions to Suppress. At the time, it was assumed such motions would be decided and any objections filed in time for counsel to focus on trial preparation. However, due to the misconduct of the Government, the defense has spent the greater part of March continuously focusing on the suppression motions (which have not been resolved, leaving any objections yet to be filed) and consequently lost significant trial preparation time in the process. The timeline regarding the Motions to Suppress consists of the following material events:

<u>2011</u>	<u>Events</u>
February 11	Defendants' Motion to Suppress
February 15	Hearing before Your Honor wherein trial is continued to June 6
February 17	Order setting hearing on Motions to Suppress
February 22	Government's Response to Defendants' Motions to Suppress
February 23	Conference Call with Court
February 28- March 2	Suppression Hearing
March 1	Hearing before Your Honor regarding transcripts and audio

March 7 Parties file post-hearing briefs; Government attempts to introduce new evidence, including testimony in the form of Jessica Foran Affidavit

March 8 Defendant McGregor moves to strike new evidence including Foran affidavit

March 9 Court grants motion to strike

March 10 Approximately 6:03 p.m., Government emails first additional document (Administrative Agent Carr email)

March 14 Defendant McGregor files Motion for Appropriate Relief Regarding Testimony of Agent Carr at Suppression Hearing seeking remedies for Government's failure to produce Carr e-mail in a timely manner

March 15 Defendant Gilley files Motion for Appropriate Relief Regarding Testimony of Agent Carr at Suppression Hearing seeking remedies for Government's failure to produce Carr e-mail in a timely manner

March 15 Court Order requiring Government response to motion and setting hearing for March 18

March 17 Government responds to Motion to Strike (after 5:00 pm), and in later communications produces three additional emails

March 18 Hearing: Government instructed to produce other matters by end of the day; further suppression hearing scheduled for March 22 (Transcript attached as Exhibit B)

Approximately 10:58 p.m. (Friday night), two Carr text messages provided

March 22 Appearance before Court; hearing rescheduled for March 24; and Government ordered to produce further matters (Transcript attached as Exhibit C)

Some documents provided by Government

March 23 Carr 302 provided to Defendants by Government at approximately 11:27 a.m.

Further hearing before Court where Government was ordered to produce further matters to Defendants (Transcript attaches as Exhibit D)

On or before 3:00 p.m., Government produces additional material

March 29	Court Order setting forth Government had provided documents <i>in camera</i> ; that some documents would be provided following day; and setting hearing
March 30	Government provides further documents to Defendants
April 1	Further hearing (approximately sixty days from beginning of trial on June 6, 2011)

Throughout the process outlined above, Judge Capel has expressed his frustration with the Government including describing its conduct as a “repeat” and “ongoing” problem,² commenting that “this is not the way a prosecution should be conducted,³ remarking the Government, not the Court was impermissibly “making determination of what’s relevant and what’s not,”⁴ stating the conduct constituted “going over the line,”⁵ and eventually threatening “there will be sanctions.”⁶ Despite Judge Capel’s warnings, the Government disobeyed his directives. For example, the materials produced to Mr. Gilley on March 30 were plainly encompassed with the March 22 Order to produce additional materials. They were to be produced in time for the March 24 hearing. But the Government did not produce them for that hearing. The face of the materials demonstrate Agent Carr and the Government’s attorney knew about these materials, but again, decided to make its own determination of relevancy. On April 1, 2011, Judge Capel again voiced his frustration with the Government’s conduct finding, among other things, that each of the attorneys of record for the United States shall, on or before April 4, 2011, by hand delivered notice, certify to the court that they have reviewed all physical

² Exhibit B, March 18, 2011 Hearing p. 5; Exhibit C, March 22, 2011 Hearing p. 5

³ Exhibit B, March 18, 2011 Hearing p. 5

⁴ Exhibit C, March 22, 2011 Hearing p. 5

⁵ Exhibit C, March 22, 2011 Hearing p. 6

⁶ Exhibit C, March 22, 2011 Hearing p. 7. Your Honor has also expressed frustration with the Government’s lack of preparation. (Doc. 763, March 10, 2011 Order, p. 20).

and electronic documents and other evidence in their possession and have complied with their requirements as outlined in the order.⁷ (Doc. 851, April 1, 2011 Order).

