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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CASE NO. 2:10-cr-186-MHT**
	)	
THOMAS E. COKER,	)	
	)	
Defendant.	)	

MOTION OF THOMAS E. COKER TO SUPPRESS ALL EVIDENCE CONSISTING OF, OR DERIVED FROM, INTERCEPTED COMMUNICATIONS (INCORPORATING THE BRIEFS AND EXHIBITS OF MCGREGOR AND GILLEY)

Comes now THOMAS E. COKER, and respectfully moves, pursuant to 18 U.S.C. § 2518(10) and the U.S. Constitution (including the First, Fourth Fifth and Sixth Amendments), to suppress the contents of all intercepted communications, and all evidence derived therefrom. Coker further respectfully moves for an evidentiary hearing on this motion (including the opportunity to submit any such testimony as may be needed, pursuant to subpoena or otherwise), if the Court does not grant the motion without necessity of a hearing. The Government should not be permitted to introduce wiretap recordings, transcripts, or evidence otherwise derived from the wiretaps in this matter.

The bases for this motion are discussed below (and in the McGregor and Gilley briefs and supporting exhibits which are adopted herein).[1] Coker further notes that this motion is made without waiver of the possibility that he may seek to introduce certain recordings and/or transcripts as part of his defense, even though the interception of those communications was inappropriate.

Coker's Standing and Scope of this Motion

According to the phone logs produced by the Government, wiretaps were placed on the phones of Milton McGregor, Ronnie Gilley and Jarrod Massey. While the phones of Tom Coker were not targets of these wiretap orders, over 80 captured communications involved calls to/from Coker's office or cell phone number. Therefore, Coker is an "aggrieved party" under the federal wiretap laws. Under Title III, an aggrieved person is defined as "a person who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed". 18 USC 2510(11). Further "any aggrieved person … may move to suppress the contents of any wire or oral communication intercepted ... or evidence derived therefrom, on the grounds that:

i) the communication was unlawfully intercepted;

ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

[1] At the pre-trial hearing held on February 8th before the Honorable Judge Capel, counsel was given permission to adopt the briefs and exhibits of co-defendants, given their voluminous nature. Coker is required to file his own motion.

iii) the interception was not made in conformity with the order of authorization or approval."

18 U.S.C. 2518(10). It is on this basis that Coker brings this motion.

Coker moves to suppress his intercepted communications from all wiretaps which have been disclosed in this case including those on the phones of: a) Milton McGregor (two separate numbers); b) Ronnie Gilley; and 3) Jarrod Massey. He also seeks suppression of evidence derived from interception of these. The interception of the communications of all three phone were part of intertwined and related applications and authorizations. In summary, Coker seeks suppression of all communications to which he was a party because the Government's operation of the wiretap was unlawful and inappropriate. Most prominently the Government utterly failed to comply with the statutory duty to "minimize" (18 U.S.C. § 2518(5)) the interception of calls that were not the proper subject of the wiretap.

1. The Government's Obligation to Minimize.

A). Section 2518(4) mandates that "[e]ach order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify … (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates."

B). Section 2518(5) further mandates, "Every order and extension thereof shall contain a provision that the authorization to intercept … shall be conducted in such a way

as to minimize the interception of communications not otherwise subject to interception under this chapter."

C). The dividing line is often discussed in terms of two words that do not appear in Title III: "pertinent" and "nonpertinent." Those nonstatutory words are a shorthand way of referring to the statute's provisions about the narrow lawful target of a wiretap. *United States v. Simels*, 2009 U.S. Dist. LEXIS 56732, *12-13 (S.D.N.Y. 2009).

D). When the Government listens to, and records, conversations that are not actually evidence of the crimes that it is supposedly investigating, the Government thereby tramples the privacy interests that the statute was designed in large part to protect. *Simels*, at *32.

E). "The government has the burden to show proper minimization." *United States v. Rivera*, 527 F.3d 891, 904 (9th Cir. 2007). A systematic violation of the duty to minimize is an appropriate basis for suppression of *all* intercepted communications (not just the ones that are plainly innocent). *See*, *e.g.*, *United States v. Hyde*, 574 F.2d 856, 869 (5th Cir. 1978) ("If the minimization requirement is blatantly disregarded, the information obtained through the wiretap may be suppressed.").

