

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

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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) CR-00-N-0422-S
)
ERIC ROBERT RUDOLPH,)
Defendant.)

**MOTION FOR PRESERVATION AND *IN CAMERA* PRODUCTION AND/OR
DISCOVERY OF ROUGH INTERVIEW NOTES**

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COMES NOW the Defendant by and through undersigned counsel, and moves this Honorable Court to enter an Order compelling all law enforcement agents, (federal, state, and local) and all government witnesses in this cause to retain and preserve all of their rough notes and/or memoranda and reports, whether handwritten, typed, or electronically recorded, in connection with their investigation, acts, conduct and/or testimony in the above-captioned cause and specifically including, but not limited to:

1. Any notes, memoranda, or reports of any interview by a government agent (whether federal, state, or local) with any confidential informant, government witness, potential witness or other individual.
2. Any surveillance notes, memoranda, or reports made by any government agent (whether federal, state, or local).
3. Notes made during the examination of any physical or documentary evidence, or crime scenes, or review of electronic surveillance tapes or recordings.

Defendant further moves that the foregoing items be produced for this Court's *in camera* inspection to determine whether grounds for disclosure exist as outlined below, or, in the alternative, that the items be produced to the defense.

STATEMENT OF FACTS

At the status conference on April 26, 2004, the parties discussed with the Court the issue of discovery of raw interview notes of prospective prosecution witnesses and other individuals interviewed by the government. The defense indicated that it was attempting to negotiate this issue with the government. (Transcript of April 26, 2004 Status Conference, p. 7). In response, the lead prosecutor indicated that "my first inclination is that we're not going to disclose those", and that the matter could "very well be something we can get to litigation pretty quickly on." (Id.

at 11) The Court then ordered the defense to file any motion for rough notes on or before May 14, 2004 (Id. at 13)

MEMORANDUM OF LAW

1. Introduction

Under some circumstances, interview, "debriefing", surveillance, and other investigative notes or memoranda, are subject to disclosure pursuant to the doctrine of prosecutorial disclosure articulated by the United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and its progeny and the provisions of 18 U.S.C. §3500 and *Jencks v. United States*, 353 U.S. 657 (1957). Each of these grounds support the present motion.

2. Brady/Giglio

"*Brady* requires the prosecutor to turn over to the defense evidence that is favorable to the accused, even though it is not subject to discovery under Rule 16 (a), since, eventually, such evidence may 'undermine the confidence in the outcome of the trial.'" *United States v. Jordan*, 316 F. 3d 1215, 1251 (11th Cir. 2003). "*Giglio* requires the prosecution to turn over to the defense evidence in its possession or control which could impeach the credibility of an important prosecution witness." Id. at 1226 n. 16. "Impeachment evidence should be disclosed in time to permit defense counsel to use it effectively in cross-examining the witness at trial." Id. at 1253.

As explained in *United States v. Harrison*, 524 F.2d 421, 427-428 (D.C. Cir. 1975):

It seems too plain for argument that rough notes from any witness interview could prove to be *Brady* material. Whether or not the prosecution uses the witness at trial, the notes could contain substantive information or leads which would be of use to the defendants on the merits of the case. If the witness does testify, the notes might reveal a discrepancy between his testimony on the stand and his story at a time when the events were fresh in his mind. The discrepancy would obviously be important for use in impeaching the witness' credibility. The possible importance of the rough notes for these purposes is not diminished in cases where the prosecutor turns over to the defense the 302 reports. The 302

reports contain the agent's narrative account of the witness's statement, prepared partly from the rough notes and partly from the agent's recollection of the interview. Although the agents are trained to include all the pertinent information in the 302 report, there is clearly room for misunderstanding or outright error whenever there is a transfer of information in this manner. In the best of good faith, the statement as recorded in the 302 report may, to some degree at least, reflect the input of the agent. In such a situation, the information contained in the rough notes taken from the witness himself might be more credible and more favorable to the defendant's position.

Although the Fifth Circuit in *United States v. Martin*, 565 F. 2d 362 (5th Cir. 1978) declined to follow *Harrison* in adopting a per se rule that rough notes of an interview with the defendant are per se *Brady* material, the Eleventh Circuit has more recently opined in *United States v. Jordan*, 316 F. 3d 1215, 1257 n. 89 (11th Cir. 2003) that

it matters not whether exculpatory or impeaching material is in the form of raw notes, a 302, or an interoffice communication: if the document contains exculpatory or impeaching information, the prosecution is duty bound to disclose it.

The court in *Jordan* further held that because “what constitutes *Brady* material is fairly debatable”, the prosecutor “should mark the material as a court exhibit and submit it to the court for *in camera* inspection.” *Id.* at 1252. Defendant urges the Court to follow this procedure in this case, as more fully outlined below.

