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

UNITED STATES OF AMERICA	)	
v.	)	CR. NO. 2:10cr186 – MHT
MILTON E. MCGREGOR, THOMAS E. COKER, ROBERT B. GEDDIE, JR., LARRY P. MEANS, JAMES E. PREUITT, QUINTON T. ROSS, JR., HARRI ANNE H. SMITH, JARRELL W. WALKER, JR., and JOSEPH R. CROSBY	)	
Defendants.	)	

UNITED STATES' REPLY IN SUPPORT OF ITS MEMORANDUM ON USE OF TRANSCRIPTS AND RULE OF COMPLETENESS OBJECTIONS

The United States, through undersigned counsel, hereby submits this reply in support of its Memorandum on Use of Transcripts and Rule of Completeness Objections (Dkt. No. 991), in response to oppositions filed by defendants McGregor, Smith, Geddie, Ross, and Crosby (Dkt. Nos. 1036, 1040, 1041, 1044, 1047.) The belated objections to the transcripts raised by the above-named defendants are without merit and should be denied.[1] The use of transcripts to

[1] The opposition comes after the parties have spent hundreds of hours over the past eight weeks creating, reviewing, and revising transcripts and then working together to resolve accuracy differences so that the transcripts could be agreed upon by all parties and marked as joint exhibits. Throughout this lengthy review process – in which the government and the defendants expended enormous amounts of time and effort to resolve audibility and accuracy differences on more than 500 transcripts (approximately 350 of which had been proposed by the defendants themselves) – the defendants never once indicated any objection to the admission of those transcripts as exhibits or to the use of those transcripts by the jury during deliberations.

assist jurors is a common and standard practice, and the parties should be permitted to use transcripts as outlined in the government's motion for the reasons discussed below.

I. The Court Should Exercise Its Discretion to Allow for the Use of Transcript Exhibits at Trial

The transcripts will significantly assist the jury. There are approximately 400 audio recordings that have been identified for use at trial by the parties. The audio recordings, when played in full, comprise an estimated sixty hours of recordings.[2] The sheer volume of the recordings, paired with the likelihood that the jury will be hearing this case for eight weeks, counsel strongly in favor of admitting the transcripts to accompany the audio played at trial.

With any case, and in particular with a case involving nine defendants and dozens of witnesses, the Court should not underestimate the importance of transcripts that clearly identify the speakers for the jury. For the jury, the recordings will contain unfamiliar voices with unfamiliar names discussing unfamiliar subject matter.[3] More than seventy different speakers are intercepted in the recordings that have been identified for use by the parties at trial. With the exception of a few rare instances, the speakers do not identify themselves by full name at the beginning of each recording, nor do they do so at the beginning of each statement they make. The transcripts provide that information, and the parties have already stipulated to its accuracy.

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[2] The government represents that Trial Exhibits 1 through 218 comprise approximately thirty hours, when played in full. The other audio exhibits, originally proposed by the defendants and later submitted as joint exhibits, are likely comparable in length.

[3] The parties' initial disagreement over the content of the transcripts demonstrates the difficulty inherent in identifying the speakers (even when those speakers' voices are personally known to defense counsel) and making out the content of the conversations. For example, the defendants objected to 120 of the government's proposed transcripts and made a substantial amount of changes to the proposed transcripts. Likewise, the government objected to 200 of the defendants' proposed transcripts and proposed a significant amount of changes to those transcripts.

Although it is true that certain voices appear regularly on the recordings, and the jury may over time learn to distinguish particular voices, the defendants' downplaying of the difficulty in differentiating the voices is likely due to the defendants' own familiarity with those who were intercepted rather than any supposed clarity of the audio itself. Nonetheless, the defendants cannot dispute that speaker identification was an issue, even for them. For example, during the parties' April 11, 2011, meet-and-confer, defense counsel and the government had to repeatedly replay a consensual recording involving Gilley and McGregor both on loud speakers and with headphones in slow motion to collectively determine which person was speaking at a particular time. It cannot be denied that the transcripts will provide very helpful assistance in terms of accurately identifying speaker of each statement – particularly for the jurors who are hearing the parties' voices for the first time during the trial – and that such assistance would further the interests of justice.

The transcripts will also aid the jury in understanding what is being said while the audio is being played at trial. The jury will be tasked with listening to unfamiliar voices discuss unfamiliar subject matter without the benefit of the physical presence of the speakers. For some of the recordings, the quality of the audio is poor at times due to the fact that the parties were meeting outdoors where passing traffic and other loud background noises, such as slamming doors and car horns, detract from the recorded conversation (see, e.g., Trial Exhibit J-9 (participant states during the conversation "I can barely hear you")), or where three or more people speak during a single recording (see, e.g., Trial Exhibits 8, 13, 45, 503, 504, 505, 506, 511, 516, 517, 618, 685), or where the parties speak at the same time, speak in a very rushed manner, or speak at a low volume. There are also instances in the recordings where a speaker is not close to a microphone or where ambient noises (such as a cheering crowd at a baseball game)

distract from the conversation. Although there may be unavoidable instances where a juror requests to stop the proceeding so that a particular recording can be paused, rewound, replayed, or otherwise adjusted to allow that juror to hear it, the use of transcripts will significantly reduce such disruptions by helping the jurors more easily make out the content of the statements as they hear the audio. See United States v. Onori, 535 F.2d 938, 947 (5th Cir.1976) (holding that the need for transcripts arises generally from two circumstances: when portions of a tape are relatively inaudible or it is difficult to identify the speakers).