It has been incredibly difficult for Mr. Gilley and his attorneys to prepare for trial since his incarceration on February 7, 2011. The defense has lost nearly a full month of what was already a frustrating and cumbersome preparation process, making it impossible to adequately prepare for a trial set to commence in sixty days. The detrimental impact the Government's misconduct has had on Mr. Gilley's opportunity to prepare for trial is compounded by the fact a significant amount of time in March was originally set aside to comply with the deadlines for designating tapes and transcripts to be used at trial.

Similar to the scheduling associated with the Motions to Suppress, the transcript and audio deadlines were established so issues regarding the accuracy and audibility would be resolved in time for the parties to focus on the upcoming trial. While straining the resources of counsel, the tape and transcript designations, in conjunction with counsel's obligations regarding the detention issue, would not have interfered with trial preparation in a way that strategic planning could not have overcome. However, this drastically changed to Mr. Gilley's severe detriment when the Government began its continuing pattern and practice of misconduct relating to the Motions to Suppress. Consequently, counsel spent the month of March continuously reviewing, preparing and attending court hearings on the suppression motions, while allocating what little additional time it had to reviewing transcripts for accuracy and recordings for audibility. The result, of course, was that Mr. Gilley lost the opportunity to adequately prepare for

⁷ Mr. Gilley's counsel will provide the Court with a copy of the transcript from the April 1, 2011 hearing as soon as it receives it from the Court Reporter.

the substantive issues facing him at trial that he simply could not afford to lose under the existing difficult circumstances of his incarceration.⁸

The Defendant and his attorneys are now faced with the impossible task of finding a way to make up for a month of lost time. This would be an exceedingly difficult task under normal circumstances, given the nature and extent of upcoming trial-related deadlines and the anticipated filing by the aggrieved party seeking review of Judge Capel's recommendation on the Motions to Suppress. However, doing so while incarcerated will be impossible. In order for Mr. Gilley to adequately prepare for trial and insure he is afforded all rights under the Constitution, he will need increased and unfettered access to his defense team and the voluminous paper discovery, consensual recordings and wiretap recordings (assuming they are not suppressed) produced in this case.

Despite the accommodations courteously provided by the Montgomery City Jail, Mr. Gilley must have more suitable conditions in which to concentrate and focus his increased efforts in a limited period of time. Greater access to his defense team means more than the ability to make a collect telephone call. Mr. Gilley must have the unrestricted ability to call anyone on his defense team and for his defense team to have the unrestricted ability to do the same. It also means Mr. Gilley having an opportunity to meet with his attorneys in something other than a tiny room where conversations must be

⁸ The Government's conduct has also harmed the Court, not only by requiring it to devote enormous resources to the ongoing misconduct, but also by substantially delaying Judge Capel's ability to resolve the suppression motions. Judge Capel should have had the time from March 7, 2011 onward to write an opinion and order. That could have been completed by now, but for the Government's misconduct. And even after Judge Capel issues his decision, there will likely be the step of an appeal, which could possibly take weeks to be ready to be under submission, much less the time Your Honor needs for consideration. The Government's misconduct has caused precisely the problem Your Honor was trying to avoid when it continued the trial: the problem that the process of ruling on the suppression motions will be very close to the trial date.

made in a hushed tone so the people in the adjoining room cannot hear them.⁹ The lost preparation time solely created by the Government's misconduct also makes it imperative that Mr. Gilley has the unrestricted ability to communicate with his defense team and review evidence using electronic means via the computer, something he is not allowed to do under his current conditions.

Similarly, greater access to the discovery in this case means not having to maintain reams of unstapled documents in a small jail cell, but rather in an organized fashion at his home and/or electronically on his computer so he can review them in a meaningful way regardless if his attorneys are present. Likewise, Mr. Gilley must be provided with the opportunity to listen to the hundreds of hours of recordings on something other than a portable CD player that plays a CD containing a maximum of eighty minutes of recording time. Not only does the current situation mean that Mr. Gilley must somehow organize over 100 CDs in his cell, but (unlike playing a master DVD disc on a computer) it is extremely difficult, if not impossible, for him to timely and accurately identify the necessary call detail (session number, call date, duration, associated numbers, etc), particularly when trying to listen to a series of related calls.

