

**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 MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO COMPEL**

Defendant Ronald Gilley hereby submits this memorandum of law in support of his Motion to Compel filed simultaneously herewith. As set forth below, the requested information falls under both Rule 16 of the Federal Rules of Criminal Procedure and the Middle District's Standing Order on Criminal Discovery. Counsel represents that the requested documents are material to the preparation of Gilley's defense. The Government has yet to provide any substantive reason as to why such information has not been produced. Accordingly, Mr. Gilley requests the Court to order its production in an expeditious matter so he will have ample time to comply with the Court's current scheduling order on motions and trial.

A. Non-Redacted FBI FD- Form 302s of Jarrod Massey

As of December 19, 2010, the Government had produced 113 FBI form FD-302 ("302s") summaries of witness interviews. Of these 113 302s, none contained any redactions. Pursuant to a plea agreement with the United States, on December 20, 2010, Co-Defendant Jarrod Massey changed his plea in the instant matter by entering pleas of guilty to Counts One, Two, Four, Five, Eight, and Ten. Importantly, Mr. Gilley is named as a Defendant in each of the counts to which Mr. Massey pled guilty. Mr. Massey's plea agreement requires him to cooperate with the

Government, including de-briefing by agents and testimony at any trial and/or grand jury proceeding. The Government in turn will make the sole determination as to the truthfulness of Mr. Massey's cooperation in order to evaluate a possible downward departure of his sentencing guidelines.

On the same day as Mr. Massey's change of plea, the Government produced six (6) 302s of its interviews with Mr. Massey, none of which had been previously produced. All but one of these 6 Massey 302s inexplicably contains a significant amount of redactions, in contravention to the Government's previous production of discovery in this case. Counsel for Mr. Gilley has requested unredacted 302s of the Government's interviews with Mr. Massey, but the Government has refused to produce them. Furthermore, the Government has not offered a rationale as to why on the one hand, 113 of the produced 302s were entirely unredacted, and on the other hand, the 6 Massey 302s contain significant redactions.

As Massey is a cooperating witness with the Government (and apparently has been for some time) his credibility is at issue. *Fed. R. Evid.* 607. As such, 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. The Government's Plea Agreement with Massey makes this especially true as it contains various provisions concerning 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

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 witnesses truthfulness when its Mr. Gilley’s liberty and constitutional rights which are at issue.

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).

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. In this regard, complete, unredacted copies of the Massey 302s are essential to Mr. Gilley's defense at trial. For example,

Defense counsel may use the FBI Form 302s for cross examination purposes, and to refresh the witness' recollection. If the witness' testimony is inconsistent with the information in the FBI Form 302s, 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 302s, he cannot track adequately the evolution of Mr. Massey's testimony over the course of his 6 interviews with the Government in preparation for Mr. Massey's cross examination.

Likewise, Mr. Gilley is unable to test the accuracy or truthfulness of material contained in the redacted portion of his interviews. It is Mr. Massey's creditability as a whole, not just bits and pieces offered by the Government that will be at issue in this case. Finally, The Government's failure to produce complete copies of the Massey 302s violates Mr. Gilley's rights under the Confrontation Clause of the Sixth Amendment to confront witnesses against him. Mr. Massey will undoubtedly provide testimony at trial regarding each of the 6 counts to which he pled guilty and in which Mr. Gilley is also charged. To disallow Mr. Gilley access to the entirety of Mr. Massey's prior testimony regarding the same denies Mr. Gilley the ability to fully confront Mr. Massey at trial. Accordingly, Mr. Gilley respectfully requests that this Honorable Court order the Government to produce all Massey 302s without redactions.

Finally, in order to make effective use of this material for cross examination, the defense must have access to the information to conduct its own investigation into the accuracy of the information and thus Massey's truthfulness. The United States is not the only party that conducts an investigation surrounding the allegations of the indictment and the credibility and background of witnesses. As Massey is expected to be a credited witness for the Government, it is imperative that the defense be given access to this information as soon as possible in order to have its own investigation completed by trial.

B. 302s Generated in Case Numbers 46187 and 44533

A review of the more than 100 302s produced by the Government indicates the underlying investigation was done under case numbers that end in 46187 and 44533.¹ Some of the 302s reference one or the other of these numbers, while in some cases both numbers are used on the same form. The Government has provided no explanation as to why the case agents used both numbers interchangeably and sometimes jointly.

