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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA	.	Cause No. 3:07CR192
	.	
Plaintiff	.	Oxford, Mississippi
	.	February 20, 2008
v.	.	9:00 a.m.
	.	
RICHARD F. "DICKIE" SCRUGGS	.	
DAVID ZACHARY SCRUGGS	.	
SIDNEY A. BACKSTROM	.	
	.	
Defendants	.	
.	

MOTION HEARING
BEFORE THE HONORABLE NEAL B. BIGGERS
U.S. SENIOR DISTRICT JUDGE

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1 **THE COURT:** The Government will be instructed to do
2 that. Again, I'm not ordering that the Government give him all
3 the prior information, just the statements that he's made
4 concerning this area of his testimony.

5 **MR. SANDERS:** Yes, sir, Your Honor. I've already
6 prepared Jencks with that in mind.

7 **THE COURT:** Okay. Good. All right. Call Agent
8 Delaney.

9 (THE WITNESS IS SWORN)

10 **WILLIAM P. DELANEY, GOVERNMENT'S WITNESS, SWORN**

11 **DIRECT EXAMINATION**

12 **THE CLERK:** State your name clearly for the record,
13 please.

14 **THE WITNESS:** It's William P. Delaney.

15 **THE COURT:** All right, sir, you may proceed.

16 **BY MR. SANDERS:**

17 Q. Agent Delaney, if you could, for the record, would you
18 tell us what you do for a living?

19 A. I'm a Special Agent with the Federal Bureau of
20 Investigation.

21 Q. And in your position as an agent with the FBI, you had the
22 opportunity to investigate a case involving the Scruggs Law
23 Firm, the defendants in this case?

24 A. Yes, I have.

25 Q. All right. And was it you who signed the affidavits

1 submitted in this case for authorization for wiretaps and for a
2 search warrant?

3 A. Yes, I was.

4 Q. When did you sign those affidavits?

5 A. I signed the first affidavit September 25th, 2007; the
6 second one October 16th, 2007; and I believe the last one
7 November 26th, I believe, 2007.

8 Q. When was the extension for the Balducci wiretap; do you
9 know?

10 A. I think it was the same day. I think it was October 16th.

11 Q. Could it have been October 24th?

12 A. Yes.

13 Q. Okay. I want to ask you -- you're familiar with this.
14 There's a motion been filed pursuant to *Franks v. Delaware*.
15 And the defendants have filed a motion pointing to specific
16 portions of conversations you left out of the affidavit. What
17 I want to do is I want to walk through the sentences to which
18 they refer, and I'm going to ask you why you left these out.
19 Do you understand?

20 A. Yes, sir.

21 Q. All right. Specifically, the defendants initially state
22 that you drafted in your affidavit that Judge Lackey called the
23 Government at the conclusion of his first meeting with Tim
24 Balducci. Was that accurate? Was it after the meeting had
25 concluded?

1 A. That was my understanding, yes.

2 Q. Okay. What do you mean by, *that was my understanding*?

3 A. The way I was involved in this, my supervisor called me
4 that the U.S. Attorney's Office in Oxford had been notified of
5 this event and asked me to contact him. He gave me the
6 impression that Judge Lackey had been approached by an attorney
7 inappropriately, and he asked me to look into it. I then
8 contacted the U.S. Attorney's Office. They basically gave me
9 the same information.

10 Shortly thereafter, I contacted Judge Lackey, interviewed
11 him in person; and he gave me the same impression; that
12 Mr. Balducci had approached him, called him, come down to visit
13 with him, made inappropriate overtures to him. And shortly
14 thereafter, he contacted the U.S. Attorney's Office.

15 Q. And do you know ow now how long after it was that he
16 contacted the U.S. Attorney's Office?

17 A. My understanding now is it'd been two weeks.

18 Q. Okay. They also point out on May the 4th -- and by the
19 way, you were familiar with the phone call that Judge Lackey
20 had with Mr. Balducci after this initial meeting with Judge
21 Lackey?

22 A. Yes, sir.

23 Q. Okay. On May the 4th, was there a conversation between
24 Judge Lackey and Tim Balducci?

25 A. Yes, there was.

1 Q. All right. And they point specifically to a sentence that
2 was not included in the affidavit, and I want to read that
3 sentence they're pointing to. They said that Tim said, "Here's
4 just some thoughts, ideas, and suggestions I thought I'd put on
5 paper to see if His Honor might be interested in." Do you
6 remember Balducci saying that?

7 A. Yeah, I remember that from the recording, yes, sir.

8 Q. All right. Why was that not included in your affidavit?

9 A. I didn't give much weight to that considering what had
10 happened earlier in the day when Mr. Balducci had, unsolicited,
11 faxed an order to the judge in his office; and the order had a
12 signature line at the bottom. To me, it seemed more --
13 obviously, Mr. Balducci was more interested in having the judge
14 sign and enter that order than just trying to give him some
15 thoughts and ideas about the case.

16 Q. All right. I want to move now to May the 9th. Did
17 Balducci and Lackey speak together on May the 9th?

18 A. Yes, they did.

19 Q. All right, sir. I'm going to read to you, again, a
20 statement made during that conversation to which the defendants
21 refer. They said that Balducci asked Judge Lackey whether he
22 thought the parties ought to arbitrate; and Judge Lackey said,
23 according to the defendants, "It does; it looks like that's
24 what they agreed to." Is that -- do you remember that
25 statement being made?

1 A. Yes, I do.

2 Q. All right. And tell the Court why you left that
3 particular statement out.

4 A. Well, prior to the judge making that particular statement,
5 he had actually told Mr. Balducci how he thought the case would
6 go. And in that instance, he thought the case would go to the
7 State Supreme Court. Mr. Balducci said, "Well, let me give you
8 my thoughts and ideas about it." He then went on a fairly long
9 explanation as to how he saw the case and how he thought it
10 should go. At the end of which, he said, "I think it should go
11 to arbitration, don't you, Judge?" And the judge said, "Well,
12 I agree"; but he never gave a definitive answer that that's how
13 he truly thought, and that's what he was going to do.

14 Q. Okay. All right. And then one more statement he made
15 on -- or to which the defendants refer, on May the 9th, that
16 Judge Lackey told Balducci he was -- he wanted to make certain
17 he was, quote, "going to get credit for the order." Do you
18 remember whether Judge Lackey said that?

19 A. Yes, that was in the conversation.

20 Q. All right. And why did you not put that statement into
21 the affidavit?

22 A. I didn't see where it was material. You had earlier where
23 the -- Mr. Balducci had approached the judge, talked to him
24 about this case at some length; at the end of which, he offered
25 a position of, of counsel when the judge was ready for it. The

1 judge clearly indicated to me that he felt that was a, you
2 know, at least, at the very least, improper overture to him, if
3 not rising to possibly criminal intent. Based on that, I put
4 much more weight into that incident than what Mr. Balducci said
5 on May 9th.

6 Q. Okay. All right. I want to move now to May 21st. Did
7 Balducci and Lackey speak together on May 21st?

8 A. Yes, they did.

9 Q. Okay. The defendants describe Judge Lackey's behavior as
10 aggressive, and they point to a particular statement Judge
11 Lackey made. He said, "I just want to hear you say it again.
12 You and Scruggs are the only ones who know anything about
13 this?" Do you remember that particular statement?

14 A. Yes.

15 Q. All right. They say that this omission thus conceals
16 Lackey's aggressive efforts to target Balducci. Was it your
17 opinion at that time that -- why did you leave that statement
18 out?

