

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

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| <b>UNITED STATES OF AMERICA,</b> | ) |                             |
|                                  | ) |                             |
| <b>Plaintiff,</b>                | ) |                             |
|                                  | ) |                             |
| v.                               | ) | <b>CR No. 2:10cr186-MHT</b> |
|                                  | ) |                             |
| <b>RONALD GILLEY, et al.</b>     | ) |                             |
|                                  | ) |                             |
| <b>Defendants.</b>               | ) |                             |

**DEFENDANT RONALD GILLEY'S REPLY MEMORANDUM IN SUPPORT OF HIS  
MOTION TO COMPEL**

COMES NOW, the Defendant RONALD GILLEY ("Mr. Gilley"), by and through his undersigned counsel, and respectfully submits this Reply memorandum of law in support of his Motion to Compel (Ct. Docs. 311 and 312) and in reply to the Government's Response to his Motion to Compel (Ct. Doc. 348). Since the time of filing of his Motion to Compel, several of the outstanding discovery issues raised in Mr. Gilley's Motion have been addressed by the Government. Therefore, this Reply primarily focuses on the remaining discovery issues for which this Honorable Court's intervention is sought, while briefly noting which issues raised previously appear to have been addressed without Court intervention. As further grounds in support of his Motion to Compel and in Reply to the Government's Response, Mr. Gilley states the following:

**I. NON-REDACTED FBI FORMS FD-302 RELATING TO JARROD MASSEY.**

As the Government observes in its Response, this issue has been resolved pursuant to this Court's Order dated January 11, 2011. (Ct. Doc. 335).

**II. FBI FORMS FD-302 AND GRAND JURY TRANSCRIPTS ASSOCIATED WITH CASE NUMBERS 46187 AND 44533.**

In response to his Motion to Compel all FBI Forms FD-302 ("302s") and grand jury transcripts associated with the Government's investigation of case numbers 46187 and 44533, the Government equivocates, "The Court's Standing Order, Brady, and Giglio provide clear direction regarding disclosures. To the best of its ability, the United States has complied in full with these mandates." *See* Gov't Resp. at 2. Mr. Gilley is not seeking to compel the Government's production of discovery accompanied by caveats, but instead, is seeking the Government's production of discovery unencumbered by caveats. The Government's expression that it has complied with the Court's Standing Order, as well as the clear dictates of *Brady* and *Giglio*, "to the best of its ability" lacks substantive meaning.

The Government acknowledges that a certain number ("small in volume") of 302s and grand jury transcripts it has not yet produced fall within the ambit of the Jencks Act, and the Government has agreed to produce these materials two (2) weeks before trial. *See* Gov't Resp. at 3. The Government also has agreed to submit the 302s and grand jury transcripts it has not yet produced to Gilley to this Honorable Court for its *in camera* review. *Id.* In this regard, Mr. Gilley requests that the Government produce all such documents to the Court expeditiously, in order for the Court to have ample time to conduct its *in camera* review in advance of trial.

**III. BRADY MATERIAL**

The Government also has agreed to submit potential *Brady* material such as draft plea agreements to the Court for an *in camera* review. *See* Gov't Resp. at 4. Mr. Gilley also requests that the Government produce all such documents to the Court expeditiously, in order for the Court to have ample time to conduct its *in camera* review in advance of trial.

**IV. ELECTRONIC COMMUNICATIONS BETWEEN ANY WITNESS AND ANY GOVERNMENT AGENT.**

Finally, the Government has agreed to produce any electronic communications between any witness and any Government agent subject to the Jencks Act "no later than two weeks prior to the commencement of trial." *See* Gov't Resp. at 5. The Government also has acknowledged its continuing *Brady* obligations and will produce information from "any electronic communication involving a potential witness contain[ing] exculpatory information." *Id.*

**V. TAPE RECORDINGS MADE BY HOUSTON COUNTY SHERIFF ANDY HUGHES**

The Government now represents that the tape recordings made by Houston County Sheriff Andy Hughes are available for Mr. Gilley's counsel to review at the FBI's office in Montgomery, Alabama. *See* Gov't Resp. at 5. Although Mr. Gilley disagrees with the Government's representation about when these tape recordings were first made available for his counsel's review, the issue has nonetheless resolved itself now that the audio recordings are in fact available for review. Because his counsel has not yet visited the FBI office in Montgomery to review these audio recordings, Mr. Gilley respectfully reserves the right to revisit this issue if these recordings are in fact not available for review or are only partially available.

