

IN THE UNITED STATES DISTRICT COURT **FILED**
FOR THE NORTHERN DISTRICT OF ALABAMA **MAUG 13 PM 1:45**
SOUTHERN DIVISION U.S. DISTRICT COURT
H.D. OF ALABAMA

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

HB

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR
REVIEW AND APPEAL OF MAGISTRATE'S ORDER OF JULY 9, 2004,
DENYING DEFENDANT'S MOTION FOR PRESERVATION AND *IN*
CAMERA INSPECTION AND/OR DISCOVERY OF
ROUGH INTERVIEW NOTES

Comes Now the United States of America, by and through its counsel, Alice H. Martin, United States Attorney for the Northern District of Alabama and William R. Chambers, Jr., and Robert Joe McLean, Assistant United States Attorneys, and respectfully files this Response to the Defendant's Motion for Review and Appeal of the Magistrate's Order Denying the Defendant's Motion for Preservation, Production and Discovery of Agent Rough Notes. The United States respectfully submits that the Magistrate's Order of July 9, 2004, Denying the Defendant's Motion for Inspection and/or Production of Rough Notes is due to be affirmed and the defendant's appeal summarily dismissed, and in support thereof submits the following:

In his latest efforts to seek discovery of agent rough notes, Rudolph argues that the notes must be produced: (1) under a Brady and Giglio analysis; (2) pursuant to Federal Rule of Criminal Procedure 16; and (3) as Jencks Act materials. Magistrate Putnam's Order properly rejects the first two arguments and holds that statutory and case law do not mandate an *in camera* examination, let alone the wholesale production, of agent rough notes under these circumstances. Finally, Rudolph's resurrection of his Jencks Act argument runs headlong into recent Eleventh Circuit case law in which the court took great pains to explain why agent rough notes do not fall within the Jencks Act.

Rudolph's present request must be examined in the proper context. In the same breath that Rudolph argues that a review of the agent notes by the district court is required to assess whether the notes should be produced to the defense, he urges the court to skip this step and simply deliver the notes wholesale to his door, offering to relieve the Court of the burdensome nature of the review process. Rudolph's request thus constitutes a transparent attempt to achieve an end-run around the analytical framework that the courts and Congress have put in place to protect the government's work product and allow Rudolph to enjoy a fishing expedition in the investigative files, which the Supreme Court says is not permissible. See Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002

(1987), and United States v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400 (1976) (both holding that Brady does not establish a duty to provide defense counsel with unlimited discovery of everything known by the prosecutor).

I. Rudolph Fails to Establish that the Agent Rough Notes Constitute Brady or Giglio Materials

A. Magistrate Putnam Correctly Identified the Standard for Materiality for Disclosure of Brady Materials

As correctly stated and applied by Magistrate Putman, a showing of materiality is required to justify disclosure under Brady and Giglio. Contrary to the defendant's claims, Brady does not "create a broad, constitutionally required right of discovery." United States v. Bagley, 473 U.S. 667, 675 n.7, 105 S.Ct. 3375, 3380 n.7 (1985). Moreover, the right of a defendant to discovery of exculpatory evidence and the government's duty to disclose any such evidence does not create the right on the part of a defendant to unsupervised searching of the government's files nor the delivery of the entire government file to the defendant to verify the government's representations that it is discharging its obligations. See Ritchie, 480 U.S. at 59, 107 S.Ct. at 1002 and Agurs, 427 U.S. at 109, 96 S.Ct. at 2400.

Magistrate Putnam further observed that production is not warranted where the defendant presents nothing more than mere speculation and supposition that

requested materials are exculpatory. The Eleventh Circuit recently explained that Brady requires production of only that material 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, 1257 (11th Cir. 2003).

Rudolph argues that the standard for establishing materiality under Brady is lowered when the examination is performed before trial, thus conveniently expanding his ability to review materials to which he would not be otherwise entitled. In fact, no Eleventh Circuit authority supports the proposition that a lower standard of materiality exists when such an examination of materials is conducted prior to trial. The proper standard is set forth in Jordan as summarized above, which was correctly stated and applied by Magistrate Putnam in his Order.

B. Rudolph’s “Showing of Materiality” Is Inaccurate and Constitutes Mere Speculation and Guesswork

Rudolph’s “Showing of Materiality” falls well short of the standard required by Jordan to show that the government is improperly withholding Brady materials. Most problematically, Rudolph’s examples of purported Brady and Giglio issues are factually inaccurate, as demonstrated below. Equally significant, however, is that Rudolph openly hazards guesses as to the motivations and causes behind the purported problems in the factual record (mostly, investigative error and

government malfeasance), while simultaneously admitting that the inferences he is drawing from these purported problems are purely speculative in nature. See, e.g., Rudolph's Reply to Govt's Resp. to Mot. for Preservation, In Camera Production, and/or Discovery of Rough Notes ("Rudolph's Reply Brief"), at 25 ("The defense simply cannot know what it does not know."). Stated simply, the purported problems suggested by Rudolph have no basis in fact, and the inferences drawn by Rudolph find no support in the record.¹

The United States has compared the reports identified by Rudolph in his brief with the rough notes in the government's possession that relate to these reports.² The rough notes do not, in any instance, reflect the existence of pertinent

¹ Rudolph's "showing" suffers from other problems as well, including errors and inconsistencies in Rudolph's own factual statements. For example, Rudolph initially asserts that "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." Rudolph's Reply Brief, at 15. This assertion is controverted by Rudolph's discussion of other witness interviews, as Rudolph notes that J.H., C.T., and B.W. all reported to agents that they saw someone walking in the path from the clinic to the truck. For example, Rudolph states that "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 toward the intersection of 16th street and 11th avenue shortly after the bombing. According to the government's theory, J.H., and only J.H., saw this person." Id., at 23.

