

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

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04 MAY 27 AM 10:00
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA :
 :
-v- : CR 00-S-0422-S
 :
ERIC ROBERT RUDOLPH, :
Defendant :

GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION
FOR PRESERVATION, *IN CAMERA* PRODUCTION AND/OR
DISCOVERY OF ROUGH NOTES

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama and William R. Chambers, Jr., Assistant United States Attorney, and respectfully files this Response to the Defendant’s Motion for Preservation, Production and Discovery of Agent Rough Notes as follows:

The defendant, in support of his Motion for Production of agent rough notes, claims that disclosure is required under Brady and Giglio principles as well as the Jencks Act. Aside from advancing claims based on pure speculation and supposition, the defendant’s request for the wholesale production of agent rough or raw notes is contrary to controlling precedent.

BRADY

The defendant first cites Brady v. Maryland, 373 U.S. 83 (1963), as supporting the production and disclosure of rough notes in this case.¹ The defendant presupposes that, because the rough notes “may” contain Brady material, the defendant is entitled to production of the notes or, at least, an *in camera* review by the Court to assess whether they should be produced. While the United States is fully aware of its continuing obligation to provide the defendant with any favorable and/or exculpatory evidence or information, the defendant’s extension of Brady to require wholesale production of rough notes fails on both factual and legal grounds. Contrary to the defendant’s claims, Brady does not “create a broad, constitutionally required right of discovery.” United States v. Bagley, 473 U.S. 667, 675 n. 7, 105 S.Ct. 3375, 3380 n. 7 (1985). Moreover, the right of a defendant to discovery of exculpatory evidence and the government’s duty to disclose any such evidence does not include or envision the creation of the right on the part of a defendant to unsupervised searching of the government’s files nor the delivery of the entire government file to the defendant. See

¹ The defendant makes reference to Giglio v. United States, 405 U.S. 150 (1972), as further grounds for disclosure but proffers nothing more than the general obligation of the government to produce impeaching material to the defendant. As with Brady, the government is fully aware of its obligations to disclose impeaching material under Giglio.

Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002 (1987) and United States v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400 (1976) (Brady does not establish a duty to provide defense counsel with unlimited discovery of everything known by the prosecutor).

The first step in determining whether production is required under Brady is to assess whether the information sought is material. Under Brady, the United States is obligated to disclose only that favorable evidence or information that is material. In United States v. Jordan, 316 F.3d 1215 (11th Cir. 2003), the Eleventh Circuit observed, “The ‘touchstone of materiality is a “reasonable probability” of a different result.’” 316 F.3d at 1252 (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 1566 (1995)). “Accordingly, under Brady, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings.” Id.

The defendant states in his Motion that the rough notes “may contain Brady/Giglio material,” admitting that his Brady request is based on pure speculation. (Motion for Production of Rough Notes page 9). The Jordan court, as well as persuasive authority from other circuits, expressly forbids such fishing expeditions: “[M]ere speculation or allegations that the prosecution possesses

exculpatory information will not suffice to prove ‘materiality.’” 316 F.3d at 1252 n.81 (citing United States v. Ramos, 27 F.3d 65, 71 (3d Cir. 1994) (mere speculation that agents’ rough notes contained Brady evidence insufficient); United States v. Williams-Davis, 90 F.3d 490, 513 (D.C. Cir. 1996) (same); and United States v. Michaels, 796 F.2d 1112, 1116 (9th Cir. 1986) (same)).

In sum, the defendant has offered nothing to show that the rough notes contain any favorable, much less exculpatory, material, and instead buttresses his argument with speculation and conjecture. The defendant’s Motion therefore seeks that which has been consistently rejected: the unchecked expansion of discovery in the name of Brady with no showing whatsoever that any alleged Brady material exists or is material. The United States has represented at every stage of the pretrial proceedings in this case that it will fully discharge its Brady obligations, and will do so with respect to agent rough notes as well. Given the government’s representation, the defendant’s Brady argument should be rejected.

