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

04 JUL 23 AM 11:21
U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V.	)	CR00-S-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

APPLICATION FOR REVIEW AND APPEAL OF MAGISTRATE JUDGE'S ORDER OF JULY 9, 2004 DENYING THE DEFENDANT'S MOTION FOR PRESERVATION AND *IN CAMERA* INSPECTION AND/OR DISCOVERY OFROUGH INTERVIEW NOTES

COMES NOW the defendant Eric Robert Rudolph, by and through his undersigned counsel of record, and hereby applies for a review of and appeals from the Magistrate Judge's Order of July 9, 2004, denying, in part[1], the Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes to the District Court. This application for review and appeal is made pursuant to U.S.C. Title 28 § 636. Relief is due the defendant pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, *Brady/Giglio* and their progeny, the *Jencks* Act and Federal Rule of Criminal Procedure 16(a)(1). As grounds for application and appeal the defendant states as follows[2]:

[1] The Magistrate's Order granted the defendant's request for preservation of the rough notes and denied all other relief sought. Magistrate's Order, at 6. The defendant, therefore, applies for review and appeals from the adverse rulings only.

[2] For purposes of this filing, the Defendant incorporates by reference any and all arguments, factual assertions and grounds for relief stated in the Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes and Defendant's Reply to Government's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes.

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The Magistrate Judge's Order of July 9, 2004, (Exhibit 1, attached) (hereinafter, "Magistrate's Order") denying the Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes (Exhibit 2, attached) (hereinafter, Defendant's Motion) is clearly erroneous and/or contrary to law for the following reasons:

1) The Magistrate's Order incorrectly interprets Rule 16 and *Brady*.

2) The Magistrate's Order misconstrues the defendant's requested relief and the reasons therefore.

3) The Magistrate's Order improperly delegates the duty to ensure that Eric Rudolph obtains a fair and impartial trial to the government, an adverse and interested party.

4) The Magistrate's Order fails to consider the fifteen examples demonstrating that the rough notes likely contain *Brady* and *Giglio* information and dismisses the defendant's showing as speculative.

For all of these reasons, the defendant moves this Honorable Court to grant the relief requested in the Defendant's Motion.

I. The Magistrate's Order Incorrectly Interprets Rule 16 and *Brady*

In the Defendant's Motion and in the Defendant's Reply to Government's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes (hereinafter "Defendant's Reply", attached as Exhibit 3), the defendant argues that Fed.R.Crim.P. 16(a)(1)(E) requires the production, or the *in camera* review, of all of the rough notes in the possession of the government, as Rule 16(a)(1)(E) provides that the government must disclose any tangible items that are *material* to the

preparation of the defense. The Defendant's Motion and the Defendant's Reply state why the documents requested are material to the preparation of the defense. The Magistrate's Order correctly concludes that "witness statements and agent memoranda are undoubtedly 'material' to the defense in the sense that having them would be 'helpful.'" Magistrate's Order at 3.

Rule 16(a)(1)(E) reads in relevant part:

> Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> ***(i) the item is material to preparing the defense*** (emphasis added)

The Magistrate Order found that the rough notes requested by the defendant are "exempt" from the application of Rule 16(a)(1)(E) by the operation of Rule 16(a)(2). Magistrate's Order at 3. Rule 16(a)(2) states:

> "***Except as Rule 16(a)(1) provides otherwise***, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided by 18 U.S.C. § 3500." (emphasis added.)

In the Order, the Magistrate incorrectly construes Rule 16(a)(2). As the emphasized portion of the Rule indicates, Rule 16(a)(2) is limited by Rule 16(a)(1). In other words, Rule 16(a)(2) only applies if Rule 16(a)(1) does not include an exception. That exception is found in Rule 16(a)(1)(E) and it is under Rule 16(a)(1)(E) that there is authority for the production of the documents requested in the Defendant's Motion and the Defendant's Reply, so long as those documents are material to the preparation of the defense. Rules 16(a)(1)(E) and Rule 16(a)(2) read together, demonstrate that the

overriding issue is the materiality of the documents rather than the documents' particular status.

The Magistrate's Order suggests that Rule 16(a)(1) is limited by Rule 16(a)(2). This reading of the Rule is not supported by the plain language of Rule 16(a)(2). If Rule 16(a)(2) stated "*notwithstanding* the provisions of Rule 16(a)(1)", the construction given it in the Magistrate's Order would be accurate.[3] Because that is not the language in the Rule, finding that Rule 16(a)(1) is limited by Rule 16(a)(2) is clearly erroneous and contrary to law.[4]

In addition, the Magistrate's Order ignores the fact that *Brady* and its progeny, in conjunction with the showing made by the defendant[5], require that the relief sought in the

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[3] The Defendant acknowledges that the Eleventh Circuit in *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003) construes Rule 16(a)(2) in the same manner as the Magistrate's Order. However, *Jordon* dealt with a former version of Rule 16 (a)(2) which provided: "Except as provided in paragraphs (A), (B), (D), and (E) of subdivision (a)(1), this rule does not authorize..." Of course, under the prior formulation of Rule 16, Rule 16(a)(1)(E) was Rule 16(a)(1)(C) which put Rule 16(a)(2) in the clear position of limiting former Rule 16(a)(1)(C). Under the new construction of the Rule, 16(a)(2) clearly no longer limits Rule 16(a)(1)(E).

[4] In addition, even if Rule 16(a)(2) were ambiguous, which it is not, the Magistrate's Order would violate the rules of statutory construction and the rule of lenity. The Supreme Court has consistently held that when the traditional tools of statutory interpretation still lead to ambiguity in a statute, the ambiguity should be resolved in favor of the defendant, instead of in favor of the government. See *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) ("When choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite"); *Ladner v. United States*, 358 U.S. 169, 177-178 (1958) ("This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"); *Whalen v. United States,* 445 U.S. 684, 695, n.10 (1980) ("This view is consistent with the settled rule that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (quoting United States v. Bass, 404 U.S. 336, 347 (1971); *Bifulco v. United States,* 447 U.S. 381, 387 (1980) ("In past cases the Court has made it clear that this principle [the rule of lenity] of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose"). This rule of construction also applies to procedural rules as well as criminal statutes and penalties. *United States. v. Long,* 654 F.2d 911, 914 (3rd Cir. 1981). The reading of Rule 16(a)(2) as proposed by the defense is not only the correct reading, assuming *arguendo* that there are two possible readings, the reading that inures to the benefit of the defendant is the one the Court must adopt.

[5] In the Defendant's Reply, the Defendant provided fifteen specific circumstances where a reading of the documents we have received suggests that the rough notes likely contain *Brady/Giglio* information and/or information material to the defense. Due to the fact that these documents contain witness names, they were

Defendant's Motion be granted. In holding otherwise, the Magistrate's Order seems to set an impossibly high and legally unwarranted standard of materiality under *Brady*. The Magistrate's Order states "the defendant **must show** that the rough notes contain some exculpatory or impeaching information *not* revealed by the FBI-302s and other produced records." Magistrate's Order at 4-5 (emphasis added). However, as pointed out in the Defendant's Motion and Reply, **there is a lowered standard of materiality for the preliminary showing of materiality that must be met in a pre-trial application under *Brady* or pursuant to Rule 16.** *United States v. Griffin*, 659 F.2d 932, 939, n.7 (9th Cir. 1981), *cert. denied* 456 U.S. 949 (1982); *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *see also United States v. Liquid Sugars*, 158 F.R.D. 446, 472 -473 (E.D. Cal 1994); *United States v. Siegfried*, 2000 U.S. Dist. LEXIS 10411, 4 (N.D. Ill. 2000). Indeed, *Jordan* itself recognized such a lower standard when it stated that "the defendant must make a specific request for the items together with an explanation of how it will be 'helpful to the defense.'" *Jordan*, 316 F.3d at 1250. The defense has made such a showing. See Defendant's Motion at 15-34.

The United States Supreme Court, and other federal court precedent, has held that an *in camera* review should be undertaken once the defense has crossed the initial low threshold for pretrial materiality. *See United States v. Agurs*, 427 U.S. at 105 ("Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the

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not attached to the Defendant's Reply. However, in the interest of preserving the record, the defense has attached these documents, under seal, for the Court's review. (Exhibit 4, attached.) In the Defendant's Reply, the Defendant reserved the right to supplement the record with these documents. Defendant's Reply, fn. 12. In addition, the defense would again point out that these fifteen examples are the product of reviewing only a small portion of the discovery for the purpose of these filings.

prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge"); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied* 440 U.S. 986 (1979) ("Requiring materials sought for discovery to be submitted to the court for *in camera* inspection is a practice which is both reasonable and protective of the defendant's rights"); *United States v. Trevino*, 89 F.3d 187, 190 (4th Cir. 1996) ("Once the accused has made a plausible showing that the evidence would be both material and favorable, the trial court *must* review the information *in camera* to ascertain its true nature and determine whether it must be disclosed").

Furthermore, it has become the norm across circuits for the trial court to inspect rough notes *in camera* for *Brady* material. As the Third Circuit stated, "[T]he rough interview notes of the FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to appellant under *Brady* or the *Jencks* Act." *United States v. Vella*, 562 F.2d 275, 276 (3rd Cir. 1977), *cert. denied* 434 U.S. 1074 (1978). In several other recent cases, while the Courts of Appeal held that FBI agents' rough notes need not be turned over to the defense, this is only because the trial court in each case conducted an *in camera* inspection of all of the rough notes and found that there were no discrepancies between the rough notes and the 302's, and that the 302's contained ***all*** of the material in the rough notes. *See United States v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002), *cert. denied* 537 U.S. 1173 (2003) ("After conducting *in camera* review of Burton's notes, the district court compared the notes to the 302 in painstaking detail...[and] found that 'the rough notes and the 302 contain no discrepancies that would have aided Brown's defense'"); *United States v. Muhummad*, 120 F.3d 688, 699 (7th Cir. 1997) (where the Court found that the defendant was not

entitled to the notes because, after an *in camera* review, the district court found that *all* of the contents of the original rough notes were in the 302's).

The defense need not demonstrate that all of the rough notes are material to require production or *in camera* review of all of the rough notes. It is enough that the prosecution has withheld some potentially "arguably exculpatory evidence" which justifies the trial court in ordering the production, or to conduct an *in camera* inspection, of all the government's rough notes. *See United States v. Griggs*, 713 F.2d 672, 673-674 (11th Cir. 1983). In *Griggs*, the prosecutor denied knowledge of any exculpatory evidence; however, during cross examination the defendant evoked "arguably exculpatory evidence" from a government witness. *Id.* at 673. In ordering the trial court to conduct an *in camera* review of all of the government's evidence, the Eleventh Circuit stated,

> "Although appellants have pointed to no specific exculpatory evidence that may have been suppressed, there is some merit to the contention that, if the arguably exculpatory statements of witnesses discussed *supra* were in a prosecutor's file and not produced, failure to disclose indicates the 'tip of an iceberg' of evidence that should have been revealed under *Brady*. It would have been appropriate for the trial court to conduct an *in camera* review of the files to detect any such suppression."

Id. at 674; *see also Anderson v. United States*, 788 F.2d 517, 518-519 (8th Cir. 1986) (where the government refused to turn over tapes of conversations and a polygraph examination of a key government witness claiming that the tapes were too voluminous and unrelated, and the Court of Appeals found error, stating, "Whether the statements were material to Anderson's guilt or punishment is a question that the district court should have determined by reviewing the tapes and the polygraph statements *in camera*").