Likewise, having to use a portable CD player and CDs containing a small percentage of the recordings severely hinders Mr. Gilley and his attorneys from jointly reviewing the calls in a timely and productive manner. For example, if counsel wants to discuss a particular call with Mr. Gilley (or vice versa), they do not have the ability to simply identify for him over the telephone or by email the call session number so he can easily find the call using his computer and the disc created by the Government containing

⁹ Even if Mr. Gilley is restricted to home confinement, he will at least have the unrestricted ability to meet with his defense team, something he does not have in his current conditions.

all the calls for a particular line (in contrast to the single disk containing a mere eighty minutes of calls he is currently forced to use). Instead, if the attorneys and Mr. Gilley need to listen to and substantively discuss a recording, it requires an in-person meeting in the small conference room at the jail (in which you can hear the communications being made in the adjoining room) where the parties must first try to compare notes regarding the substance of the call so, eventually, Mr. Gilley's counsel can (hopefully) find the single call on the computer for review. This procedure is difficult enough with a single call, but can be unbelievably frustrating, if not impossible, when trying to review multiple calls, particularly a series of related phone calls made over different phone lines. The only way for Mr. Gilley and his attorneys to meaningfully and resourcefully review the calls in preparation for a trial sixty days away is for them to have equal access to computers or similar devices (none of which are allowed in the Montgomery City Jail) that provide a streamlined method for identifying and listening to the recordings.

The ability to adequately consider and concentrate on the massive amount of discovery and the defenses to this case over the next sixty days will also require living and working conditions that, among other things, allow Mr. Gilley to sleep at normal and regular hours, to concentrate without interruptions caused by other inmates in his immediate vicinity, to receive adequate medications and receive them in a timely fashion, to manage his personal hygiene and to receive the appropriate nutrition given the circumstances.¹⁰ Neither the Montgomery City Jail, nor any other city or county facility

¹⁰ This argument is not to be construed as a condemnation of the Montgomery City Jail. The Jail and its staff have admittedly provided Mr. Gilley with unique accommodations that have allowed him an increased opportunity to prepare for trial. However, the situation has changed as a result of the need for a significant increase in preparation time solely caused by the Government's misconduct. Given such lost time, Mr. Gilley must be provided with accommodations, electronic discovery and access to his attorneys that no jail can provide.

in the Middle District, can accommodate what Mr. Gilley needs over the next sixty days in order to fully and adequately prepare for trial.

The fact the Government's misconduct caused Mr. Gilley to lose invaluable trial preparation time and now makes it impossible for him to adequately prepare for trial should not be construed as a waiver of any previously asserted legal and factual arguments. Mr. Gilley steadfastly maintains he rebutted the presumption of detention created by the finding of probable cause, and the Government has failed to present clear and convincing evidence he would pose a non-physical danger to the community if released pending trial. That said, however, given the events of the last month arising from the Motions to Suppress, Mr. Gilley's Constitutional rights to a fair trial and effective assistance of counsel have been greatly infringed upon because of the Government's misconduct. The only opportunity to potentially remedy such infringement is Mr. Gilley's immediate release from jail.

CONCLUSION

The Government should not be allowed to obtain any advantage or benefit resulting from its egregious misconduct. This will be the exact outcome unless Mr. Gilley is released from jail (under his proposed enhanced conditions) and provided an adequate opportunity to prepare for trial. In its March 10, 2011 Order, this Court stated it "appreciates Gilley's contention that his detention has impaired his and his counsel's ability to prepare for trial." (Document 763, p. 24). Such appreciation can only be magnified given the events of the last month. The circumstance Mr. Gilley now faces -- the limited period of time he has to prepare for trial as a result of the Government's misconduct -- is significantly different than what he was facing on March 10. Counsel

cannot state the critical nature of the current state of affairs. It must have the opportunity to have complete and unrestricted access to Mr. Gilley. Likewise, Mr. Gilley must have complete and unrestricted access to the discovery, particularly the electronic materials, produced in this case. Anything less than that will constitute a deprivation of his Constitutional rights that cannot be remedied in any prison facility located in the Middle District of Alabama.

Respectfully submitted,

/s/ G. Douglas Jones

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 4th day of April, 2011, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

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