F). The scope of the interception was supposed to be limited to intercepting conversations demonstrating evidence of certain narrow specified types of criminal activity – essentially, allegations of bribery in the State Legislature plus a few specific tag-along allegations. The Government's written instructions to its monitoring agents were consistent with this principle.

2. The Government Failed to Minimize the Calls.

The Government systematically and grossly departed from its instructions and obligations. The failure to reasonably minimize the interception of non-criminal conversations included four related failures:

(1) First, the monitoring agents failed to follow the law, and the instructions, about what range of conversations they should be intercepting, listening to, and recording.

(2) Second, this led also to a dramatic failure to follow a reasonable learning-based approach to limiting future interceptions. As experience with wiretap grew, calls with certain people should have been minimized more quickly based on the knowledge that calls with those people in the past had not been public-corruption-related. But this never happened.

(3) The Government failed to take reasonable steps to figure out which calls were attorney-client privileged. "Section 2518(5) requires the government to minimize the interception of privileged communications." *United States v. Harrelson*, 754 F.2d 1153, 1169 (5th Cir. 1985).

(4) The Government's mistreatment of calls as they were intercepted – by designating too many as "pertinent," and by intercepting too broadly – led to further trampling of privacy interests as well, as the wrongfully intercepted calls were listened to by multiple agents. Each such instance constituted another

inappropriate interception.. *See* 18 U.S.C. 2510(4) ("interception" includes both listening ("aural") and recording ("other acquisition")).

3. Evidence Establishes a Systematic Failure to Minimize.

The "Judges Reports" and related evidence, including Government synopses of calls deemed "pertinent," demonstrate evidence of the systematic failure to minimize.[2]

A). The calls demonstrate eavesdropping on general discussions of Alabama politics, including state court battles about bingo operations, unrelated to the crimes that were putatively under investigation.

B). The calls establish eavesdropping on business-related discussions, unrelated to the alleged crimes that were the premise for the wiretap authorization.

C). The calls establish eavesdropping on contacts with news media.

D). The calls establish the Government was keeping track of individuals physical whereabouts.

E). The calls establish the Government was tracking voice mail messages and merely checking in with office staff.

F). The calls establish eavesdropping on private family conversations.

---

[2] McGregor has submitted substantial evidence in this regard. This evidence is directly relevant to Coker because, for the purposes of this motion, Coker's interests are closely aligned with McGregor's. The Government has produced preliminary transcripts of 70 recordings it intends to introduce in its case in chief (58 telephone calls and 12 consensual recordings). Coker is intercepted on 6 of these recordings: 5 telephone calls with McGregor and 1 telephone call with Massey.

G). Other "pertinent" calls are absurdly unrelated to any relevant issue or category. Reasonable minimization would have avoided all these improper intrusions.

4. The Wiretaps Captured Attorney-Client Privileged Communications.

5. The Government Completely Failed to Distinguish Between Lawful Political Activity and the Alleged "Corruption".

6. The relevant issue is the reasonableness of the Government's actions under the circumstances. The raw numbers themselves are practically no probative value. The Government failed to do what it reasonably could, on a systematic basis.

Conclusion

If ever there was a wiretap that should be suppressed in its entirety for failure to minimize, this is it. From beginning to very end, the Government did not even follow the standards that had been nominally set in written instructions. This wiretap, in practice, was the sort of wholesale destruction of privacy that the law was written to prohibit. Suppression of all the fruits of the wiretap is the only reasonable response to this abuse of government power. Accordingly, Coker requests that the Court suppress the contents of all intercepted communications, and all evidence derived therefrom.

Respectfully submitted,

/s/ David McKnight
David McKnight
BAXLEY, DILLARD, DAUPHIN
MCKNIGHT & JAMES
2008 Third Avenue South
Birmingham, Alabama 35233
Telephone: 205.271.1100
Fax: 205.271.1108
Email: dmcknight@baxleydillard.com

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ David McKnight
Of Counsel