² In some cases, the government does not possess rough notes related to the investigative reports cited in Rudolph's brief. The lack of rough notes occurs primarily where Birmingham Police officers or agents outside of the Federal Bureau of Investigation (FBI) conducted interviews and rough notes were either

information that was purposefully withheld from the report or facts that were erroneously transcribed in the report. In other words, the reports substantially and accurately reflect what was originally noted by the interviewing agent(s) at the time of the interview.³

It is nonetheless worth noting that many of the inconsistencies identified in Rudolph's factual showing are largely overstated, and the overstatements severely undercut the credibility of the resulting inferences drawn by Rudolph. For example, Rudolph observes that one witness, G.S., met with a law enforcement officer for two hours, and the resulting summary consists of two pages of single-spaced, typed text. Rudolph complains that this summary cannot possibly account for all the conversation during the two-hour meeting. See Rudolph's Reply Brief, at 22. Based on this deduction, Rudolph concludes that the rough notes of this interview "surely contain crucial exculpatory information" reported to the officer by G.S. Id. at 23. Notwithstanding the likelihood that the summary indeed

not made or not maintained by the government. In other instances, FBI agents did not retain rough notes regarding some interviews.

³ The United States has not undertaken a review of each and every agent note in this case to compare the rough notes to the reports, but instead has performed a review of those agent notes that the government has a reason to believe may constitute Brady, Giglio, or Jencks Act materials. The government will continue to perform this review as necessary in order to discharge its discovery obligations.

accounts for the pertinent information provided by G.S. during this interview, Rudolph's guesswork here proves to be inaccurate: the government's review shows that the facts memorialized in the agent notes all are included in the final summary report without omitting "crucial exculpatory information." Indeed, the fact that G.S.'s meeting took two hours to complete was reported by another witness, W.M.; an examination of the rough notes taken during W.M.'s interview includes a reference to his/her description of G.S.'s two-hour meeting, and this statement is then faithfully reported in W.M.'s interview summary.

Similarly, Rudolph observes that, during an interview of witness M.S. by Rudolph's counsel, M.S. said that he/she saw an individual emerge from the woods near Vulcan Park after the bombing. See Rudolph's Reply Brief, at 33-34. Rudolph then points to a summary of an earlier interview of M.S. by law enforcement during which M.S. states that he/she did not see anything after the explosion. Rudolph offers this report as conclusive evidence of agent error, as "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." Id. at 34. Rudolph also expects that the rough notes associated with this report will establish investigative misconduct, as "the notes could demonstrate federal law enforcement's eagerness to falsify evidence to gain an

advantage in this litigation.” Id. Rudolph’s deductions prove to be completely inaccurate, however, as the rough notes accurately reflect the statements in the interview summary and nothing more.

Rudolph next points to two interviews of Officer D.H. that are memorialized in interview summaries provided to Rudolph. Rudolph notes that D.H. first says that he/she recalls being on duty outside the New Woman, All Woman Health Care Clinic on January 17, 1998, and seeing an individual outside the clinic. See Rudolph’s Reply Brief, at 17-18. When interviewed a second time, D.H. states that he/she was on administrative leave on January 17, 1998, and therefore could not have been on duty on that date. Rudolph seizes on these two statements to deduct that one of the following must be true: (1) the agents erred in drafting the reports, because the witness statements are not identical; (2) the agents “intentionally misrepresented what [the witness] had to say . . . [thus demonstrating] federal law enforcement’s willingness to mischaracterize evidence to advance its theories of guilt,” id. at 19; or (3) the witness deliberately lied during the interview.⁴

⁴ Rudolph also takes this opportunity to gratuitously opine that law enforcement’s policy regarding taped interviews should be revisited, and even go so far as suggest that the government is obligated to share the reasoning behind its decisions to conduct interviews with witnesses and, ostensibly, take other investigative actions. See Rudolph’s Reply Brief, at 18-20.

Rather than establish that the rough interview notes contain Brady material, Rudolph's "showing" merely reflects the possibility that, when a witness is interviewed on several instances, there may be discrete or substantive differences in the witness' memories and statements, and one purpose of the interview summaries is to document these differences so that the government is in compliance with its Brady and Giglio obligations. Rather than establish the various nefarious government conspiracies suggested in his Reply Brief, Rudolph has simply demonstrated one of the realities associated with eyewitness testimony.

As correctly stated by Magistrate Putnam, the government has provided Rudolph with thousands of FBI 302s recording, summarizing and detailing investigative interviews with potential witnesses.⁵ Rudolph is, therefore, aware of any inconsistencies and inaccuracies and is free to address them. Any "materiality of the rough notes could lie only in the possibility that the rough notes contained

⁵ Importantly, the government was not obligated to produce many, if not most, of the FBI-302s that Rudolph has received, as Jordan emphasized that interview summaries prepared by law enforcement officers are not subject to production unless they otherwise constitute Brady, Giglio, or Jencks Act materials. The government's production of these summaries was in no way a concession or agreement that they in fact constitute Brady, Giglio, or the Jencks Act materials, but rather reflects a decision by the government to adopt a liberal discovery policy under the circumstances of this case.

something different from what is reflected in the FBI-302s and other documents generated from them.” Magistrate’s Order of July 9, 2004, at p. 4. Magistrate Putnam thus correctly applied the standard by holding that, “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.” See United States v. Griffin, 659 F.2d 932 (9th Cir. 1981) (defendant must raise at least a colorable claim that rough notes contain evidence favorable to the defendant and material to his claim of innocence); United States v. Ramos, 27 F.3d 65, 71 (3rd Cir. 1994) (existence of Brady material may not be inferred from speculation alone but at least a colorable claim that exculpatory material exists in material not already provided to the defendant must be made).