19 A. Again, Judge Lackey, when called on the 21st of May, he
20 started that whole conversation out by telling Mr. Balducci,
21 "I've never been involved in anything like this before." He
22 was looking for reassurances. Judge Lackey was terribly
23 troubled by this whole incident.

24 He was really conflicted for two reasons: A, he knew what
25 Mr. Balducci had done was wrong; but also, Mr. Balducci was a

1 friend of his for several years. And the judge was conflicted.
2 He knew what he needed to do; but by the same token, he was
3 conflicted. He didn't want to get his friend in trouble.

4 And I think that really kind of manifested itself on May
5 21st both with that phone call where he's clearly troubled, and
6 Mr. Balducci picks up on that pretty quickly, and then later
7 that day when he sends a recusal letter.

8 Q. Okay. I want to ask you about -- I'm still on May 21st.
9 Here's another statement I want to refer you to. Do you
10 remember Tim Balducci saying, "I don't mean to make you
11 uncomfortable. If it's not something you feel right about, you
12 do what your heart tells you. I've got complete confidence
13 that it's completely fine. I would never put you -- you nor
14 me -- in that position. I have complete confidence that it's
15 fine." Do you remember whether or not Balducci said that?

16 A. Yes, sir, he did.

17 Q. And why didn't you put that in the affidavit?

18 A. Again, I didn't give a lot of weight to it. Simply the
19 fact that my impression of that conversation, Mr. Balducci was
20 reacting to Judge Lackey's initial statement about him being
21 troubled; he'd never been involved in anything like this
22 before. He was looking for some reassurance. To me, it was
23 nothing more than Mr. Balducci trying to put the judge at ease,
24 trying to get him to, you know, deal with him in a position
25 that he would be more comfortable in.

1 Q. Okay. And then, finally, on the 21st, I believe, do you
2 remember Balducci saying this, "Frankly, Judge, I think we're
3 right; and I think that the law is on our side. And I think
4 probably had I never approached you, we'd probably had the
5 right result with us on this thing. My goal was simply to tell
6 you where -- that I had an interest in this thing and if I
7 could help guide you to where I thought this thing legally
8 could come." You remember that statement?

9 A. Yes, sir.

10 Q. And why was that not provided in your affidavit?

11 A. Again, I go back to Judge Lackey's initial statement on
12 that May 21st conversation. He was obviously troubled. And
13 also, I didn't give a lot of credence to -- you know,
14 Mr. Balducci had already approached the judge again back in
15 March and subsequent contacts in early May. He told him what
16 he wanted. I just didn't give a lot of credibility to what was
17 said in that particular conversation.

18 Q. And when was this affidavit signed, the initial Balducci
19 wire signed?

20 A. September 25th.

21 Q. And, so, you were aware, at that time, of events that took
22 place later?

23 A. Yes, sir.

24 Q. All right. The next thing the defendants point to with
25 their motion is the fact that -- you remember when Judge Lackey

1 recused himself from the *Jones v. Scruggs* case?

2 A. He sent a letter out May 21st after the phone call to
3 Mr. Balducci.

4 Q. Did he tell you -- did you talk to him before he recused?

5 A. No, I did not.

6 Q. All right. Why did you not include in the affidavit
7 anything about the recusal?

8 A. I didn't think it was pertinent to the case, you know, to
9 what we were looking at. Judge Lackey recused himself not
10 because what he was doing -- there was nothing criminal going
11 on or nothing wrong. Judge Lackey recused himself, from my
12 perspective, because he was troubled by this.

13 Like a lot of things that people do when they're -- things
14 bother them, they want to get away from them. He made that
15 decision to try and, you know, remove himself from this
16 problem; but he also realized after he did it that he really
17 wasn't solving anything; and that, ultimately, this issue of
18 whether what Mr. Balducci did was merely improper or if there
19 was criminal intent needed to be resolved. And he was -- he
20 needed to be involved in that process to finding that out.

21 Q. When he did recuse, did he contact you?

22 A. When he --

23 Q. After he recused?

24 A. When he sent in his subsequent letter saying he was coming
25 back in?

1 Q. No. I'm talking about after he recused. Did he contact
2 you?

3 A. The following day.

4 Q. And did you meet with him?

5 A. Yes, I did.

6 Q. And what did you tell him to do?

7 A. I discussed with him, basically, what the options were,
8 you know. He told me -- he didn't really give me any concrete
9 explanations, from what I recall, as to why he did it. I could
10 tell, again, this whole situation troubled him greatly. We
11 discussed possible options. He told me that, you know, the
12 door for him getting back in was not necessarily closed.

13 I don't remember specifically what he hadn't done to
14 finalize it. I think it may have been notify the Supreme
15 Court, but I'm not sure. But anyway, he indicated to me that
16 the door was not shut on him getting back into the case. We
17 talked about it; and when I left him that day, he had not made
18 a decision one way or the other what he was going to do, other
19 than he was just going to think about it.

20 Q. Were you demanding that he get back into the case?

21 A. No. No.

22 Q. All right. The next thing to which the defendants refer
23 is that your affidavit failed to disclose that Judge Lackey
24 repeatedly contacted Balducci from May until September. As I
25 said, they're describing Judge Lackey's behavior as aggressive.

1 October 16th.

2 MR. KEKER: Excuse me, Mr. Sanders. Your Honor,
3 could I suggest that maybe if I could examine on this
4 affidavit -- and we have this affidavit -- kind of put it to
5 bed in one place before we move on? I'm afraid they're all
6 going to get mushed up.

7 THE COURT: That may be preferable.

8 MR. KEKER: And I'll stop at --

9 THE COURT: All right.

10 CROSS-EXAMINATION

11 BY MR. KEKER:

12 Q. Good afternoon, Agent Delaney.

13 A. Good afternoon.

14 Q. Agent Delaney, you've said you're the case agent on this
15 case?

16 A. Yes, sir.

17 Q. And when were you assigned to it?

18 A. I'm sorry?

19 Q. When were you assigned to the case?

20 A. Early April, I believe. Early, mid-April.

21 Q. And you said one of the first things you did is interview
22 Judge Lackey?

23 A. Yes, sir.

24 Q. Do you remember when that interview was?

25 A. I believe it was around April 24th.

1 Q. Did Judge Lackey tell you then that he had waited two
2 weeks before reporting his conversation with Mr. Balducci?

3 A. No, sir. He didn't give me a frame as to when he had
4 reported it. He just said he reported it to the U.S.
5 Attorney's Office.

6 Q. Why did you put it in your declaration, that we're
7 referring to now as Exhibit 9 -- why did you put in your
8 declaration that it was at the conclusion of the meeting, then?

9 A. That was my understanding talking to the U.S. Attorney's
10 Office and talking to the judge, that it was shortly after
11 Mr. Balducci came down and met with him.

12 Q. Okay. So did Judge Lackey give you the impression --
13 leave you to understand that at the conclusion of the meeting
14 he went to the U.S. Attorney and said, "There's a problem
15 here"?

16 A. We didn't get into the time frame as to how quickly he
17 went and saw the U.S. Attorney's Office. He just indicated to
18 me that that's what he had done.

