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

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON MCGREGOR, ET AL.	)	

BRIEF IN SUPPORT OF PROPOSAL FOR MANAGEMENT OF POTENTIALLY PRIVILEGED WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTED BY THE UNITED STATES

The United States of America, through undersigned counsel, hereby outlines a proposal for efficiently and expeditiously reviewing potentially privileged wire and electronic communications (i.e., communications potentially protected by the attorney-client privilege or spousal privilege) that were lawfully intercepted pursuant to Court-authorized wiretaps under 28 U.S.C. § 2518.

As described in greater detail below, the communications need to be reviewed not only to confirm whether they are indeed privileged, but also to determine whether they contain discoverable information that must be disclosed pursuant to the United States' ongoing discovery obligations. To that end, the United States submits that the review should be conducted by a separate "filter" team comprising attorneys who are not engaged in the prosecution of this matter. As outlined below, this proposal provides the advantage of efficiency over a similar review by a court-appointed third-party, while at the same time insuring that the defendants will have a full and fair opportunity to participate in the privilege review process.

BACKGROUND

On March 1, 2010, the Honorable Truman M. Hobbs authorized interception of wire communications occurring over the cellular telephones of defendants McGregor and Massey,

pursuant to 18 U.S.C. § 2518. Ten days later, on March 11, 2010, Judge Hobbs authorized interception of wire and electronic communications occurring over a cellular telephone used by defendant Gilley, and expanded the interception of communications occurring over Massey's phone to include electronic communications.[1] Subsequently, on March 30, 2010, Judge Hobbs authorized the continued interception of communications occurring over the initial three phone lines, as well as the interception of wire communications occurring over an additional cellular telephone line used by defendant McGregor.[2] The United States discontinued monitoring of all four phone lines on April 8, 2010.

For purposes of monitoring and managing intercepted communications, the government employed a proprietary software program called VoiceBox. The VoiceBox system permitted each intercepted communication to be classified in real time by the monitoring agent. Classifications included "pertinent," "non-pertinent," and "privileged." Communications classified as "privileged" in this matter can only be accessed by certain FBI personnel—and not by any of the prosecuting attorneys or case agents.

During the course of the wiretap investigation, the United States maintained a list of attorneys the government believed might possibly provide legal representation to each of the target defendants—McGregor, Massey, and Gilley. Attorneys were added to the respective lists based on public records checks of pending and completed Alabama court cases, prior knowledge of case

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[1] "Wire" communications refer to traditional audio telephone calls, while "electronic" communications refer to SMS text messages. Wire and electronic communications collectively are referred to as "communications."

[2] During the course of the wiretap portion of the investigation, defendants McGregor and Gilley each used at least three separate cellular telephones.

personnel, and the content of intercepted communications. Intercepted communications involving listed attorneys were, in most instances, marked "privileged" based solely on the identity of the caller (ascertained by voice recognition or associated telephone number) as opposed to the content of the call.[3] As a result, a call's designation as "privileged"[4] in the VoiceBox system does not settle the question of whether the content (or any portion thereof) is legally shielded under the attorney-client privilege doctrine (or, in the case of spouses, the spousal privilege). Because, with limited exceptions,[5] the United States has not gone back to evaluate the privileged nature of communications marked as such—of which there are approximately 1079 totaling twenty-two hours of audio—these

[3] The United States' first ten-day report to Judge Hobbs provided the Court with a detailed explanation of the government's protocol for handling potentially privileged communications, as well as a timeline of its development. *See* Misc. No. 2:10-cm-1959-TMH, Dkt. No. 6 at 9-12.

[4] In general, monitoring agents were instructed to "minimize" potentially privileged communications involving known, listed attorneys or spouses. "Minimization" in the VoiceBox system worked as follows for telephone calls: when an outgoing or incoming call initiated, the VoiceBox system automatically created a "session" for the call and began recording any audio on the telephone line (including any ringing prior to the recipient answering the phone); once the monitoring agent identified a participant as a listed attorney/spouse (based on the associated phone number or individual's voice/self-identification), the monitor would trigger VoiceBox's "minimization" feature, which meant that, going forward, the monitor could not hear any audio and the system did not record any unless and until the monitor discontinued "minimization." For example, if a call lasted five (5) minutes and the monitoring agent engaged "minimization" for the last four (4) minutes, the VoiceBox system would still log a call (or "session") containing one (1) minute of audio, which the monitor would mark "privileged"—even if the only recorded audio contained, for instance, ringing or a caller on hold. SMS text messages, which are transmitted in complete form, were embargoed upon interception and reviewed by designated agents, who made the necessary classification before permitting broader dissemination.