Here, Rudolph’s argument is nothing more than supposition built upon speculation, and Rudolph’s request for production and/or inspection of the rough notes is nothing more than a fishing expedition to obtain information upon which to base an attack against law enforcement conducting this investigation rather than

a true search for any favorable or exculpatory material.⁶

II. Agent Rough Notes Are Not Discoverable Under Federal Rule of Criminal Procedure 16

Rudolph maintains that agent rough notes are discoverable under Federal Rule of Criminal Procedure 16(a)(1)(E)(i) because they are material to the preparation of the defense. As correctly interpreted by Magistrate Putnam, Rule 16(a)(2) exempts from discovery or inspection any reports, memoranda or other internal government documents, as well as statements made by prospective government witnesses, except as provided in 18 U.S.C. § 3500. The Eleventh Circuit has, as recently as last year, reiterated the limitations placed on discovery by Rule 16(a)(2) in United States v. Jordan, 316 F.3d 1215, 1251 (11th Cir. 2003).

In response to Magistrate Putnam's analysis of this issue, Rudolph claims that the 2002 amendments to Rule 16 expressly carve out an exception to the work product protection embodied in Rule 16(a)(2) on the mere showing that documents in the government's possession are material to the defense. The pre-2002 version of Rule 16(a)(2) protected from discovery memoranda prepared by government attorneys as well as agents' reports except as otherwise provided "in paragraphs

⁶ As discussed below, this fact becomes more apparent when reviewing the defendant's offer to have the Court skip the step of *in camera* review, which he argues is the custom and practice of every district, in favor of wholesale production.

(A), (B), (D), and (E) of subsection (a)(1).” In other words, the work product protection contained in the pre-2002 version of Rule 16(a)(2) was trumped by subsections (a)(1)(A), (a)(1)(B), (a)(1)(D), and (a)(1)(E), while Rule 16(a)(2) allowed the government to protect from discovery the written documents, memoranda, and materials that fell within subsection (a)(1)(C).

The 2002 amendment renumbered the paragraphs of Rule 16. Former subsection (a)(1)(C) was moved, with its language undisturbed, to subsection (a)(1)(E). In addition, the 2002 amendment altered the language of Rule 16(a)(2), which now states that a defendant is not entitled to discovery of attorney memoranda and agent reports “except as Rule 16(a)(1) provides otherwise.”

Rudolph argues that, because the amended version of Rule 16(a)(2) no longer specifically excludes subsection (a)(1)(E), the work product materials that fall within subsection (a)(2) – including memoranda and internal documents prepared by government attorneys – are no longer protected from discovery. Rudolph instead posits that these materials must be disclosed on the mere showing that they are material to the defense under Rule 16(a)(1)(E).

This position would result in a startling shift in the rules governing criminal discovery and would abrogate the significant body of case law that holds that the protections afforded by Rule 16(a)(2) apply to attorney memoranda and agent

reports irrespective of the language of subsection 16(a)(1)(E). Indeed, the Eleventh Circuit unequivocally reached this conclusion last year in Jordan, holding that, “Under Rule 16(a)(2), therefore, the interview summaries made by the government agents were exempt from discovery.” 316 F.3d at 1227 n.17 (citing Notes of Advisory Committee on 1944 Amendments to Federal Rules of Criminal Procedure, Fed. R. Crim. P. Rule 16). The Advisory Committee’s commentary to the 2002 amendments expressly rejects any argument that the amendments were intended to make any changes to the existing case law concerning subsections (a)(1)(E) and (a)(2): “The language of Rule 16 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rule. These changes are intended to be stylistic only, except as noted.” Notes of Advisory Committee on 2002 Amendments to Federal Rules of Criminal Procedure, Fed. R. Crim. P. 16 (emphasis added). With respect to subparagraph 16(a)(1)(C), which is the focus of Rudolph’s argument, the Advisory Committee observes only that the subsection has been relettered. Id. The Advisory Committee thus intended only stylistic changes, and not the fundamental shift suggested by Rudolph.

Not surprisingly, courts that have applied subsections (a)(1)(E) and (a)(2)

together after the effective date of the 2002 amendment have not adopted the position espoused by Rudolph. See United States v. Savoca, No. 03 CR 841 SCR, 2004 WL 1179312 (S.D.N.Y. March 29, 2004) (unpublished) (agent reports are protected from discovery under Rule 16(a)(2) under amended rules) (attached as Ex. A); United States v. Ceballo, No. 03 CR 283 SWK, 2003 WL 21961123 (S.D.N.Y. Aug. 18, 2003) (unpublished) (same) (attached as Ex. B).

For these reasons, Magistrate Putnam correctly concluded the Rule 16(a)(1)(E) cannot serve as the means for discovery of agent notes. Instead, the binding authority of Jordan expressly holds that agent notes are protected from discovery under the amended rule.

III. The Agent Notes Do Not Constitute Jencks Act Materials

Rudolph's resurrection of his Jencks Act argument is a non-starter. The United States need not repeat its argument set forth in its pleadings before Judge Putnam, as this argument is definitively set to rest by Jordan and other case law. Jordan, 316 F.3d at 1254; United States v. Delgado, 56 F.3d 1357, 1364 (11th Cir. 1995). In order to constitute Jencks Act materials, an agent's rough notes must be "substantially verbatim" to the witness's statements, which is defined as "using the nearly exact wording or phrasing the witness uttered during the interview." Merely using some of the exact wording or phraseology does not transform notes

into Jencks material. Id.

Here, Rudolph has proffered nothing showing that the agent rough notes in this case are “statements” under the Jencks Act and, as such, are subject to production, much less an inspection by the Court. The defendant readily admits as much but chooses to ignore the plain meaning of the Act in favor of production based solely on his assumption and “belief.” When, as is the case here, the defendant has been provided with witness statements through discovery and production of all FBI 302s prepared in this case, production of rough notes contravenes the Congressional policy behind the Jencks Act to protect witnesses from being impeached with words that are not their own, are an incomplete version of their testimony or contain an agent’s impressions and interpretations. See Palermo v. United States, 360 U.S. 343, 79 S.Ct. 1217 (1959).