19 Q. Did you later learn that it was a two-week interval?

20 A. Yes, sir.

21 Q. Did you ask him about it?

22 A. He explained it to me.

23 Q. What did he explain? Tell us about that.

24 A. As what happened in that interim?

25 Q. Yeah.

1 A. He had talked to several different people after
2 Mr. Balducci's visit. Again, he was troubled. He didn't know
3 what to do. He talked to several different people soliciting
4 different people's advice. Ultimately, he decided the best
5 course of action was to contact the U.S. Attorney's Office.

6 Q. Did he tell you who he talked to?

7 A. He did. I don't know any of the individuals personally,
8 so I can't recall their names.

9 Q. Did he tell you that during this two-week period he was
10 sort of trying to figure out whether or not anything improper
11 had happened?

12 A. He just told me that he was discussing it with other
13 people and trying figure out what the best course of action
14 was.

15 Q. Did he tell you that he had a real question about whether
16 or not anything improper had happened?

17 A. No. He made it clear to me that he certainly believed
18 something improper had happened. It was just a question of
19 whether something criminal had happened.

20 Q. What did he tell you about this *of counsel* position?

21 A. He told me that he believed -- he took it, when
22 Mr. Balducci came down and talked about the civil case that he
23 was hearing -- that when Mr. Balducci, at the end of
24 conversation, offered him the position of, *of counsel* to him
25 Mr. Balducci was trying to say that if, you know, you help us

1 out on this case; when you're ready, I'll have a position in my
2 law firm for you.

3 Q. And that's the way Judge Lackey presented it, offer of
4 quid pro quo?

5 A. Yes, sir.

6 Q. So he had no question in his mind that he had been bribed?

7 A. No, sir. There was no -- see, there was no question that
8 he had been bribed. That was the whole crux of this thing. He
9 knew something improper had happened, but he didn't know for
10 sure if something illegal had happened.

11 Q. So Judge Lackey didn't know whether or not someone had
12 offered to bribe him?

13 A. Say that again, sir.

14 Q. Judge Lackey, after this first meeting with Mr. Balducci,
15 spent two weeks trying to figure out what to do about it?

16 A. Uh-huh (yes).

17 Q. And he didn't know, during that two-week period, that he
18 had been bribed?

19 A. He didn't know whether, you know, what had happened with
20 Mr. Balducci rose to the level of a criminal action, no. That
21 was the whole point of contacting the U.S. Attorney's Office
22 and bringing our office in to determine if that in fact had
23 happened or would happen.

24 Q. So what you did is set up recording equipment in his
25 office to get to the bottom of it?

1 A. Basically to make it -- to find out if that in fact had
2 happened, whether it was just an improper overture by
3 Mr. Balducci or was it more.

4 Q. When did you set up recording equipment in Judge Lackey's
5 office? And by you, I mean the Government.

6 A. The first time we tried to made a recorded conversation
7 was May 3rd.

8 Q. When did you set up the recording equipment?

9 A. I'm not sure when -- what you mean by *set up*. I gave him
10 a telephone recorder on May 3rd.

11 Q. Was there a call with Mr. Balducci on May 3rd?

12 A. Yes, there was.

13 Q. And was that call recorded?

14 A. It was -- the only thing that was successfully recorded
15 was the preamble.

16 Q. And what was the preamble?

17 A. Just basically the judge identifying who he was, who he
18 was calling, the time, the date, the numbers he was calling
19 from and calling to, from what I recall.

20 Q. And, so, he talks into this recording machine; and we've
21 been told that there's no recording of this.

22 A. That's correct.

23 Q. You're telling me there was a recording, but it
24 malfunctioned some point?

25 A. The only thing that was captured on tape was preamble.

1 The actual content of the conversation between Judge Lackey and
2 Balducci was not captured.

3 Q. Who had control over that recording device on May 3rd to
4 determine whether or not a call would be recorded or not?

5 A. I gave the recording -- actually, Judge Lackey used his
6 own recording device on that instance.

7 Q. Oh, so you didn't give --

8 A. I gave him one; he elected to use his own in that
9 particular incident.

10 Q. And he didn't record the call on May 3rd?

11 A. It was not successfully recorded, no.

12 Q. Did he report to you about that?

13 A. Yes. I was in the office with him.

14 Q. During the call?

15 A. Yes, sir.

16 **THE COURT:** Mr. Keker, the area of inquiry that has
17 been established for this testimony is to examine what you have
18 alleged were misleading or false statements that were not put
19 in the affidavit. Please stick to that area.

20 **MR. KEKER:** And forgive me if I got afield.

21 **BY MR. KEKER:**

22 Q. As I understand your testimony, every one of the omissions
23 that we have alluded to was done on purpose; you did it
24 intentionally?

25 A. I won't say it was done intentionally. I weighed what

1 information I had in front of me, and I tried to make the best
2 decision I could based on what I believe was probable cause
3 that Mr. Balducci was using his phone to conduct a criminal
4 conspiracy.

5 Q. And to the extent that the information before you didn't
6 fit into what you thought established probable cause, you chose
7 to leave it out?

8 A. No.

9 Q. Well, I think you said something about, you just didn't
10 see much credibility with what he said; and therefore, you left
11 it out. Another time you said, you didn't think it carried
12 much weight; and you left it out. All the exculpatory material
13 you left out?

14 A. I explained myself why I left it out. There was
15 obviously, in my view, reasons why Mr. Balducci said those
16 things.

17 Q. Okay. Then let's go through some of them. May 4th, the
18 first call that's recorded, you left out deliberately that he
19 referred to this order that he'd sent down as "just some
20 thoughts, ideas, suggestions, I thought I'd put it on paper,
21 see if His Honor might be interested in it"?

22 A. Uh-huh (yes).

23 Q. And you left that out because you didn't think it
24 supported probable cause?

25 A. Again, earlier in the day, he had sent a fax to the judge,

1 unsolicited, with an order with a signature line on it. I give
2 more weight to that action than what Mr. Balducci said. To me,
3 it was clear that -- to me what Mr. Balducci wanted was the
4 judge to sign and enter that order rather than just trying to
5 give him some thoughts and ideas about the case.

6 Q. There wasn't any mention in that phone conversation about
7 an *of counsel* position, was there?

8 A. No, sir, there wasn't.

9 Q. And what you said in your affidavit was that there had
10 been mention of an *of counsel* position in the May 3rd
11 unrecorded call?

12 A. Correct.

13 Q. And in your affidavit, you quoted what was said in the May
14 3rd call. And would you agree that your affidavit gives the
15 impression there was a recording with that May 3rd call?

16 A. That was taken from a statement provided to me by the
17 judge. The judge wrote out a statement after the May 3rd
18 recording.

19 Q. Okay. And you were quoting from his statement?

20 A. Yes, sir.

21 Q. Okay. And you didn't consider it misleading that you were
22 quoting and implying that it was recorded?

23 A. I don't think it says in the affidavit that it is from a
24 recording. It's quoted from a -- it's quoted from Judge
25 Lackey's statement that he gave to me.

1 Q. Let me jump ahead, then, to May 9. We're still trying to
2 determine -- you and Judge Lackey are trying to determine if
3 Mr. Balducci is a criminal. You left out that there was no
4 discussion of -- you didn't say anything, but there's no
5 discussion of money, no discussion of the *of counsel* position
6 in that call, right?

7 A. Not that I recall. Well, I take that back. I believe
8 Mr. Balducci spoke about some of the people he did bring in --
9 had brought in recently as *of counsel*; and I'm not sure if he
10 specifically said, "Judge, again, we'd like to have you *of*
11 *counsel*"; but that was the -- my interpretation of the intent
12 of that, of that whole litany, was to say that we've got room
13 for you; we'd like to have you in there.

