

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
)
 MILTON E. McGREGOR, et al.)
)
 Defendants.)

**DEFENDANT MILTON MCGREGOR'S BRIEF IN SUPPORT OF
MOTION TO MODIFY DISCOVERY**

Defendant Milton E. McGregor hereby submits this Brief in Support of his Motion to Modify Discovery:

On October 4, 2010, a sixty-five page, thirty-nine count indictment was filed against McGregor and ten other defendants. The indictment references activities going back as far as April of 2008 and a cursory review of documents produced by the Government and accessible to Defendant reflects investigative material dating as far back as 2004.

On the afternoon of October 15, following arraignment of the Defendants, the Government provided nineteen CDs and DVDs containing discovery disclosures. The Government also requested that each Defendant provide an external hard drive onto which the Government would transfer additional discovery. Based upon counsel's initial overview, the nineteen disks initially provided by the Government contained, among other things: (a) at least fifty hours of un-transcribed audio recordings of telephone calls and consensual recordings;¹ (b) transcribed grand jury testimony from over forty-five witnesses; (c) more than 54,000 pages of

¹ There appear to be over 2700 wiretapped phone calls and well over 100 consensual recordings, some of which are *extremely* lengthy – for example, one is six hours long.

financial documents bates stamped USFIN; (d) an unknown quantity of additional records, some of which are bates stamped and others not, but just the bates stamped portion numbers through page 64,000; and (e) more than 5,000 emails.

Upon initial review of these disks, counsel for Defendant determined that the disk containing the documents bates stamped USFIN 1-54734 was corrupted and largely inaccessible, another disk labeled Disc 1 of 5/US 1-1914; US 14091-54586; US 54587- 55101 was corrupted and inaccessible, and a disk labeled Disc 4 of 5/US-54587 was entirely empty even though it purported to contain three files. After these accessibility issues were discovered, on October 19 counsel for Defendant McGregor sent an email to counsel for the Government informing them of these problems. [Exhibit A]. Since that time, further problems have been discovered on disks purporting to contain emails, namely the disk labeled Disc 5 of 5/ US-64185.

The task of simply trying to determine what type of information was on the initial nineteen disks and gain access to that information has taken a substantial amount of time. Additional time, which could have been used reviewing the information, was instead spent documenting the numerous problems encountered when attempting to access the information on the disks and ensuring that that they could not be solved internally without recourse from the Government.

On October 22, the Government produced to Defendant's counsel approximately 800 pages of documents, eleven additional disks, and replacement disks for three of the previously-produced disks which were inaccessible. [Exhibit B]. As it relates to the replacement disks provided by the Government on October 22, one of those disks contained approximately 25,000 *additional pages* of financial documents bates stamped USFIN. The provision of the replacement discs on October 22 was the first time the Defendant had access to about 120,000 of

the 130,000 pages of bates stamped documents initially provided. The new disks provided contained at least an additional 25,000 pages of bates stamped pages of materials and *numerous* other files the page number length of which has not yet been determined because they are not bates stamped and because of the numerous problems encountered with accessing those files. At present the total bates stamped pages the Government has provided is approximately 170,000 pages (approximately 80,000 of so-called financial material and approximately 90,000 pages of so-called non-financial material). Counsel for the Defendant informed the Government of these continuing accessibility problems by email dated October 24. [Exhibit C]. After additional review and continued efforts to access the information, counsel for the Defendant provided the Government with an updated written report on the missing and inaccessible disclosures on October 27. [Exhibit D]. Discussion with the government relating to technical problems is still ongoing.

On the morning of October 27, counsel for all defendants and counsel for the Government met and conferred regarding various discovery matters. One of the primary issues discussed was the continued accessibility issues that defense counsel was having with certain disks produced by the Government. At the Government's request, one of the attorneys for Defendant McGregor, Ms. Holliday, agreed to serve as the defense liaison for the purpose of compiling a list of accessibility issues that attorneys for the defendants were having with the Government's disclosures. This list was to then be provided to the Government for it to address. On the evening of October 27, Ms. Holliday provided to the Government an updated technical problems chart reflecting input from some of the attorneys for the defendants. [Exhibit E]. Ms. Holliday then provided a further updated chart on October 28, as requested by the Government. [Exhibit F]. As of the date of this motion, significant accessibility issues remain with respect to

the disclosures provided by the Government as reflected in the chart provided by Ms. Holliday, including numerous disks with multiple corrupted files. Numerous files can only be accessed by the purchase of software programs, some of which appear to be proprietary. While the Government has agreed to work with Defendants on these accessibility issues, the process has been cumbersome and time-consuming.