The Government has confirmed it has produced all the 302s that they intend to produce, but it has not identified or provided a description of the 302s it has unilaterally withheld. Because the produced 302s cover a wide range of time and relate to topics, including Troy King and other unindicted lobbyists and legislators, Mr. Gilley cannot conceive as to how the withheld documents somehow fall outside the standing order on discovery and are immaterial to his defense. When case agents work more than one case and fail to distinguish or separate the cases in their investigative reports, prosecutors cannot pick and choose which reports to provide to the defense. Accordingly, consistent with the previous production of over 100 302s under case numbers 46187 and/or 44533, the Government should be compelled to turn over *all* the 302s done under those case numbers. Alternatively, at a minimum, Mr. Gilley should be provided a detailed description of the subject matter of the withheld documents so he can make specific requests for the withheld 302s.

C. Grand Jury Testimony from Case Numbers 47187 and 44533

Similar to its production of 302s, as part of its initial production under the standing order, the Government produced over fifty transcripts of grand jury witnesses presumably associated with the FBI case numbers ending in 46187 and 44533. Upon information and belief, some of

¹ See Exhibit A to Defendant Gilley's Reply Submission in Support of His Motion to Compel Disclosures Regarding "Recusal" of Office of United States Attorney filed under seal on December 8, 2010.

the produced testimony is from a grand jury proceeding separate from the one that returned the indictment in this case and one in which the United States Attorney's Office for the Middle District of Alabama is recused from participation. However, despite a request from Mr. Gilley, the Government has not provided any indication as to the nature or amount of withheld grand jury testimony. Moreover, the Government has not provided any explanation of how the subject matter of this withheld testimony is substantially different from the produced testimony. Just as with the production of 302s, the Government may not pick and choose the grand jury testimony associated with case numbers 46187 and 44533 to provide to the Defendants. Instead, all of the testimony should have been provided to the Defendants at the same time.

D. *Brady* Material

The standing order provides at arraignment, or on a date otherwise set by the Court for good cause shown, the Government shall tender to the Defendant “[a]ll information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963).” In addition to the withheld 302s and grand jury testimony, Mr. Gilley is under the impression there is additional *Brady* material that has not been tendered to him. Specifically, he has requested, but not received, drafts of plea agreements circulated between the government and other defendants and cooperating witnesses. The drafts of these documents, including parts initially redacted or altered by defendants and cooperating witnesses, could be extremely favorable to Mr. Gilley on the issues of guilt or punishment. For instance, on information and belief, in at least one such draft, Jennifer Pouncey, an alleged co-conspirator and cooperating witness who has entered into a plea agreement with the Government, submitted to the Government, red-line alterations to factual statements of her plea agreement that are clearly

exculpatory to other co-conspirators, including Gilley. As such, they should have been provided to him at the time of arraignment or, if created after such date, as they were circulated between the relevant parties. Likewise, Mr. Gilley is under the impression the Government recently contacted former Birmingham Mayor Larry Langford to seek his assistance in this case and that Mr. Langford provided exculpatory information regarding electronic bingo operations. If it exists, such information likely contains *Brady* material to the Defendants and such be produced immediately.

E. Text Messages, E-mails or other Electronic Communication Between an Agent or Prosecutor and any Witness

The Government has advised that certain 302s, such as those expected when a cooperating source turns over a consensually produced audio or video recording. In this age of digital communications, however, it would not be uncommon for an agent or prosecutor to communicate with a witness via text from a mobile phone, e-mail or other electronic communication. Such communications are just as material to this case as interviews that have been summarized in the form of an FBI 302. Moreover, any such form of electronic communication is a "statement" of both the agent and the witness and therefore producible pursuant to the Jenks Act and the Standing Order.

F. Tape Recordings Made by Houston County Sheriff Andy Hughes

Upon reviewing the 302s produced by the Government, Mr. Gilley learned that Houston County, Alabama Sheriff Andy Hughes was interviewed numerous times by the FBI and may be a cooperating witness. The interviews (which could contain statements of Defendant Gilley) clearly demonstrate that Sherriff Hughes was providing information to the FBI relating to Gilley, his County Crossings development located in Houston County and his relationship with state and local governmental officials. The 302s dated November 23, 2009, March 26, 2009 and April 30,

2009 also indicate that Sheriff Hughes provided the FBI with at least eighteen audio recordings of conversations that he made on his own initiative. To date, the Government has not provided any explanation as to why they have not provided Mr. Gilley with these recordings nor has he been given a log of the date, time and participants of said recordings. Given the undisputed fact that the 302s regarding the recordings were turned over, as well as the fact that Sheriff Hughes's relationship with Gilley makes them obviously material to preparing his defense, the Government should be directed to immediately turn the recordings over to the Defendants.