JENCKS ACT

The defendant next claims that the agent rough notes in this case are subject to disclosure under Title 18, United States Code, Section 3500 (“the Jencks Act”).

Section 3500(e) defines a statement as: (1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic,

mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury. 18 U.S.C. § 3500(e). In Jordan, the Eleventh Circuit addressed the disclosure of rough notes as Jencks materials and emphasized that statements to be disclosed under the Jencks Act are limited to statements that provide an undistorted and complete recounting of what had been said. Jordan, 316 F.3d at 1252. In other words, “only those statements which [can] properly be called the witness’ own words” constitute Jencks materials. Id. Jordan thus rejects a *per se* rule that rough notes are Jencks material, and instead holds that, “an interviewer’s raw notes, and anything prepared from those notes (such as an FBI 302), are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness.” Id. See United States v. Delgado, 56 F.3d 1357, 1364 (11th Cir. 1995).

Substantially verbatim is defined as “using the nearly exact wording or phrasing the witness uttered during the interview.” Jordan, 316 F.3d at 1254. It should also be noted that merely using some of the exact wording or phraseology

does not transform notes into Jencks material. Id.

Here, the defendant has made no showing that the agent rough notes are substantially verbatim or were signed or otherwise ratified by the witness. Absent such a showing, the defendant's argument that all of the agent rough notes constitute Jencks Act materials fails as a matter of law. Rather, to the extent that any of the agent rough notes constitute Jencks materials, these notes will be produced to the defendant at the appropriate time.

The defendant readily admits that he can offer no proof that the rough notes are Jencks material and therefore are subject to disclosure. Indeed, defense counsel simply offers in the Motion for Disclosure that there is "every reason to believe that the raw notes withheld by the government are in fact substantially verbatim accounts of the witnesses." (Motion for Production of Rough Notes p. 6). Defense counsel's musings are precisely the kind of speculative requests that are rejected in Jordan and other circuit precedent.

The defendant cites United States v. Martin, 565 F.2d 362 (5th Cir. 1978), as requiring disclosure of witness notes once the witness has testified. Contrary to the defendant's reading of Martin, no such blanket production of notes is mandated. The Court in Martin, rejecting claims of a Jencks Act violation after rough notes were destroyed following completion of the final report of the

witness' statement, cited Title 18, United States Code, Section 3500(b) as the applicable procedure governing disclosure statements of witnesses. Section 3500(b) provides in part:

After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b). Basic to concept of production under the Jencks Act is the fact that production is limited to statements as they are defined in the Act itself. As summarized earlier, the Jordan opinion disposes of the defendant's speculative claim that the agent rough notes constitute statements under the Act.

When, as is the case here, the defendant has been provided with witness statements through discovery and production of all FBI 302s prepared in this case, production of rough notes contravenes the Congressional policy behind the Jencks Act to protect witnesses from being impeached with words that are not their own, are an incomplete version of their testimony or contain an agent's impressions and interpretations. See Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217 (1959). The defendant has proffered nothing showing that the agent rough or raw notes made during interviews with witnesses in this case are "statements" under the Jencks Act and, as such, are subject to production, much less an inspection by the

Court.

For these reasons, the United States declines to provide wholesale discovery of agent rough notes to the defendant, and instead will discharge its obligations to provide Jencks Act materials as defined in the Act.

IN CAMERA REVIEW

Although the defendant cannot establish that wholesale production of rough notes is required under Brady or the Jencks Act, and admits as much in his Motion, he then seeks to skirt the prevailing law on the issue and have the District Court conduct an *in camera* review of the rough notes.²

The defendant, premises this request largely on Jordan, arguing that Jordan requires the government to submit agent rough notes to the Court for *in camera* inspection. Jordan, however, creates no such wholesale requirement. Rather, Jordan observes that, if a prosecutor deems that materials in its possession potentially fall within the scope of Brady materials, the prosecutor should mark the material as a court exhibit and submit it to the court for *in camera* inspection. Jordan, 316 F.3d at 1252.