There is a lower standard of materiality in pretrial applications for the documents sought, specifically in regards to rough notes as *Brady* material. Further, since a showing has been made that these documents contain exculpatory and/or impeachment material that the government has not disclosed, these instances evince the "tip of the iceberg" of other evidence in these notes that the government has not disclosed, as the *Griggs* Court held. At a minimum, the showing made by the defendant is sufficient to meet the standard of materiality to require an *in camera* inspection.[6]

II. The Magistrate's Order Misconstrues the Defendant's Requested Relief and the Reasons Therefore

The Magistrate's Order states "[t]he memorializing records have been produced to the defendant; he now wants the underlying notes, ostensibly to compare them to the documented version of the interview for inconsistencies or incompleteness." This

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[6] As indicated above, under Griggs, it is enough that the prosecution has withheld some potentially "arguably exculpatory evidence" which justifies the trial court in ordering the production, or to conduct an in camera inspection, of all the government's rough notes. It is significant that in other areas of discovery related to this case, the government has clearly and improperly withheld important Brady material. Thus, on April 9, 2004, the defense filed a pleading (document 239) in which the defense pointed out that it appears clear that former FBI analyst and now ATF analyst E.B. played a crucial role in examining the explosives residue evidence in this case. The pleading also pointed out that in researching E.B's background the defense came across this reference in *United Sates v. Gonzalez*, 1996 WL 328601 (D.Del. 1996), dealing with the media's right of access to certain Brady documents turned over to the defense post-trial after Bender had testified as an explosive residue expert:

> "The general contents of the documents were made known to the News Journal by the criminal defendant's unsealed motion for a new trial. Subsequent to the defendant's conviction, the prosecution gave certain documents of which it had just come into possession, containing allegations of past wrongdoing, misconduct, and possible evidence contamination by E.B. , who had testified as an expert witness for the government. The sealed documents included, inter alia, allegations of Bender's failure, while an explosives examiner at the Federal Bureau of Investigations ("FBI"), to follow FBI Materials Analysis Protocols in examining trace materials found on explosive fragments and residue, Bender's maintenance of a dirty and possibly contaminated work environment, his failure to sterilize laboratory glassware, and general allegations of professional incompetence."

The defense noted with alarm that the documents about E.B. released by the Department of Justice as Brady material in Gonzalez have not as yet been released by the same Department of Justice as Brady material in this case. The defendant specifically requested that the Court re-order the government to provide all Brady and Giglio material pertaining to its expert witnesses. To date, the government has not responded to this pleading or provided the exculpatory information related to E.B.

statement does not reflect the import of what is at issue. If one witness is reported to have said two, three of even four markedly different things at different times there are only two possibilities: 1) the witness has given inconsistent statements; or 2) the agents are not accurately reporting the witness' statement. Thus, the reason that the defense has requested this information is because it is exculpatory or impeaching.

Courts have recognized that, to ensure that a defendant receive a fair trial, he must have at his disposal any and all information suggesting that someone else committed the act for which he is charged and any and all information that would call into question a witness' credibility so long as that information is within the government custody and control. *Kyles v Whitley*, 514 U.S. 419, 437 (1995) ("This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the governments behalf in the case, including the police"); *Giglio v United States*, 405 U.S. 150, 154 (1972) ("Whether non-disclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the government...To the extent that this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it"); *United States v. Merlino*, 349 F.3d 144, 154 (3rd Cir. 2003); cert denied 124 S. Ct. 1726 (2004) ("*Brady* places an affirmative obligation on prosecutors 'to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police'") (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)); *United States v. Fallon*, 348 F.3d 248, 251 (7th Cir. 2003) ("Under *Brady* and its progeny, the government has the affirmative duty to disclose

evidence favorable to a defendant and material either to guilt or punishment"); *United States v. Bagley*, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule"); *Belmontes v. Woodford*, 335 F.3d 1024, 1042 (9th Cir. 2003) ("The prosecution has an affirmative duty to turn over to the defense all evidence favorable to the accused, including impeachment evidence"); *United States v. Boone*, 279 F.3d 163, 189 (3rd Cir. 2002), *cert. denied*, 535 U.S. 1089 (2002) ("The affirmative duty to disclose includes impeachment evidence as well as exculpatory evidence"); *Smith v. Holtz*, 210 F.3d 186, 195 (3rd Cir. 2000); *cert. denied*, 531 U.S. 880 (2000) ("The affirmative duty to disclose reaches impeachment evidence as well as exculpatory evidence"). The information the defense seeks is precisely of this sort.

The defense is not simply interested in making a comparison between documents currently possessed and those sought. The defense is trying to prepare to defend a man's life and freedom. Information suggesting that someone else committed the offense, that the witnesses the government will rely upon are unreliable, or that the investigation was flawed is vital to the effective preparation of the defense.

Finally, the Magistrate's Order indicates that the "defendant seems to abandon the argument that *Jencks* requires production or *in camera* inspection." Magistrate's Order at 1. In the Defendant's Reply to Government's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes (hereinafter "Defendant's Reply") the defendant stated, *inter alia*,

> "In its initial filing the defendant asserted in its argument that the rough notes may represent *Jencks* material stating that there is 'every reason to believe that the raw notes are in fact substantially verbatim accounts of the witnesses.' Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes at pg. 6. After reviewing many, but not all of the 302's, for the purpose of this

> filing it is actually unlikely that the 302's are truly representative of the rough notes. Therefore, inasmuch as there are material differences between the 302's and the rough notes, the defendant does not rely upon the *Jencks* Act. * * * Finally, should the court determine that the defendant has not made a showing of materiality, i.e., material differences between the 302's and the rough notes, presumably the court would have found that there is no material difference between the rough notes and the 302's and therefore the defense would move this Honorable Court for an *in camera* inspection to determine whether or not the notes are sufficiently similar to the 302's to be considered *Jencks* material."

Defendant's Reply to Govt's Response, Doc 257, p. 2 at n. 1.

Therefore, the defendant has not abandoned its argument as it relates to the *Jencks* Act, but merely pointed out that the nature of the few documents reviewed for the purpose of the Defendant's Reply strongly suggests that much of the information in the rough notes will be material to the defense and/or *Brady/Giglio* information.

III. The Magistrate's Order Improperly Delegates the Duty to Ensure that Eric Rudolph Obtains a Fair and Impartial Trial to the Government, an Adverse and Interested Party

The Magistrate's Order states: "The parties are fully aware of the consequences a failure to produce "material" Brady/Giglio information may have." Magistrate's Order at 5. Of note, the Magistrate's Order emphasizes the word "material." The import of this emphasis must be taken in the context of the Magistrate's reference to language in *United States v. Jordan*, 316 F.3d 1215 at page four of the Magistrate's Order which states, in relevant part: "*Brady* obligates the Government to disclose only favorable evidence that is "material." The 'touchstone of materiality is a 'reasonable probability' of a different result." (quoting *Kyles v. Whitley*, 514 U.S. 419 (1995). Therefore, it appears that the Magistrate's Order is directing the government that it need only produce "favorable" evidence if it is reasonably probable that a different result would be obtained if the

"favorable" evidence is disclosed. Such a suggestion is "clearly erroneous," contrary to law, contrary to due process, and contrary to any construction of "fundamental fairness."

The government cannot be expected to accurately speculate as to the result of not producing the documents. Rather, it is the government's affirmative obligation to provide the defense with any item which is "favorable." *Brady v. Maryland*, 373 U.S 83, 87 (1963); *Halliburton v. Sec'y for Dep't of Corr.*, 342 F.3d 1233, 1238 (11th Cir. 2004)("In *Brady*, the Supreme Court placed an affirmative duty on the prosecution to reveal any 'evidence [that] is material either to guilt or to punishment'")(quoting *Brady*, 373 U.S. at 87). Fundamental fairness does not rest on the government's *assumptions* or *speculations* as to how the trial will proceed. To decide prior to trial and at this stage of the proceedings that the government's position is so strong that no favorable evidence would or could reasonably change the outcome is to prejudge the very issue which only a jury can decide. Such a reading of the law in the Magistrate's Order or by the Eleventh Circuit, assuming it meant what was said in *Jordan*, would turn decades of precedent on its head.

Further, the Magistrate's Order places the responsibility on the government to meet its obligations, ignoring the fact that the government, in its Sur-Reply of the United States to Defendant's Reply to Government's Response to Motion to Reconsider Trial Date (hereinafter, Government's Sur-Reply), stated that "the United States is not in a position to know what might or what might not be Brady material." Government's Sur-Reply at 4. Therefore, the ultimate responsibility to ensure that Eric Rudolph receives a fair trial lies not with an adverse party who has an interest in the outcome of the litigation

but must lie with the Court once a threshold showing of materiality has been made. As emphasized in *United States v. Harrison*, 524 F.2d 421, 427-428 (D.C. Cir. 1975):

> "(t)he decision on discoverability is emphatically a judicial decision", and "(t)his responsibility of the federal trial judge, it goes without saying, is not to be delegated to the prosecutor." Questions of production of statements are not to be solved through one party's determination that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage."

Therefore, the ultimate responsibility to ensure that Eric Rudolph receives a fair trial lies not with an adverse party who has an interest in the outcome of the litigation but must lie with the Court once a threshold showing of materiality has been made.[7]

IV. The Magistrate's Order Improperly Ignores the Fifteen Examples Demonstrating that the Rough Notes Likely Contain *Brady* and *Giglio* Information and Dismisses the Defendant's Showing as Speculative

As stated, *supra*, the Defendant's Reply listed fifteen specific examples which reflect that it is likely that the rough notes are either material and/or contain *Brady/Giglio* information. The Magistrate's Order indicates that the defendant "points to inconsistencies between statements taken from witnesses at different times, and suggests that the rough notes might contain even more inconsistencies. It is nothing more than speculation to assert that the rough notes, *from which the produced records were*

[7] The defense recognizes the tremendous burden which would be put upon the Court in order to ensure that the defense received all favorable information. The defense also recognizes the difficulty in conveying sufficient information to the Court in order to have an accurate and complete review of all of the rough notes. In the interest of judicial economy, therefore, it would appear that the best course would be to provide all of the rough notes to the defense directly.

Further, it is not clear whether or not the Magistrate's Order found that the Defendant's request for all of the rough notes was unfounded because there was not a showing as to each and every witness in the case or whether the Court would have reviewed those notes to which the Defendant's showing apply had such a request been made. The Defendant has asserted and continues to assert that its showing is sufficient to justify disclosure or *in camera* review of all the rough notes. However, in the alternative, the defense now requests that disclosure or *in camera* review be made of the rough notes to which the Defendants showing in Defendant's Reply references, and further moves, should such an ad hoc analysis be approved, that the defense be permitted to submit additional examples as it becomes aware of them.

generated, would reveal additional inconsistencies beyond those already revealed." Magistrate's Order at 5-6 (emphasis added).

It should be noted that the defendant requested a hearing on his motion. That request was not addressed in the Magistrate's Order. Further, because there has been no hearing, there is nothing in the record to indicate that the "records produced" are an accurate product of the rough notes, as the Magistrate's Order seems to suggest. On the contrary, it is the defense's contention, as supported by the showing contained in Defendant's Reply, that the records produced will not be consistent with the underlying notes.

Also, it cannot be presumed that the information contained in the documents provided is an accurate rendition of witness interviews.[8] While it is possible that the agents for the government accurately wrote down the information from each witness and that the government's agents FD-302s accurately reflect those notes, there should be no assumption made on this point because there is no foundation in the record to support it. It is entirely possible that witnesses gave different information than reflected in the rough notes. It is also entirely possible that the rough notes are accurate and the FD-302's are flawed. The Magistrate's Order gives no credence to the possibility that the mistakes

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[8] Other courts have called into question the premise that the rough notes and the FD-302's can be presumed to be of similar nature to the rough notes. "The words recorded in the FBI 302 are the FBI agent's characterization of what ... [the witness] said, not the words that ... [the witness] actually spoke. FBI 302s are 'routinely prepared' merely as 'the agent's personal summary of the interview to serve to refresh his memory in later preparing a written report of the investigation,' *United States v. Peterson*, 524 F.2d 167, 175 & n.11 (4th Cir. 1975), and are not intended to be verbatim recitations of the interviewee's statements." See also, United States v. Cole, 634 F.2d 866, 867 (5th Cir. 1981) ("Although the notes may have contained phrases or isolated sentences identical to the language used by the witness, they were not a 'substantially verbatim report' of the interview.")

could lie with the agents.[9] While the assumption in the Magistrate's Order may be valid, only a review of the information by the Court will reveal the accuracy of this assumption.