G. Consensual Recording Information

Despite a formal request from Mr. Gilley, the Government has not provided the following information relating to the consensual recordings made during the underlying investigation: (a) copies of all authorizations for consensual monitoring utilized in this case; (b) copies of 302s reflecting consensual recordings conducted in this case, whether or not pertinent recordings were obtained; and (c) documentation regarding the specific electronic recording devices, including make, model and serial number, used for all consensual recordings made in this case.

All of this information is material to preparing Mr. Gilley's defense, particularly since it is evident the recordings will be a central part of the Government's case-in-chief. The authorizations, for example, will provide Gilley with material information relating to the nature, scope and recording requirements associated with the recordings. Likewise, the 302s are material to chain-of-custody issues and could provide a basis for suppression or other evidentiary ruling. Lastly, the information relating to the devices provides Mr. Gilley with pertinent facts that he may need for examination purposes at a suppression hearing and/or trial, and are also material for any recording-related expert to make an admissible analysis and opinion. Thus, they should be turned over to him on an expedited basis.

H. Title III Wiretap Information

As the Court is acutely aware, the Government procured thousands of telephone calls pursuant to a Title III wiretap on telephones registered to Defendants Massey, McGregor and Gilley. During discovery, Mr. Gilley learned the recordings were made utilizing the Voicebox recording system. Upon his own investigation, Mr. Gilley also learned the Voicebox system could generate material reports relating to various aspects of the recorded calls that had not been produced to him. These reports not only include information such as caller identity and the date and duration of the call, but also information including: (1) the agent(s) who listened to the call, (2) how the call was initially designated (*e.g.* pertinent, privileged or non-pertinent), (3) if the designation was changed; (4) whether the call was minimized and for how long it was minimized; (5) how many times the call was accessed, (6) who accessed the call, (7) whether the call was recorded onto a CD or other portable device, (8) whether the call was transcribed, (9) how a privileged call was handled both at the time of the call and before and after it was marked privileged and (10) the call synopsis completed by the monitoring agent.

Mr. Gilley has had a difficult time obtaining the Voicebox data from the Government. While the Government eventually allowed Mr. Gilley to see one particular report for his privileged calls, it has been unwilling to provide any additional requested information. This includes the Government's refusal to even provide Mr. Gilley with the same report it did for the privileged calls for the non-privileged calls.

Mr. Gilley seeks the following information specifically relating to the Title III Wiretaps utilizing the Voicebox system: (1) line-sheet minimization reports; (2) electronic surveillance logs; (3) document summary reports; (4) case statistical breakdown; (5) statistical summary reports; (6) session history for non-privileged, pertinent recordings; (7) user line

assignments/reports; (8) identification of call monitors and (9) any formal or informal minimization procedures. Specifically, the requested Voicebox data (none of which the Government has stated it cannot produce from the Voicebox system) will allow Mr. Gilley to determine whether mistakes were made, if there was a violation of any ethical obligations, whether there was a reckless disregard of the Title III requirements, whether the Government adopted reasonable measures to reduce the interception of conversations unrelated to the criminal activity to a practical minimum and whether Mr. Gilley's Fourth, Fifth and/or Sixth Amendment rights were violated. This information is material and vital to Mr. Gilley being able to adequately determine whether his fundamental constitutional rights were violated as the result of the widespread use and abuse of electronic surveillance techniques. *See U.S. v. Renzi*, 722 F.Supp.2d 1100 (D.Ariz. 2010) (suppressing wiretaps in case involving Title III recordings utilizing the Voicebox system where government unlawfully intercepted defendant's privileged attorney-client communications, in violation of defendant's Fourth Amendment rights). Otherwise, any anticipated suppression motion will be initially grounded on the material gleaned from the one report that has been produced and speculation based on that review, as to what these reports contain. It is certainly in all the Parties' best interest that the threshold issues relating to the Title III wiretaps be expeditiously determined with a full and complete evidentiary record comprised of the requested Voicebox information that can be generated by the Government. Accordingly, the Government should be directed to provide Mr. Gilley with this information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this the 30th day of December, 2010, 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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