3. Jencks Act

The Jencks Act is "designed to further the fair and just administration of criminal justice, of which the judiciary is the special guardian." *Campbell v. United States*, 365 U.S. 85, 92 (1961). “The Jencks Act, of course, mandates that a statement by a prospective prosecution witness to an investigative agent or the grand jury must be provided to the defense after the witness has testified on direct examination.” *United States v. Jordan*, 316 F. 3d 1215, 1250 (11th Cir. 2003). However, for obvious reasons of judicial efficiency, especially in a complex case such as the present one, “it is customary in many jurisdictions for the government to produce

Jencks materials prior to trial.” Id. at 1251 n. 78

Rough notes that an investigating agent prepared and that concern the subject matter of his testimony are subject to disclosure under 18 U.S.C. § 3500(e)(1). The leading case is *Clancy v. United States*, 365 U.S. 312 (1961), which involved memoranda prepared by government agents concerning interviews that the agents described in their testimony. The Supreme Court held that the defendants were entitled to the memoranda because each was “a written statement made by said witness and signed or otherwise adopted or approved by him.” Id. at 314- 15 (quoting 18 U.S.C. 3500(e)(1)). Similarly, “[u]nder the Jencks Act, a defendant is entitled to a witness’ notes after he has testified, so that the notes may be used in cross-examination.” *United States v. Martin*, 565 F.2d 362, 363 (5th Cir. 1978); see also, *United States v. Jordan*, 316 F. 3d 1215, 1252 (11th Cir. 2003)(“If the agent is called as a witness, these (rough notes)—depending upon the scope of the agent’s testimony on direct examination— may constitute Jencks material.”); *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993)(same); *United States v. Hodgkiss*, 116 F.3d 116, 117 (5th Cir.) (“[T]he debriefing notes are statements of the debriefing agents.”), vacated on other grounds, 522 U.S. 1012 (1997); *United States v. Rivera Pedin*, 861 F.2d 1522, 1527 (11th Cir. 1988) (diary entries for period covering witness's involvement in case constituted Jencks material); *United States v. Campagnuolo*, 592 F.2d 852, 864 (5th Cir. 1979) (agent's report concerning telephone calls that the agent received was statement, under the Jencks Act, of a prospective government witness); *United States v. Sink*, 586 F.2d 1041, 1051 (5th Cir. 1978) (“[T]he memorandum report was clearly a 'statement' as to Agents Stebbins and Connelly.”); *United States v. Bell*, 457 F. 2d 1231 (5th Cir. 1972)(“It is well established that ‘individual `notes and reports' of agents of the government, made in the course of a criminal investigation, are the proper subject of inquiry and subject to production under the Jencks Act”).

Moreover, under 18 U.S.C. § 3500(e)(2), “an interviewer's raw notes, and anything

prepared from those notes (such as an FBI 302), are ... Jencks Act statements of the witness (if they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness. *United States v. Jordan*, 316 F. 3d at 1252; *United States v. Delgado*, 56 F.3d 1357, 1364 (11th Cir.1995). Although fragmentary notes of a witness interview containing occasional verbatim statements do not constitute statements of the interviewed witness, see *United States v. Jordan*, 316 F. 3d at 1255; *United States v. Loyd*, 743 F.2d 1555, 1567 (11th Cir. 1984), more extensive notes may well contain substantially verbatim statements. In both *Jordan* and *Lloyd*, the Eleventh Circuit recognized that an agent's notes may constitute *Jencks* statements of the interviewee. ¹ The Court in both cases also stated that “(w)hether a 302, raw notes, or other government document contains sufficiently extensive verbatim recitation to come within the Act is a matter of fact to be decided by the trial court.” *United States v. Jordan*, 316 F. 3d at 1255; *United States v. Loyd*, 743 F.2d at 1566. The Court in *Jordan* also said that if, after reading the statements, the court thinks a witness may have "adopted" them as his own, the court should have hold an evidentiary hearing to determine if the witness had in fact done so. 316 F. 3d at 1255.

Because defense counsel in the present case have not seen the contents of any raw notes, they are obviously not in a position to prove conclusively that any of the notes are in fact *Jencks* material. However, based on the exhaustiveness of the discovery already disclosed, the defense has every reason to believe that the raw notes withheld by the government are in fact substantially verbatim accounts of the witnesses. In these circumstances, the Court has an obligation to review the materials *in camera*. See, e.g., *United States v. Cole*, 617 F.2d 151,

¹A prosecutor's notes are no less producible under the Jencks Act than an agent's notes if they contain a substantially verbatim recital of what a witness said. See *Goldberg v. United States*, 425 U.S. 94, 101-108 (1976); *United States v. North Am. Reporting, Inc.*, 740 F.2d 50, 55-56 (D.C. Cir. 1984).

152-53 (5th Cir. 1980); *United States v. Conroy*, 589 F.2d 1258, 1272-73 (5th Cir. 1979) (trial court erred when it refused to review potential Jencks material, stating "I have got better things to do than referee discovery"); *United States v. Hogan*, 763 F.2d 697, 704 (5th Cir.), withdrawn in part on other grounds, 771 F.2d 82 (5th Cir. 1985).