IV. Rudolph Has Not Established the Need for In Camera Review of the Rough Notes

Despite Rudolph’s failure to establish that production of rough notes is required under Brady, Giglio or the Jencks Act, he seeks to skirt the prevailing law on the issue by having this Court order an *in camera* review, and then simply hand this task off to defense counsel because of the significant resources that would be required to complete the task.

Rudolph claims that it has become the norm for district courts to conduct *in camera* reviews of rough notes for Brady material. This, however, is not accurate. The United States' review of case law suggests that the Third Circuit is the only circuit court that employs a procedure where a district judge performs an *in camera* review of agent notes. The government's review yielded no other authority holding that such a review is either the norm nor compulsory. Of course, a court may deem that an *in camera* review of agent notes is warranted by the specific facts and circumstances of a case, especially in circumstances where the notes relate to an interview of the defendant himself. See United States v. Brown, 303 F.3d 582 (5th Cir. 2002) and United States v. Muhammad, 120 F.3d 688 (7th Cir. 1997). Brown and Muhammad, however, do not state, or even suggest, that the review performed by the district court is mandated in other situations or is to be the normal and expected procedure in all cases dealing with rough notes.

Rejecting similar reasoning in seeking production of rough notes, the Court in United States v. Michaels, 796 F.2d 1112, 1116 (9th Cir. 1986), held that Brady does not, "require the trial court to make an *in camera* search of the government files for evidence favorable to the accused." quoting United States v. Harris, 409 F.2d 77, 8081 (4th Cir.1969). See also United States v. Harris, 409 F.2d 77 (4th Cir. 1969)(Brady does not require *in camera* search of government files).

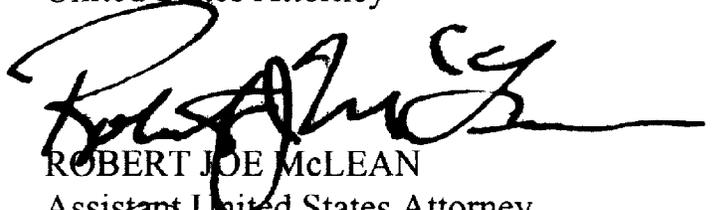
It is also interesting to note that while Rudolph argues that a review of the rough notes by the court is required to assess whether the notes should be produced, he urges the court to simply bypass this review and deliver the notes wholesale to his lawyers, citing the burdensome nature of the review process. The defendant's request for an *in camera* review of the rough notes thus constitutes nothing more than a transparent attempt at an end-run around the analytical framework that the courts and Congress have put in place to protect the government's work product and allow the defendant to enjoy a fishing expedition in the government's investigative files, which the Supreme Court says is not permissible. See Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002 (1987) and United States v. Agurs, 427 U.S. 97, 109, 96 S.Ct. 2392, 2400 (1976).

V. Conclusion

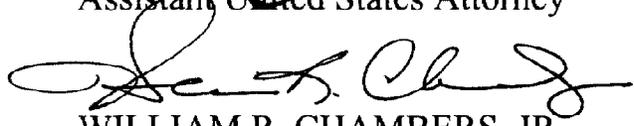
For these reasons, Magistrate Putnam correctly denied Rudolph's request for discovery of, or *in camera* review of, the agent rough notes, and Rudolph's Present Motion should be denied.

Respectfully submitted this the 13th day of August, 2004.

ALICE H. MARTIN
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been served on the defendant by mailing a copy of same this date, August 13, 2004, by First Class, United States mail, postage prepaid, to his attorneys of record,

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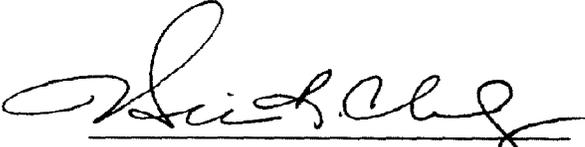

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EXHIBIT A

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2004 WL 1179312 (S.D.N.Y.)
(Cite as: 2004 WL 1179312 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

UNITED STATES OF AMERICA
v.
Lawrence SAVOCA and Salvatore Savoca

No. 03 CR.841 SCR.

March 29, 2004.

MEMORANDUM DECISION AND ORDER

ROBINSON, J.

I. INTRODUCTION:

*1 On November 6, 2003, counsel for Salvatore Savoca (the "Defendant"; collectively the Defendant and his brother Lawrence Savoca are referred to herein as the "Defendants") served a Rule 17(c) subpoena on the Town of Carmel Police Department ("Carmel") seeking:

Any and all documents and/or objects, including but not limited to, investigative reports, supplementary investigative reports, memoranda, forensic analysis, [FN1] witness statements, [FN2] incident reports, 911 recordings/tapes, [FN3] etc. that relate in any manner to an incident that took place on June 21, 2001 at approximately 3:30

A.M. at Highland Road, Mahopac, New York, and/or Michael Geary, Salvatore Savoca, Lawrence Savoca, or to Carmel Police Department File No. V# 29197.

FN1. It should be noted that the Government has represented that it already disclosed to the defense all of the scientific and forensic reports contained in the Carmel Police Department's file (See Reply, Page 9).

FN2. The Government represents that it will turn over all prospective impeachment material of government witnesses at the time of trial at the same time it turns over the § 3500 material. (Reply, Page 9).

FN3. It should be noted that the Government has stated that it intends to call the speakers on the 911 tapes to testify. Therefore, the prior statements of the witnesses are not subject to disclosure at this time, subject to the requirements § 3500(a). (Reply, Page 9).