On October 29, counsel for Defendant also received from the Government a hard drive containing additional disclosures. The hard drive apparently contains imaged copies of computer hard drives belonging to Defendant Crosby. At this time, counsel for Defendant has not had a sufficient opportunity to review the information on the hard drive, but it appears to contain another voluminous amount of discovery material that must be reviewed by counsel. Accessing this additional information was not straightforward as the Government provided the information in a format that required counsel for Defendant to obtain additional hardware and software.

There also remains a significant quantity of discoverable information which is in the possession of the Government but which has not yet been turned over to Defendant McGregor. The Government indicated in its October 22 letter that additional materials produced to the grand jury have not been provided because the materials were provided to the grand jury in a format that was inaccessible to the Government. [Exhibit B, paragraph (1)]. The Government promised to provide these additional documents “[i]f and when these technical matters are resolved,....” [Id.]. Additionally, during the October 28 hearing, counsel for the Government discussed the fact that it has yet to produce tape recordings of 1,078 potentially privileged telephone calls and tape recordings of 7,800 non-pertinent calls. The Government has an obligation to disclose to Defendant McGregor all recordings of calls in which he participates. *See* Fed. R. Crim. P. 16(a)(1)(B). Furthermore, in reviewing the 302s disclosed by the Government, several of them

reference attachments or audio or video recordings maintained in Section 1A of the file. Neither the attachments nor the audio or video recordings have apparently been produced by the Government. Once this was discovered, counsel for Defendant notified counsel for the Government. [Exhibit G]. On October 29, counsel for the Government promised to provide an answer regarding the missing attachments, audio and video recordings. [Exhibit H].

In addition, the Government has promised to provide a pen register and has indicated that such a register has not been provided thus far. The Government has also not provided, to the Defendant's knowledge any court pleadings through which it sought permission to create a pen register. The Government has also promised to provide the information represented by "placeholder" files on the discs provided. Such have not been produced to date. The Government has been asked to confirm that it has produced all relevant 302s and grand jury testimony, and has informed Defendant Preuitt's attorney that they are reviewing same. Lastly, the Government has been informed that it appears that approximately 12,000 pages of bates-stamped materials (1915-14090) have actually not been produced on any of the discs provided, even though it is identified on the Government's index of documents provided.

Based on the production issues encountered so far, counsel for the Defendant anticipates further accessibility issues and delay as they attempt to review the initial disclosures of the Government. Given the current state of discovery, it is impossible to conclude that the Government has fully complied with its initial disclosure obligations.

On October 18, the Court entered an Order on Arraignment which, among other things, required the Government to make additional discovery disclosures on October 22 and required the Defendants to fulfill their reciprocal discovery obligations imposed by paragraph four of the Standing Order on Criminal Discovery by October 29, 2010. [Doc. 132]. The Government has

not completed its required disclosures by the Court's October 22 deadline. Nevertheless, paragraph four of the Standing Order on Criminal Discovery requires that the Defendant, "on or before a date set by the court, []provide all discoverable information within the scope of Fed. R. Crim. P. 16(b)." [Standing Order 534]. Included within the scope of Rule 16(b) are expert summaries and documents possessed by the Defendant which are intended to be used in the Defendant's case-in-chief. Fed. R. Crim. P. 16(b).

"At any time the court may, for good cause, ... defer discovery or inspection or grant other appropriate relief." Fed. R. Crim. P. 16(d)(1). Rule 16(d)(1) therefore empowers the Court to make orders modifying discovery, and "the discretion provided to the trial court by Rule 16(d)(1) is vast." 2 Charles Allen Wright and Peter J. Henning, *Federal Practice and Procedure*, § 262 (4th ed. 2008). Such modification powers include the delay of discovery disclosures. *See, e.g., U.S. v. Mannino*, 480 F. Supp. 1182, 1187–1188 (S.D. N.Y. 1979) (granting government's motion for delay of Rule 16 disclosures); *U.S. v. Coiro*, 785 F. Supp. 326, 329 (E.D. N.Y. 1992) (allowing government to delay certain Rule 16 disclosures where the disclosures would ultimately be made well in advance of trial and there was no showing that the delay in disclosure would prejudice the defendant).