V. Conclusion

The Magistrate's Order concedes that "agent memoranda are undoubtedly 'material' to the defense." Magistrate's Order at 3. This finding is all that is necessary to require production or *in camera* review of these notes. For all of the reasons stated herein, and in the previous filings referenced, the defendant is entitled to the relief sought and the defendant hereby moves this Honorable Court to grant the relief requested in the Defendant's Motion and the Defendant's Reply or, in the alternative, to request that the Magistrate Judge reconsider its July 9, 2004 Order. Finally, the defense again requests that an evidentiary hearing be held on the matters raised.

RESPECTFULLY SUBMITTED:
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BILL BOWEN
JUDY CLARKE

BY:

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[9] As pointed out in the Defendant's Reply, we have already had witnesses tell defense investigators and counsel for the defense that the information in the records produced is inaccurate. This Court is not in a position to make a credibility choice between the witnesses and the government's agents.

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 23 day of July, 2004, served a copy of the foregoing by United States mail, postage prepaid and properly addressed, and/or by hand-delivery, to AUSA Michael Whisonant, United States Attorney's Office, 1801 4th Avenue North, Birmingham, AL 35203.

RICHARD S. JAFFE

EXHIBIT 1

FILED
04 JUL -9 PM 1:03
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

UNITED STATES OF AMERICA,	)	
	)	
vs.	)	Case No. CR-00-S-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

ENTERED
JUL 9 2004

ORDER

On May 14, 2004, defendant filed his Motion for Preservation and *In Camera* Production and/or Discovery of Rough Interview Notes (Doc. 221), in which he seeks not only an order directing Government agents to preserve their rough notes of interviews with witnesses, but also directing that the notes be submitted to the court for *in camera* inspection or turned over to the defense. His original motion advanced two arguments supporting the need for *in camera* review: first, that the rough notes may contain exculpatory or impeaching Brady/Giglio material the Government is obligated to produce and, second, that some portion of the notes constitute Jencks material. In a reply brief filed July 2, 2004, however, defendant seems to abandon the argument that Jencks requires production or *in camera* inspection. Rather now, in addition to the Brady/Giglio argument, he contends that the agents' rough notes are discoverable under Rule 16(a)(1)(E)(i) of the *Federal Rules of Criminal Procedure*, as they are "material" to the preparation of the defense. Although the court agrees that the Government should be required to preserve all notes now existing, neither of these arguments warrants wholesale *in camera* review or production to the defense of rough notes of literally tens of thousands of witness interviews.

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It is important to understand the precise nature of the defendant's request. Already produced to him have been *hundreds* of *thousands* of pages of FBI-302s[1] and other investigative records and memoranda. What he seeks now are not these records, but the investigative agents' rough notes, taken during interviews of thousands of witnesses and later used to generate the documents that have been produced to him. For example, when an investigating agent interviews a witness, he may make rough, hand-written notes of the interview from which the agent will later prepare an FBI-302 or similar record memorializing the substance (but not necessarily the exact words) of the witness's statement. The memorializing records have been produced to the defendant; he now wants the underlying rough notes, ostensibly to compare them to the documented version of the interview for inconsistencies or incompleteness. Short of simply producing these rough notes to the defense, he asks that the court undertake an *in camera* review, comparing literally hundreds of thousands of rough notes to the FBI-302s and other records generated from them.

The defendant's reliance on F.R.Crim.P. 16(a)(1)(E)(i) as a basis for seeking rough notes is unpersuasive. Contending that rough notes of witness interviews is discoverable simply overlooks Rule 16(a)(2), which limits the discoverability of even material and helpful information in the Government's possession. That rule states plainly:

> Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

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[1] FBI-302s are the forms used by FBI agents to summarize, record, and memorialize investigative interviews with potential witnesses.

An agent's rough notes of a witness interview are either a "statement" made by a prospective government witness or a "report[], memorand[um], or other internal government document[]" made by "a government agent in connection with investigating... the case." Under either category, they are exempt from production. As the court of appeals recently pointed out, Rule 16(a)(2) is a "limitation" on the discovery provided by Rule 16(a)(1)(E). United States v. Jordan, 316 F.3d 1215, 1251 (11th Cir. 2003)("The discovery afforded by Rule 16(a)(1)(C) is *limited* by Rules 16(a)(2) and (3).")[2] [italics added].[3] Therefore, even though witness statements and agent memoranda are undoubtedly "material" to the defense in the sense that having them would be "helpful," they remain exempt from discovery by operation of Rule 16(a)(2). See also United Kingdom v. United States, 238 F.3d 1312 (11th Cir. 2001). Rule 16(a)(1)(E)(i) simply does not override Rule 16(a)(2)'s limitation on the discovery of rough notes of witness interviews.

Notwithstanding Rule 16(a)(2), however, the obligation to produce Brady/Giglio materials still falls on the Government; it is the prosecutors' duty to identify material exculpatory and impeaching information and to make it available to the defendant. United States v. Jordan, 316 F.3d 1215, 1251 (11th Cir. 2003). To obtain discovery of the rough notes as Brady/Giglio material, the

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[2] The reference to Rule 16(a)(1)(C) involved the format of the rule prior to the 2002 reorganization of the Rules. The current version of former Rule 16(a)(1)(C) is now Rule 16(a)(1)(E). Thus, Jordan still stands for the proposition that discovery under Rule 16(a)(1)(*E*) is limited by Rules 16(a)(2) and (3).

[3] Indeed, in Jordan the Eleventh Circuit observed that Rule 16(a)(2) precludes discovery even of the FBI-302s, or "witness summaries." "Under Rule 16(a)(2), therefore, the interview summaries made by the government agents were exempt from discovery." Id. at 1227, note 17. Certainly, if the prepared summary of a witness interview is shielded from discovery, the underlying notes of the interview are also.

defendant must meet the standards required by Brady/Giglio. Again, in Jordan the court of appeals explained:

> In addition to the government's discovery obligations under Rule 16(a), the government must also honor the defendant's constitutional rights, particularly the due process right Brady v. Maryland established. [Footnote omitted]. 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. Newton, 44 F.3d 913, 918 (11th Cir. 1995) (quoting United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 3381, 87 L. Ed. 2d 481 (1985)). The defendant's right to the disclosure of favorable evidence, however, does not "create a broad, constitutionally required right of discovery." Bagley, 473 U.S. at 675 n. 7, 105 S. Ct. at 3380 n. 7. [Footnote omitted]. Indeed, a "defendant's right to discover exculpatory evidence does not include the unsupervised right to search through the [government's] files," Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S. Ct. 989, 1002, 94 L. Ed. 2d 40 (1987), nor does the right require the prosecution to deliver its entire file to the defense. See Agurs, 427 U.S. at 109, 96 S.Ct. at 2400. Rather, Brady obligates the government to disclose only favorable evidence that is "material." The "touchstone of materiality is a 'reasonable probability' of a different result." Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (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.

United States v. Jordan, 316 F.3d 1215, 1256-1257 (11th Cir. 2003).

Here the defendant has pointed to no specific information or issue suggesting that the court must supervise and enforce the Government's compliance with its Brady/Giglio duty; rather defendant simply asks the court to review hundreds of thousands of pages of rough notes of witness interviews to assure that the Government has met its obligation. Given that the Government has produced the FBI-302s and other investigative memoranda, the "materiality" of the rough notes could lie only in the possibility that the rough notes contained something different from what is reflected in the FBI-302s and other documents generated from them. In other words, the defendant

must show that the rough notes contain some exculpatory or impeaching information *not* revealed by the FBI-302s and other produced records. If the rough notes are consistent with the FBI-302s and other records already produced, then everything helpful has been produced and nothing has been suppressed. Absent some showing, or at least a colorable suggestion, that there exists such exculpatory or impeaching information in the rough notes but not in the documents already produced, the Government has complied with its acknowledged Brady/Giglio duty, and the court would have no reason to undertake such a massive and apparently unnecessary task.

The parties are fully aware of the consequences a failure to produce "material" Brady/Giglio information may have. The court's undertaking of such a massive review would have the deleterious effect of relieving the prosecutors of their duty to do so, and of relieving them of the consequences of a failure to do so. If the Government produced all rough notes for *in camera* review, it could not be said then that the Government suppressed any exculpatory or impeaching information. Yet, the court's review of the documents would not assure that everything that might be materially helpful to the defense would be made available to the defense, as the court also might not appreciate or realize the materiality of any particular needle of information in a haystack of documents. The prosecutors have a greater interest in assuring faithful compliance with Brady/Giglio, and to the extent they are unsure of the significance of any particular information they possess, they remain free to submit that particular information to the court for *in camera* review. See Jordan, *supra*.

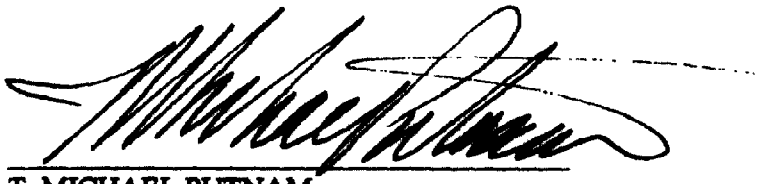
In his reply brief of July 2, 2004, the defendant attempts to show the possibility that the rough notes contain exculpatory or impeaching information *not* already revealed in the FBI-302s and other records that have been produced. He points to inconsistencies between statements taken from witnesses at different times, and suggests that the rough notes might contain even more

inconsistencies. Insofar as the FBI-302s reveal the inconsistencies on which the defense predicates its argument, the inconsistencies are *known* to the defense and can be exploited. It is nothing more than speculation to assert that the rough notes, from which the produced records were generated, would reveal additional inconsistencies beyond those already revealed.

Accordingly, to the extent the defendant's motion seeks an order directing the Government to take steps to *preserve* all rough notes, it is due to be and hereby is GRANTED, and the Government is DIRECTED to preserve all existing rough notes of witness interviews. Insofar as the motion seeks to compel production of the notes as discovery or to compel their submission for *in camera* review, the motion is DENIED.

The Clerk is DIRECTED to forward a copy of the foregoing to all counsel of record.

DONE this the 9th day of July, 2004.



T. MICHAEL PUTNAM
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
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,	)	
	)	
V.	)	CR00-S-422-S
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

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

COMES NOW Eric Robert Rudolph, by and through his undersigned counsel of record, and hereby respectfully files this reply to the Government's Response to Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Federal Rule of Criminal Procedure 16(a)(1)(E) and the Jencks Act, and, as grounds states, as follows:

I. Introduction

First, it should be noted that the defendant's initial filing for the handwritten notes of law enforcement officers was filed in the context of a case in which the government seeks to have Eric Rudolph executed. The documents sought to be received in discovery, or reviewed *in camera* by this Honorable Court, are merely the contemporaneous notes written by law enforcement officers during thousands of interviews. These notes should reflect the actual words used by the witnesses at the time of the interviews. The 302's which are merely summaries, will often, intentionally or unintentionally, contain an

agent's interpretation of what the witness had to say as opposed to the exact words used. Given the nature of these documents, they would be turned over as a matter of course in a case involving money damages; i.e., a car accident case. Given that what is at issue in this matter is far more sobering than monetary damages, the defense, or this Honorable Court, ought, in fairness, should be able to read these notes of the federal agents and law enforcement officers to determine whether or not there is information contained therein which is favorable to Rudolph in the defense of his life and liberty. The defense position in this regard is firmly grounded in the Federal Rules of Criminal Procedure and the United States Constitution.