On November 24, 2003 the Government moved to quash that subpoena ("Government's Motion") on five grounds: (1) Rule 17(c) subpoenas may not be used to circumvent Rule 16; (2) local police departments working closely and/or in joint task forces with the Government may not be separately subpoenaed for their records; (3) Rule 16(a)(2) bars the disclosure of reports

generated by local or state law enforcement agents regardless of whether those agents are part of a joint federal operation; (4) Rule 17(c) subpoenas must be specific and seek relevant, admissible documents; and (5) the subpoenaed documents are protected by the law enforcement privilege. The Defendant filed a memorandum of law in opposition ("Defendant's Motion") to the Government's Motion on December 15, 2003 on three grounds: (1) the Government does not have standing to bring the instant motion to quash; (2) the Government's claim that the subpoenaed records are privileged from disclosure under the qualified "law enforcement privilege" should be rejected out of hand; (3) the records sought in the subpoena issued to Carmel meet the requirements of *United States v. Nixon* [FN4] and its progeny. The Government filed a reply on December 22, 2003 ("Reply").

FN4. 418 U.S. 683 (1974).

The charges against the Defendants stem from an incident that occurred during the early morning hours of June 21, 2001 in Mahopac, New York. The Government alleges that on or about that date and time the Defendants attempted an armed robbery of Michael Geary ("Geary") outside his home. During the course of the attempted robbery, Mr. Geary was shot, but not seriously wounded. According to certain affidavits provided by the Government, which are described more fully below, this incident was initially investigated by Carmel. There was no federal involvement with the investigation until January 22, 2002. On that date, Carmel enlisted the assistance of the Bureau of Alcohol, Tobacco and Firearms. Carmel and the ATF continued to investigate this incident and on November 4, 2002 the United States Attorney's Office for the Southern District of New York began its involvement in this matter. Since that date, the

Government submits that Carmel, the ATF and the SDNY have worked in conjunction with one another.

II. ANALYSIS:

A. WHETHER THE GOVERNMENT HAS STANDING TO MOVE TO QUASH THE DEFENDANT'S SUBPOENA:

*2 Before reaching the merits of the Government's argument in favor of quashing the subpoena, this Court must first consider the threshold question of whether the Government has standing to move to quash the Defendant's subpoena. The Defendant argues that the Government does not have standing.

First, it should be noted that the Government and Carmel jointly moved to quash the subpoena. The Government's Motion was signed by AUSA Elliott Jacobson and Thomas Costello, Esq., Town Counsel for Carmel, who at the time of the Government's Motion was the attorney for the Carmel Police Department. [FN5] The Defendant does not address this fact other than remarking that "[a]ll that appears is that government counsel signed Thomas Costello, Esq.'s name to the letter submitted to the Court on November 24, 2003." (Defendant's Motion, Page 1). The mere fact that the Government signed on behalf of Mr. Costello does not defeat the joint nature of the motion. Furthermore, as Mr. Costello's affidavit makes clear, the Government signed his name to the Government's Motion with his permission after he reviewed the Government's Motion and explicitly authorized the Government to sign on his behalf. (Reply, Exhibit 3 (Costello Affidavit)). Additionally, it should be noted that while the Government handled the actual argument, Mr. Costello did appear at the oral argument on the Government's Motion on

behalf of Carmel.

FN5. Mr. Costello has since been replaced as Town Counsel, but he did appear at the oral argument on this motion on behalf of Carmel.

Second, as set forth more fully below in Section II(B), this Court finds that a joint investigation has existed, and continues to exist, between the federal and local law enforcement authorities. Therefore, even if this Court found, which it does not, that Carmel had not moved jointly with the Government, the Government would have standing to make this motion to quash the Defendant's subpoena.

B. WHETHER THE DEFENDANT'S SUBPOENA SHOULD BE QUASHED:

Having determined that the Government has standing to move to quash the subpoena, the Court now must address the merits of the Government's Motion.

Discovery in criminal cases is limited by Federal Rule of Criminal Procedure 16(a)(2), which provides that except as provided in Rule 16(a)(1) defendants are not entitled to "the discovery or inspection of reports, memoranda, or other internal governmental documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." *Id.* (emphasis added). The case law establishes, [FN6] and the Defendant in the current case does not dispute, that if the type of documents that have been subpoenaed from Carmel had been generated by the ATF, the Government would not have an obligation to turn them over, separate and apart from the ordinary disclosure obligations of Rule 16, *Brady*, *Giglio* and § 3500. Therefore, if this Court finds that a joint investigation exists

between Carmel, the ATF and the United States Attorney's Office for the Southern District of New York ("SDNY"), the Carmel law enforcement officers are "other government agents" under Rule 16(a)(2) and the Carmel files should be entitled to the same protection from the Defendant's subpoena. [FN7]

FN6. See e.g. *United States v. Koskerides*, 877 F.2d 1129, 1133-34 (2d Cir.1989) (IRS agent's tax report precluded from discovery under Rule 16(a)(2)); *United States v. Ruffolo*, No. 89 Cr. 938(KMW), 1990 WL 29425, at *1 (S.D.N.Y. March 13, 1990) (Rule 16(a)(2) held to bar disclosure of investigative, agent, and surveillance reports prepared by federal agents), *aff'd*, 930 F.2d 911 (2d Cir.), cert. denied, 112 S.Ct. 130 (1991); *United States v. Feola*, 651 F. Supp. 1068, 1142-43 (S.D.N.Y.1987) (disclosure of investigative files and interview reports of law enforcement officials barred by Rule 16(a)(2)) *United States v. Jones*, No. 85 Cr. 1075(CSH), 1986 WL 275, at *6 (S.D.N.Y. May 28, 1986) (defendants not entitled to disclosure of FBI and NYCPD police reports relating to identifications of defendants; such material "falls squarely within [Rule 16(a)(2)'s] prohibition") (Bricant, Ch.J.).

FN7. It should be noted that one of the other arguments advanced by the Government in support of quashing the Defendant's motion is that Carmel's file should be protected under Rule 16(a)(2) whether or not a joint investigation exists. Several District Courts from this jurisdiction, most notably Judge Haight in *United*

States v. Cherry, 876 F.Supp. 547, 549 (S.D.N.Y.1995) have interpreted Rule 16(a)(2) in this manner. In the case at bar, this Court need not reach that question because a joint investigation exists.

