

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal No.: 3:00-CR-400-P
v.	)	
	)	Judge Jorge A. Solis
MARTIN NEWS AGENCY, INC.; and	)	
BENNETT T. MARTIN,	)	
	)	FILED: April 30, 2001
Defendants.	)	

RESPONSE AND BRIEF OF THE UNITED STATES  
IN OPPOSITION TO MOTION FOR PRODUCTION  
OF STATEMENTS OF WITNESSES (18 U.S.C. § 3500)

I  
INTRODUCTION

The United States opposes defendants' *Motion for Production of Statements of Witnesses (18 U.S.C. § 3500)* ("Motion") asking this Court to issue an Order instructing the government to produce the following: (1) any and all statements as defined by 18 U.S.C. § 3500(e) of all witnesses to be called by the government in its case in chief; (2) any and all handwritten notes, records, or memoranda of all law enforcement agents involved in the investigation of this case which may be statements themselves or contain statements to be produced in accordance with 18 U.S.C. § 3500(b), and instructing the government to maintain all notes, memorandums, and transcriptions of all interviews in order to have them available to turn over to the defendants and counsel pursuant to 18 U.S.C. § 3500. Motion, pp. 1-2. The United States understands its obligation under Jencks and will disclose any Jencks statements not yet produced as required by the statute. Because the defendants' Motion is untimely and contrary to the law, it should be denied.

II  
LAW AND ARGUMENT

A. DEFENDANTS ARE NOT YET ENTITLED TO JENCKS MATERIAL

As the defendants correctly state in their memorandum of points and authorities in support of their Motion, the Jencks Act requires that any statement of a witness in the possession of the United States which relates to the subject matter as to which the witness has testified, shall be produced to the defendants, upon a motion to the court. At the time their Motion was filed, almost three months remained before trial is scheduled to begin. In United States v. Campagnuolo, 592 F.2d. 852 (5th Cir. 1979), the Fifth Circuit acknowledged that the Jencks Act, 18 U.S.C. § 3500, does not require the government to allow a defendant to examine a grand jury transcript of a government witness until after the witness has testified at trial. Id. at 858, 861. The Campagnuolo Court specifically stated that the standing discovery order in place in Campagnuolo was “invalid to the extent that it allowed discovery beyond the limitations of the Jencks Act.” Id. at 858.

Therefore, defendants’ request that all Jencks statements be turned over to them is premature. The United States will comply with Jencks in a timely manner. The United States is willing to discuss disclosure of Jencks Act material at the pretrial conference scheduled by the Court for June 27, 2001.

B. NEITHER FIFTH CIRCUIT CASE LAW  
NOR THE JENCKS ACT REQUIRES THAT NOTES BE PRESERVED

Defendants’ request that this Court instruct the United States not to destroy “all” interview notes is not supported by case law or the Jencks Act. The Fifth Circuit has held that interview notes need not be preserved. “Nothing in the Jencks Act requires that notes made in the

course of an investigation be preserved after the notes have served their purpose of assisting in the preparation of interview reports.” United States v. Pacheco, 489 F.2d 554, 566 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); see also United States v. Gates, 557 F.2d 1086, 1089 (5th Cir. 1977), cert. denied, 434 U.S. 1017 (1978); United States v. Martin, 565 F.2d 362, 363-64 (5th Cir. 1978). No Jencks Act violation occurs when such notes are destroyed pursuant to agency procedures. United States v. Edwards, 702 F.2d 529 (5th Cir. 1983); United States v. Cole, 634 F.2d 866, 868 (5th Cir. 1981), cert. denied, 452 U.S. 918 (1981); Martin, 565 F.2d at 363-64; Gates, 557 F.2d at 1089.

The defendants would have the Court order the government to preserve any notes because they may have impeachment value or contain exculpatory evidence. Brady provided a remedy for a defendant for the government’s suppression of evidence favorable on the issue of guilt or punishment, thereby creating a self-imposed obligation to disclose any such evidence in its possession. Thus, Brady does not constitute authority for the issuance of the order defendants seek. Moreover, all Brady requires is that information “material” to the guilt or punishment of a defendant be disclosed. Brady does not require that this information be disclosed in any particular form. See, e.g., United States v. Grossman, 843 F.2d. 78, 84-85 (2nd Cir. 1988), cert. denied, 488 U.S. 1040 (1989) (Defendant not entitled to grand jury transcript containing exculpatory information, only the information); United States v. Five Persons, 472 F. Supp. 64, 69 (D.N.J. 1979) (Neither Brady nor Jencks require actual “statement” to be disclosed, only the information). The government is aware of its discovery obligations under both Jencks and Brady and fully intends to adhere to them.