14 Q. And at the end of the conversation, he says -- Judge
15 Lackey said, "It looks like they deserve to have the case go to
16 arbitration," or words to that effect; and you left that out
17 deliberately, right?

18 A. I don't think he said that, sir. I think what he said,
19 "Looks like they agreed to it." But again, as I said earlier,
20 before Judge Lackey had said that, he had told Mr. Balducci
21 that he thought the case was going to the Supreme Court. He
22 was reacting in that particular statement, which you reference
23 in your motion, he was reacting -- the judge was reacting to a
24 question that Mr. Balducci posed to him. He answered it. He
25 didn't answer it completely. He just said, "Yeah, sort of

1 looks like what they agreed to." But he didn't say, "I agree
2 with it; that's how I'm going to act," or any other.

3 Q. Agent Delaney, you are an FBI agent; and in substance,
4 you're being paid to look at the world through dirty windows;
5 isn't that true?

6 A. I'm not sure what you mean by *dirty windows*.

7 Q. Well, you cast a suspicious eye on human transactions to
8 see if there's anything illegal about it, right?

9 A. If allegations are brought to me, my job is to try to
10 figure out whether they're true or not.

11 Q. Did you understand that the job of the judge -- remember
12 the judicial branch -- in evaluating the affidavit from a law
13 enforcement officer is to try to look at it fair and square and
14 call the chips -- look at it fair and square, look at all the
15 information and make a decision?

16 A. Yes, sir.

17 Q. And did you understand that you were filtering out
18 exculpatory information so the judge wouldn't have that to look
19 at?

20 A. Again, I put down in that affidavit what I thought was the
21 best probable cause regarding Mr. Balducci's use of his
22 cellular telephone in a criminal case.

23 Q. Did you tell the judge that as of May 9 they -- the
24 judge -- Balducci had talked to Judge Lackey, and Judge Lackey
25 says, "It looks like that's what they agreed to"? There was no

1 discussion about doing anything further with respect to
2 anything. Did you tell the judge that it was over on May 9th?

3 A. No, I did not put that in my affidavit, if that's what
4 you're asking me.

5 Q. And then on May 21, Judge Lackey started calling
6 Mr. Balducci again, right?

7 A. He called him, yes, sir.

8 Q. Did you tell him to call him?

9 A. I was not present for that call.

10 Q. Did you tell him to call?

11 A. (No response.)

12 Q. Or suggest?

13 A. I'm sure we discussed having him call, yes.

14 Q. And did he call him once -- he called him twice; and
15 finally, he got him the third time. And Mr. Balducci assured
16 Judge Lackey that nobody other than Balducci and Scruggs knew
17 the arrangements suggested by Balducci.

18 You put that in; but then you omitted that it was Judge
19 Lackey that was bringing that up; that Balducci said a number
20 of times he didn't want the judge to do anything improper; that
21 Balducci said to Judge Lackey, "You do what you feel
22 comfortable with, and I don't mean to make you uncomfortable,
23 if it's not something you feel right about. You do what your
24 heart tells you. I've got complete confidence that this is
25 completely fine. I would never put you or me in that position.

1 I have complete confidence that it's fine." You left that out
2 of your affidavit, right?

3 A. Yes, sir.

4 Q. And you did it on purpose?

5 A. No, I did not do it on purpose. I did it, again,
6 reflecting over the content of the call and the fact that the
7 judge calls up, he's troubled. Mr. Balducci picks up that he's
8 troubled. I believe the judge starts out the conversation
9 with, "I've never been involved in anything like this before.
10 I'm looking for reassurance." My impression, that's what
11 Mr. Balducci was doing; he was reacting to that comment of the
12 judge and trying to reassure the judge.

13 Q. You said earlier he was trying to put the judge at ease?

14 A. Yes, sir.

15 Q. And you didn't put that in your affidavit so that the
16 judge evaluating probable cause would know that?

17 A. No, I didn't.

18 Q. Why didn't you do that?

19 A. Why didn't I put that the judge was not at ease?

20 Q. Why didn't you put that Balducci's making all these
21 professions of innocence, trying to put the judge at ease and
22 make everything go away, basically?

23 A. But he never did say, Look -- he said -- he was trying to
24 put the judge at ease; but he never said, "Look, Judge, you
25 misunderstood me. I didn't mean to influence you in this way.

1 And, you know, I don't want to -- you know, we don't need to
2 talk about this anymore; and I apologize." It never went that
3 far.

4 Q. But he said, "You do what you feel comfortable with. I
5 don't mean to make you uncomfortable. If it's something that
6 you feel right about, you do what your heart tells you."

7 What's the difference, Agent Delaney?

8 A. The difference is he's telling him what to do; he's not
9 stopping -- you know, he's not saying, What happened in the
10 past was wrong. He's not trying to stop what is happening then
11 or what may happen in the future.

12 Q. You didn't put in the affidavit what he said on May 21st,
13 and this is all right before Judge Lackey gets out of the case
14 because he's being earwigged by the other side. Balducci says,
15 "Frankly, I think we're right; and I think the law's on our
16 side. And I think probably had I never approached you, we'd
17 have probably had the right result for us on this thing. My
18 goal is simply to tell you where I had an interest in this
19 thing and help guide you to where I thought this thing legally
20 could come." You left that out, too?

21 A. Yes, sir.

22 Q. And then you omitted, he recused himself that same night
23 or day?

24 A. Yes, sir.

25 Q. And you left that out of the affidavit?

1 A. Yes, I did.

2 Q. But you also left out of the affidavit -- who called whom
3 the next day? You got together with him the next day?

4 A. Yes, I did.

5 Q. And you told him to get back in there?

6 A. No, sir, I didn't.

7 Q. Why did you get together with him the next day?

8 A. I believe he called me to tell me that he'd made that
9 phone call to Mr. Balducci and that he was recusing himself.

10 Q. Well, he filed a form on the 21st, right?

11 A. I'm sorry?

12 Q. He filed a form recusing himself, a formal recusal?

13 A. My understanding is he faxed the letter on the 21st.

14 Q. And he called you and told you about it?

15 A. On the 22nd.

16 Q. And you talked him into getting back in the case?

17 A. No, I did not. He made that decision on his own.

18 Q. Did you and Judge Lackey talk about the fact that up to
19 now, at least, you as a professional agent and he as a judge,
20 nothing criminal had happened; there's no case?

21 A. No. We -- in that particular instance, from what I
22 recall, we discussed his recusal, his possibility of getting
23 back in. We talked about the different options. And again,
24 from what I recall, at the end of meeting with him, he had not
25 made up his mind what he was going to do. He said he would

1 think about it.

2 Q. So when did you learn that he was going to get back in the
3 case?

4 A. Less than a week later, I believe.

5 Q. Okay. And the first thing you did when you learned he was
6 going to get back in the case, you came up and wired up this
7 judge in circuit court; and you sent him up to New Albany to
8 have lunch with Tim Balducci, right?

9 A. No, that was not the next thing.

10 **THE COURT:** Counselor, now --

11 **MR. KEKER:** I'm sorry, Your Honor.

12 **THE COURT:** Stick with what we've talked about.

13 **BY MR. KEKER:**

14 Q. Did you say anything in the affidavit about the fact that
15 you wired him up and sent him to New Albany to have lunch with
16 Tim Balducci?