*3 The Defendant makes two principal arguments in opposition to the existence of a joint investigation. First, the Defendant contends that the Government's claim that a "joint investigation" existed between the Government and Carmel "should be rejected on its face for the failure of the government to make any factual proffer, by affidavit or the proffer of sworn testimony, concerning the underlying events." (Defendant's Motion, Page 4). However, the Government has submitted affidavits from AUSA Jacobson ("Jacobson Affidavit"), Lieutenant Karst of the Carmel Police Department ("Karst Affidavit") and Mr. Costello ("Costello Affidavit") establish facts, which support the existence of a joint federal/local investigation. More particularly, the Jacobson Affidavit, Karst Affidavit and Costello Affidavit establish the following:

- (1) Lieutenant Karst is the lead investigative law enforcement officer from Carmel with responsibility for the investigation of this matter; (Karst Affidavit, ¶ 1)
- (2) the attempted robbery and shooting of Michael Geary was initially investigated by Carmel; (Id. at ¶ 3)
- (3) on January 22, 2002, Lieutenant Karst contacted the ATF to request assistance in the investigation and Special Agent Don McCarthy was assigned to the case; (Id.)
- (4) from that date to the present, the investigation of this case, which remains active and ongoing, has been conducted jointly by Carmel and the ATF; (Id. and Jacobson Affidavit at ¶ 4)
- (5) Carmel and the ATF's joint investigation has been under the direct supervision of the SDNY since November 4, 2002; (Id. at ¶ 4

- and Jacobson Affidavit at ¶ 4);
- (6) as part of that supervision, Carmel and the SDNY have interviewed witnesses, met with local prosecutors and law enforcement officers, and obtained evidence and intelligence regarding the Defendants; (Id.)
- (7) Carmel has turned over its entire investigative file to the SDNY; (Karst Affidavit at ¶ 5 and Jacobson Affidavit at ¶ 6)
- (8) in addition to the crimes charged in this case, Carmel, the ATF and the SDNY are investigating the Defendants in connection with other crimes in this jurisdiction; (Id.)
- (9) AUSA Jacobson of the SDNY is in immediate charge of the investigation and prosecution of the Defendants; (Jacobson Affidavit, ¶ 1)
- (10) AUSA Jacobson has been in constant communication with both Lieutenant Karst and Special Agent McCarthy regarding the investigation; (Id. at ¶ 5)
- (11) the Government made prompt and complete discovery to the Defendants pursuant to Fed.R.Crim.P. 16 and *Brady* and its progeny; (Id. at ¶ 6)
- (12) when materials from the Carmel file were discoverable under Rule 16 they were disclosed to the Defendants; (Id.)
- (13) before the Government Motion was submitted, Mr. Costello reviewed and approved it and authorized AUSA Jacobson to sign his name; (Id. at ¶ 7 and Costello Affidavit at ¶ 3 & 4) and
- (14) Carmel is moving jointly with the Government to quash the subpoena for the reasons set forth in the Government's Motion. (Costello Affidavit at ¶ 5)

*4 Based upon the above representations this Court finds that a joint investigation has existed between the Carmel Police Department, Bureau of Alcohol, Tobacco and Firearms and the SDNY for almost two years. The local and federal authorities have worked,

and continue to work, collaboratively and to share the responsibilities of the investigation of the Defendants. The Defendant has not offered any evidence to contradict the statements made in the Jacobson, Karst and Costello Affidavits.

The second argument advanced by the Defendant, notwithstanding the uncontroverted facts as set forth in the affidavits, is that this investigation "has none of the attributes of a typical joint investigation [.]" (Defendant's Motion, Page 5). In support of this contention, the Defendant relies primarily on two cases: *United States v. Mora*, 623 F.Supp. 354 (D.Mass.1985) and *United States v. Guerrerio*, 670 F.Supp. 1215, 1218-19 (S.D.N.Y.1987). Neither case supports the Defendant's argument.

In *Mora*, a Massachusetts District Court case, the court found that a joint investigation did not exist because the investigation was primarily a state matter. *Mora* at 358-59. In *Mora*, in contrast to the case at bar, the testimony showed that state personnel conducted the physical surveillance, sought wiretap warrants in state court and monitored the interceptions. *Id.* Late in the investigation, the decision was made that the case would be prosecuted in federal court. *Id.* Even if the *Mora* decision was binding on this Court, which it is not, it does not counsel a finding that a joint investigation did not exist because that decision is factually distinguishable from the case at bar. In this case, while Carmel initially investigated the case, since that time the investigation has been conducted by the federal and local authorities working in conjunction with one another and sharing the investigative responsibilities.

Likewise, the facts of *Guerrerio* are distinct from the case at bar. As an initial matter, the defendant in *Guerrerio* sought materials from

the local law enforcement agency's file pursuant to the discovery provisions of Fed.R.Crim.P. 16; not a Rule 17(c) subpoena. In the current case, the Government already has provided the Defendants with the materials from Carmel's file that are disclosable pursuant to Rule 16. Further, in *Guerrerio*, it was the Government who opposed the finding of a joint investigation and the defendant who sought to show its existence. The court in *Guerrerio* found no joint investigation because the investigations by local and federal authorities had been conducted separately, without cooperation of the other. In *Guerrerio* the court found that disclosure was not required, and a joint investigation did not exist, because (1) the "U.S. Attorney did not possess or control the documents sought"; (2) the documents in question "played no role in the federal prosecution"; and (3) like the defendants, the government would not have been able to acquire the documents without a court order. *Guerrerio* at 1220.