4. The procedure to be followed in deciding the present motion

Whether raw interview notes constitute *Brady/Giglio* or *Jencks* material should be decided, at the very least, by the Court and not exclusively by the Government or its agents. *United States v. Rivera Pedin*, 861 F.2d 1522, 1527 (11th Cir. 1988); *United States v. Conroy*, 589 F.2d 1258, 1272-73 (5th Cir. 1979); *United States v. Harrison*, 524 F.2d 421, 427-428 (D.C. Cir. 1975) .

As indicated above, the Eleventh Circuit recently held in *Jordon* that because “what constitutes *Brady* material is fairly debatable”, the prosecutor “should mark the material as a court exhibit and submit it to the court for *in camera* inspection.” *Id.* at 1252.

Similarly, as early as *United States v. Cole*, 617 F.2d 151, 152-53 (5th Cir. 1980) and *United States v. Conroy*, 589 F.2d 1258, 1272-73 (5th Cir. 1979) the Fifth Circuit held that an *in camera* hearing was necessary to resolve Jencks Act issues. The Court stated in *Conroy*, citing *Palermo v. United States*, 360 U.S. 343, 354 (1959), that

(W)hen it is doubtful whether the production of a particular statement is compelled by the statute, we approve the practice of having the Government submit the statement to the trial judge for an *In camera* determination. Indeed, any other procedure would be destructive of the statutory purpose.

The task of determining whether statements relate to prosecution testimony is thus vested in the trial court, not in the government. *Scales v. United States*, 1961, 367 U.S. 203, 258, 81 S.Ct. 1469, 1501, 6 L.Ed.2d 782, 817. The duty may be onerous and unpleasant, but so, indeed, are many of the duties that judges assume. The Act does not, of course, mandate that the trial judge examine voluminous material without assistance from government counsel. The court need only review those sections that the government seeks to withhold; but it should accomplish this by studying the portions proposed to be expunged in their proper

context as parts of the complete document. If the court then determines that the government's expurgation is proper, the defense has no further cause for complaint. See, e. g., *Holmes v. United States*, 4 Cir. 1960, 284 F.2d 716, 720. But where the court fails even to look at the complete materials, thereby abdicating its responsibility to government counsel, the reviewing court has no choice but to vacate the judgment and remand for an appropriate examination.

589 F. 2d at 1273

During the *in camera* review, “(i)t is not the function of the trial judge to speculate as to the usefulness of the reports to the defendant, rather his primary inquiry is directed to the producibility of the reports, i. e., is the report a ‘statement’ under the Act? Does it relate to the subject matter of the witness's testimony?.” *United States v. Bell*, 457 F. 2d 1231, 1235 (5th Cir. 1972). As indicated above, if, after reading the statements, the court thinks a witness may have “adopted” them as his own, the court should have hold an evidentiary hearing to determine if the witness had in fact done so. *United States v. Jordan*, 316 F. 3d at 1255.

The foregoing procedural rules obviously place a heavy burden on the Court in a complex case such as the present one involving literally hundreds of government interviews. At the status conference on April 26, 2004, the government vaguely informed the Court that “(t)he rough notes that would be of witnessess who will testify would be a fairly small portion of the overall universe of rough notes of witnesses.” (Transcript of Status Conference at p. 12). As to the smaller universe of government witnesses, the defense will continue to urge the government to release the rough interview notes of these witnesses in order to avoid the inevitable protracted delays which will result if an *in camera* review is delayed until midtrial. As to the larger group of witnesses that the prosecution does not intend to call, the defense sees no escape from the conclusion that the Court must review the rough interview notes of these witnesses to see if they contain *Brady/Giglio* material. The defense stands ready to assist the Court in any way it can, including, as was suggested at the status conference, providing the Court with *in camera*

showings as to the theory of the defense and as to the relevancy and importance of particular witnesses

5. Conclusion

The raw interview notes which the Defendant seeks preserved and produced by this motion may contain facts crucial to the defense of his case and to fact-finding issues which this Court will ultimately be bound to determine. Whether or not such notes are *Jencks* material, they may contain *Brady/Giglio* material. Again, if the government objects to disclosure of such material to the Defendant directly, this Court must decide whether the materials are subject to production under the *Brady/Giglio* doctrine or under *Jencks*.

WHEREFORE, for any or all of the foregoing reasons, Mr. Rudolph requests this Court to enter an order granting this motion for preservation, in camera production, and/or discovery.

Respectfully submitted,

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Dated: May 14, 2004

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CERTIFICATE OF SERVICE

I do hereby certify that I have served upon the attorney for the government the defendant's Motion to Strike the Death Penalty and accompanying Exhibit A by facsimile and U.S. Mail, first class postage prepaid and addressset to:

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Robert J. McLean
Will Chambers
Assistants United States Attorney
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This the 14th day of May, 2004.



Bill Bowen