**VI. CONSENSUAL RECORDING INFORMATION**

As to the consensual recordings conducted in this case, Mr. Gilley raised three issues in his Motion to Compel, including production of: 1) copies of all authorizations for consensual monitoring used in this case; 2) copies of 302s reflecting consensual recordings conducted in this case, whether or not pertinent recordings were obtained; and 3) documentation regarding the specific electronic devices including the make, model, and serial number, used for consensual recordings in this case. *See* Mot. to Compel at 8. Of these three requests, the Government

represents that Mr. Gilley's first request for production of authorizations for consensual monitoring has been satisfied, in that "[t]he United States has provided all documentation responsive to this request." *See* Gov't Resp. at 6. However, the Government does take issue with Mr. Gilley's two remaining requests for production regarding consensual recordings.

In support of its objection to Mr. Gilley's request for the make, model, and serial number for all devices used to make consensual recordings in this case, the Government cites *United States v. Van Horn*, 789 F.2d 1492, 1508 (11th Cir. 1986), for the proposition that the Eleventh Circuit has recognized a "qualified law enforcement privilege" applicable to the "nature and location of electronic surveillance equipment." *Van Horn*, 789 F.2d at 1508, *see also* Gov't Resp at 6. The Government's response confuses the issue from Mr. Gilley's discrete request in his Motion to Compel. In *Van Horn*, the defendant sought to compel discovery of "either the type of microphone used in his office, or where the microphone was hidden." 789 F.2d at 1507. Whereas *Van Horn* directly addresses a discovery request relating to the location of a "bug," Mr. Gilley's request, in contrast, relates to the make, model, and serial number of the Government's recording devices employed in consensual recordings this case. Although the court disallowed the defendant the discovery he requested in *Van Horn*, the court stated that "the privilege will give way if the defendant can show need for the information." *Id.* at 1508. The court further stated, "[w]e stress that the necessity determination requires a case by case balancing process, and that we have established **no fixed rules** about the discoverability of electronic surveillance techniques in criminal cases." (emphasis added) *Id.* In his motion, Mr. Gilley stated that the make, model, and serial number of the recording devices at issue, are necessary to the analysis of any retained recording-related expert. *See* Mot. to Compel at 8. For example, information regarding the make or model of the recording device may provide an expert with information

needed to form an opinion about the unreliability of the recordings if, for instance, the particular make and model of the recording device has been recalled by the manufacturer because of a defect such as the device briefly turning off and on while recording thus omitting some of the content of the subject conversation. Under such a scenario, the serial numbers would be relevant to track the usage of a particular device if it turned out a particular device was in fact defective. Unless the Government is claiming that the devices themselves are proprietary, which it is not, the Government cannot reasonably contend that identifying which commercially available recording device it employed in this investigation runs afoul of this qualified privilege, especially when it is relevant to a defense expert's opinion about such a device. Obviously, each device does not work as well as the other, and Mr. Gilley is entitled to know if the Government utilized a make and model of a recording device in this case that is known within the industry for defective performance.

As to Mr. Gilley's request for any chain of custody documents relating to the recordings, whether 302s or designated otherwise, it is not clear on what basis the Government opposes his request. The Government cites authority from a drug case, *United States v. Roberson*, 897 F.2d 1092, 1096 (11th Cir. 1990), in which the defendant complained of "gaps in the making of the chemical analysis." *See* Gov't Resp. at 7. While Mr. Gilley agrees that the court in *Roberson* held that "gaps in the chain of custody affect only the weight of the evidence, not its admissibility," this statement actually makes the point as to why the Government's chain of custody documents for all consensual recordings should be made available to Mr. Gilley. *Roberson*, 897 F.2d at 1096. The court in *Roberson* is silent on whether the defendant made discovery requests for the government's chain of custody documents relating to the drugs at issue. The court is also silent on whether or not such chain of custody documents were produced

to the defendant, with or without the defendant's request. What is clear is that the defendant was aware of two (2) gaps in the chain of custody at trial, which then gave the defendant a basis from which to argue the weight to which the jury should assign such evidence. Here, without any information about the chain of custody of the consensual recordings, Mr. Gilley is not in a position to be aware of any such gaps, and thus cannot even argue to a jury that evidence which lacks a proper chain of custody may be attributed less evidentiary weight.