*5 In the current case, the Government does possess and control the documents sought by the Defendant. Obviously, the Government would not need to separately obtain a court order to acquire the materials. Applying the *Guerrerio* holding to the current case, would mandate that the Government provide Rule 16 materials from the Carmel file because the factors set forth therein establish the existence of a joint investigation; if that was the basis of the Defendant's argument he would be correct. [FN8] However, *Guerrerio* does not support the Defendant's contention that a joint investigation did not exist here. In fact, the reasons given in support of the non-existence in *Guerrerio*, support the finding of a joint investigation in the case at bar.

FN8. It should be noted that the Government has represented that it has

already provided disclosure of documents from the Carmel file as part of the Rule 16 disclosure. Further, as set forth above, the Government has represented that it will provide further disclosure in accordance with its obligations under *Brady, Giglio* and § 3500, if and when applicable.

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In the current case, it is evident that the Defendant's objective is to gain access to as much of the entire, joint investigative file as possible, including the materials prepared by Carmel. While the Defendant's interest in this regard is understandable, Rule 16 does not sanction it. As set forth above, this Court finds that there is sufficient evidence to support the existence of a joint investigation. Accordingly, this Court finds that the Government's Motion to quash the Defendant's subpoena of the Carmel Police Department should be granted.

Having found that the subpoena should be quashed on the above grounds, this Court need not address the Government's alternative arguments to quash pursuant to (a) Fed.R.Crim.P. 16(a)(2) (in the absence of a joint investigation), (b) the law enforcement privilege, and (c) the requirements of Fed.R.Crim.P. 17(c), as interpreted by *Nixon* and its progeny.

III. CONCLUSION:

As set forth more fully above, this Court finds that: (a) the Government has standing to move to quash the Defendant's subpoena; (b) a joint investigation exists between Carmel, the ATF and the SDNY; and (c) the items subpoenaed by the Defendant are protected under Fed.R.Crim.P. 16(a)(2). Accordingly, the Government's Motion to Quash the Defendant's subpoena is granted.

It is so ordered.

EXHIBIT B

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Not Reported in F.Supp.2d
2003 WL 21961123 (S.D.N.Y.)
(Cite as: 2003 WL 21961123 (S.D.N.Y.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. New York.

UNITED STATES OF AMERICA,
v.
Frank CEBALLO, Defendant.

No. 03 CR. 283(SWK).

Aug. 18, 2003.

In criminal action, on state and federal government's motion to quash defendant's subpoena, the District Court, Kram, J., held that: (1) disclosure of investigatory files generated by police department was barred; (2) internal police department investigative files were inadmissible hearsay; and (3) witness statements had to be disclosed.

Motions granted.

[1] Criminal Law k627.6(4)

110k627.6(4)

Disclosure of investigatory files generated by police department was barred by rule identifying information not subject to disclosure to defendant. Fed.Rules Cr.Proc.Rule 16, 17, 18 U.S.C.A.

[2] Criminal Law k627.6(4)

110k627.6(4)

Internal police department investigative files were inadmissible hearsay, and, therefore, not subject to defendant's subpoena to produce documents and objects. Fed.Rules Cr.Proc.Rule 17(c), 18 U.S.C.A.

[3] Records k32
326k32

Witness statements had to be disclosed to defendant in federal criminal case that stemmed from same circumstances as prior state investigation, although they were under seal pursuant to New York law. 18 U.S.C.A. § 3500; McKinney's Criminal Procedure Law § 160.50(1).

[3] States k18.63
360k18.63

Witness statements had to be disclosed to defendant in federal criminal case that stemmed from same circumstances as prior state investigation, although they were under seal pursuant to New York law. 18 U.S.C.A. § 3500; McKinney's Criminal Procedure Law § 160.50(1).

OPINION & ORDER

KRAM, J.

*1 The New York Police Department (the "NYPD") and the Bronx County District Attorney's Office (the "Office") move to quash subpoenas recently served by defendant Frank Ceballo in the above referenced case.

I. THE NYPD SUBPOENA

[1] On June 18, 2003, counsel for Ceballo served a subpoena on the NYPD requesting police reports, memos, precinct blotter entries, 911 recordings and "Sprint Reports" concerning the arrest of the defendant and the voided arrest of a woman named Denise Simmons on January 25, 2003. The NYPD moves to quash this subpoena, alleging that it is an attempt by the Defendant to circumvent Rule 16 of the Federal Rules of Criminal Procedure and that the subpoena does not satisfy the standards of Rule 17, which requires that the materials sought be relevant, admissible and specifically identified.

Rule 17(c) is not to be used as method of discovery in criminal cases. *See United States v. Cherry*, 876 F.Supp. 547, 552 (S.D.N.Y.1995). "Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in Fed.R.Crim.P. 16." *Id.* Instead, Rule 16(a)(1) provides for disclosure of evidence by the Government and identifies the types of discovery the Government must disclose upon the Defendant's request. These include: the Defendant's statements and criminal records, document and tangible objects, reports of examinations and tests, and expert witnesses' opinions. Fed.R.Crim.P. 16(a)(1)(A)-(E).

Rule 16(a)(2) then limits the information that a defendant is entitled to receive. In pertinent part, the Rule states:

Except as provided [in Rule 16(a)(1)(A)-(E)], this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case. Nor does this rule authorize the discovery or

inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

"Rule 16(a)(2) bars disclosure of reports generated by local law enforcement agents, even when subpoenaed pursuant to Rule 17(c)." *United States v. Jenkins*, No. 02 Cr. 1384(RCC), 2003 WL 1461477, *5 (S.D.N.Y. Mar. 21, 2003); *see also United States v. Chen De Yian*, No. 94 Cr. 719(DLC), 1995 WL 614563, *1 (S.D.N.Y. Oct. 19, 1995) ("Discovery is barred by Rule 16(a)(2) and that bar cannot be circumvented by a Rule 17(c) subpoena."); *Cherry*, 876 F.Supp. at 547 (granting motion to quash subpoenas requesting disclosure of reports prepared by the NYPD). Therefore, the defendant is not entitled to pre-trial discovery of the NYPD investigatory files and on this ground the subpoena must be quashed.

