

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Action No. 09-cr-00266-CMA

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. DAVID A. BANKS;
2. DEMETRIUS K. HARPER, a/k/a KEN HARPER;
3. GARY L. WALKER;
4. CLINTON A. STEWART, a/k/a C. ALFRED STEWART;
5. DAVID A. ZIRPOLO; and
6. KENDRICK BARNES,

Defendants.

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REPORTER'S TRANSCRIPT  
(Motions Hearing)

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Proceedings before the HONORABLE CHRISTINE M. ARGUELLO, Judge, United States District Court, for the District of Colorado, commencing at 9:09 a.m. on the 9th day of July 2010, Alfred A. Arraj United States Courthouse, Denver, Colorado.

1 into 2007. We don't have any type of grand jury records  
2 from 2004.

3 So that's another component that I need to further  
4 investigate for purposes of determining whether  
5 suppression of this material is appropriate in this case,  
6 and that is why we need these records. That is just one  
7 example that we have called from the discovery we have,  
8 Your Honor.

9 THE COURT: All right. Anybody else?

10 Mr. Barnard?

11 MR. BARNARD: Thank you, Your Honor. Your Honor,  
12 it is my understanding that once Mr. Barnes had found --  
13 or had talked to his bank or his institution, that a  
14 number of other people whose records had been obtained  
15 then went to their banks and had been told by their banks  
16 that no subpoenas, in fact, had been issued to those  
17 institutions.

18 Unfortunately, I have not yet had a chance to  
19 investigate or to obtain evidence of this, but at this  
20 point, there has been the suggestion, through various  
21 people, that their banks are saying that they did not  
22 receive subpoenas. And that is, again, part of the reason  
23 why we are making the request for the subpoenas.

24 THE COURT: All right. Mr. Kirsch?

25 MR. KIRSCH: Your Honor, the Government's position

1 is that the defendants are not even close to meeting the  
2 standard required for disclosure in this case, and that  
3 standard has been set by the Supreme Court in the Douglas  
4 Oil case. It has been reaffirmed by the Tenth Circuit.  
5 They have not, in their pleadings or here today,  
6 established a particularized need for these materials.

7 They have not shown a specific and allowable use  
8 for the grand jury materials in a judicial proceeding.  
9 What they have said ranges from they have no reason to  
10 disbelieve the Government, when the Government says all of  
11 these were obtained through grand jury subpoenas, to  
12 somebody told my client that they were told that -- by  
13 somebody else at a bank that there wasn't a subpoena  
14 issued for their records. At least double, if not triple  
15 hearsay.

16 That is clearly insufficient to demonstrate a  
17 particularized need under the Supreme Court precedent and  
18 the Tenth Circuit's precedent. They have not even  
19 suggested, even if the records were improperly obtained,  
20 how it is that that would be relevant in this case.

21 They have suggested -- the only suggestion that has  
22 been made today, is that they would have grounds for  
23 suppression. And the ground that they identified was that  
24 they were obtained in violation of the right to the  
25 Financial Privacy Act. With all due respect to the



1 defendants, even if that were true, that is not grounds  
2 for suppression.

3 There is no Fourth Amendment grounds for  
4 suppression because the defendants don't have any  
5 reasonable expectation of privacy in business records that  
6 are held by a third party.

7 THE COURT: I would disagree with that.

8 MR. KIRSCH: Well --

9 THE COURT: I think financial records, definitely  
10 there is a right to privacy.

11 MR. KIRSCH: There is a statutory right to privacy,  
12 Your Honor, but there is not a Fourth Amendment right to  
13 privacy that I am aware of with respect to financial  
14 records held by a third party.

15 THE COURT: Let me ask you this, because the  
16 Supreme Court and the Tenth Circuit ruling, my reading of  
17 it, at least, is that that is generally geared with  
18 respect to confidential information. What is confidential  
19 about the subpoenas, themselves?

20 MR. KIRSCH: Part of what is confidential about the  
21 subpoenas, themselves, is the manner in which the  
22 Government makes the requests for these materials; that  
23 revealing the subpoenas would reveal part of the tactics  
24 by which the Government conducts its investigation. And  
25 the defendants don't have any right to get that