Lastly, the Government cites *United States v. Ransom*, 515 F.2d 885, 890 (5th Cir. 1975) for further support in its opposition to producing all chain of custody documents relating to consensual recordings.<sup>1</sup> *Ransom* is inapposite to the Government's arguments in opposition to Mr. Gilley's request for chain of custody documents, because *Ransom* addressed the defendant's "claims that a proper chain of custody for the tapes was never established. The trial judge at the suppression hearing did not require that the chain of custody be shown[.]" 515 F.2d at 890. The discovery request for chain of custody documents in this case is not in the context of a pretrial suppression hearing. As the court in *Ransom* observed, its ruling was restricted to the context of the suppression hearing, stating: "Mindful that the rules of evidence generally applicable in criminal trials do not always apply with the same force in suppression hearings before a judge, we find no error in the court's decision not to require proof of chain of custody." *Id.* Thus, *Ransom* does not apply to the facts and circumstances surrounding Mr. Gilley's discovery request in this case. Here, Mr. Gilley is seeking compulsion of the chain of custody documents. If the Government later objects to the documents usage at a suppression hearing or at trial, that is a separate issue apart from whether the documents are subject to production now.

---

<sup>1</sup> In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), this Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit issued before October 1, 1981.

## **VII. TITLE III WIRETAP INFORMATION.**

The Government subdivides Mr. Gilley's requests for production of Title III wiretap information into three headings: 1) additional session history reports; 2) synopses; and 3) call monitors and VoiceBox reports. Mr. Gilley addresses each issue in turn *infra*.

### **A. Additional Session History Reports.**

The Government does not oppose Mr. Gilley's request for non-pertinent session histories and anticipates production of these reports by January 21, 2011. *See* Gov't Resp. at 8. The remaining point of contention relating to the session history reports is whether the Government should produce complete session histories of all calls classified as "pertinent." The Government's lead argument in this regard is that "[d]isclosure of session history reports for 'pertinent' interceptions would also risk exposing the focus and direction of the government's ongoing investigation[.]" *See* Gov't Resp. at 9. The Government's argument in this regard is specious. The Government was the sole arbiter of when to bring the Indictment in this case and what charges to include in the Indictment. If any aspect of the Government's ongoing investigation is purportedly compromised because of Mr. Gilley's discovery requests stemming from the Indictment, that is a situation of the Government's own creation. The Government easily could have adjusted what charges to bring and when to bring them while it completed its investigation, but Mr. Gilley's rights to a fair trial cannot be compromised due to any problems the Government's own timing may have caused itself.

### **B. Synopses.**

As for the Mr. Gilley's request for the synopses of the intercepted calls, the Government fails to articulate a basis for its non-production and simply responds by challenging the basis for Mr. Gilley's request, stating "he has failed to articulate why he needs summaries of the source

audio he already possesses." *See* Gov't Resp. at 9. The basis for Mr. Gilley's request for the synopses, as is the basis for all discovery requests in federal criminal cases, is Fed. R. Crim. P. 16. Rule 16(a)(1)(E) plainly states, "Upon a defendant's request, the government **must** permit the defendant to inspect and to copy...documents, data...if the item is within the government's possession, custody, or control and: the item is material to preparing the defense[.]" The Government does not articulate a legal basis for its non-production of the synopses or claim a privilege relating to the same.<sup>2</sup> The Government does not dispute that the synopses Mr. Gilley seeks are within its control, and the synopses are material to Mr. Gilley's defense. For instance, the Government may have deemed an audio recording inconsequential in its synopsis of the recording, but at trial, the Government may contend that the same recording is at the heart of its case against Mr. Gilley. Mr. Gilley requires production of these synopses to be able to effectively cross-examine Government agents at trial about any such shifting theory of prosecution. Additionally, the synopses contain the Government's contemporaneous recordings of Mr. Gilley's statements and are subject to production under Fed. R. Crim. P. 16(a)(1)(B) as the Defendant's written or recorded statement. Finally, the Government is not burdened by the production of the synopses, and the Government is not prejudiced by the production of the synopses.