Second, the Government's Response to Defendant's Motion for Preservation, *In Camera* Production, and/or Discovery of Rough Notes (hereafter "Government's Response"), relies on its assertion that "the defendant can offer nothing other than pure conjecture to establish that the rough notes should be produced" and, therefore, that an *in camera* review of the rough notes is not be justified. Government's Response at 11. The defense has reviewed, specifically for the purpose of this motion, many, but not nearly all, of the 302's previously provided by the government and have found that there are numerous internal inconsistencies, inconsistencies between interviews and, on many occasions, the obvious exclusion of relevant material. In addition, the defense has found many documents which suggest that the rough notes[1] will, in fact, contain much exculpatory and impeaching information.

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[1] For purposes of this motion, "rough notes" is used broadly to include, but is not limited to, notes taken by law enforcement, drafts of 302's, and drafts of affidavits intended to be used for the purpose of obtaining search warrants.

If for example, an agent drafted an affidavit in order to justify the search of a suspect's property, but ultimately obtained the suspect's consent prior to seeking a search warrant, it is very likely that the unused affidavit contains both Brady and Rule 16 material. Likewise, if an agent drafted a 302 and later replaced it

This reply will detail the legal justification requiring the production, or in the alternative, the *in camera* review of all of the rough notes in this case. Finally, the defense will supply this Honorable Court with various instances which demonstrate that the rough notes should be produced.[2]

II. The Application of Fed.R.Crim.P. 16(a)(1)(E)

Fed.R.Crim.P. 16(a)(1)(E) requires the production, or the *in camera* review, of all of the rough notes in the possession of the government. Rule 16(a)(1)(e) provides that the government must disclose any tangible items that are *material* to the preparation of the defense. Rule 16(a)(1)(E) states in relevant part:

> Documents and Objects. Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> ***(i) the item is material to preparing the defense***

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with a "final" 302, and the changes between the documents are material, the draft would contain both Brady and Rule 16 material.

[2] In its initial filing the defendant asserted in its argument that the rough notes may represent Jencks material stating that there is "every reason to believe that the raw notes are in fact substantially verbatim accounts of the witnesses." Defendant's Motion for Preservation, *In Camera* Production and/or Discovery of Rough Notes at pg. 6. After reviewing many, but not all of the 302's, for the purpose of this filing it is actually unlikely that the 302's are truly representative of the rough notes. Therefore, inasmuch as there are material differences between the 302's and the rough notes, the defendant does not rely upon the Jencks Act. To the extent that some of the rough notes are determined to be consistent with the accompanying 302, it would seem that there is much less harm in the government producing duplicative discovery than failing to provide required discovery, especially in a case involving the death penalty. Further, should the Court undertake the task of reviewing all of the rough notes the Defendant asserts that where there are no material differences between the rough notes and the 302 that the material contained therein is in fact Jencks material and is due to be produced to the Defendant. Finally, should the court determine that the defendant has not made a showing of materiality, i.e., material differences between the 302's and the rough notes, presumably the court would have found that there is no material difference between the rough notes and the 302's and therefore the defense would move this Honorable Court for an *in camera* inspection to determine whether or not the notes are sufficiently similar to the 302's to be considered Jencks material.

(Emphasis added)

The government attempts in its response to establish an extraordinarily high standard of materiality, namely a "reasonable probability of a different result," in order to compel production.[3] Government's Response at 3. This position is not faithful to Supreme Court, Circuit Court or District Court precedent. *See Kyles v. Whitney*, 514 U.S. 419, 434 (1995); *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003), *cert. denied* 124 S. Ct. 133 (2003); *United States v. Mandel*, 914 F.2d 1215, 1219 (9th Cir. 1990); *United States v. Siegfried*, 2000 U.S. Dist. LEXIS 10411, 4 (N.D. Ill. 2000); *United States v. Liquid Sugars*, 158 F.R.D. 446, 472 -473 (E.D. Cal 1994). Initially, the quote from *Kyles* the government uses to establish this test of materiality is taken out of context when one looks to the full opinion. Read in full, the Court stated, "A showing of materiality *does not require demonstration by a preponderance that disclosure of suppressed evidence would have resulted in the defendant's acquittal...Bagley*'s touchstone of materiality is a 'reasonable probability' of a different result, and *the adjective is important*. The question is *not* whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles*, 514 U.S. at 434. (Emphasis added). Therefore, the test is not the probability of a different outcome, but only whether the defendant received a fair trial and whether the evidence "in the eyes of a neutral and objective observer could alter the outcome of the proceedings." *Jordan*, 316 F.3d at 1252.

[3] "[the] touchstone of materiality is a 'reasonable probability of a different result." government's Response at 3 (quoting *Kyles*, 514 U.S. at 434).

It is important to note that the materiality standard espoused in *Kyles* and *Bagley* is only applicable for appellate review. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *Kyles*, 514 U.S. at 434. In both of these cases, the Court was dealing with the question of whether one's conviction should be overturned because of error. *Bagley*, 473 U.S. at 669; *Kyles*, 514 U.S. at 421-422. However, in pretrial proceedings, the Supreme Court and several federal courts have indicated that there should be an **even lower standard of materiality**. *See United States v. Agurs*, 427 U.S. 97, 108 (1976) ("Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure"); *Liquid Sugars*, 158 F.R.D. at 472 -473; *Mandel*, 914 F.2d at 1219 ("It is not necessary for a defendant to make as strong showing of materiality to uphold the trial court's granting discovery as it would to overturn a denial of discovery"); *Siegfried*, 2000 U.S. Dist. LEXIS at 4 ("The fact that denial of discovery might ultimately turn out on appeal not to have prejudiced the defendant...is not a compelling reason for a trial court not to order discovery in the first place. Unlike the Court of Appeals, this Court has not seen or heard the evidence at trial and cannot say whether the information requested will turn out to be insignificant or that its non-production ultimately will not demonstrably prejudice the defense"). As the Court in *Liquid Sugars* explained:

> The Court of Appeals has the benefit of hindsight, i.e., it can assess the significance of the requested but not disclosed evidence against the backdrop of precisely what facts were introduced at trial which demonstrate the defendant's guilt. Prior to trial, this court has no such benefit. Requiring a district court to predict what will change the verdict months before it is ever decided is a markedly impossible directive. This court cannot prognosticate pre-trial to a probability that a defendant will be acquitted if his or her discovery is allowed. Nor can this court even determine pre-trial whether the granting of the request

> will significantly alter the quantum of proof in the defendant's favor...the test set forth by this court for pre-trial assessment of materiality – significantly helpful to an understanding of important evidence – is a workable, fair, non-burdensome test.

Liquid Sugars, 158 F.R.D. at 472-473.

Therefore, although the defendant must show that the requested evidence "bears some abstract logical relationship to the issues in the case. . . . There must be some indication that the pretrial disclosure of the disputed evidence would [enable] the defendant significantly to alter the quantum of proof in his favor," *United States v. Ross*, 511 F.2d 757, 762-3 (5th Cir. 1975), *cert. denied* 423 U.S. 836 (1975); *followed by Jordan*, 316 F.3d at 1251, "This materiality standard normally 'is not a heavy burden,' (internal citation omitted); rather, evidence is material as long as there is a strong indication that it will 'play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal' (internal citation omitted)." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (quoting *United States v. Felt*, 491 F. Supp. 179, 186 (D.D.C. 1979)); *followed by Liquid Sugars*, 125 F.R.D. at 471; *United States v. Bergonzi*, 214 F.R.D. 563, 577 (N.D. Cal. 2003); *United States v. Jackson*, 850 F. Supp 1481, 1503 (D. Kan. 1994); *State v. Johnson*, 778 So. 2d 706, 713 (La. Ct. App. 2001).

Because the defendant demonstrates, *infra*, that there are some significant discrepancies and inconsistencies in some of the documents provided to date, this showing is enough to cross this lowered materiality standard, and require disclosure from the government. The discrepancies discussed, *infra*, evince the 302 reports could have been "distorted because of overzealousness on the part of the agent preparing it." *United States v. Harrison*, 524 F.2d 421, 430 (D.C. Cir. 1975) (where the Court found that

agents' rough notes are potentially discoverable material because, "It seems too plain for argument that rough notes from any witness interview could prove to be *Brady* material"). Further, the nature of the documents, as well as the inconsistencies and discrepancies, demonstrate materiality in two ways: they contain exculpatory information, and effective impeachment of government witnesses is impossible without them. *Id.* at 427.

Moreover, as the 11th Circuit Court of Appeals recognized in *Jordan*, Rule 16 is " 'intended to prescribe the minimum amount of discovery to which the parties are entitled,' and leaves intact a court's 'discretion' to grant or deny 'broader' discovery requests of a criminal defendant." *Jordan*, 316 F.3d at 1249 (quoting Notes of Advisory Committee on 1974 Amendments to Federal Rules of Criminal Procedure, *Fed. R. Crim. P. Rule 16*). The potential imposition of the death penalty, courts have held, leads to a broader right of discovery. *See Ex Parte Monk*, 557 So. 2d 832, 836-837 (Ala. 1989); *followed by Duncan v. State*, 575 So. 2d 1198, 1202 1203 (Ala. Crim. App. Ct 1990), *cert. denied* 513 U.S. 1007 (1994). The Court in *Ex Parte Monk* ruled, "The hovering death penalty is the special circumstance justifying broader discovery in capital cases." *Monk*, 557 So. 2d at 836-837. As the Supreme Court said, "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even in close cases, the law, in order to give a doubtfully condemned man another chance." *Stein v New York*, 346 U.S. 156, 196 (1953), *overruled for other reasons by Jackson v Denno*, 378 U.S. 368, 391 (1964); see also *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977) ("From the point of view of the defendant, it [the death penalty] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life

of one of its citizens also differs dramatically from any other legitimate state action"). Thus, the special circumstances in this case, i.e., the potential imposition of the death penalty, should compel this Honorable Court to give broader discovery rights than in other criminal cases.

Additionally, pursuant to Rule 16, many federal and state courts have found that a defendant has a right to discovery of the underlying procedures of scientific evaluations by expert witnesses, as well as these witnesses' bench and lab notes. *See United States v. Zanfordino*, 833 F. Supp. 429 (S.D.N.Y. 1993); *United States v. Green*, 144 F.R.D. 631, 639 (W.D.N.Y. 1992), *cert. denied* 519 U.S. 955 (1996); *Liquid Sugars*, 158 F.R.D. at 470; *Siegfried*, 2000 U.S. Dist. LEXIS at 3-4; *United States v. Yee*, 129 F.R.D. 629, 635 (N.D. Ohio 1990); *State v. Burgess*, 482 So. 2d 651, 653 (La. Ct. App. 1985); *State v. Cunningham*, 108 N.C. App. 185, 194 (N.C. Ct. App. 1992). The primary reason that these courts have granted this discovery request is that "considerations of fundamental fairness require that the defense have access to material concerning the manner and means of testing so that it can make an independent determination of the tests' reliability and have a fair opportunity to challenge the government's evidence," *Siegfried*, 2000 U.S. Dist. LEXIS at 3-4, as well as effectively challenge the witness during cross examination. Indeed, in this case the defense will receive this predicate scientific material.