[2] Moreover, the NYPD subpoena must be quashed for it also fails to satisfy the requirements of Rule 17(c). A defendant seeking the production of documents pursuant to Rule 17(c) has the burden of demonstrating: (1) the documents are evidentiary and relevant; (2) they are not otherwise procurable by the defendant reasonably in advance of trial by the exercise of due diligence; (3) the defendant cannot properly prepare for trial without such production and the failure to obtain it might delay the trial; and (4) the application is not intended as a general "fishing expedition" and was therefore made in good faith. *United States v. Jenkins*, 2003 WL 1461477 at *5 (citing *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)). "The proponent of the subpoena has the burden of proving relevance and admissibility and must also identify the materials with specificity." *Id.* The documents must meet the tests of relevancy and

admissibility when they are sought. *See id.*

*2 Internal NYPD investigative files are inadmissible hearsay. *See, e.g., United States v. Brown*, No. 95 Cr. 168(AGS), 1995 WL 387698, *10 (S.D.N.Y. June 30, 1995) ("Such [NYPD interview] memoranda would, of course be hearsay and inadmissible as evidence at trial"); *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir.1981) (holding materials that were hearsay and therefore not admissible at trial were not subject to a Rule 17(c) subpoena). Therefore, Defendant has not sustained his burden of showing the admissibility of the requested documents from the NYPD, and the requirements of Rule 17(c) have not been met.

II. THE BRONX COUNTY DISTRICT ATTORNEY'S OFFICE SUBPOENA

[3] The Bronx County District Attorney's Office (the "Office") also moves quash a subpoena served by Ceballo on the grounds that the records sought are sealed pursuant to New York State Criminal Procedure Law § 160.50(1). The Office further asserts that the file could contain "privileged, non-disclosable information, such as witness statements, to which Mr. Ceballo would not be entitled" in the absence of a "compelling and particularized need." Letter from Assistant District Attorney Lara R. Binimow to Alan Nelson, Esq, dated July 9, 2003, at 1 (citing *Huston v. Turkel*, 236 A.D.2d 283, 653 N.Y.S.2d 584, 585 (N.Y.App.Div.1997)).

The documents sought by Ceballo were sealed pursuant to New York Criminal Procedure Law § 160.50 and remain sealed. That statute provides, in pertinent part:

1. Upon the termination of a criminal action or proceeding against a person in favor of such person ..., the record of such action or proceeding shall be sealed.... Upon receipt

of notification of such termination and sealing:

(C) ... all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution ... on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency.

N.Y.Crim. P. Law § 160.50(1) (McKinney 2003). "The primary purpose of the sealing of the records pursuant to § 160.50 is to ensure confidentiality and to protect the individual from the potential public stigma associated with a criminal prosecution." *Lehman v. Kornblau*, 206 F.R.D. 345, 347 (E.D.N.Y.2001).

However, § 160.50(1)(d) provides an exception for a request for such records when made by the accused. The accused is entitled to the "official records and papers" referenced in § 160.50(1)(c); such records and papers have been determined to encompass trial exhibits from the prior proceeding and tape recordings. *See, e.g., Levitov v. Cowley*, 270 A.D.2d 269, 705 N.Y.S.2d 375, 376 (N.Y.App.Div.2000) (defense exhibits introduced during cross-examination of prosecution witnesses not subject to seal upon acquittal of defendants); *Matter of Dondi*, 63 N.Y.2d 331, 337, 482 N.Y.S.2d 431, 472 N.E.2d 281 (N.Y.1984) (tape recordings not subject to seal when request by the accused). Yet, the accused's right of access to the records is not unconditional. *See Harper v. Angiolillo*, 89 N.Y.2d 761, 765-66, 658 N.Y.S.2d 229, 680 N.E.2d 602 (N.Y.1997). "For example, records compiled for law enforcement purposes may not be subject to disclosure where disclosure would interfere with law enforcement investigation or judicial

proceedings, deprive a person of a right to a fair trial, identify a confidential source, reveal nonroutine investigative techniques or procedures, endanger the life or safety of any person, or interfere with statutory exemptions and privileges." *Harper*, 89 N.Y.2d at 767, 658 N.Y.S.2d 229, 680 N.E.2d 602 (citations omitted).

*3 With regard to Ceballo's file maintained by the Bronx District Attorney's Office, the Court finds unpersuasive the Office's stated reasons for nondisclosure. Pursuant to § 160.50(1)(d), Ceballo is entitled to disclosure of certain contents of the file. However, as discussed above, Rule 16 and Rule 17 of the Federal Rules of Civil Procedure limit the disclosure required. Although requested by the Defendant, police reports in the file need not be disclosed. *See United States v. Jenkins*, 2003 WL 1461477 at *5. Further, any NYPD investigative material in the file is inadmissible hearsay and should not be disclosed. *United States v. Brown*, 1995 WL 387698 at *10. Unlike the cases cited by Defendant in opposition to the motion to quash, the ongoing federal charges in this matter stem from the same circumstances as the prior state investigation, and public policy concerns and the Federal Rules of Criminal Procedure limit the amount of disclosure required at this time. Witness statements contained within the file are to be disclosed in accordance with 18 U.S.C. § 3500. Should the file contain any other documents that the Office asserts are subject to privilege, the Office shall submit those documents to the Court for *in camera* review. Accordingly, the Bronx County District Attorney's Office's motion to quash the subpoena is granted.

III. CONCLUSION

For the reasons set forth above, the NYPD's motion to quash the subpoena is granted.

Additionally, the Bronx County District Attorney's Office's motion to quash the subpoena is granted.

SO ORDERED.

2003 WL 21961123 (S.D.N.Y.)

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