### **C. Identification of Call Monitors and Production of VoiceBox Reports.**

The Government contends that it has provided a means for identification of all call monitors. However, the session history reports reveal that one user is identified as

---

<sup>2</sup> Mr. Gilley does appreciate the Government's concern that "The United States has taken significant protective measures – both before and after indictment – to minimize exposure by government personnel to potentially privileged as well as non-pertinent content, and production of synopses for interceptions currently marked as such would risk further exposure." If this is the Government's only or primary concern relating to production of these synopses, Mr. Gilley's counsel can and will work with the Government to address this legitimate concern and accomplish the production he seeks of these documents.

"194privileged." In this regard, Mr. Gilley does seek to compel the production of any and all call monitors who monitored calls under this identification for each call in which this identification was utilized.

Finally, the Government questions Mr. Gilley's need for the VoiceBox reports he has requested, stating that he has failed to articulate a basis for requesting such documents and data. Again, Mr. Gilley is well within his right under Fed. R. Crim. P. 16(a)(1)(E) to request and receive such information. This information is certainly relevant any expert analysis prepared in Mr. Gilley's defense. Furthermore, the Government is not burdened by production of the VoiceBox reports, and the Government is not prejudiced by production of the VoiceBox Reports.

WHEREFORE, premises considered, Mr. Gilley moves this Honorable Court to enter an Order granting his Motion to Compel as to any unresolved discovery issues.

Respectfully submitted,

/s/ G. Douglas Jones  
G. Douglas Jones  
ASB-3880-s82g

**OF COUNSEL:**

Thomas J. Butler (ASB-7790-T75T)  
Anil A. Mujumdar (ASB-2004-165m)  
Haskell Slaughter Young & Rediker, LLC  
1400 Park Place Tower  
2001 Park Place  
Birmingham, AL 35203  
Phone: (205) 251-1000  
[gdj@hsy.com](mailto:gdj@hsy.com)

Sandra Payne Hagood (ASB-0360-S73H)  
7660 Fay Avenue  
Suite H-526  
LaJolla, CA 92307  
Phone: 858-245-5741  
[sandra@hagoodappellate.com](mailto:sandra@hagoodappellate.com)

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this the 18<sup>th</sup> day of January, filed the foregoing with the Clerk of Court via CM/ECF and an electronic copy of the same has been sent to the following:

Louis V. Franklin, Sr.  
Assistant U. S. Attorney  
131 Clayton Street  
Montgomery, Alabama 36104  
[Louis.franklin@usdoj.gov](mailto:Louis.franklin@usdoj.gov)

Stephen P. Feaga  
U.S. Attorney's Office  
P.O. Box 197  
Montgomery, AL 36101-0197  
[Steve.feaga@usdoj.gov](mailto:Steve.feaga@usdoj.gov)

Peter J. Ainsworth  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Peter.Ainsworth@usdoj.gov](mailto:Peter.Ainsworth@usdoj.gov)

Eric Olshan  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Eric.olshan@usdoj.gov](mailto:Eric.olshan@usdoj.gov)

Barak Cohen  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Barak.cohen@usdoj.gov](mailto:Barak.cohen@usdoj.gov)

Brenda Morris  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Brenda.Morris@usdoj.gov](mailto:Brenda.Morris@usdoj.gov)

Emily Rae Woods  
U.S. Department of Justice  
Public Integrity Section  
1400 New York Avenue-NW 12<sup>th</sup> Floor  
Washington, DC 20005  
[Rae.woods@usdoj.gov](mailto:Rae.woods@usdoj.gov)

Joe Espy, III  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)

William M. Espy  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)

Benjamin J. Espy  
MELTON, ESPY & WILLIAMS, PC  
P.O. Box Drawer 5130  
Montgomery, AL 36103  
[bespy@mewlegal.com](mailto:bespy@mewlegal.com)

Fred D. Gray  
Waiter E. McGowan  
GRAY, LANGFORD, SAPP  
McGOWAN, GRAY, GRAY  
& NATHANSON, P.C.  
P.O. Box 830239  
Tuskegee, AL 36083-0239  
[fgray@glsmgn.com](mailto:fgray@glsmgn.com)  
[wem@glsmgn.com](mailto:wem@glsmgn.com)

Robert D. Segall  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[segall@copelandfranco.com](mailto:segall@copelandfranco.com)

David Martin  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[martin@copelandfranco.com](mailto:martin@copelandfranco.com)