United States v. Alvarez, 358 F.3d 1194 (9th Cir. 2004), involved a

² It is worth noting that agents interviewed thousands of witnesses during this investigation.

situation identical to that presented by Rudolph here, as the defendant sought discovery of rough notes as Brady and/or Jencks Act material and demanded an *in camera* review. Rejecting the claim that the District Court should review notes *in camera* to determine whether they were discoverable, the Court held:

The Jencks Act provides for *in camera* inspection 'if the United States claims that any statement ordered to be produced ... contains matter which does not relate to the subject matter of the testimony of the witness.' 18 U.S.C. §3500(c). The Act does not authorize the district court to troll for evidence favorable to the defendant. Similarly, the district court need not conduct an *in camera* review of the government's files for Brady evidence favorable to the accused.

Alvarez, 358 F.3d at 1210-11 (citing United States v. Michaels, 796 F.2d 1112, 1116 (9th Cir. 1986)). See United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 202 (3d Cir.1970).

Rejecting similar speculative reasoning in seeking production of rough notes, the Court in United States v. Michaels, 796 F.2d 1112 (9th Cir. 1986), held that Brady does not, "require the trial court to make an *in camera* search of the government files for evidence favorable to the accused." 796 F.2d at 1116 (quoting United States v. Harris, 409 F.2d 77, 80-81 (4th Cir. 1969). The Michaels court also quickly disposed with the argument that notes could be considered Jencks material absent some showing that the notes qualified as either (1) a statement or writing signed, approved or adopted by the witness or (2) a

substantially verbatim recitation of the witness' oral statement. Id. at 1117. See also Harris, 409 F.2d at 80-81 (4th Cir. 1969) (Brady does not require *in camera* search of government files).

In camera review of the rough notes in this case is not warranted under Brady or the Jencks Act. Brady does not require *in camera* review, especially in a case such as this where the defendant has offered nothing more than speculation and generalizations that the rough notes may contain favorable information. It is well established that a defendant must make specific requests coupled with some degree of proof that the information he seeks is material. The defendant here has offered nothing more than a broad request for Brady and Jencks material, without any showing of materiality. Given the government's representation that it will fulfill its Brady and Jencks Act obligations, the defendant's Motion fails to establish a need for *in camera* review of the thousands of agents notes in this case.

CONCLUSION

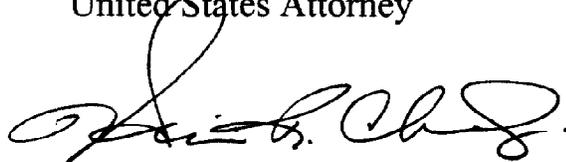
The United States declines to provide the defendant with wholesale discovery of agent rough notes. The defendant has not established that the rough notes or anything contained therein constitute Brady information nor Jencks Act statements subject to production. The general and speculative nature of the defendant's claims that the rough notes might contain Brady material is

insufficient to justify disclosure or review by the Court. The defendant's speculation that the rough notes constitute statements of witnesses, as defined by Title 18, United States Code, Section 3500 is, by his own admission, based on nothing more than a "belief." Contrary to the defendant's claims, even a broad definition of what may constitute Brady material does not confer the right of unfettered access to rough notes, especially where such claims are based solely on guesswork. Because the defendant can offer nothing other than pure conjecture to establish that the rough notes should be produced, an *in camera* review by this Court can hardly be justified.

The United States stands by its representation that all Brady and Jencks Act materials will be provided to the defendant. Given this record, the United States submits that the defendant's Motion is due to be denied in its entirety.

Respectfully submitted this the 27th day of May, 2004.

ALICE H. MARTIN
United States Attorney



WILLIAM R. CHAMBERS, JR.
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, May 27, 2004, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

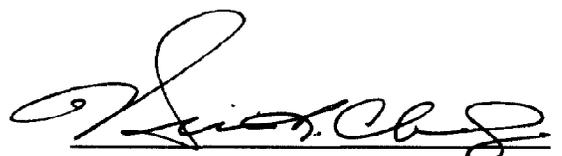
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