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

UNITED STATES OF AMERICA,	)	
	)	
P1aintiff,	)	
	)	**No. 2:10 -CR-186-MHT**
v.	)	
	)	**ORAL ARGUMENT REQUESTED**
RONALD E. GILLEY, et. al.,	)	
	)	
Defendants.	)	

DEFENDANT RONALD E. GILLEY'S REPLY TO UNITED STATES' OPPOSITION TO REVOCATION OF DETENTION ORDER

Comes now the Defendant Ronald E. Gilley and in response to the opposition to the Defendant's motion to revoke the detention order filed by the United States, hereby states as follows:

I. THE FACTS DO NOT SUPPORT AN ORDER OF PRE-TRIAL DETENTION

A. The Defendant Did Not Commit a Crime While On Pre-Trial Release

Significantly, the United States' acknowledges that any allegation that the Defendant violated a condition of release by committing a crime is based solely on co-defendant Jarrod Massey's "belief" or "understanding" regarding contacts with the Defendant. For instance, when describing the Defendant's conversations with Massey at the courthouse on December 14, 2010, the Government states "…the defendant had already made comments which Massey <u>believed</u> were an effort to corruptly offer or persuade Massey to testify falsely." (Gov't Opposition p.9 emphasis added). Likewise, regarding the phone contact between the Defendant and Massey later that same day, the Government states "[A]gain Massey <u>understood</u> the defendant to be verifying or reconfirming the previous commitment he made to Massey regarding an equity interest in the

Defendant's development. The recognition by the Government that Mr. Gilley is being detained in large measure based on the opinion and beliefs of a cooperating co-defendant is especially significant in that they completely ignored other critical evidence casting doubt on Massey's opinion.

First, as the Magistrate did in his order, the Government ignores the large volume of evidence regarding Massey's attempts throughout the summer and fall of 2010 to collect on some $90,000 in overdue invoices due him from Defendant's company. In merely one sentence the Government acknowledges that the Defendant owed "Massey a considerable amount of money" (Gov't opposition p.8), but ignores the overwhelming evidence of Massey's efforts to collect. *See generally* DX 2. The Defendant established at the evidentiary hearing that Massey had been in almost weekly communication with either Mr. Gilley directly or someone at his company regarding the payment of his invoices (Tr. 58, 60, 70 and DX2). Many of the contacts occurred after Mr. Gilley and Mr. Massey were released on bond following their arrest. (DX 2). These efforts to collect on legitimate invoices in the weeks leading up to December 14th places the December 14th conversations in a much clearer context than Mr. Massey's opinion or belief about conversations that took place in April, some six (6) months earlier.

Second, the Government fails to acknowledge that the timing of the disclosures regarding the contact at arraignment and on December 14th cast serious doubt as to whether Massey's "opinion" is correct. The record reveals that Massey began cooperating with the Government on October 12, 2010, just a couple of days before the arraignment. He gave a total of five (5) more proffers after the arraignment, but at no time did he mention either the arraignment conversation with the Defendant or his efforts to collect money. (*See* DX 3). Likewise Massey appeared in Court with his attorneys and prosecutors approximately one week after the December 14th

contact and still there was no mention of any communication with Mr. Gilley. (Tr. 42, 43). It was only after one of Massey's attorneys mentioned it to the United States on January 3, 2011, that any contact first came to light. (Gov't Opposition p. 10). Even then the record reflects that Mr. Masey was not interviewed by phone for three (3) days and then in person on January 7, 2011, four days after the initial report (DX3).[1] The only logical inference of this chain of events is that neither Massey nor his lawyers (who had cut-off earlier contact with Mr. Gilley and had witnessed the December 14th courtroom contact) felt that the December 14th contacts held any significance until the United States reacted with a revocation motion. Seeing what the United States wanted from him, Mr. Massey for the first time decided that his communications with Mr. Gilley related back to an earlier, pre-indictment time.