Moreover, listening to a recording for a long period of time without a visual aid understandably will be difficult for jurors. Several of the recordings, if played in full, will last for more than thirty minutes. (See, e.g., Trial Exhibits 1 (46 minutes), 4 (36 minutes), 8 (84 minutes), 9 (88 minutes), 13 (30 minutes), 15 (60 minutes), 133 (38 minutes), 134 (33 minutes), 143 (50 minutes), 170, (48 minutes), 503 (202 minutes), 504 (132 minutes), 505 (60 minutes), 506 (39 minutes), 508 (88 minutes), 514 (75 minutes), 527 (42 minutes), 535 (40 minutes), 668 (79 minutes).) Hearing a recording is far less engaging than watching a witness testify, and having a hardcopy transcript for the jury to follow as a recording plays will help ensure the jurors stay engaged throughout the lengthy recordings. Although the government will seek to narrow the portions of the audio and the corresponding transcripts that are actually played to the jury at trial, it is an unavoidable fact that the government's case rests on a large volume of audio recordings, most of which will need to be played in full at trial. Transcripts will assist the jury in following along with the conversation and will also help alleviate some of the disadvantage inherent in producing evidence without the benefit of a live and engaging in-person speaker.

The defendants raise a laundry list of supposed logistical problems in their attempt to persuade the Court to preclude the use of the transcripts. Those concerns do not outweigh the

benefits provided by the transcripts. Under the government's plan, rather than produce copies of voluminous documentary exhibits and transcript exhibits to each juror at the outset, which would require a large amount of storage space, the materials would be provided in installment binders organized to correspond to the upcoming witness(es) testimony.[4] Although it referred to the installment binders as "daily" binders in its motion, the government does not anticipate creating new volumes each morning. Instead, it will submit a new volume only after its witness(es) have covered all content in the current volume, which will probably happen on a weekly basis but will necessarily depend on the speed with which the trial is progressing. The government is amendable to having two jurors share a single copy of the binder so that only eight sets are needed for the sixteen jurors. The current volume can be left on the juror's chair, along with their notepad, at the end of the day to be stored in the courtroom until the following morning, or the binders can be retrieved by the parties and brought back to the courtroom the following morning. The preceding volumes can be stored in a secure location near the courtroom, or can be stored with the parties, until the end of trial when all installment binders can be returned to the courtroom and made available to the jury for use in deliberations. The defendants' concern over parties seeing jurors' notes on the transcripts can be easily addressed by instructing the jurors to take notes only on their notepads and not to write on the individual exhibits themselves.

As an alternative to this plan, the government is amenable to providing empty binders to the jurors and passing out hole-punched transcripts one-by-one for the jurors as recordings are played. The jurors can then add the individual transcript to their binders or simply return it to the attorney at the end of the recording without using binders. To implement this plan, the

[4] It is quite likely that the government will elect not to introduce large numbers of the transcripts that have been marked as exhibits, and the installment binder plan will avoid the unnecessary copying of exhibits that are never actually used at trial.

government could make ready multiple copies of the transcripts stored in hanging files inside bins in the courtroom, and those materials can be quality-checked by defense in advance of the trial.

The government feels strongly that paper transcripts are necessary to aid the jury and would caution the Court against having the parties rely exclusively on the captioned transcript software for publication of the transcripts to the jury. First, as the Court noted, the act of turning pages on a physical hardcopy is more interactive and engaging than seeing a transcript scroll across a computer screen. Second, there are presently only four small monitors for use by the sixteen jurors, which leads to concerns over whether all jurors would be able to see the text on the screen. Third, it is inevitable that problems may arise with the technology which may prevent the software or hardware from properly displaying the transcripts. In that situation, the parties would have to shift to reliance on hardcopy transcripts until the problems could be remedied. While the government reserves the right to use the Sanction software program at times to supplement the hardcopy transcripts and as a display in jury addresses, the government recommends that the Court allow for the distribution and use of hardcopy transcripts during the trial.

II. The Court Should Exercise Its Discretion to Allow for the Use of Audio and Transcript Exhibits During Deliberations

The jurors should be provided all exhibits during their deliberations – and there is no good reason to exclude the audio and transcript exhibits from the jury. This trial of nine defendants is expected to last eight weeks and involve testimony from dozens of witnesses and publication of hundreds of documentary exhibits as well as hundreds of audio recordings and corresponding transcripts. The voluminous amount of the information relayed to the jury during the trial, and the expected length of the trial itself, counsel strongly in favor of providing the

audio and transcript exhibits to the jury for use in the deliberation room. See United States v. Brown, 872 F.2d 385, 392 (11th Cir. 1989) (holding that "the use of transcripts is not restricted to the time of presenting the tapes to the jury," and that "absent a showing that the transcripts are inaccurate or that specific prejudice occurred, there is no error in allowing transcripts to go to the jury room."); see also Onori, 535 F.2d at 947-48 (admitting transcripts as evidence to be used by jury during deliberations, "so long as each side to the dispute is given an opportunity to submit a transcript containing its version of a conversation.").