17 A. No, I did not.

18 Q. And did you say anything in the affidavit about the fact
19 that at that lunch nothing -- Balducci, despite being alone in
20 the car with Judge Lackey not once but twice, said nothing
21 about the *Jones* case or about *of counsel* or any of this?

22 A. No, I didn't.

23 Q. And did you say anything in the affidavit about the fact
24 that you wired him up again on June 28 and directed him to go
25 to the Balducci office?

1 A. No, I did not.

2 Q. But you did do that; you did wire him up and send him to
3 the Balducci office?

4 A. I gave him a body recorder; and, yes, he did.

5 Q. And again, nothing happened; you didn't say anything about
6 that in the affidavit?

7 A. No, I did not.

8 Q. At any point, did Judge Lackey say to you, you know, "I'm
9 getting nervous about this motion that's been pending since
10 March 19th"?

11 A. No. We discussed that. Actually, I brought it up more
12 than he did; and he assured me it was fine; he'd be able to
13 take care of it.

14 Q. Did you put into your affidavit that during your -- I
15 guess you were on some kind of military leave during --

16 A. No, sir, I was not on military.

17 Q. But you were out of state in July?

18 A. Yes.

19 Q. And Judge Lackey held a hearing in the *Jones* case to
20 decide the motion to arbitrate? Did you know that?

21 A. I believe I learned of that later.

22 Q. And there's nothing in the affidavit about that or about
23 the fact that he still wouldn't issue an order one way or the
24 other?

25 A. No, sir.

1 Q. And then there's nothing in the affidavit about -- well,
2 did you ask Judge Lackey when you got back in August to start
3 making calls to Balducci?

4 A. I mean, I -- no. Did I continually direct him to make
5 calls? No. It was understood from the beginning that if
6 Mr. Balducci contacted him, he was, you know, to try and record
7 the conversation or, if not, call him back and record the
8 conversation. I wasn't directing him when to make the calls or
9 anything like that. That was pretty much up to Judge Lackey.

10 Q. And did you know that he tried to contact Mr. Balducci on
11 August 3rd, but Mr. Balducci didn't call him back?

12 A. Yes, sir.

13 Q. And did you put that in the affidavit?

14 A. No. I believe actually what happened is he called and he
15 wasn't there, and he didn't leave a message for him to call
16 back.

17 Q. And Mr. Balducci didn't call him back?

18 A. No, he didn't; but he didn't ask him to call him back
19 either.

20 Q. And did you put in the affidavit that he called him, Judge
21 Lackey called Balducci on August 9?

22 A. That's not in the affidavit, no.

23 Q. And did you say that Judge Lackey was trying to implicate
24 Dick Scruggs in that conversation by asking, "You think Dickie
25 wants this thing to go to mediation and arbitration"? He

1 brings up Scruggs's name just gratuitously?

2 A. No, it's not in the affidavit.

3 Q. And did you put in the affidavit that on August 9 Balducci
4 told Lackey -- Judge Lackey's just had a hearing -- to decide
5 the motion how he sees it? "If that's how you see it after
6 you've taken a look at it, if you see it that way, that'd be
7 terrific."

8 A. That's not in the affidavit.

9 Q. But it happened, didn't it?

10 A. Yes, it did.

11 Q. And then on August 27, Judge Lackey called Mr. Balducci
12 twice; and Balducci didn't call him back. And you didn't
13 mention that in the affidavit, did you?

14 A. No, sir.

15 Q. And on September 11th, Judge Lackey same thing, called him
16 twice, leaving messages; and Balducci didn't call him back.

17 A. I believe Mr. Balducci may have been out of town on that
18 particular instance.

19 Q. But you didn't say in your affidavit --

20 A. No, it's not in the affidavit.

21 Q. Then you said you were stopping by to see Judge Lackey.
22 How many times do you think you stopped down at Calhoun City to
23 see Judge Lackey?

24 A. I couldn't give you an accurate number, sir.

25 Q. On September 18 -- you talked about September 18, said

1 something about they mentioned a hump and all that business.

2 That wasn't September 18. That was September 21st, wasn't it?

3 I don't want to confuse you.

4 A. Without looking at the transcript -- I think it was
5 September 18; but without looking at the transcript, I don't
6 know for sure.

7 Q. On September 18, Mr. -- Judge Lackey said to
8 Mr. Balducci -- first of all, who called whom on September 18?
9 It was Judge Lackey calling Balducci, correct?

10 A. I believe that's correct.

11 Q. And let me give you the transcript if you want to use it
12 to refresh your recollection.

13 A. Thank you.

14 MR. KEKER: Would you like a copy, Your Honor?

15 THE COURT: No.

16 MR. KEKER: This is Exhibit 12 to the Dooley
17 declaration.

18 BY MR. KEKER:

19 Q. September 18 is not the call where he says he's got to get
20 over the hump, is it?

21 A. Okay. Are you asking me?

22 Q. Yeah. I just want you --

23 THE COURT: What are you asking him to look at?

24 MR. KEKER: I'm asking him to look at the transcript
25 we've been provided.

1 **THE COURT:** I know that, but what part.

2 **MR. KEKER:** On September 18, to see if his testimony
3 on direct was mistaken, that this is not the call where he
4 talks about "I've got to get over a hump." That happened three
5 days later, and I think Agent Delaney --

6 **THE WITNESS:** I don't see it in here.

7 **BY MR. KEKER:**

8 Q. So -- but that is the conversation where Judge Lackey says
9 Grady -- meaning Grady Tollison, the opponent in the *Jones v.*
10 *Scruggs* case -- is putting some pressure on him?

11 A. September 18.

12 Q. Did you talk to Judge Lackey to get an understanding what
13 that pressure was?

14 A. I don't recall talking to Judge Lackey about that, no.

15 Q. Where did the idea on September 18 to ask Balducci what
16 could be done -- what can you do for me or what can they do for
17 me, where did that idea come from?

18 A. That idea came from -- that was sort of the idea from the
19 very beginning, again, to find out which way this thing was
20 going to go. Is it just an improper overture or something
21 criminal in nature that occurred? Again, I go back to the
22 judge was very, very troubled over this. He didn't want to get
23 his friend in trouble. Let me finish, please.

24 It took Judge Lackey virtually the entire summer -- from
25 my perspective, it took him the entire summer to realize he

1 needed to get this thing resolved; we needed to get this thing
2 resolved. And the only way to get it resolved was for him to
3 broach that question to Mr. Balducci in sort of the form that
4 he did.

5 Q. Did you say in the affidavit that you filed in September
6 that for six months of calling and visiting and transcribed
7 calls Balducci had not even given a glimmer that he was talking
8 about a bribe?

9 A. Again, the judge -- early on in that first meeting, back
10 in March, the judge believed that that overture where he talked
11 about the case and then later *of counsel* was a possibility that
12 a bribe did exist.

13 Q. Did you say in the affidavit that from March to
14 September 17 there had never been a hint from Mr. Balducci or
15 anybody else that they were talking about money bribe to
16 Judge --

17 A. No, that did not come up. That does not eliminate the
18 fact of what happened on March 28.

19 Q. So was it -- whose idea was it to raise the issue of a
20 money bribe in September after this six months of silence?

21 A. Again, it was not the issue of -- the idea of whether it
22 was a money bribe was not the initial thing. It was framing
23 the question in such a way, without putting any kind of
24 tangible value on it, to see what Mr. Balducci's reaction would
25 be; and that's what he did.