[5] During the course of interception, two attorneys were assigned as "filter" attorneys. These attorneys, who did not participate in the investigation or prosecution of this matter, reviewed approximately 40 calls, some of which previously had been marked as "privileged," to assist in determining the privileged (or non-privileged) nature of those calls and whether to add callers to the lists of attorneys. The role of these attorneys, which was disclosed to Judge Hobbs, was limited, and subsequently they did not review any additional calls marked "privileged."

legal determinations remain open.

At the discovery conference held before the Court on October 28, 2010, the Court requested that the parties submit briefs proposing how the intercepted communications identified by the government as potentially privileged should be reviewed.

DISCUSSION

It is axiomatic that the government holds an ongoing responsibility to produce to the defense information that is discoverable under *Brady v. Maryland*, 373 U.S. 83 (1963), *United States v. Giglio*, 405 U.S. 150 (1972), and their progeny. As a result, it is imperative that *all* communications—not just non-privileged communications—intercepted by the United States as part of this case be reviewed for purposes of discovery. As a threshold matter, the United States intends to provide to each of the potential privilege holders—McGregor, Massey, and Gilley—the communications marked "privileged" for their own respective telephone lines. However, the United States recognizes its obligation to provide to *all* defendants *Brady* and *Giglio* information in the government's possession. Because communications marked "privileged" may contain exculpatory content as to those defendants that do not potentially hold the privilege, it is imperative that this body of communications be reviewed.[6]

To that end, the process of reviewing communications marked "privileged" could occur through either of two methods: by a government "filter" team, or by a third-party appointed by the

[6] As the United States has noted, currently there are a total of approximately 7790 communications marked "non-pertinent" across all four phone lines. The vast bulk of those communications are shorter than one minute in duration. With the Court's approval, the United States intends to provide this body of communications to all defendants. However, if the Court would prefer, the government will provide defendants McGregor, Massey, and Gilley with their respective "non-pertinent" communications and submit copies to be reviewed in accordance with the procedures set forth *infra*.

Court. Both methods offer reliable means for assessing whether the communications are discoverable, and must therefore be produced to all defendants rather than just to the defendant whose phone line was involved in the call. While the United States has no objection to review by a third-party for the purpose of this discoverability question, we submit that it would be more efficient and expeditious, and would place fewer burdens on the Court, to use a government filter team. That is because, if one or more of the defendants raise a claim that agents unreasonably accessed privileged communications and that this somehow prejudiced them, the government will, in any event, need to use a "filter" team to respond to such a challenge by showing that the communications were not in fact privileged and/or that no prejudice flowed from the carefully limited monitoring. Thus, under the third-party appointment option, the privilege analysis would need to be performed twice: once by the court appointee and then later by the government filter team tasked with responding to challenges to our management of the wiretap process. Because this second review is likely to be necessary in response to defense motions, we recommend and propose the use of a government filter review procedure from the outset.

First, we propose that the communications be reviewed through a filter team consisting of two government lawyers who would operate at arms-length from the team of government attorneys and agents prosecuting this case.[7] Establishing a "wall" in this manner would shield the prosecution

[7] Courts generally have supported the use of a filter team where there is some legitimate reason for doing so, such as the mixture of privileged and non-privileged documents here. *See, e.g.*, *In re Grand Jury Subpoena of Ford*, 756 F.2d 249, 254 (2d Cir. 1985); *Hicks v. Bush*, 452 F. Supp. 2d 88, 102-03 (D.D.C. 2006); *United States v. SDI Future Health, Inc.*, 464 F. Supp. 2d 1027, 1039 (D. Nev. 2006); *United States v. Gawrysiak*, 972 F. Supp. 853, 864-65 (D.N.J. 1997); *United States v. Noriega*, 764 F. Supp. 1480, 1489 (S.D. Fla. 1991). *But see, e.g.*, *United States v. Rayburn House Office Building, Room 2113, Washington, D.C. 20515*, 497 F.3d 654 (D.C. Cir. 2007) (holding limited to the review of material protected under the Speech or Debate Clause of the Constitution); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y.