By the end of the trial, the jury may well want to refresh its recollection as to recordings it heard weeks or months prior to the start of deliberations, and the transcripts will aid the jury in that endeavor. Just as the transcripts will assist the jury during the trial, they will also assist the jury during deliberations for the same reasons above –the high volume of recordings, the length of the recordings, the imperfect quality of the recordings, the presence of multiple speakers (who often speak over one another), and the difficulty identifying the speakers. Additionally, the transcripts will assist the jury in identifying the portions of the audio they want to play. For example, if jurors wish to re-play a portion of a call that appears on page twenty of a forty page transcript, they can fast-forward to the halfway point in the audio to find the right place. Without the roadmap of the recording provided by the transcript, the jurors would be forced to listen to the full recording start-to-finish to listen for the relevant portion that want to review.

The defendants' concerns over juror misuse of transcripts can be addressed easily with an appropriate jury instruction.[5] The Eleventh Circuit has a pattern jury instruction, which further shows it is common practice for transcripts to be admitted at trial, that states the following:

[5] The defendants' purported concern over juror dependence on the transcripts is somewhat undermined by the defendants' own stipulation that each of the transcript exhibits accurately reflects both the participants and the content of the conversations.

> Members of the Jury: Exhibit _____ has been identified as a typewritten transcript [and partial translation from Spanish into English] of the oral conversation heard on the tape recording received in evidence as Exhibit _____. [The transcript also purports to identify the speakers engaged in the conversation.]
>
> I've admitted the transcript for the limited and secondary purpose of helping you follow the content of the conversation as you listen to the tape recording [, particularly those portions spoken in Spanish,] [and also to help you identify the speakers.]
>
> But you are specifically instructed that whether the transcript correctly reflects the content of the conversation [or the identity of the speakers] is entirely for you to decide based on [your own evaluation of the testimony you have heard about the preparation of the transcript, and from] your own examination of the transcript in relation to hearing the tape recording itself as the primary evidence of its own contents.
>
> If you determine that the transcript is in any respect incorrect or unreliable, you should disregard it to that extent.

The annotations and comments to this instruction cite United States v. Nixon, 918 F.2d 895 (11th Cir. 1990), noting that "transcripts are admissible in evidence, including transcripts that purport to identify the speakers" as well as remarking that the instruction can be given at the time transcripts are offered and received. The government has no objection to the inclusion of the above jury instruction.

With respect to the audio exhibits, the government will make available a clean laptop with connectivity disabled that can be used by the jury during deliberations. The laptop can be made available for inspection by defense counsel prior to submission to the Court. The government can also draft simple step-by-step instructions on how to play the audio files on the laptop to minimize juror confusion and share those proposed instructions with the defense to obtain their consent prior to submission to the Court. In response to the defendants' concerns over jurors' inability to identify the audio exhibits, the government notes that the audio files will be referred to by exhibit numbers at trial and the individual audio files have already been marked with those same exhibit numbers in their electronic file names and on the audio disk labels. By

providing a copy of the joint exhibit list to the jury – which lists helpful and uncontested information related to the audio exhibits, including the exhibit number, the phone number (where applicable), the date/time of the recording, the electronic file name, and the speaker names – the jury should be able to easily identify which audio recordings it wants to replay during deliberations. Prior to submitting the joint exhibit list to the jury, the parties can simply delete the rows of the chart to remove references to transcripts and audio exhibits that were not ultimately admitted into evidence at trial.[6]

[6] As articulated in its previous filing, see Doc. 991 at 8-9, the government will contact defense counsel to resolve any issues relating to potential objections under the rule of completeness, see Fed. R. Evid. 106.

III. Conclusion

For these reasons, the government respectfully requests that the Court adopt the proposals described in the government's motion.

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Respectfully Submitted,

LANNY A. BREUER
Assistant Attorney General
Attorney for the United States
Acting Under Authority of 28 U.S.C. § 515

JACK SMITH
Chief
Public Integrity Section

/s/Edward T. Kang
Edward T. Kang
Trial Attorney
United States Department of Justice
Criminal Division
Public Integrity Section
1400 New York Avenue, N.W.
Washington, D.C.
(202) 514-1412

CERTIFICATE OF SERVICE

I certify that on May 6, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

/s/ Edward T. Kang
Edward T. Kang
Trial Attorney
Public Integrity Section
U.S. Department of Justice
1400 New York Ave., N.W., 12th Floor
Washington, D.C. 20005
(202) 514-1412
Edward.kang3@usdoj.gov