

**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 GILLEY, et al.)	
)	
Defendants.)	

**DEFENDANT RONALD GILLEY'S EMERGENCY MOTION
TO COMPEL THE IMMEDIATE PRODUCTION OF INFORMATION
AND/OR DOCUMENTATION RELATING TO JARROD MASSEY**

Comes now Ronald Gilley, by and through his undersigned counsel, and respectfully requests that in light of the January 12, 2011 hearing on the Government's Motion to Revoke the Order of Pre-Trial Release, this Court compel the Government to immediately produce: (1) non-redacted copies of five 302's of Jarrod Massey, (2) any additional 302's that Mr. Gilley has not received and (3) if Mr. Massey has made contact with any agent or prosecutor in which no 302 was prepared, any notes or other memos of any information he provided as part of such contact.

1. On December 20, 2010, Co-Defendant Jarrod Massey changed his plea to guilty in the above-styled matter. In doing so, he agreed to plead guilty to Counts 1, 2, 4, 5, 8 and 10.

2. That same day, the Government provided six 302's of Jarrod Massey, not previously provided, which were notes from proffers provided on October 12 (entitled "first proffer"), October 14 ("second proffer"), October 21 ("third proffer"), November 9 ("fourth proffer"), November 18 ("fifth proffer") and December 2 ("sixth proffer").

3. Each of these proffers has been redacted by the Government, except the second proffer dated October 14. The other proffers have been, in some cases, significantly and substantially redacted, including entire pages being obscured and hidden.

4. On December 30, 2010, the Government notified the Court and the parties it would not produce full copies of Massey's Form 302's until January 31, 2011, because "the content of the contested redactions pertains to an ongoing criminal investigation involving facts beyond the scope of the Indictment in this matter."

5. On January 6, 2011, the Government filed a Motion to Revoke the Order of Pre-Trial Release for Mr. Gilley. According to the Motion:

[t]o wit: (Gilley) did knowingly offer money or a thing of value in order to corruptly persuade another person, then co-defendant Jarrod Massey, with the intent to influence, delay or prevent the testimony of Jarrod Massey in an official proceeding and to cause or to induce Jarrod Massey to withhold testimony from an official proceeding in violation of Title 18, United States Code, Section 1512(b)(1) and (2)(A).

In addition, the defendant violated the Court's additional condition of release (8)(j) in that he failed to avoid all contact, directly or indirectly, with any person who is or may become a potential witness in the investigation or prosecution, to: he did personally on more than one occasion, one of which occurred during the very time in which the Court was conducting a proceeding related to this case, offer money or a thing of value to Jarrod Massey and that he did so after having promised this Court to obey all conditions of release and agreeing that he was aware of the penalties and sanctions which might be imposed should he fail to abide by the conditions of his release.¹

¹ The Government's recitation of Paragraph (8)(j) is not correct. On November 10, 2010, the Court entered an Order providing that the Order Setting Conditions of Release for each defendant indicted in this cause be revised to amend condition (j) to state "the defendant must avoid all contact, directly or indirectly, with any witness related to the subject matter of the indictment with the intent to discuss matters contained in the indictment, unless the communication is made in the presence of defendant's counsel and in preparation for trial. The defendant may engage in communications with any person regarding matters not alleged in the pending indictment."

6. On January 6, 2011, the Court notified the parties it would hold a hearing on the Government's Motion to Revoke on Wednesday, January 12, 2011 at 10:00 a.m.

7. Mr. Gilley acknowledges the Government's position stated on December 30, 2010 that it would not provide full copies of the 302's until January 31, 2011, because of the ongoing investigation. However, given the averments made in the Motion to Revoke, the "ongoing investigation" necessarily includes an investigation into Mr. Gilley's alleged communications with Mr. Massey. In light of the hearing set for Wednesday, January 12, 2011 that will certainly involve evidence of Mr. Massey's statements with respect to the content of such communications, Mr. Gilley must have full versions of the recently produced Form 302's, as well as any additional 302's that he has not received and, if Mr. Massey has made contact with any agent or prosecutor in which no 302 was prepared, any notes or other memos of any information he provided as part of such contact..