Good cause exists in this case to defer the October 29 disclosure deadline imposed on Defendant McGregor by this Court's Order on Arraignment.² This is a complex case involving multiple parties and an alleged far-reaching conspiracy. The discovery produced so far by the Government is extraordinarily voluminous and consists of well over 170,000 pages of documents and 50 hours of recorded conversations, none of them transcribed. Further complicating defense counsel's review of the un-transcribed recordings is the fact that the second speakers on the vast

² With the knowledge and permission of the Court, Defendant's Motion to Modify Discovery is being filed after the October 29 deadline for Defendant to make its initial disclosures.

majority of the thousands of recorded conversations are not identified. Much of the documentation which the Government has attempted to provide has been corrupted or inaccessible, further delaying the review of such material by Defendant's counsel. Counsel for Defendant McGregor has also not received the admittedly voluminous recordings of the potentially privileged and possibly non-pertinent calls in which he participated.

Under Rule 16(b), the scope of the defendant's discovery obligation is largely determined in terms of what materials the defendant intends to use in his case-in-chief. In order to determine what the defense intends to use, it is necessary first to review the Government's production in order to get some sense of what the Government intends to introduce in its case. Defendant's counsel simply has not had adequate time to review even a meaningful portion of the accessible material provided by the Government and has obviously had no time to review that which remains unproduced or inaccessible. Therefore, counsel for Defendant needs additional time in which to make a meaningful and informed disclosure under Rule 16(b).

The circumstance presented here serves to highlight the inherent flaws in Rule 16 discovery. Under Rule 16, the Government is required to produce, among other things, documents which are material to preparing the defense or which the Government intends to use in its case-in-chief at trial. Fed. R. Crim. P. 16(a)(1)(E). By contrast, the defendant is required to produce, among other things, documents which are within the defendant's possession, custody or control and which the defendant intends to use in his case-in-chief at trial. Fed. R. Crim. P. 16(b)(1)(A). When the Government, as it has done here, chooses to make a mass production without specifying which documents are simply material to preparing the defense and which documents the Government intends to use at its case-in-chief, the defendant is placed at a severe disadvantage, one that ignores the realities of criminal trial practice and the defendant's

constitutional right to remain silent. To make his required disclosure, the defendant is required to wade through the morass of the Government's production, formulate his trial strategy and then serve up to the Government the precise information he intends to use in his case-in-chief.

Defendant McGregor's counsel therefore asks the Court to extend Defendant McGregor's reciprocal initial disclosure deadline for forty-five days. Such an extension would result in disclosures on December 13, well in advance of the April 4, 2011 trial date and would not prejudice the Government in any respect. If the Court is unwilling to provide Defendant McGregor with an additional forty-five days to make his initial disclosures, Defendant McGregor asks the Court for an order requiring either that: (1) the Government first specify which portion of the massive disclosure it has made constitutes documents and objects it intends to use in its case-in-chief. *See United States v. Anderson*, 416 F.Supp.2d 110, 114-115 (D. D.C. 2006) (requiring the government, in a complex case involving thousands of pages of initial disclosures, to specifically identify documents which it intended to use in its case-in-chief); *United States v. O'Keefe*, 2007 WL 1239207 at *2 (D.D.C. April 27, 2007) (recognizing that the Government has an obligation to "identify specifically which items it intends to use in its case-in-chief at trial... [and] may not, as it appears to have done in this case, identify a large number of documents that it may or may not seek to introduce at trial."); or (2) the Government identify any discrete portions of the produced documents that it does not intend to use in its case-in-chief. *See U.S. v. McDade*, 1992 WL 382351 *2 (E.D. Pa. Dec. 11, 1992) (requiring the Government "[t]o the best of its good faith ability to tell the defense of any discrete parcels of material that it [did] not plan to use at trial." (emphasis in original). As admitted by counsel for the Government during the October 28th discovery conference with the Court, the Government does not intend to introduce the vast majority of the voluminous documents it has produced so far.

Requiring the Government to specifically identify which documents it intends to use, or now knows that it does not intend to use, in its case-in-chief would serve to greatly narrow the focus of the defense and allow Defendant McGregor to more quickly and accurately make an informed initial disclose relating to the information he intends to use in his case-in-chief.

Undersigned counsel hereby certifies that they conferred with counsel for the Government on October 27 in a good faith effort to resolve this matter by agreement but were unable to do so.

WHEREFORE, for the reasons set forth above, Defendant Milton McGregor moves the Court to modify Defendant's discovery obligations by deferring Defendant's initial disclosures under Rule 16(b) until December 13, 2010.

s/ J. David Martin

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CERTIFICATE OF SERVICE

I hereby certify that on 1st day of November, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/EFC system which will send notification of such filing to all counsel of record.

s/ J. David Martin
Of Counsel