1 The judge told me in early September, he said, "Look, we
2 need to find out one once and for all what is going on here";
3 and that's what we decided to do, to have him ask Mr. Balducci
4 in the manner that's recorded in this conversation on the 18th
5 of September.

6 Q. The 18th -- and he asked him -- and Balducci's reaction
7 was --

8 MR. SANDERS: Your Honor, we're now getting into -- I
9 think the affidavit was September 25th. I thought we were
10 getting into what took place after the 25th.

11 MR. KEKER: No. No, still September 18th
12 conversation. I want to make sure this part is clear. On
13 September 18 --

14 THE COURT: Limit it to what you've alleged was
15 omitted from the affidavit or what you allege was in the
16 affidavit that was materially misleading and why he did that.
17 That's what this examination is about.

18 BY MR. KEKER:

19 Q. Did you put in the affidavit that in response to a
20 suggestion by the judge that they do something for him? Did
21 you put in the affidavit that Mr. Balducci did not offer to do
22 anything for him, did not come back with any concrete proposal?

23 A. I put in the affidavit the contents of that conversation
24 from September 18.

25 Q. Well, you didn't put in all the contents, did you?

1 A. No, I didn't.

2 Q. And you didn't put in the fact that he did not come back
3 and say, yeah, we will do X, Y, Z.

4 A. There was nothing definitive decided on October -- I'm
5 sorry -- September 18th, other than the fact that the judge
6 asked, "If I help them out, will they help me out" and
7 Mr. Balducci -- I believe his response was, "No question, I
8 think they will."

9 Q. But he also said, "You go think on it, Balducci, and come
10 back and tell me what you've got to offer," words to that
11 effect?

12 A. I don't know what the exact words are. Can I look at the
13 transcript?

14 Q. Sure. But you know -- he did not -- he tried to leave it
15 with Balducci, and Balducci didn't respond with any kind of
16 specific quid pro quo.

17 A. No. There was no specific deal done on September 18th.
18 It was strictly, as I said, he asked if I would help them,
19 would they help me; and he was told he thought he would.

20 Q. Did you point out in the affidavit, to the magistrate
21 deciding whether or not to issue the wiretap, that after three
22 days Judge Lackey was the one who had to come up with a
23 specific quid pro quo, namely \$40,000?

24 A. I believe on the 21st Mr. Balducci asked him what he was
25 referring to.

1 Q. And that's when the judge raises the issue of money?

2 A. Yes.

3 Q. And talks about the hump he has to get over and the
4 problems in his private life?

5 A. He talks about the hump he has to get over after
6 Mr. Balducci agrees to the 40 in discussing how they're going
7 to do it and saying he's the one to do it.

8 Q. The transcript will speak for itself.

9 MR. KEKER: That's all I have on this, Your Honor.

10 THE COURT: All right. Any redirect?

11 MR. SANDERS: Yes, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. SANDERS:

14 Q. There was some conversation about the September 18th and
15 the September 21st when Judge Lackey said "to get him over a
16 hump." Did Judge Lackey discuss getting over a hump both
17 times? Do you recall?

18 A. I think on the 18th. I'm not sure if he used the exact
19 term *getting over a hump*, but I think he'd indicated he'd had
20 some problems.

21 Q. All right. If I hand you the transcript from
22 September 18th, would it refresh your recollection? You may
23 still have it.

24 A. I have it.

25 Q. If you look at page 8, do you think that would refresh

1 your recollection?

2 MR. KEKER: Your Honor, I'm embarrassed to say what I
3 handed him were excerpts and not the full transcript. I'm not
4 sure if --

5 THE WITNESS: There is no page 8.

6 MR. SANDERS: May I approach, Your Honor?

7 THE COURT: All right. You may hand him the
8 transcript.

9 MR. SANDERS: Okay.

10 THE COURT: Give Mr. Keker back his excerpts.

11 THE WITNESS: Yes, he does. He does say that it's my
12 make and my hump, can't blame anybody else.

13 BY MR. SANDERS:

14 Q. Okay. I just wanted to clear that up. He asked you about
15 May the 4th. Again, he asked you about the thoughts, ideas
16 that Balducci was referring to?

17 A. Yes, sir.

18 Q. What specific document was Balducci referring to when he
19 talked about the thoughts, ideas on paper?

20 A. He was referring to that May 4th order that he'd faxed
21 down to Judge Lackey earlier in the morning.

22 Q. All right. And now he asked you, too, on May 4th whether
23 or not Balducci refers to *of counsel*. Did he on May 4th?

24 A. No, not that I recall.

25 Q. Did he on May 3rd?

1 A. Yes, he did.

2 Q. And did he on May 9th?

3 A. I believe he did.

4 Q. All right. And again, the statements Balducci is making,
5 that I think everything is fine, this order is fine, I think
6 this is probably right, those statements he made, what was your
7 impression of those statements; and why did you not put those
8 statements in the affidavit?

9 A. Again, to me -- which date are we talking about, May --

10 Q. The 21st of May.

11 A. Oh, the 21st. Again, those statements, to me, were
12 clearly made in response to the judge's first comment during
13 the conversation that, "Look, I've never been involved in
14 something like this." He's clearly troubled. Mr. Balducci
15 picks up on the judge is clearly troubled. And Mr. Balducci
16 clearly is trying to put the judge at ease and trying to assure
17 him that everything will be okay.

18 Q. Everything will be okay meaning what?

19 A. That nobody else is going to find out, that they'll be
20 able to do -- you know, if the judge does what they're asking
21 him to do, that there won't be any problems as a result of it.

22 Q. Okay. Also, you said that Tim never said anything like,
23 "No, you misunderstood this, Judge" something to that effect.
24 What would you have done if he'd said something like that?

25 A. If Mr. Balducci had made it clear that the judge was

1 mistaken in his overtures in March or early May and relay that
2 to me, if it was on tape, then I probably would have approached
3 Mr. Balducci, interviewed him, tried to find out exactly what
4 his intentions were. Based on that, I may have gone and
5 interviewed Mr. Scruggs; but certainly, I would have talked to
6 Mr. Balducci.

7 Q. And finally, you mentioned once -- you said that Judge
8 Lackey had -- Mr. Kecker did -- he said that Judge Lackey
9 recused because he was being earwigged by the other side. You
10 said you met with Judge Lackey after he recused. Was that why?

11 A. No. He recused himself because he was terribly troubled
12 by this.

13 MR. SANDERS: Your Honor, I don't have any more
14 questions for this agent on the September 25th wiretap.

15 THE COURT: All right. You may step down.

16 MR. KEKER: Your Honor, may I ask him one question
17 about the September 25?

18 THE COURT: Was it anything that came out on cross?

19 MR. KEKER: Well, it's the date.

20 THE COURT: You may ask him about any question that
21 came out on cross-examination.

22 MR. KEKER: This is something that -- I wouldn't say
23 it came -- this has to do with the affidavit and the date.

24 THE COURT: One question.

25 MR. KEKER: One question.

1 RE CROSS EXAMINATION

2 BY MR. KEKER:

3 Q. What date was your affidavit signed? I'm showing you
4 Exhibit 9.

5 A. September 25th.

6 Q. Okay. And whose dating is that?

7 A. That's mine.

8 Q. And that says 25?

9 A. Yes, sir.

10 Q. Okay. Thank you.

11 MR. SANDERS: Your Honor, no further questions as far
12 as the September 25th affidavit.

13 THE COURT: Okay. You may step down. We'll call you
14 back out in a couple of minutes.

15 THE WITNESS: Thank you, sir.

16 THE COURT: All right. We'll be in recess ten
17 minutes.

18 (AFTER A SHORT BREAK, THE PROCEEDING CONTINUED)

19 (CALL TO ORDER OF THE COURT)

20 THE COURT: All right. There's also an affidavit for
21 a wiretap on -- I believe it was October 16th on Patterson's
22 phone; is that correct?