The disclosure of the scientific notes and procedures is analogous to the request for the FBI agents' rough notes. Insofar as the agents will be giving testimony based upon the 302's, the rough notes would be crucial to making an independent determination of the accuracy of the agent's final 302, challenging the agent's conclusions in the 302 and

effectively cross examining the agent's testimony. Since, "even the most conscientious agent can err, despite careful training and despite rechecking the report against the notes," *Harrison*, 524 F.2d at 429, in addition to the aforementioned risk of distortion through the overzealousness of the agents, the rough notes are crucial to checking the accuracy of the 302's and challenging the agent's testimony. Therefore, for the exact same reasons that courts allow discovery of underlying procedures and bench notes for expert witnesses, the rough notes of witness interviews need to be produced.

III. The Application of *Brady v. Maryland*

The rough notes sought by the defense must be disclosed under *Brady* and its progeny. While the 11th Circuit has held that the defense must make a preliminary showing of materiality when seeking rough notes pursuant to a *Brady* request, case law is consistent in holding, as with Rule 16 requests, **that there is a lowered standard of materiality that must be met in a pre-trial application.** *United States v. Griffin*, 659 F.2d 932, 939, n.7 (9th Cir. 1981), *cert. denied* 456 U.S. 949 (1982); *United States v. Ramos*, 27 F.3d 65, 71 (3rd Cir. 1994); *see also Liquid Sugars*, 158 F.R.D. at 472-473; *Siegfried*, 2000 U.S. Dist. LEXIS at 4. Furthermore, several Circuit Courts of Appeals have ruled on precisely the issue of whether FBI agents' rough notes should be compelled under *Brady*, and though they required a preliminary showing of materiality, they embraced a lowered standard. Finally, the defense need not demonstrate that all of the rough notes are material to require production or *in camera* review of all of the rough notes. It is simply enough that the prosecution has withheld some "arguably exculpatory evidence," evinced in examples, *infra*, that are simply the "tip of the iceberg" for other, undisclosed, exculpatory material, which justify the trial court in ordering the production,

or to conduct an *in camera* inspection, of all the government's rough notes. *See United States v. Griggs*, 713 F.2d 672, 673-674 (11th Cir. 1983).

The government has conceded that if the rough notes contain *Brady* material, they should be disclosed. Government's Response at 4. However, in a subsequent filing, the government made it abundantly clear that it does not know what is *Brady* material in this case. Sur-Reply of the United States to Defendant's Reply to Government's Response to Motion to Reconsider Trial Date at 4.[4] Although the government is correct in its assessment of 11th Circuit law, in that *Brady* does not allow "mere speculation or allegations" to compel disclosure, once there is even a small showing of materiality, the government has an obligation to disclose the material at least to an *in camera* inspection.

In fact, in one of the very cases the government cites in its motion, *Ramos*, 27 F.3d at 71, the Third Circuit adopted the language and reasoning of *Griffin*, 659 F.2d at 939, n. 7, where the Court opined that, "Unless there is some indication, ***however small***, that the rough notes...met the *Brady* requirement of materiality, we cannot hold dismissal is proper." *Id.* (Emphasis added). Thus, while these courts have required the defendant to show a "colorable claim," *Id.* at 939, of materiality, which can be demonstrated by way of examination of agents or interviewees, or other available documentary evidence, *Id.*; *Ramos*, 27 F.3d at 71, these Courts have intonated that "however small" this showing is, it would suffice. These Courts have recognized the precarious position the defense is in,

[4] In the Sur-Reply of the United States to Defendant's Reply to government's Response to Motion to Reconsider Trial Date, the government states "the United States is not in a position to know what might or what might not be Brady material" and suggests that they need to know the theory of defense before undertaking the challenge of determining what the possible defenses are and comparing those to the material in their possession. Given that the government is unwilling to speculate as to the possible defenses which may be employed, and, of course, the defense is never going to discuss that matter with the government, the appropriate and expedient thing to do is to absolve them from making such determinations which they are, upon their own admission, ill-equipped to make.

namely that we are trying to show that evidence which we have not seen is material, and accordingly have lowered the standard of materiality.

Additionally, it has become a norm across Circuits for the trial court to inspect rough notes *in camera* for *Brady* material. As the Third Circuit stated, "the rough interview notes of the FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to appellant under *Brady* or the Jencks Act." *United States v. Vella*, 562 F.2d 275, 276 (3rd Cir. 1977), *cert. denied* 434 U.S. 1074 (1978).[5] In several other recent cases, while the Courts of Appeal held that FBI agents' rough notes need not be turned over to the defense, this is only because the trial court in each case conducted an *in camera* inspection of all of the rough notes and found that there were no discrepancies between the rough notes and the 302's, and that the 302's contained ***all*** of the material in the rough notes. *See United States v. Brown*, 303 F.3d 582, 593 (5th Cir. 2002), *cert. denied* 537 U.S. 1173 (2003) ("After conducting *in camera* review of Burton's notes, the district court compared the notes to the 302 in painstaking detail...[and] found that 'the rough notes and the 302 contain no discrepancies that would have aided Brown's defense'"); *United States v. Muhummad*, 120 F.3d 688, 699 (7th Cir. 1997)[6] (where Court found that the defendant was not entitled to the notes because after

[5] Note that the government cites in its brief *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 202 (3rd Cir. 1970), as an authority opposing *in camera* review. government's Response at 9. However, in *Vella* and later in *United States v. Ammar*, 714 F.2d 238, 259 (3rd Cir. 1983), *cert. denied* 464 U.S. 936 (1983), the Third Circuit explicitly held that FBI agents' rough notes and rough drafts of 302's should be disclosed to the trial court for *in camera* review to see if they contain *Brady* or Jencks Act material.

[6] Note that in a later decision, *United States v. Coe*, 220 F.3d 573, 582 (7th Cir. 2000), the Court found that there was not an abuse of discretion when the trial court found minor discrepancies between rough notes and the 302's and still did not order their production. However, this is easily distinguishable from our case because the Court of Appeals was reviewing for reversible error and abuse of discretion, not deciding whether the notes should be produced in the first place.

in camera review the district court found that *all* of the contents of the original rough notes were in the 302's).

Moreover, both Supreme Court and other federal court precedent indicate that *in camera* review should be undertaken once the defense has crossed the initial low threshold for pretrial materiality. *See United States v. Agurs*, 427 U.S. at 105 ("Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge"); *Jordan*, 316 F.3d at 1252 ("Not infrequently, what constitutes *Brady* material is fairly debatable.[7] In such cases, the prosecutor should mark the material as a court exhibit and submit to the court for *en camera* inspection"); *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir. 1978), *cert. denied* 440 U.S. 986 (1979) ("Requiring materials sought for discovery to be submitted to the court for *in camera* inspection is a practice which is both reasonable and protective of the defendant's rights"); *United States*

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[7] MCLEAN: "In Atlanta...[t]here were a lot of anonymous calls or calls where they said, you know, my boyfriend did it."

JAFFE: "It's classic *Brady*. Even if it's not credible, who makes that decision."

MCLEAN: "Well, again, your calling something *Brady* that's not necessarily *Brady*. The defense theory is: Everything is *Brady*. ***The government's theory is nothing is Brady***." (Emphasis added).
Court Conference, July 30, 2003, pp. 9-10.

CLARKE: "[W]e would think that the negatives (referring to negative scientific test results) would be *Brady*.

MCLEAN: "Well, I'm not sure that it is Brady. Again, your interpretation of Brady and ours is somewhat different."
Court Conference, March 31, 2004, p. 22.

JAFFE: "Very often, in those rough notes, there are differences. There's impeaching differences under *Giglio* and *Kyles*. There may be *Brady*. I understand the government has already reviewed those. But again, without them understanding our theories of defense, I'm not sure that that review would be all that meaningful. And, also, as we've said several times in here, the government's view of Brady and our view of *Brady* is quite often different."
Court Conference, April 26, 2004, p. 7.

v. Trevino, 89 F.3d 187, 190 (4th Cir. 1996) (In regards to confidential information, "Once the accused has made a plausible showing that the evidence would be both material and favorable, the trial court must review the information *in camera* to ascertain its true nature and determine whether it must be disclosed").[8]

In *United States v. Griggs*, 713 F.2d 672 (11th Cir. 1983), the 11th Circuit was presented with a case in which the prosecutor denied knowledge of any exculpatory evidence; however, during cross examination the defendant evoked "arguably exculpatory evidence" from a government witness. *Id.* at 673. In ordering the trial court to conduct an *in camera* review of all of the government's evidence, the 11th Circuit stated, "Although appellants have pointed to no specific exculpatory evidence that may have been suppressed, there is some merit to the contention that, if the arguably exculpatory statements of witnesses discussed *supra* were in a prosecutor's file and not produced, failure to disclose indicates the 'tip of an iceberg' of evidence that should have been revealed under *Brady*. It would have been appropriate for the trial court to conduct an *in camera* review of the files to detect any such suppression." *Id.* at 674; *see also Anderson v. United States*, 788 F.2d 517, 518-519 (8th Cir. 1986) (where the government refused to turn over tapes of conversations and a polygraph examination of a key government witness claiming that the tapes were too voluminous and unrelated, and the Court of Appeals found error, stating, "Whether the statements were material to Anderson's guilt or punishment is a question that the district court should have determined by reviewing the tapes and the polygraph statements *in camera*"). Thus,

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[8] Note that the government cites to the antiquated *United States v. Harris*, 409 F.2d 77 (4th Cir. 1969), to support its proposition that *Brady* does not require *in camera* review. Since 1969, as shown by the cases supra, many Courts have required *in camera* inspection and *Trevino* shows the 4th Circuit does not even follow this precedent anymore.

because the defense has made a preliminary materiality showing, *infra*, that there is some suppression of "arguably exculpatory evidence" by the government with respect to some of the rough notes, the Court should undertake an *in camera* inspection of all the rough notes, as the instances indicate the tip of the iceberg of other exculpatory or impeachment evidence.[9] It would be a difficult and time consuming task for the defense to interview every single witness that the FBI interviewed to determine if there is an indication of discrepancies between every rough note and every 302, and such an undertaking could extend the time for which the defense could reasonably be ready for trial. [10]

As previously stated, there is a lower standard of materiality in pretrial applications for rough notes, specifically in regards to rough notes as *Brady* material, and even cases that the government cite to have recognized that the showing of materiality need only be small. Further, since we have made a showing, *infra*, that these reports contain exculpatory or impeachment material that the government has not disclosed, these instances evince the "tip of the iceberg" of other evidence in these notes that the government has not disclosed, as the *Griggs* Court held. At a minimum, the showing

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[9] In addition, the defense has discovered that the government is aware, or should be aware, of obviously exculpatory material which has not been turned over to the defense. One of the experts the government has stated its intention to use is E.B. In *United States v. Gonzalez*, 1996 WL 328601 (D.Del. 1996), dealing with the media's right of access to certain documents turned over to the defense post trial after E.B. had testified:

"The general contents of the documents were made known to the News Journal by the criminal defendant's unsealed motion for a new trial. Subsequent to the defendant's conviction, the prosecution gave certain documents of which it had just come into possession, containing allegations of past wrongdoing, misconduct, and possible evidence contamination by (E.B.), who had testified as an expert witness for the government. The sealed documents included, *inter alia*, allegations of (E.B.'s) failure, while an explosives examiner at the Federal Bureau of Investigations ("FBI"), to follow FBI Materials Analysis Protocols in examining trace materials found on explosive fragments and residue, E.B's maintenance of a dirty and possibly contaminated work environment, (E.B's) failure to sterilize laboratory glassware, and general allegations of professional incompetence."

[10] The defense acknowledges that in most cases the process of handling rough notes is to utilize the Court as a conduit. However, given the enormity of the task that the Court would have to undertake to fairly review each and every rough note in this case, which number in the tens of thousands, and given the burden that the defense would be under to fully communicate with the Court so that its review would be meaningful, it is simply more practical to order the disclosure of all rough notes to the defense.

made by the defendant is sufficient to meet the standard of materiality to require an *in camera* inspection.

