

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
Northern Division**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CR. NO. 2:10cr186-MHT
)	
MILTON E. McGREGOR, et al.,)	
)	
Defendants.)	

**RESPONSE TO GOVERNMENT’S PROPOSED TIMELINES
FOR SUBMISSION OF TRANSCRIPTS AND AUDIO FILES**

COMES NOW, Milton McGregor and files this objection and response to the Government’s proposed timelines for submission of transcripts and audio files. McGregor herein proposes an alternative timeline based on the preceding orders of this Court.

As background and as support for these objections and alternate proposal, McGregor would show the Court the following:

(1) The audio recordings that the Government claims are the basis for its case, have been in the Government’s possession since, at the very latest, April 2010. Some have been in its possession since 2009. The Government has admitted, and indeed there is substantial evidence, that many of the calls recorded have been transcribed in full since March 2010.

(2) As early as October 15, 2010, McGregor’s counsel asked in open Court for transcripts of the recordings on which the Government intended to base its case. This Court indicated in that initial hearing that it recognized that Defendants’ counsel should be permitted to see and review the transcripts if the Government intended to use the transcripts at trial. The exchange below indicates that Mr. Ainsworth, even on October 15, 2010, admitted that the Government was “working on the transcription” (something the Government had been doing

since at least early 2010) and it also seems to show, especially in light of recent events, that Mr. Ainsworth intended to use the lack of a firm deadline to turn over the transcripts to the Government's advantage

MR. ESPY: The tapes, one quick question. Are they transcribed? That would make some difference as to time, too. If the tapes are transcribed, it makes it a considerably quicker process than if they're not, Judge.

THE COURT: Mr. Ainsworth, are the tapes transcribed?

MR. AINSWORTH: The tapes that are – the Disks that they're going over today are simply the audio. We're working on the transcription. At some point we'll be able to hand it over. But as I read the discovery order, the local discovery order, and as I read the other obligations, those are not due today and we need to spend a little more time.

THE COURT: I would just say this. From my past experiences with trying cases in which there are tapes or audio, I know that you will provide the Court with a transcription. If the defendants are going to have their own transcripts done, you need to do that immediately so that you can exchange transcripts. And to the extent that there is a dispute, the Court can resolve that at trial, or present an appropriate charge to the jury.

MR. AINSWORTH: Absolutely, Your Honor.

THE COURT: If it comes up at trial, quite often lawyers are not prepared for disputes over what's being said on the tapes or the accuracy of the transcripts. And I would hope to avoid that problem. So I'm putting you on notice now that if you're going to get transcripts from the Government, if you take issue get your own transcripts, and make sure that whoever is going to do the transcription is capable of testifying, if that's required. But first of all try to agree with the Government about what's being said.

Yes?

MR. ESPY: Can we go ahead and get what they have got.

THE COURT: They're supposed to get that to you today.

MR. ESPY: Okay. He didn't indicate who's going to give us the transcripts today.

THE COURT: He said he doesn't have transcripts –

MR. ESPY: I think he indicated he doesn't have some of them.

THE COURT: We'll take that up later.

MR. ESPY: Okay. Okay.

THE COURT: I don't want to get into that. But I was putting you all on notice that when I get to trial I just don't want to have a problem with the transcripts.

(3) In meet and confer sessions immediately following that hearing, McGregor's counsel asked specifically when such transcripts would be made available to them and requested that they be made available at the earliest practicable date.

(4) The Government ultimately did provide some transcripts in December 2010, almost two months later. In providing these approximately 80 transcripts, the Government made no representation as to whether these were final transcripts and whether they were the complete set of transcripts to be used in the Government's case in chief.

(5) McGregor's counsel, in an attempt to come to some agreement as to what the audio recordings contained, began the process of reviewing them. After spending a substantial amount of time beginning such a process, it became evident that such would ultimately be a complete waste of time because there had been no representation that the transcript drafts provided had been finalized and many, in fact, had watermarks that read "draft" running across each and every page.

(6) It would be senseless to undertake the enormous amount of work to "correct" the government's unfinalized transcripts only to have the Government then provide edited versions with changes requiring the parties to start the process all over again. Upon realizing this, McGregor realized it had no real choice but to insist that the Government provide all of the transcripts it intends to use in final format.

(7) Thereafter, on January 6, 2011 McGregor filed a motion to compel production of the final versions of transcripts the Government intended to use in chief. [Doc. #325 at 12-13]. See Exh. A, hereto.

(8) On January 26, 2011, Judge Capel granted that motion, ruling: “[T]he court orders that the Government shall provide finalized transcripts to Defendant as quickly as possible. Then, Defendant shall provide the Government with his finalized transcripts within ten days.” Doc. 373 at 6 (attached hereto as Exh. B).

(9) Those transcripts were not produced in the subsequent weeks nor were there any representation made as to when they would be produced, and during the week of February 14, 2011, McGregor, in two separate communications with the Government, requested that the Government comply with this Court’s very clear order requiring that the Government provide the transcripts. The Government did not produce the transcripts or explain why they had not been produced.

(10) On February 22, 2011, McGregor was forced to file its Second Motion to Compel requesting that the final transcripts be provided as ordered and that the Court order production on a “date certain.” See Exh. C.