from unwanted exposure to privileged material and insure that any confidential or privileged communications be exposed to the smallest group possible. The filter team's role would be to review intercepted communications that currently are marked "privileged" in the VoiceBox system in an effort to (1) screen truly privileged communications from non-privileged communications, and (2) in the case of communications that, in fact, are legally privileged, identify which communications contain discoverable material as to any of the non-privilege-holding defendants.[8] The defendants whose communications are at issue will have an equal opportunity to review those communications and provide input to the Court.

At the conclusion of the filter team review, and prior to disclosing any material to any party, the filter team would provide to the Court and the potential privilege holder a log of each reviewed call, the determination as to the call—privileged vs. non-privileged (in whole or in part) and discoverable vs. non-discoverable—and the basis for such determination. The filter team would be prepared, at the Court's request, to provide all reviewed communications for further in camera consideration prior to dissemination.

In the event that a Court-appointed magistrate or special master is chosen, he or she would, of course, conduct the same type of review to determine whether any of the intercepted communications contain discoverable or privileged material. This review process should mirror the proposed actions of a filter team, differing only in the management of the review by a third party

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1994).

[8] Communications determined not to contain privileged content should be disclosed to all defendants and the prosecution team. These communications would not require the secondary inquiry regarding their exculpatory character.

designated by the Court.[9] However, should the Court designate a third-party reviewer, the United States requests that such reviewer compile a log similar to the one described above. We also request that a filter team be allowed to access these communications, in the event that questions are raised in defense motions, in order to fully demonstrate to the Court the altogether reasonable and conservative approach that the government took in managing the intercept process.

Regardless of whether the review is conducted by a filter team or an independent third-party, the communications marked "privileged" must be reviewed for exculpatory information such that the United States can discharge its discovery obligations. As a result, permitting defendants McGregor, Massey, and Gilley to conduct a review and provide a privilege log[10] is insufficient, as they are under no obligation to identify and produce any discoverable information to their co-defendants. Indeed, depending on the content, there may be a strategic incentive for these defendants not to share certain material.

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[9] Third-party review also finds support in caselaw, particularly where material is subject to heightened concerns. *See, e.g.*, *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, 454 F.3d 511 (6th Cir. 2006) (reversing district court's decision approving use of a filter team documents not already under the government's control); *Black v. United States*, 172 F.R.D. 511, 516 (S.D. Fla. 1997); *United States v. Abbell*, 914 F. Supp. 519, 519-20 (S.D. Fla. 1995) (permitting third-party review where "[e]xamination of these materials will require a detailed analysis of the contents of each item seized in relation to a complex underlying investigation that alleges crimes of narcotics trafficking, money laundering and obstruction of justice, as well as highly complex and sensitive privilege issues."); *United States v. Stewart*, 2002 WL 1300059, at *1 (S.D.N.Y. June 11, 2002) (national security case involving documents and computer files seized from a law office).

[10] If the Court orders such a review (and nothing more), defendants McGregor, Massey, and Gilley should be required to generate a privilege log that memorializes (1) which intercepted communications are ultimately deemed "privileged" and (2) the legal and factual bases of the putative privilege. *See In re Grand Jury Subpoenas*, 454 F.3d at 524 (requiring production of a privilege log following first-cut review by a special master). Without such a log, the United States—through the use of a filter team—will not be able to mount its own challenge to the defendants' privilege determinations.

CONCLUSION

Wherefore, the United States respectfully submits that review of potentially privileged communications intercepted pursuant to lawfully obtained wiretap authorizations should be conducted by a government filter team. However, in the event that the Court appoints a magistrate or special master instead, the government should be permitted to establish a filter team for purposes of responding to any challenges raised by the defendants to the protocol that the government implemented to handle potentially privileged communications.

Respectfully submitted this the 1st day of November, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2010, 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 attorneys of record.

Respectfully submitted,

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