23 MR. KEKER: Yes, Your Honor.

24 THE COURT: Is that your next one?

25 MR. SANDERS: Yes, sir, Your Honor.

1 **THE COURT:** Now, there's a question we haven't taken
2 up yet. There hasn't been any question raised about standing
3 for the defendants in this case to complain about a wiretap on
4 somebody else's phone. Of course, there was no wiretap ever on
5 Mr. Scruggs elder, Mr. Zach Scruggs, or Mr. Backstrom's phone.
6 So their phones were never tapped.

7 So I understand there's no law that's clear that an
8 aggrieved party can complain about if evidence on a wiretap of
9 somebody else's phone is used against a third person -- or a
10 second person from the phone, owner of the phone, then that
11 aggrieved person has a standing to complain about it. But the
12 question that I'd like to hear from counsel on is if there was
13 no information gained from the wiretap on Mr. Balducci's phone
14 from September 25th, I believe is when it was issued, until the
15 renewal of that wiretap -- which was, what, 30 days later?

16 **MR. SANDERS:** Yes, sir.

17 **THE COURT:** Thirty days later. Was there any
18 information during that thirty-day period that any of these
19 three defendants can claim they are aggrieved by, Mr. Kecker?

20 **MR. KEKER:** I believe so, Your Honor. October 18,
21 Mr. Backstrom is on one of the calls. And it's also our
22 position that calls on a wiretap into a premises, owners of the
23 premise have standing. We've briefed that piece.

24 **THE COURT:** If they're aggrieved by the results.

25 **MR. KEKER:** Yes, sir. And then it's also our

1 position that this is cumulative, that the first one leads to
2 the second one, leads to the third one, sort of the taint runs
3 all the way through. The search warrant eventually is based on
4 the fruits of these wiretaps. So for all these reasons, they
5 have standing.

6 And then just to an anticipate, Mr. Patterson's phone --
7 Mr. Dick Scruggs and, I think, Mr. Patterson -- but I'm not
8 sure about that. But I know Dick Scruggs is on the Patterson
9 tap that we'll get to later on.

10 **THE COURT:** All right. You may proceed. Evidently,
11 the Government's not concerned with that issue then, are you?
12 You haven't brought it up.

13 **MR. SANDERS:** That's right. Your Honor, first, we're
14 aware that the Government doesn't waive standing. The
15 Government cannot waive standing. In this instance, frankly,
16 Your Honor, we looked at the information; we looked at the law
17 out there. We knew if a party was aggrieved they had standing,
18 and it's certainly our position that the defendants are
19 aggrieved by the information elicited from the wiretaps.

20 **THE COURT:** Well, the question I brought up was
21 whether they were aggrieved by this 30-day period from which
22 the first wiretap was issued till 30 days later when it was
23 renewed.

24 **MR. SANDERS:** Yes, sir.

25 **THE COURT:** And probable cause or information had to

1 be presented at that renewal that would point toward the --
2 that would justify the renewal of it. So evidently, you're not
3 concerned with any standing of these three defendants to object
4 to information that was gained from this first 30-day period
5 where Mr. Balducci's phone was wiretapped?

6 MR. SANDERS: Your Honor, as I said, we don't believe
7 we waived it; and we may well address it at a later time. At
8 this point, however, we see the case law saying that if a
9 person is aggrieved -- and we believe that, for instance, on
10 October 18th, all three defendants were greatly aggrieved by
11 information elicited from the wiretap.

12 THE COURT: Okay. That would be within the thirty
13 days.

14 MR. SANDERS: Yes, sir.

15 THE COURT: All right. Good. All right, Mr. Keker.

16 MR. KEKER: Your Honor, if we're going to go back to
17 Mr. Sanders to elicit information and I cross, that's all
18 right. Otherwise, I'll do it.

19 THE COURT: It's up to you gentlemen.

20 MR. KEKER: I'll do it either way, Mr. Sanders.

21 MR. SANDERS: Your Honor, do you want argument now on
22 the September 25th?

23 THE COURT: No. Do you want to go forward with the
24 second affidavit?

25 MR. SANDERS: Yes, sir.

1 **THE COURT:** All right. You may proceed.

2 **DIRECT EXAMINATION**

3 **BY MR. SANDERS:**

4 Q. Okay. Mr. Delaney, I am going to talk to you now about
5 the Patterson wiretap. The affidavit was signed -- when did
6 you sign the affidavit for the Patterson --

7 A. I believe it was October 16th.

8 Q. All right. They refer in their motion to three different
9 statements made, and I'm going to read those statements to you
10 and have you explain to us why they weren't contained in the
11 Patterson wiretap. The first one they talk about is that you
12 put in the affidavit that Patterson's talking to Balducci, and
13 you point out that P.L. Blake -- that Patterson has spoken to
14 P.L. Blake. And you said that he's already talked to P.L. and
15 that P.L. knows the amount.

16 A. Uh-huh (yes).

17 Q. Did P.L. Blake -- did Patterson also tell P.L. Blake on
18 the telephone call that P.L. doesn't know what it's about or
19 anything?

20 **MR. KEKER:** I think it was misspoken. It was a phone
21 call not with P.L. Blake but with Patterson Balducci.

22 **BY MR. SANDERS:**

23 Q. That's right. It's Patterson and Balducci. And does
24 Patterson tell Balducci that P.L. knows the amount of the
25 bribe? Do you remember that?

1 A. Yes, sir.

2 MR. KEKER: Well, I object because he didn't say he
3 knows the amount of the bribe. Does P.L. know the amount is
4 all he said, nothing said about the bribe.

5 MR. SANDERS: I'm sorry. I'll rephrase, Your Honor.

6 THE COURT: Okay.

7 BY MR. SANDERS:

8 Q. Did Patterson tell P.L. the amount?

9 A. Yes.

10 Q. Did Patterson also tell Balducci that P.L. doesn't know
11 what it's about or anything?

12 A. Yes, he did. I believe that's on the transcript of the
13 call.

14 Q. All right. Why did you not put that in the October 16th
15 affidavit?

16 A. Again, I'm trying to establish probable cause that
17 Mr. Patterson is aware of the conspiracy and using his phone in
18 connection with the conspiracy. We used the elements of that
19 call where he said he knew the amount. In a subsequent call, I
20 believe on October 10th, where, again, it's Mr. Patterson
21 speaking with Mr. Balducci. Mr. Patterson's asking
22 Mr. Balducci when the order's going to be sign, and he says
23 P.L. wants to know. I took those two phone calls to establish
24 the probable cause that Mr. Patterson and Mr. Blake had reason
25 to believe that they were involved in this conspiracy.

1 Q. Based on the September 27th and the October 10th call?

2 A. Yes, sir.

3 Q. All right. They also refer to a September 27th call
4 between -- or I think it's a conversation between Balducci and
5 Judge Lackey. All right? And this is -- I'll try to
6 paraphrase this, but it's essentially there's a statement
7 Balducci makes -- he says to Judge Lackey, "There ain't another
8 soul in the world that knows about this, okay? And this is --
9 this is -- this is taken care of."