Shannon Holliday  
COPELAND, FRANCO, SCREWS &  
GILL, P.A.  
P.O. Box 347  
Montgomery, Alabama 3610 1-0347  
[holliday@copelandfranco.com](mailto:holliday@copelandfranco.com)

Sam Heldman  
THE GARDNER FIRM, P.C.  
2805 31st Street NW  
Washington, DC 20008  
[sam@heldman.net](mailto:sam@heldman.net)

Stewart D. McKnight  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, AL 35233  
[dmcknight@bddmc.com](mailto:dmcknight@bddmc.com)

Joel E. Dillard  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, AL 35233  
[jdillard@bddmc.com](mailto:jdillard@bddmc.com)

William J. Baxley  
Baxley, Dillard, Dauphin, McKnight  
& Barclift  
2008 Third Avenue South  
Birmingham, AL 3523  
[wbaxley@bddmc.com](mailto:wbaxley@bddmc.com)

Brett M. Bloomston  
Attorney at Law  
1330 21st Way South, Ste 120  
Birmingham, AL 35205  
[brettbloomston@hotmail.com](mailto:brettbloomston@hotmail.com)

William N. Clark  
Stephen W. Shaw  
Redden Mills & Clark  
505 North 20th Street, Suite 940  
Birmingham, AL 35203  
[wnc@rmclaw.com](mailto:wnc@rmclaw.com)  
[sws@rmclaw.com](mailto:sws@rmclaw.com)

Ron W. Wise  
Attorney at Law  
200 Interstate Park Drive, Suite 105  
Montgomery, AL 36109  
[ronwise@aol.com](mailto:ronwise@aol.com)

H. Lewis Gillis  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[hlgillis@tmgslaw.com](mailto:hlgillis@tmgslaw.com)

Latasha M. Nickle  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[lameadows@tmgslaw.com](mailto:lameadows@tmgslaw.com)

Tyrone C. Means  
Thomas Means Gillis & Seay  
P.O. Drawer 5058  
Montgomery, AL 36103  
[tcmeans@tmgslaw.com](mailto:tcmeans@tmgslaw.com)

J. W. Parkrnan, III  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[parkman@parkmanlawfirm.com](mailto:parkman@parkmanlawfirm.com)

Richard M. Adams  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[adams@parkmanlawfirm.com](mailto:adams@parkmanlawfirm.com)

William C. White, II  
Parkman, Adams & White  
505 20th Street North, Suite 825  
Birmingham, AL 35203  
[wwhite@parkmanlawfirm.com](mailto:wwhite@parkmanlawfirm.com)

Susan G. James  
Denise A. Simmons  
Susan G. James & Associates  
600 S. McDonough Street  
Montgomery, AL 36104  
[sgjamesandassoc@aol.com](mailto:sgjamesandassoc@aol.com)  
[dsimlaw@aol.com](mailto:dsimlaw@aol.com)

Thomas M. Goggans  
Attorney at Law  
2030 East Second Street  
Montgomery, AL 36106  
[tgoggans@tgoggans.com](mailto:tgoggans@tgoggans.com)

Samuel H. Franklin  
Jackson R. Sharman, III  
LIGHTFOOT, FRANKLIN  
& WHITE, L.L.C.  
The Clark Building  
400 North 20th Street  
Birmingham, AL 35203  
[sfranklin@lightfootlaw.com](mailto:sfranklin@lightfootlaw.com)  
[jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)

Joseph J. Basgier, III  
Bloomston & Basgier  
1330 21<sup>st</sup> Way South, Suite 120  
Birmingham, AL 35235  
[joebasgier@gmail.com](mailto:joebasgier@gmail.com)

John M. Englehart  
Englehart Law Office  
9457 Alysbury Place  
Montgomery, AL 36117-6005  
[jmenglehart@gmail.com](mailto:jmenglehart@gmail.com)

Joshua L. McKeown  
The Cochran Firm Criminal Defense-  
Birmingham LLC  
505 20<sup>th</sup> Street North  
Suite 825  
Birmingham, AL 35203  
[jmckeown@parkmanlawfirm.com](mailto:jmckeown@parkmanlawfirm.com)

Jeffery Clyde Duffey  
Law Office of Jeffery C. Duffey  
600 South McDonough Street  
Montgomery, AL 36104  
[jcduffey@aol.com](mailto:jcduffey@aol.com)

/s/ G. Douglas Jones \_\_\_\_\_  
OF COUNSEL