IV. The Defendant's Showing of Materiality[11]

The following paragraphs refer to a number of illustrations justifying the disclosure of the rough notes. The defense has received hundreds of thousands of documents contained on roughly forty-five (45) compact disks. The defense has not had the opportunity to review all of these documents for the purpose of trial preparation and has reviewed even less for the purpose of this motion.[12] However, the defense has reviewed enough, and investigated enough, to realize that the rough notes are discoverable under the standards discussed, *supra*. The illustrations are as follows:

a) One of the anticipated issues at trial will be how, consistent with the government's theory that Eric Rudolph acted alone, Eric Rudolph parked his truck some two miles from the area of the clinic and walked down to the clinic along busy thoroughfares, without anybody seeing him. The only witness disclosed to date who saw anybody walking in the area between where the truck was parked and the clinic is J.G. In BH-AM-003896 J.G. says that he/she saw a person, at 7:10 AM on January 29, 1998, wearing dark pants, a dark coat and a dark hat walking north, towards downtown, bound

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[11] The defendant's showing of materiality references a number of Bates stamped documents provided by the government. There are also references to interviews conducted by the defense. These documents are not attached as an exhibit hereto due to the Defendant's concerns regarding the application of the Protective Order and the Defendant's interest in maintaining the confidentiality of his work-product, respectively. In signing this filing counsel for the defendant verifies that what is alleged to be contained in the documents referenced, *infra*, is accurate. However, should the Court or the government request that these documents be made available for the Court's review in making determinations with respect to the merits of this motion they will be provided.

[12] Because a full and complete record would be necessary for any appellate review of this motion, should this Honorable Court choose to deny access to all of the rough notes in this case, the defense reserves the right to supplement the record with a copy of all of the discovery received to date and also reserves the right to move that all of the roughs notes be sealed and made a part of the record.

on the east side of Montgomery Hwy in the area of Aldridge's Garden Shop[13] and McDonald's. However, in BH-302-001715 J.G. states that he/she saw this person walking south, towards Homewood and in the opposite direction of the clinic, on 20th Street South.

Given that the government may rely upon this person as a witness at trial, it is material to the defense to know whether J.G. made two inconsistent statements with respect to the direction of travel of the person or whether the agents made a mistake in reporting what J.G. had to say. Under one circumstance the error is the witness', and is impeachment material, and in the other circumstance the error could be impeachment material as to the agent who made the error.

b) In many circumstances the statements the government has provided are incomplete. According to the statements in Bates stamped documents BH-302-008155, BH-302-000665, BH-AM-003550, BH-AM-005016, BH-AM-005752, BH-RS-000738 and BH-RS-001171, E.A. was on the top floor of the Medical Towers Building. Just after the explosion, E.A. saw a white male running from the direction of the clinic and behind a building next door to the clinic. E.A. describes this white male as having had on a dark jacket and a ski cap.

However, in statements to the defense this same witness has indicated that E.A. also saw a white truck leave the area near where this white male was observed. Of note, one of the suspects that the government investigated, J.D., drove a white Chevrolet truck at the time of the bombing. J.D. is a known abortion protester who lived within a block of the clinic, who also had bomb making manuals, including instructions on remote detonated bombs, as well as an "Army of God" manual in his/her possession, and was

[13] This location is now occupied by Walgreen's Drug Store.

even known to have watched numerous videos regarding other bombings prior to January 29, 1998,. It is crucial for the defense to know if E.A. told law enforcement about this truck, or if they asked. If this information is contained in the rough notes, it is exculpatory, and, if it is not, it is impeachment.

c) One of the initial investigative efforts that law enforcement undertook after the government identified Eric Rudolph as a potential suspect was to determine whether western North Carolina resident, and purported Eric Rudolph associate, T.B., had been to Birmingham prior to the date of the bombing. Clearly, if the government could establish T.B.'s presence in Birmingham, it would buttress the government's completely circumstantial case against Eric Rudolph. The government produced to the defendant Bates stamped document numbered BH-302-001787, a FD-302[14] drafted by Special Agent D.S. of the BATF and Special Agent W.F. of the FBI, which purports to reflect the substance of an February 1998 interview with Birmingham Police Officer D.H. Officer D.H. worked an off duty job at the clinic in 1998. On page 3 and 4 of BH-302-001787, there is a discussion between the agents and Officer D.H. of an unknown suspicious person being present at a clinic protest on January 17, 1998. Officer D.H. states that he/she saw this person arrive with other protesters and leave with other protesters. On page 5 of BH-302-001787, Officer D.H. states that Officer T.G. of the Birmingham Police Department showed him/her two photographs while they were both present for Officer Robert Sanderson's wake. Officer D.H. also indicates to the agents

[14] Throughout the defendant's showing of materiality there are references to "FD-302's." However, the Bates stamped documents referenced herein are not all technically FD-302's. There are also "Rapid-Start" sheets, "lead sheets" and others which also contain summaries of witness statements. For the convenience of the reader, and due to the fact that the differences between the nomenclature of the BATF and FBI are not material to the motion and do not effect the nature of the documents, the defense has not made this distinction in each reference, but rather refers to all documents provided by the government as FD-302's.

that one of the pictures was of Eric Rudolph, whom Officer D.H. indicated he/she did not recognize. Officer D.H. states that Officer T.G. also "showed [him/her] a photo of another person." Officer D.H. says that the person in the picture Officer T.G. showed him is the same person that Officer D.H. had seen on January 17, 1998.

The agents then contacted Officer T.G. and asked him/her to join the interview. Officer T.G. arrives at the place of the interview with the same photo Officer T.G. has previously shown to Officer D.H.. The agents conducting the interview recognize that the person depicted in the picture as T.B.. Officer D.H. identifies the person depicted in this picture as being the suspicious person who was at the clinic protest on January 17, 1998, twelve days prior to the bombing. Officer D.H. goes into great detail as to this person's description and Officer D.H. further states that he/she pointed this person out to a clinic worker on January 17, 1998.

The government also provided the defense a document Bates stamped numbered BH-302-045634. This document reflects a statement of Officer D.H. taken in May 2002, over four years after D.H.'s first statement. In this statement, Officer D.H. states that in 1998 he/she was shown a picture of a "crowd" of people and that he/she simply picked out one who looked familiar to him. Officer D.H. says that he/she was then told that the person he/she picked was T.B.. Finally, Officer D.H. says that he/she was on administrative leave on January 17, 1998, due to a shooting incident and was, therefore, not at the clinic on that date.

Several significant conclusions can be drawn from these documents all of which support the defendant's motion. First, it is clear that if federal law enforcement did not have a policy of refusing to record witness interviews, there would be no confusion as to

what Officer D.H. said or what he/she meant. Another conclusion that can be drawn is that Officer D.H. did not say what is reflected in the FD-302 and through inadvertence, i.e., the agents relied on their memory rather than on their notes; the agents simply put incorrect information in the document. If an error of this significance could occur in such an important interview, similar undiscovered errors, in all likelihood, exist in hundreds or thousands of other documents.[15]

These circumstances call into question the validity and value of the discovery received to date and it underscores the importance of having the rough notes, so that the defense has as an accurate, or as close to accurate as possible, rendition of what a witness told the agents without the interference of faulty memories. Under such circumstances the rough notes would be more material than the FD-302. Further, if the government has provided the defense with documents in which witnesses are purported to have said "X", and, in fact, the witness says that he or she said "Y", the defense has relied upon information in making decisions about investigation and trial preparation based upon substantially flawed information. Further, it is equally possible that law enforcement decisions were made after relying upon substantially flawed information.

Moreover, if the agents who interviewed Officer D.H. intentionally misrepresented what he/she had to say, the rough notes could serve as valuable *Brady* and *Giglio* information as the notes could demonstrate federal law enforcement's willingness to mischaracterize evidence to advance its theories of guilt.

Another conclusion that could be drawn is that Officer D.H. may not have been truthful during his/her interviews. The statements of Officer D.H., if they are accurately

[15] A defendant has a right to present theories of defense without undue restriction. See *Chambers v. Mississippi*, 410, U.S. 284, 294-304 (1973). One defense that can be employed in any circumstantial case, is questioning the quality of an investigation and thus its conclusions.

reflected in these 302's, cannot be fairly considered to be at all consistent, and, therefore, any rough notes of these interviews are *Giglio* material.

Finally, the defense is entitled to the rough notes due to the fact that the defense ought to be privy to why this second interview was conducted after the passing of four years. The rough notes may contain some material information as to why this subsequent interview was conducted. The potential impeachment value and exculpatory nature, in terms of bias, of this information requires that these notes either be turned over to the defense or reviewed *in camera* by the court.

d) At trial, the government will undoubtedly attempt to show that Eric Rudolph was present in Birmingham at various times prior to the bombing in an attempt to prove that Eric Rudolph had the opportunity to commit the crime with which he is charged. One of the witnesses the government may rely upon to prove this connection is P.C.. Bates stamped documents BH-AM-003120, BH-302-001718 and BH-RS-000326 reflect that on January 28, 1998, at 9 PM to 9:30 PM, witness P.C. was walking his/her dog and passed a blue or "bluish" colored truck parked but still running near the intersection of 15th Street and 16th Avenue. This vehicle was occupied by at least one white male who appeared to have on a wig due to the fact that the hair was long and shiny. In one of the documents, BH-AM-3120, P.C. is reported to have said specifically that this person's hair was not shoulder-length. In another document, BH-302-0017181, P.C. is purported to have said specifically that the hair was shoulder-length. P.C. also describes the person as a "younger age" and not "old age." As P.C. walked back past the truck on his/her way home, he/she saw the same truck still parked and still running. The person in the truck did not look right or left which P.C. felt was unusual.

Given that the government may rely upon this person as a witness at trial, it is material to the defense to know whether P.C. made two inconsistent statements with respect to the description of the person in the truck or whether the agents made a mistake in reporting what he/she had to say. Under one circumstance, the error is the witness' and is impeachment material and in the other circumstance the error could be impeachment material as to the agent who made the error. This error could impeach the quality of the government's investigation.

e) One of the most glaring weaknesses in the government's case is the fact that they have no direct evidence that Eric Rudolph placed the explosive device at the clinic. Further, it is clear from the wording of the indictment that it is the government's theory that Eric Rudolph acted alone. In addition, it is the government's position that the perpetrator dug a fairly deep hole into fairly rocky ground at the site of the bombing in clear view on the corner of a busy intersection and then placed the bomb in the hole. (The purpose of this hole would be to directionalize the shrapnel from the bomb toward the clinic.)

While there is no direct evidence suggesting that Eric Rudolph performed any of these actions, there are 302's which suggest that three other people were at the clinic acting suspiciously at 11:30 PM on January 28, 1998, the night prior to the bombing. J.M., as reflected in documents Bates stamped numbered BH-302-000385, BH-AM-004259 and BH-RS-000155 was walking down 10th Avenue, one-half block away from the clinic, when J.M. observed a gray, early to mid 90's, Nissan Maxima.[16] This vehicle was parked in front of the New Woman/All Women Health Care Clinic and J.M observed

[16] Bates stamped document AT-EC-000716 indicates that a person was seen entering a dark colored Nissan Maxima, with a possible Jefferson County, AL tag, shortly after the July 27, 1996 bombing at Centennial Olympic Park.

two white males walk from the area of the clinic and get into the Nissan. As J.M. got closer to the Nissan, a third white male came from the area of the clinic and bumped into J.M. This third white male got into the Nissan as well. This person did not say anything when they bumped into each other. J.M. said "what's the deal" but received no reply.

J.M. described this third person as 5'8", medium to heavy build, short hair with possibly a red tint, wearing a dark toboggan hat, a brown nylon windbreaker and blue jeans. This description is inconsistent with Eric Rudolph. Bates stamped document BH-RS-000155 indicates that J.M. came to the crime scene to give this information to law enforcement.