8. Mr. Gilley further acknowledges that since Mr. Massey is a cooperating witness with the Government, his credibility is at issue. Fed. R. Evid. 607. As such, Mr. Gilley is entitled to test all alleged facts he has provided the Government and to gauge that against benefit the Government has promised him in exchange for his testimony.

9. The Government's Plea Agreement with Mr. Massey makes this especially true as it contains various provisions concerning Mr. Massey's testimony reflecting on the credibility (or lack thereof, with regard to his statements. For example:

A) Paragraph 11(b)(iv) provides that his acceptance of responsibility points may be taken away if he "gives conflicting statements";

B) Paragraph 12(a) requires him to "provid[e] truthful and complete information and testimony...";

C) In Paragraph 13 “[t]he United States reserves the right to evaluate the nature and extent of the defendant’s cooperation. This evaluation is further subjected to “the sole and unreviewable judgment of the United States.”

10. Mr. Gilley should be allowed to also see everything that Mr. Massey has provided the Government in order to assess his credibility and compliance. The Government is not entitled to be the sole determiner of a witness's truthfulness when Mr. Gilley's liberty and constitutional rights are at issue.

11. It is well known that testimony of persons entering plea agreements with the Government has a great potential for being unreliable. Chief Justice Warren wrote that the incentives facing informants create “a serious potential for undermining the integrity of the truth-finding process in the federal courts.” *Hoffa v. United States*, 385 U.S. 293, 320 (1966) (Warren, C.J., dissenting). *See also United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) (“It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence.”); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980) (“promises of immunity or leniency premised on cooperation ... may provide a strong inducement to falsify...”); Trott, “Words of Warning for Prosecutors Using Criminals as Witnesses,” 47 *Hastings L.J.* 1381, 1383 (1996).

12. Defendants have a Constitutional right under the Sixth Amendment to confront the witnesses against them. The rules of evidence provide various means of doing so with relation to prior statements of the witnesses. These include but are not limited to testing the witnesses general character for truthfulness (FRE 608 and 609); establishing prior inconsistent statements (FRE 613 and 801); and bias.

13. Complete, unredacted copies of the Massey 302's are essential to Mr. Gilley's defense at the revocation hearing. For example,

Defense counsel may use the FBI Form 302's for cross examination purposes, and to refresh the witness' recollection. If the witness' testimony is inconsistent with the information in the FBI Form 302's, defense counsel can ask the FBI agents whether the witnesses told them what is written in the FBI Form 302.

United States v. Silber, 2010 WL 1222723 *2 (E.D. Mich. 2010). Because Mr. Gilley only has access to redacted copies of the Massey 302's, he cannot adequately track the evolution of Mr. Massey's testimony over the course of his 6 interviews with the Government in preparation for cross-examination. Additionally, the Government's failure to produce complete copies of the Massey 302's violates Mr. Gilley's rights under the Confrontation Clause of the Sixth Amendment to confront witnesses against him. To disallow Mr. Gilley access to the entirety of Mr. Massey's prior testimony denies Mr. Gilley the ability to fully confront the evidence presented against him during the hearing on the Motion to Revoke the Order of Pre-Trial Release. Likewise, for the same reasons, Mr. Gilley is entitled to any additional 302's that he has not received and, if Mr. Massey has made contact with any agent or prosecutor in which no 302 was prepared, any notes or other memos of any information he provided as part of such contact.

14. Pursuant to the Standing Order on Criminal Discovery, the undersigned certifies his good faith efforts to resolve the subject matter of the motion by agreement with opposing counsel. Specifically, on January 6, 2011, a written request for the information was made to Government's counsel. As of the filing of the Motion, the undersigned had not received a response from counsel. Due to the time-sensitive nature of the production in light of the upcoming hearing, the undersigned was left with no choice but to file the instant motion.

WHEREFORE, Mr. Gilley moves this Court to compel the immediate production of: (1) non-redacted copies of the five redacted 302's of Jarrod Massey, (2) any additional 302's that Mr. Gilley has not received, and (3) if Mr. Massey has made contact with any agent or prosecutor in which no 302 was prepared, any notes or other memos of any information he provided as part of such contact.

Respectfully submitted,

/s/ G. Douglas Jones

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 7th 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:

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