Third, the United States also ignores the fact that another cooperating individual, Terry Spicer, also has stated that Massey expressed only an "opinion" about Mr. Gilley's intent in offering a equity interest in his development in exchange for silence. Mr. Spicer, a former state legislator, had been receiving bribes in the form of cash from his friend Massey for many years. But yet when Massey tells Spicer in June that Mr. Gilley had offered him an equity interest in his developments, Massey initially says it was "because of all of the work done for him" but then adds that he "believes" it was to keep him quiet (Tr. 61-64, 193-194). This acknowledgement by Mr. Spicer casts serious doubt as to whether Massey was testifying truthfully about an explicit conversation with Mr. Gilley rather than his pure "opinion" or "belief" regarding Mr. Gilley's motives. Accordingly, the evidence suggests that Mr. Gilley never made an offer to Mr. Massey

[1] The Government states that Massey was interviewed by phone and in person the "next day" following the January 3, 2011, report to the Government by one of Mr. Massey's attorneys. The record reflects, however, that Mr. Massey was interviewed by phone on January 6, 2011, the same day the that Motion to Revoke was filed, and again in person on January 7, 2011, three and four days after the initial report.

that could be considered corrupt and that Mr. Massey is testifying as to only his subjective belief about what the Defendant really meant rather than what he actually said.

The Government's reliance on Mr. Gilley's use of pre-paid cell phones is also over exaggerated. To begin with, the use of such phones in and of themselves is perfectly legal. While the United States goes to considerable effort to cast a nefarious connotation to Mr. Gilley's use of such phones, the evidence proved that in a four day period in December Mr. Gilley made 103 calls on this phone to lawyers, his office and others, none of which the United States alleges involved any criminal activity (Tr. 122-123). Moreover, the United States ignores grand jury testimony given in May, 2010, from a witness from whom Mr. Gilley had purchased a number of pre-paid phones that indicated that Mr. Gilley's use of said phones was because he was convinced that the Governor of the State of Alabama, who has no legal authority to eavesdrop on Mr. Gilley's telephone conversations, had been listening to his business conversations and thus was able to obstruct his business development. (Said GJ Testimony will be filed under seal as Ex. A).

It should also be noted that the Government knew of Mr. Gilley's use of pre-paid phones throughout this investigation. Mention of the phones and the tape recordings played at the evidentiary hearing are contained in the indictment, but yet neither the Government nor the Magistrate felt compelled to prohibit Mr. Gilley's use of said phones until after the Motion to Revoke was filed (Doc. 338). Since that time, and prior to his detention, Mr. Gilley strictly adhered to the use of only his personal cell phone as ordered by the Magistrate on January 12, 2011 (*See generally* testimony of David Conoly, Tr. 207-216).

B. Defendant Did Not Violate a Condition of Bond by Contacting A Potential Witness

Even with the Government's Opposition Brief it is still unclear when it is alleged that the Defendant violated a condition of release by merely contacting a "witness or potential witness." By December 14th the conditions of bond had been changed to prohibit contact with "witnesses" not "potential witnesses." (Doc. 201) It is undisputed that as far as Mr. Gilley knew Mr. Massey was not a "witness" on December 14th, but a co-defendant. It thus seems clear then that no violations of bond occurred on December 14, 2011, because of the mere contact of Mr. Gilley with Mr. Massey. Likewise, it is unconceivable that the Government or the Magistrate has determined that Mr. Gilley's contact at the October 15, 2010, arraignment was a violation of a bond condition that would justify detention. Mr. Massey was a business associate and co-defendant of Mr. Gilley. Surely this condition of bond should not be interpreted to prohibit mere contact alone between business associates and alleged co-conspirators, especially in light of the fact that Judge Moorer narrowed this condition on November 10, 2010 (Doc. 201). Due Process requires notice of the specific allegations regarding an alleged violation of his conditions of release which he has yet to obtain from either the United States or the Magistrate. The failure of the United States to give specific notice and the failure of the Magistrate to make specific findings on this point demonstrates a complete lack of evidence regarding this allegation.

Finally, the discussion in the Government's Opposition regarding attempted contacts with Sonny Reagan, a former advisor to the Governor and now a member of the Alabama Attorney General's office, is nothing more than a red herring. As the Government acknowledges, Mr. Reagan, is at best a "potential witness." According to the Magistrate's Order of November 10, 2010, Mr. Gilley is not prohibited from contacting mere "potential witnesses." (Doc. 201).