This information alone, in conjunction with the statement of J.A., Bates stamped number document BH-302-029739, who saw a gray Nissan or Toyota two door parked at 11th and 19th between 6 AM and 6:30 AM, clearly demonstrate that the statements by J.M. are exculpatory. Therefore, any document relating thereto, whether rough notes or otherwise, reflect that someone else could have been responsible for placing the bomb and is discoverable and production is required. Moreover, the exculpatory nature of the information, and the lack of production from the government, demonstrates the government's inability to recognize clearly exculpatory evidence.

f) Eric Rudolph has stated that he is not guilty of the charges against him; therefore, one of the most obvious and important efforts the defense is making is gathering and investigating any information that some other person or persons is responsible for the offense. There are a number of indications in the documents, in addition to J.M.'s statement, suggesting that suspicious individuals were in the area of the clinic with an opportunity to plant the device in this case.

Among them are BH-302-000251 and BH-AM-003006, which reflect interviews of G.S. who states that between 6:55 AM and 7:00 AM G.S. saw a man get into a light-colored American made car, possibly a Chevy Impala. This vehicle was parked directly in front of the New Woman/All Women Clinic. The person who got into the car shook the steering wheel violently and then drove off. G.S. describes this person as a white male, over 5'10", middle-aged, blondish brown, matted, clumpy, "wild", hair to bottom of neck, clean shaven, no glasses, light colored long pants, possibly blue jeans.

Witness, W.M., as reflected in BH-302-000221, states that G.S. was interviewed for two hours on Feb. 1st, 1998. The statements we have received could not reflect two hours of conversation. Bates stamped document BH-302-000251 is the longer of the two documents and is only two pages. Even giving law enforcement the benefit of the doubt, this document reflects no more than a fifteen to twenty minute conversation. Given that the substance of G.S.'s statement is exculpatory and given that law enforcement found it appropriate to interview him for two hours, the rough notes surely contain crucial exculpatory information.

g) The government's theory, as best as can be determined from the affidavits for arrest and search warrants, is that the person who the government suspects was responsible for the bombing was in Rast Park walking in a southwesterly direction towards the intersection of 16th Street and 11th Avenue shortly after the bombing. According, to the government's theory, J.H., and only J.H.,[17] saw this person. However,

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[17] Bates stamped document BH-AM-003221 reflects that it was law enforcements' intention to interview all 409 students who lived at Rast Hall at the time of the bombing. Bates stamped document BH-RS-000418 indicates that this lead was covered "w/o positive results."

J.H. was a resident of Rast Hall on January 29, 1998 and was in the Rast Hall laundry room when he indicates he first saw the individual he followed. Interestingly enough, however, when one searches ALL of the documents we have been provided with our search engine, using the terms "Rast Hall," there

other people were in that area. One example is D.V., Bates stamped documents BH-302-37207 and BH-RS-001288, who was driving east on 11th Ave at 17th Street South when he/she heard the explosion. D.V. made a u-turn in a parking lot and then drove west on 11th to 16th Street where he/she then turned right onto 16th Street. While D.V. did observe a white male walking through an alley behind the Barber School near the corner of 10th Avenue and 16th Street, D.V. did not indicate that he/she saw anybody at the intersection of 16th Street and 11th Avenue. As far as can be determined, law enforcement did not ask D.V. about anybody walking through the park or standing or crossing at the intersection of 16th Street and 11th Avenue

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are only fifty-four (54) "hits" and only two of these "hits" reference actual witness interviews of residents of Rast Hall other than J.H. These witnesses are B.E.W. and J.M.H., both of whom impeach J.H.

B.E.W., in Bates stamped documents BH-302-037937 and BH-RS-000544, indicates that he/she was in his/her dorm room at Rast Hall when the bomb went off. He/she saw a woman in a green dress or scrubs get into a Ford Bronco or other similar SUV in the alley behind the Domino's and drive west to 16th Street turn north and then west on 10th. He/she believes that this person got into the passenger side of the vehicle. J.H. reports no such vehicle. J.M.H. in Bates stamped documents BH-302-037658, BH-AM-003264 and BH-RS-000467 indicates that he/she heard the explosion and then tires screeching from his Rast Hall dorm room and that he/she immediately looked out the window toward the clinic. He did not see any vehicles or pedestrians leaving the area. J.M.H. was utilizing his/her binoculars when he/she made these observations. If either of these student's accounts are accurate and truthful, J.H.'s account of the events is called into question. Further, it is likely that if any of the remaining 406 residents of Rast Hall had been interviewed, their accounts would be more similar to B.E.W.'s and J.E.H.'s than J.H.'s account.

In contrast addition, if one searches "Camp Hall" in the same database there are 251 "hits" referencing a much greater number of witness interviews with Camp Hall residents. Granted many of these Camp Hall residents have very little to say. However, it seems unreasonable to expect that the investigation would concentrate a greater effort on Camp Hall when that dormitory is situated with much less of a view of the area in which the "alleged suspect" was spotted by J.H. A map of this portion of the campus can be located at: http://www.uab.edu/Campus_map/campus_map_names.html .
In addition, J.H. indicates that J.H. saw the "suspect" he eventually followed cross the street at the intersection of 11th Avenue and 16th Street. A search of the database with all of the documents provided by the government reveals that nobody else seems to have seen this "suspect" or have been in this area at the time J.H. sees the "suspect." This is despite the fact that there were literally hundreds of people within a block of the clinic, located at the corner of 10th Avenue and 17th Street, at the time of the explosion. The only person J.H. states was in the area with him/her during his/her observations is discounted by J.H.'s speculation that she did not see the "suspect."

The striking absence of this pertinent information raises significant questions regarding the quality of the investigatory interview goals and/or techniques and raise potential issues of bias as well. Either the agent who conducted the interview apparently did an incomplete interview, an error the type of which, cumulatively with other errors, could undermine the conclusions of the investigation. Alternatively, D.V. may have stated that he/she did not see anybody in the park or at the intersection and the information simply never made it into the documents. Under either of these scenarios, the defense would be entitled to the rough notes as both impeachment and exculpatory information, respectively. That the defense does not know which scenario is true cannot be said to convert the defense's argument into mere speculation. The defense simply cannot know what it does not know.

h) As previously stated, the government's theory is that the person who the government suspects was responsible for the bombing was in Rast Park walking in a southwesterly direction towards the intersection of 16th Street and 11th Avenue shortly after the bombing. Clearly, it would be important for the defense to demonstrate that multiple people were seen leaving the scene of the bombing who do not fit Eric Rudolph's description nor do they fit the description given by J.H. of the person he/she alleges to have seen in Rast Park. Bates stamped documents numbered BH-302-001388 and BH-RS-000479 reflect an interview concerning S.M. occurring on February 4, 1998.

S.M., who works one half of a block from the clinic at Hubbard Properties, states that he/she went to the scene just after the explosion and saw a young white male under 30, wearing a blue sweatshirt, blue jeans and medium length brown hair leaving the scene through the Domino's Pizza parking lot. Bates stamped document numbers BH-302-

009490 and BH-AM-5897 reflect interviews with S.M. on February 27, 1998, where S.M. again says that he/she saw somebody leaving the scene and S.M. says he/she saw someone running north on 17th Street within a minute of the explosion. S.M. describes this person as a white male wearing blue jeans and a short sleeved blue shirt and had medium length curly brown hair. However, in Bates numbered document BH-302-015000, an interview on February 9, 1998, S.M. is said to have indicated that he/she did not see any "individuals leaving the scene that would have been suspicious."

The same type of inconsistency occurs with W.S. a co-worker of S.M.'s. Bates stamped documents BH-302-009482 and BH-AM-005899 are statements taken on March 2, 1998, in which W.S. says that immediately after the blast he/she saw two white males leaving the area of the bombing. One ran North on 17th and then west through the Domino's lot. The other white male ran south on 17th Street. However, in Bates numbered document BH-AM-003280, W.S. is purported to have said that he/she did not see anybody leaving the scene. In addition, BH-RS-000612 indicates that S.M. and W.S. were interviewed and that they saw nothing.

C.G., who is a co-worker of both S.M. and W.S. at Hubbard Properties, is interviewed in Bates numbered documents BH-302-009889, BH-AM-005883 and BH-RS-001325, C.G. stated that he/she heard the explosion and saw S.M. and W.S. run toward the scene. C.G. stated that within thirty (30) seconds of the explosion C.G. saw a tall, thin white male wearing a green army raincoat and a sailor's hat. This person had blond to light brown hair which came down to his shoulders. When C.G. first saw this person, he was coming out of the woods south of Domino's Pizza but north of the dentist's office which is located on 17th Street midway between 10th and 11th Avenue.

This man ran north while looking at the blast site towards Domino's, then west in front of Domino's, and finally out of site. This person would be going in a totally different direction than the person allegedly seen by J.H.

Clearly, it appears that these three witnesses saw at least one person leaving the scene of the bombing. Further, the person or persons seen by these witnesses impeach, not only the government's theory but its main witness, J.H., whose description of the person J.H. allegedly saw is far different than the description given by these witnesses.

i) J.H., the government's main witness who was relied upon in applications for arrest and search warrants, and in gaining the indictment itself, is interviewed a number of times, the results of which are in the following Bates stamped numbered documents: BH-302-017174, BH-302-005574, BH-302-000653, BH-302-001223, BH-302-000095, BH-EC-035059, BH-SUS-000141, BH-RS-000093, BH-RS-000094, BH-1B-001238, BH-RS-000054, BH-AM-004550, BH-AM-002952, BH-302-22766 and BH-302-022764. J.H.'s statements are remarkable, not only in their numbers, but in the number of inconsistencies and discrepancies. Discovery of the rough notes is necessary for the defense to have a global view of the extent of these inconsistencies.

To illustrate the issue, according to J.H., he/she heard the explosion and looked out the window of the laundry room whereupon he/she saw, immediately, or within seconds, an individual walking away from the immediate area at a quick pace. J.H. went outside and was looking toward the area of the explosion. (In BH-RS-000158 and BH-AM-002933 J.H.' described the person as "calmly" walking through the park.) J.H. was standing with a girl, but J.H. does not think she saw the person J.H. saw. (BH-302-005574, p. 24) This person is described as a white male with long, shoulder length,

brown hair, 6'1", "not medium height", (BH-302-005574 p. 4) 175 to 185 lbs., "not stout looking", (BH-302-005574 p. 4) wearing a black hat, unknown type and color of jacket, perhaps a longer coat, dark pants and an empty black backpack. J.H. later decides that the coat was brown in BH-302-000653, at p. 3.

J.H. states that this person walked south through Rast Park and continued south on 16th Street. J.H. went to his/her vehicle. During this time the person J.H. claims to have seen in the Rast Park was out of his/her sight for any number of minutes. J.H. drove south on 16th Street and then saw a person who then turned west onto 14th Alley South where this person pulled something out of his pocket. J.H. thinks, but did not see, that it was a blue plastic bag. In addition, Agent W.F. tells J.H. it was a bag, BH-302-005574, at p. 26. J.H. says he/she continued to 15th Ave where J.H. turned left and waited on 15th Ave between 16th and 17th Street. "Moments later," J.H. saw another person walking east on 15th Avenue toward 17th Street on the North side of the street. The determination that it is the same person is based on the person carrying a blue plastic bag. BH-302-05574, p. 7, 8. According to J.H., this person, BH-302-05574, at p. 8, had "either brown or blackish hair" that appeared pressed down, and "whatever the hair was it wasn't on him anymore." In BH-302-005574, at p. 8 Det. J.B. tells, ***yes tells***, J.H. that the person previously had a wig on.