(11) In a telephone hearing relating to that motion on February 23, 2011, the Government represented to the Court that it could provide the transcripts by Friday of that week, i.e., February 25. Peter Ainsworth made this representation and further represented that there would be approximately 100 transcripts.

(12) On February 25, 2011, McGregor’s counsel had personnel scheduled to work to review the transcripts. No transcripts were provided. Instead late on February 25, 2011 (7:26 pm), McGregor’s counsel received an email from the Government, see Exh. D, stating that a disc

had been sent Federal Express for arrival “early next week.” Said disc was received by McGregor’s counsel in the afternoon of February 28, 2011.

(13) However, instead of providing finalized transcripts, as ordered by this court, the Government once again provided only drafts. The Government stated in its email of February 25, 2011, “We do not represent the transcripts to be final versions. Nor do we represent that this production includes all transcripts we may seek to enter at trial. Rather, this is an effort to provide you with early drafts far in advance of the trial date.” (Many or most of these so-called early drafts are now going on one year old.)

(14) In short, the Government has simply thumbed its nose at this Court’s January 26, 2011 order. And the proposed dates provided in its February 28, 2011 filing are further attempts to ignore an outstanding Court Order which it never once sought to have reconsidered, overturned or appealed.

(15) Instead, the Government has blatantly omitted any mention of this Court’s January 26, 2011 Order in its February 28, 2011 filing. Rather, the Government suggests that it should have until April 22, 2011 (four months after being ordered to produce final transcripts and more than one year after obtaining the audio) to provide such transcripts.

(16) In light of the fact that: (a) the Government and its agents have known the content of these calls and consensual recordings since last March or earlier and that it transcribed many, if not most at that time, using *two* full time transcriptionists dedicated to that task; (b) that it chose to bring an indictment based on the recordings in October and including in that indictment the content of many of those recordings, and (c) it represented its readiness for an April 4 trial which necessarily means that it was prepared to have the transcripts to Defendants well before that date, it is impossible to believe that the Government has not known for months now (or had

the ability to discern) which recordings would be used in its case in chief and to finalize the same.

(17) It cannot be stressed enough that the date the Government has chosen to turn over the transcripts is a full two weeks *after the Government represented it was ready to begin the trial of this case*. Indeed, it was scarcely two weeks ago that the Government represented its readiness to start trial on April 4. The notion that it now needs until April 22 to finalize its transcripts is not only thumbing its nose at the January 26 Court Order, it is also necessarily inaccurate.

(18) As Counsel understands this Court's ruling regarding continuing the case, an impetus for doing so was to give all parties time to reasonably prepare for trial. Postponing the production of final transcripts ordered this January until April 22 undermines completely the ability to prepare for trial in an orderly and reasonable fashion.

(19) Moreover the Court's interest in having all transcript issues resolved before trial is best served by early disclosure. It is likely that during the last weeks of trial it will be so hectic that the Defendants may not have an opportunity to work with the Government to resolve differences in so many transcripts, and the reality may be that two sets of transcripts will be presented to the jury, even where differences may not be overly material.

(20) At present, it is important to note that, not only do Defendants not have a final draft of the transcripts, but they have not even been provided with a final list. In fact, the discs provided in January had approximately eighty recordings on them, and the disc provided February 28 supposedly had 180 recordings on it, but it did not contain some of the recordings that had been on the disc provided in January. In short, the list of the Government's recordings is a moving, fluid target. And it is apparent that the list is not complete because there are no

recordings identified from the final days of the wiretap for at least two of the Defendants, suggesting that the Government has not yet bothered to identify which of these recordings it will use. Moreover, on the disc provided by the Government there are multiple copies of various calls, with at least one call being provided in three different versions.

(21) Not only is the date proposed- April 22 – flawed in that it comes so late in the preparation for trial, but it also requires simultaneous transfer of the transcripts. This makes little or no sense. By almost absolute necessity, the transcripts that McGregor and other Defendants will use in their cases in chief will be determined by the transcripts that the Government identifies. To require simultaneous exchange is to create unnecessary inefficiency in the process in addition to the unreasonable delay, and it is not in keeping with the existing procedure set out in the January 26, 2010 order.

(22) Alternatively, McGregor would propose the following schedule for exchanging transcripts. While the following does alter slightly the original ruling giving McGregor only ten days to produce its transcripts, it does so for the purpose of providing McGregor time, instead, to first determine whether it has objections to the Government's transcripts and to lodge those:

(a) Deadline for the provision of all final transcripts the Government intends to use in its case in chief: March 11, 2011.

(b) Deadline for Defendants' objections to final transcripts and/or stipulations of accuracy: March 25, 2011. (McGregor asks for two weeks because, at this point, McGregor fully expects that the Government really intends to provide more in the realm of 200 transcripts or more which will require some time for review and objection.)

(c) Deadline for Defendants' production of final transcripts it intends to use in its case in chief: April 8, 2011.

(d) Deadline for the Government's objection to said transcripts and or stipulations of accuracy: April 22.

(e) Deadline for Parties to stipulate to the accuracy of transcripts: April 29.

(23) This particular schedule frees the parties from spending the last six weeks before trial undertaking the onerous task of stipulating to what will likely be hundreds of different transcripts. It also provides time to nail down with the Court, to the extent necessary, how competing versions of transcripts will be handled at trial and how many there will be.

(24) As for the identification of audio recordings to be used, the dates proposed are not objectionable.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on 1st day of March, 2011, 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.

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