10 And then later, Balducci says -- Lackey asks, "When you
11 tell Mr. Scruggs or Dickie or whatever I ought to call him --
12 you tell him that this is a first-time venture with me." And
13 then Balducci says, "He's not even involved at that level,
14 Judge." Balducci goes on to say, "The way this will work is
15 I'll just go to him at some point in time and say that I cured
16 a problem that you had, and you need to recognize the problem
17 that I have cured. That's how it works." Do you remember
18 those statements, Balducci speaking to Judge Lackey?

19 A. I do.

20 Q. And why were those statements not included in the
21 October 16th affidavit?

22 A. Again, I didn't give those statements as much weight as I
23 gave previous statements. Earlier on the 27th, we intercepted,
24 I believe, two calls on Mr. Balducci's phone. I believe one
25 with Mr. Patterson, and I believe the other one was Mr. Biden

1 (phonetic); I'm not sure. Mr. Balducci says in those two
2 separate phone calls he's on his way to Oxford. I believe he
3 says he's going to go see either the Scruggs Law Firm or
4 Mr. Scruggs or words to that effect.

5 One of the phone calls he tells, I believe Mr. Patterson,
6 he's on his way to go see Sid to pick up that thing. We know
7 from phone calls during that morning that he's on his way to
8 head south, which is Calhoun City, south of Oxford. So based
9 on those earlier phone calls, on the 27th, I gave much more
10 weight to the veracity of those phone calls than I did to that
11 conversation that Mr. Balducci had with the judge while
12 conducting elicited --

13 Q. Okay. Was one of the conversations to which you just
14 referred with Steve Patterson when he's talking about this
15 order with Balducci? Did that conversation take place before
16 Balducci meets with Judge Lackey?

17 A. Yes, it does.

18 Q. Okay. So did you believe that Balducci wasn't telling the
19 truth here?

20 A. I had reason to doubt what he was saying.

21 Q. Okay. And then based on subsequent conversations, who
22 else did you think knew or at least you believed had probable
23 cause to know that there was a crime taking place?

24 A. Subsequent conversations we believe that Mr. Scruggs,
25 based on -- on Mr. Balducci saying he's going to the law firm

1 before that day, we had surveillance locate Mr. Balducci
2 returning to the Scruggs Law Firm after the first bribe payment
3 on September 27th. We had the four-minute phone call September
4 27th immediately after Mr. Balducci had agreed to the bribe
5 payment with the judge in Calhoun City.

6 We had, I believe, a surveillance later in October showing
7 Mr. Patterson and Mr. Balducci visiting the Scruggs Law Firm
8 while these payments were going on -- in the midst of these
9 bribe payments.

10 Q. Let me ask you this: You mentioned just a minute ago --
11 you said something about Sid. What did you say about Sid?

12 A. One of the intercepted phone calls on the morning of the
13 27th was, I believe, Mr. Balducci told Mr. Patterson that he
14 was going to see Sid to pick that thing up.

15 Q. Okay.

16 A. And, you know, later in the day after Mr. Balducci had
17 dropped off the money and an order -- we did in fact recover an
18 order from the judge's office.

19 Q. Okay. And then one final point they make about this.
20 They say that on October the 10th that Balducci called Judge
21 Lackey and asked when he could pick up the sweet potatoes.

22 A. Uh-huh (yes).

23 Q. Did you think Tim Balducci was going to pick up sweet
24 potatoes from Judge Lackey?

25 A. No, sir.

1 Q. What did you think that was?

2 A. Sweet potatoes was their code word for the order.

3 Q. Okay. At the end of that conversation, Balducci talks
4 about he was going to get back to Judge Lackey about, quote,
5 that other deal.

6 A. Yes, sir.

7 Q. The defendants say that this is strong evidence that
8 Balducci did not understand Lackey's request for the payment to
9 be connected with the order being entered in the Scruggs case.
10 Is that how you saw?

11 A. No. I think it's pretty clear what Mr. Balducci meant by
12 the other deal was the second half of the money on
13 September 27th even though he'd originally agreed on 40,000.
14 He delivered 20,000; and during that conversation, he said he
15 would get the rest of them later. And that's what I took that
16 October 10th conversation to mean was the other deal was the
17 remaining 20,000 of the 40,000.

18 **MR. SANDERS:** Tender the witness, Your Honor.

19 **THE COURT:** Very well.

20 **CROSS-EXAMINATION**

21 **BY MR. KEKER:**

22 Q. Agent Delaney, the October 16 affidavit in support of the
23 Patterson wiretap repeats, in essence, all the allegations with
24 all the omissions that were in the one we just talked about,
25 right?

1 A. Yes, sir.

2 Q. Okay. So we won't go over that again. But all of that
3 applies to this, too --

4 A. Yes, sir.

5 Q. -- what we talked about. And then what's new here --
6 let's start with the big one. You had a tape that you knew
7 amounted to Mr. Balducci telling Judge Lackey that Scruggs did
8 not know about the bribe that was being paid on September 27th;
9 is that a fair characterization?

10 A. That's what he told him, yes, sir.

11 Q. And you didn't think it was true?

12 A. I had reason to doubt it, yes, sir.

13 Q. Okay. Now, in your FBI training, do they tell you that
14 when you're preparing an affidavit for probable cause you are
15 to present a fair picture of all the evidence to the judge to
16 let him decide?

17 A. I believe we're suppose to present evidence that I think
18 gives probable cause that would lead to the approval of the
19 warrant.

20 Q. Okay. So your job -- the FBI training tells you your job
21 is to present the information to the judge that will allow you
22 to get a warrant whether or not it is a fair picture of what's
23 going on?

24 A. No, I don't think that's accurate.

25 Q. Does the FBI care about whether or not they present to a

1 judicial officer --

2 A. Yes, they do.

3 Q. -- a search warrant affidavit -- whether or not it's a
4 fair picture of what's going on?

5 A. Yes, they do.

6 Q. And how does the judge weigh whether or not it's a fair
7 picture if you leave out all the favorable information or all
8 the information that doesn't fit your view of the events?

9 A. I think the fact that you have those calls from
10 September 27th in the morning -- I think that's -- there's
11 enough weight given to know that -- that establishes the
12 probable cause that Mr. Patterson was involved in the
13 conspiracy and using his phone to do so.

14 Q. Okay. You think you had enough on Mr. Patterson. And the
15 allegation, though, was that the conspiracy included Dick
16 Scruggs.

17 A. Yes, sir.

18 Q. And you were making quite a point in this affidavit that
19 Dick Scruggs was an important member of this conspiracy.

20 A. I think there was enough probable cause to establish that,
21 yes.

22 Q. And did you leave out of your affidavit that Judge Lackey
23 made a real yeoman's effort, a tremendous effort, in
24 September 27th to get some evidence on Dick Scruggs; and he
25 failed?

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C E R T I F I C A T E

I, Rita Davis Sisk, RPR, BCR, CSR #1626, Official Court Reporter for the United States District Court, Northern District of Mississippi, was present in court during the foregoing matter and reported said proceedings stenographically.

I further certify that thereafter, I, Rita Davis Sisk, RPR, BCR, CSR #1626, have caused said stenographic notes to be transcribed via computer, and that the foregoing pages are a true and accurate transcription to the best of my ability.

Witness my hand, this 20th day of February, 2008.



RITA DAVIS SISK, RPR, BCR, CSR #1626
Official Court Reporter