All of this means, of course, that the person would have had to stuff a "long" coat, a wig and a cap into a blue plastic bag which previously fit into a fist. This new person then walks east to 18th Street South where the person turned North and then east on 15th Ave where J.H. lost sight of the person. In BH-302-000653 p. 3, **J.H. says that he/she pretends his/her car broke down at 17th Street allowing the person to pass and get**

ahead of J.H. so he could get a better look at the person he was following. In the "911" tape BH-302-000095, p. 3 J.H. affirmatively says that J.H.'s car broke down.

At 7:54 AM, J.H. makes a "911" phone call from the McDonald's. While J.H. is on the phone he/she observes another person across the street from the McDonald's. J.H. says the person had a **white shirt** on and is not sure if this person had glasses on, BH-302-005574, at p. 16. In BH-302-000653, at p. 4, the person is wearing a **light colored** shirt with a dark long-sleeve shirt underneath. The person has a book bag which is described as being "puffed up" and the person does not have the blue plastic bag. The conclusion that it is the same person is based on the book bag being full rather than empty, BH-302-005574, p. 30. J.H. does not know if this third person is dressed the same as the person J.H. saw on 15th Avenue, BH-302-005574, at p. 30. **Ironically, J.H. says that the height and weight of the various people J.H. saw "were *about* the same,"** BH-302-5574, p. 31. After making the "911" call, J.H. gets in his/her car and travels west on Valley Avenue when J.H. sees a gray truck traveling in the opposite (east) direction, BH-302-005574 at p. 21 and 18. As J.H. drives by, he/she sees that the person in the gray truck had a black or blue shirt under another shirt, making J.H. think this now second, third, fourth or fifth person was the same person, but he/she is unsure. (BH-302-005574, p. 19) J.H. does note that the person in the gray truck had a mustache which J.H. had never noticed on either of the previous people, BH-302-005574, p. 20.

J.H. is a very important lay witness in this case. Given that J.H.'s pre-trial statements are full of inconsistencies and discrepancies, it is very likely that the rough notes with reference to these statements will contain additional inconsistencies and

discrepancies.[18] The defense is entitled to the impeachment information which will be contained in the actual notes in order to conduct a meaningful cross-examination. Such an examination will not be possible with only the FD-302.

j) Some of the discovery received from the government is simply useless without the rough notes. For example E.H.'s statement, Bates stamped number BH-302-012602, is an exact duplicate of P.S.'s statement, Bates stamped BH-302-012604. The only difference between the documents are the names.

k) One of the factual issues at trial will revolve around circumstances at the McDonald's on Montgomery Highway. and, as is often the case, the details are the most important issue. With respect to some of these important witnesses, no details are forthcoming in the initial interview, but then seem to appear once the interviews are done without the tape recorders. One witness, B.W., a worker at McDonald's, as reflected in interviews Bates stamped numbered BH-302-000059, BH-302-001435 and BH-AM-003163, says that J.H. arrived at McDonald's at 8:30 to 9:00 AM and was hysterical. B.W. says that he/she heard J.H. say that he/she had "seen a man burn down a building downtown" and that J.H. had "seen a man blow up a building down by UAB near the Ronald McDonald House." B.W. says that J.H. said that he/she saw the person take off a wig and sunglasses and place them in a book bag and described the person as wearing a flannel shirt and a ball cap. B.W. says that while on the phone J.H. started to jump up and down saying "here he comes, here he comes." B.W. then sees the white male J.H. was referring to and indicates that B.W. saw him walking "calmly" down the hill in front

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[18] In addition, it is made clear in Bates stamped document BH-302-005574 (recorded interview of J.H. on January 29, 1998 at 10:24 A.M) that an off-tape discussion was had between J.H. and Det. J.B. prior to the tape recorder being turned on. Page 1 of the transcript reflects the following:
Det. J.B.: "(J.H.), this morning, uh, I've already spoke with you, uh, can you tell me where you were and what you witnessed this morning?"

of McDonald's. B.W. describes the person he/she saw as a white male, 5'8" to 5'9", slender, in his late 20's to early 30's, with brown hair, curled up at the collar, and a rough beard, as if the person had not shaved in a couple of days, carrying a dark blue book bag which appeared to be full, wearing tinted prescription glasses and a "nasty" baseball cap. B.W. further describes this person as having shoulder-length, light brown curly hair and wearing a flannel plaid shirt, dark shoes and dark pants. B.W. says that he/she would recognize this person if he/she saw him again.

However, prior to giving all of these details, B.W. was interviewed initially on January 29, 1998 at 10:01 AM. This occurred roughly two hours after the events B.W. was being asked to describe. In this taped statement, Bates stamped number BH-302-000830, to Officer B.L., B.W. is uncertain as to almost every detail. B.W. says that "all I saw was his (blue) book bag" and that he had a hat of an unknown color. B.W. says the person's hair was shoulder-length and curly and describes the person as being 5'8" to 5'9" "slim" and his weight as being 180 to 190. B.W. could not describe the pants at all and "couldn't say" whether the person had any facial hair. Finally, B.W. saw that the person had glasses but he/she does not know whether they were "shades" or prescription.

Obviously, B.W. is an important witness and it is unclear why his/her statements are so drastically different. Because the statements are so drastically different, the rough notes probably contain additional impeachment material over and above what is contained in the documents received so far.

l) One of the witnesses the defense expects the government to rely upon is M.B., interviews reflected in Bates stamped document numbers BH-302-000663, BH-SUS-000313, BH-EC-043807, and BH-AM-003365. M.B. states that at 9:40 AM on the

morning of the bombing M.B. was entering I-59 north at the Trussville, AL exit, which would lie between Birmingham and North Carolina. M.B. states that as she tried to merge, a gray pick up truck M.B. observed, would not let him/her merge into the right lane. In the initial interview on February 5, 1998, M.B. could not recall any descriptive data regarding the driver other than the person was a while male. Subsequently, M.B. was shown, and identified, a picture of Eric Rudolph as being the person driving the truck in question. The rough notes of the initial interview likely indicate additional uncertainty which would impeach any in-court identification. The defense needs the rough notes to adequately examine M.B. and explore the circumstances of the witness' initial statement.

m) Some of the documents provided by the government are missing vital information and without such information the documents are useless. For example, in Bates numbered documents BH-302-012604, BH-AM-003733 and BH-RS-000827, P.S. says that he/she saw a White Dodge truck being driven by a suspicious white male who made a sudden U-Turn on 19th Street South after being parked on 19th and 10th Avenue (two blocks from the clinic) and then turn into an alley on the 1800 block of 10th Avenue South and drive west bound (one block away from and towards the clinic). The driver is described as a white male, brown or black hair, brown eyes, early to mid-twenties, with blue or black shirt on. This could be valuable information to the defense showing other suspicious individuals who may have committed the offense. However, no time is noted on these documents.

n) As previously stated, the government will likely try to prove that Eric Rudolph was in Birmingham on one or more occasions prior to the bombing, The government may try to do this with witnesses who saw a truck similar to the one owned by Eric

Rudolph. In Bates stamped numbered document BH-RS-001017, R.L. says that he/she saw a truck matching the description of Rudolph's illegally parked 2 to 2.5 weeks before the bombing at the corner of 10th Avenue and 18th Street. R.L. goes on to state that he/she has not seen the truck since the bombing. However, the document does not indicate whether he/she saw the truck on one day two weeks before the bombing or whether it was parked there every day for two straight weeks. Hopefully, the agent who took the statement took adequate notes so as to clarify this issue.

o) M.S. (referenced in Bates stamped documents BH-IN-000356 and BH-AM-003250) supervisor at Vulcan Park, heard the explosion and went outside with co-worker C.T. to see from where the explosion came. The documents indicate that M.S. did not see anything and went inside. C.T. then *told* M.S. that he/she saw an individual walking from the woods and towards the highway. In Bates stamped documents BH-RS-000260, BH-AM-003039, BH-RS-000283, BH-302-000089, BH-302-003387, BH-302-003387, BH-EC-035969, BH-302-004490 and BH-302-000089, C.T. indicates that he/she was working at the Vulcan Park when he/she heard the explosion and that within one and a half minutes to four minutes C.T. saw a man walking up the side of the mountain and then down Montgomery Highway. This person was wearing a black jacket, a black hat, and a backpack and was 5'8" 160 to 170 lbs. According to Bates stamped document BH-302-006273, Tinsley, along with five other employees of Vulcan Park, is shown a picture of Eric Rudolph. None of the employees could make an identification.

The defense has spoken with M.S. Interestingly enough he/she has indicated to a defense investigator and a member of the defense team that not only did M.S. see the

person walk out of the woods, but M.S. told investigators at the time of his/her interviews that he/she had seen this person. M.S. has signed a statement to this effect.

Significant inferences can be drawn from these documents, all of which support the defendant's motion. If federal law enforcement did not refuse to tape record witness interviews, we would know what M.S. said and what M.S. meant. Also, it is possible that M.S. did not say what is reflected in the documents provided by the government and through inadvertence the agents simply put the wrong information in the document. If an errors of this type can occur in an important interview, similar, yet undiscovered, errors likely exist in the other documents as well. These inferences raise questions as to the validity and the value of the discovery received and it underscores the importance of having the rough notes which would, hopefully, give the defense an accurate rendition of what the witness told the agents, without the interference of human error. Further, it appears that the government has provided the defense with documents in which witnesses are purported to have said one thing, and in reality the witness said something else. Where that occurs, the defense is relying upon information in making decisions about investigation and trial preparation based on incorrect information, and may be doing so on innumerable occasions.

Also, if the agents who interviewed M.S. intentionally misrepresented what he/she said, the rough notes could serve as valuable *Brady* and *Giglio* information, as the notes could demonstrate federal law enforcement's eagerness to falsify evidence to gain an advantage in this litigation.

V. Conclusion

The argument, controlling precedent and illustrations included *supra* justify the disclosure to the defense, or in the alternative an *in camera* review of, all of the rough notes in this case. Further, given the nature of this case and the burden it would put on both this Honorable Court and the defense to conduct a fair and meaningful review of all of the rough notes, the far more practical and fair approach would be for the Court to order all of the rough notes to be disclosed to the defense.

WHEREFORE, PREMISES CONSIDERED, the defendant moves, pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Federal Rules of Criminal Procedure, that the government be required to produce, or in the alternative, that the Court examine *in camera*, all rough notes which exist in this case. Further, the defendant requests that an evidentiary hearing be held on the issues raised in the motion.

RESPECTFULLY SUBMITTED:
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MICHAEL BURT
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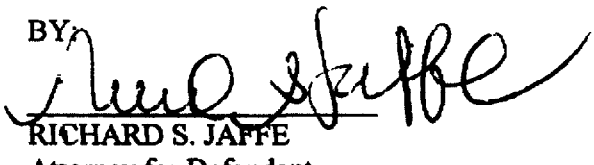
BY: 
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CERTIFICATE OF SERVICE

I do hereby certify that I have on this the 2 day of July, 2004, served a copy of the foregoing by United States mail, postage prepaid and properly addressed, and/or by hand-delivery, to AUSA Michael Whisonant, United States Attorney's Office, 1801 4th Avenue North, Birmingham, AL 35203.

RICHARD S. JAFFE

EXHIBIT 3

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

FILED
04 MAY 14 AM 9:20
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 *Jordon* 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,

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[1] A 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 addresset to:

Michael W. Whisonant
Robert J. McLean
Will Chambers
Assistants United States Attorney
U. S. Department of Justice
Office of United States Attorney
Northern District of Alabama
1801 Fourth Avenue North
Birmingham, Alabama 35203-2101

This the 14th day of May, 2004.

Bill Bowen

CR-00-5422-S

SEALED DOCUMENT

DO NOT DISCLOSE

Attached Exhibits

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