II. DEFENDANT'S CONDITIONS OF CONFINEMENT PREVENT HIM FROM ADEQUATELY PREPARING FOR TRIAL

The Government takes the conclusory position, without any citation to any legal authority, that Mr. Gilley's "incarceration does not hinder his ability to prepare for trial." *See* Gov't Opposition at § II. The Government's minimal treatment of this essential point in response to this Honorable Court's Show Cause Order (Ct. Doc. 644), belies the fallacy of its position.[2] Mr. Gilley's trial preparation should not and cannot be controlled by the Government's assessment of how and when Mr. Gilley's trial preparation should occur and whether or not such preparation is sufficient to preserve his innocence and protect his liberty interests at stake.

Although the Government is correct that Mr. Gilley's conditions are somewhat better than they were and that he now has access to trial materials, which he received for the first time on February 25, 2010, the morning after Mr. Gilley was moved to a cell in which he could secure his materials (Ct. Doc. 657), Mr. Gilley's new environment at the jail still does not allow him to prepare adequately for trial.[3] Mr. Gilley and his counsel appreciate the efforts the jail staff have made on his behalf to make arrangements for him to keep trial materials securely in his cell, however, no matter what lengths the Jail staff go to in order to accommodate Mr. Gilley's trial preparation needs, his ability to prepare for trial will still be greatly hindered. The following examples highlight the ongoing problems with Mr. Gilley's trial preparation that cannot be remedied:

[2] After a lengthy factual rendition, most of which relates to pre-indictment conduct rather than conduct that occurred post-bond, the Government devotes only one paragraph covering approximately half of a page to this absolutely essential Sixth Amendment issue. *See* Gov't Resp. at 14 – 15.

[3] Mr. Gilley lost approximately three (3) weeks of trial preparation between February 7, 2011, the date Judge Moorer ordered his detention, and February 25, 2011, the first morning he spent in a cell in which he could keep trial materials securely.

- Mr. Gilley can only make outgoing calls from the jail. If Mr. Gilley's counsel needs to speak with him, by facility rules which cannot be altered, they have no way to call in (for example, to provide updates, to inquire about discovery, to discuss new developments or trial strategy generally, etc.), and discuss matters with him short of meeting with him in person.
- Mr. Gilley is only allowed to listen to calls on a single disk CD player, which makes it impossible to scroll through a call to a particular point in time (min:sec) or to play any call in context with other calls. To record the audio files produced in this case to CD-R disks will likely require 75 – 100 separate compact disks, making it impractical to search for calls.
- There are approximately 200,000 documents that have been produced through electronic discovery in this case. Mr. Gilley is not allowed any device which will allow him to review these electronic documents. If his counsel were to print paper copies of these documents, it is estimated that 200,000 paper documents would fill more than five (5) dozen banker's boxes. It is not practicable to keep more than 5 dozen banker's boxes in Mr. Gilley's cell.
- The schedule of the facility, which cannot be altered simply to suit Mr. Gilley's trial preparation, is such that Mr. Gilley's trial preparation is hindered. There are several timed activities throughout the day, such as roll call, boot camp, meals, etc., that interrupt Mr. Gilley's trial preparation. He thus is not at liberty to prepare for his trial on his own schedule throughout the day. After each meeting with counsel, Mr. Gilley is taken to a holding cell, where he must wait until Jail staff can strip search him and return him to his cell. Depending on staffing and

the needs of the facility at the point Mr. Gilley is ready to return to his cell, this process may last anywhere from thirty (30) minutes to over an hour.

- Likewise, depending on the staffing and needs of the facility at the point Mr. Gilley's counsel arrives to meet with him, counsel may have to wait anywhere from thirty (30) minutes to an hour in total going and coming from the lobby of the jail to the attorney/client conference room.
- The conference facility for attorney/client meetings is not conducive to productive sessions. The room is barely big enough for 3 people, much less attorneys with computers and documents. There is no ability to bring in water and bathroom breaks will be a time consuming ordeal. Once in the attorney/client conference room attorneys will not be able to freely communicate with other attorneys involved in the case.
- There is a constant din of noise in the jail, sometimes louder than others, through no fault of the facility and its staff, which makes it extremely difficult, if not nearly impossible to listen constructively to the wiretap and consensual recordings. Mr. Gilley's new cell allows him to keep his trial materials securely so they will not be pilfered by other inmates, but it does not allow him a quiet place to prepare for his trial.

The inability to have free access to his attorneys and his inability to review tape recordings cannot be overstated, especially given the magnitude of discovery and the looming June 6, 2011, trial date. While Mr. Gilley can freely call his attorneys, at least as long as the pre-paid deposit amount for collect calls is adequate, his attorneys cannot call him. Trial preparation for the defense is much more than sitting with a client listening to tapes or discussing trial

strategy. Counsel often, most times daily, will need to talk to the client about ongoing matters. Under any form of custodial detention, such free flow of attorney-client communication is impossible.

Likewise, Mr. Gilley simply cannot review the massive number of recordings provided by the Government. The United States has repeatedly told the Court that "this is a tape case." The use of the recordings is essential for the United States and essential to the defense. There are approximately 3,000 "pertinent" phone calls that have been provided to the defense, but because of the limitations imposed by the custodial facility Mr. Gilley has no way to effectively listen to and organize said recordings. Listening to the recordings on an audio CD player can only be done without the benefit of an index or ability to distinguish one conversation from another prior to listening. Likewise, given that it will take approximately 75 to 100 CD's of conversations recorded from 4 different phones to get Mr. Gilley a complete set of recordings, it will be impossible for him to play any call in context with any other call.

Finally, the Defendant doubts seriously that any prosecutor in this case has ever had to defend and prepare a defendant for trial in a case of this magnitude and complexity. They simply are not qualified to state with any degree of certainty that Defendant's detention allows him to prepare for trial. Significantly, however, the Government has given the Court a clear idea that even they cannot even properly prepare their own witnesses who are in custody. Rather than try and prepare their star witness, Jarrod Massey, in the jail where he is being detained, the United States sought and received a Court Order allowing Massey to be released to FBI agents where he can be prepared at their leisure and with all the amenities, such as decent food, snacks and restroom breaks, that the U.S. Attorney's Office can provide (Doc. 627).

III. CONDITIONS OF RELEASE

Following the filing of the Motion to Revoke, the Magistrate tightened up Mr. Gilley's conditions of release by requiring GPS monitoring, home detention, prohibited used of any cell phone not registered in his name and maintenance of a log of his telephone calls (Doc. 338). The restrictions were later modified to allow Mr. Gilley to travel to Birmingham on two occasions, both of which included overnight stays (Doc. 370). There has been nothing to suggest that in the 26 day period between the imposition of the new conditions and his detention, Mr. Gilley was anything but in perfect compliance with the Magistrate's Order. Likewise, there is nothing to suggest that Mr. Gilley will be anything but compliant if he is released under the same or similar conditions. It is thus respectfully argued that Defendants' conduct under the conditions of release imposed on January 12, 2011, more than overcomes any rebuttable presumption regarding conditions or combinations of conditions that might insure his compliance with bond.

Defendant respectfully suggests that a more detailed statement regarding conditions or combination of conditions of release and the reasons why such conditions will insure that Mr. Gilley appear at trial and not present a danger to the community is set out in Defendants "Motion for Revocation of Detention Order," (Doc 639, p. 22-32).

IV. CONCLUSION

Simply put, the Magistrate got it wrong and the Government has it wrong. The evidence that Mr. Gilley violated a condition of his release is at best based on speculation and opinion of a co-defendant who is seeking to ingratiate himself with the United States in order to get favorable treatment for his admitted criminal conduct. The presumption of innocence should not be relegated to such an inferior position based on the opinions and speculation of a cooperating witness. Moreover, to say that Mr. Gilley's conditions of his detention are

compatible with his Sixth Amendment rights to effective assistance of counsel and ability to prepare for trial is somewhat ludicrous. Given the magnitude of this case and the upcoming trial date of June 6, 2011, Mr. Gilley simply cannot adequately assist in the preparation of his defense; his attorney's cannot communicate with him except through visitation or a call from him; he cannot listen to the some 3,000 phone calls in any way that is organized or efficient; and attorney visits will be of limited duration and not conducive to productive sessions. Defendant Gilley respectfully submits that the weakness of the evidence against him regarding any alleged bond violation, the inability to truly prepare his defense for a June 6th trial and his full compliance with the more stringent conditions of bond imposed on January 12, 2011, require a revocation of the Magistrate's detention order and the Defendant's release from detention with appropriate conditions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 28th day of February, 2011, 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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