Indeed, to date, the United States has turned over all Brady (and Giglio) information

currently known to the government, as well as complied with its discovery obligations under Rule 16. Included in the discovery are some materials covered under Jencks; namely, the grand jury transcripts and substance of interviews of Martin News' former employees covered under Fed. R. Crim. P. 16(a)(1)(A)(1) or (2). Thus, the United States has exceeded its obligations to the defendants, turning over certain statements before it was required to do so. The Fifth Circuit, in United States v. Scott, 524 F.2d 465, 468 (5th Cir. 1975) held that "the government's failure to produce the [Jencks] statements before trial did not result in a violation of the appellant's constitutional rights." As the court in Scott stated, "[t]his Court and others have recognized that the rule announced in Brady is not a pretrial remedy and was not intended to override the mandate of the Jencks Act." Id. at 467-68 (citing United States v. Frick, 490 F.2d 666 (5th Cir. 1973); United States v. Montos, 421 F.2d 215 (5th Cir. 1970); United States v. Regan, 503 F.2d 1, 3 at fn. 1 (2nd Cir. 1974).

On February 12, 2001, the government sent counsel for each defendant a letter which detailed information that might arguably be exculpatory or impeaching. As the government's February 12, 2001 letter to each defendant informed them, the United States is aware of its continuing disclosure obligations under Brady and Giglio, and will notify the defendants promptly in the event that any further information is determined to fall within Brady or Giglio.

Regardless, the United States does not intend to destroy any handwritten notes of interviews. The United States respectfully requests that this Court deny defendants' Motion as it applies to the preservation of interview notes.

C. THE PROSECUTORS' NOTES ARE NOT JENCKS ACT STATEMENTS

Although the defendants' Motion does not specifically request that this Court enter an

order instructing the prosecutors in charge of prosecuting this case to turn over their notes of interviews with witnesses, the defendants do mention this possibility in their memorandum in support. As the defendants correctly note, prosecutors' notes are only discoverable under Jencks if the notes have been signed or otherwise adopted or approved by the witness. Goldberg v. United States, 425 U.S. 94 (1976). Notes of interviews do not fall within the Jencks Act if they contain only occasional verbatim recitations of phrases used by the person interviewed. Palermo v. United States, 360 U.S. 343 (1959); United States v. Martino, 648 F.2d 367 (5th Cir. 1981). Production of reports that are not substantially verbatim recitals of oral statements would threaten witnesses with impeachment on the basis of statements that they did not actually make. Palermo, 360 U.S. 343; United States v. Jodon, 581 F.2d 553 (5th Cir. 1978).

Here, none of the government's prospective trial witnesses "adopted or approved" any notes taken during the course of their interviews. None of the witnesses who were interviewed signed the notes. These notes are not "statements" discoverable under the Jencks Act. As stated by the Fifth Circuit in United States v. Pierce, 893 F.2d 669 (5th Cir. 1990), "[i]n order for interview notes to qualify as a statement under § 3500(e)(1) the witness must have signed, read, or heard the entire document read." Id. at 675 (citing United States v. Hogan, 763 F.2d 697, 704 (5th Cir.1985)). See also United States v. Welch, 810 F.2d 485, 490 (5th Cir. 1987), cert. denied, 484 U.S. 955 (1987) (holding that an agent's interview notes are not statements of the witness under Jencks unless the witness "signed or otherwise adopted or approved the report," or the notes were "substantially verbatim reports" of the witness interview).

D. DEFENDANTS ARE NOT ENTITLED TO INTERNAL GOVERNMENT DOCUMENTS

To the extent that defendants' Motion seeks access to internal government documents by

requesting the Court to order the government to maintain all notes and memoranda of all interviews in order to have them available to turn over to the defendants and counsel pursuant to 18 U.S.C. § 3500, defendants clearly are not entitled to those documents. Fed. R. Crim. P. 16(a)(2) protects from disclosure “reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case.” Interview notes taken by attorneys for the United States from discussions with prospective witnesses, as well as reports or memoranda written concerning these interviews, obviously fall within the protections of this provision, and their production should not be ordered by this Court as the interview notes do not otherwise qualify as Jencks Act statements.

E. INVESTIGATOR’S NOTES

The United States has not yet made a final determination as to who its witnesses will be at trial. If an agent does testify at trial, the government will disclose any relevant Jencks Act statements in a timely manner.

IV  
CONCLUSION

For the foregoing reasons, the United States respectfully requests the Court to deny defendants' Motion.

Respectfully Submitted,

SCOTT M. WATSON  
Chief, Cleveland Field Office

\_\_\_\_\_  
“/s/”  
RICHARD T. HAMILTON, JR.  
Ohio Bar Number--0042399

MICHAEL F. WOOD  
District of Columbia Bar Number--376312

KIMBERLY A. SMITH  
Ohio Bar Number--0069513

SARAH L. WAGNER  
Texas Bar Number--24013700

Attorneys, Antitrust Division  
U.S. Department of Justice  
Plaza 9 Building, Suite 700  
55 Erieview Plaza  
Cleveland, OH 44114-1816  
Telephone: (216) 522-4107  
FAX: (216) 522-8332

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 27th day of April, 2001. In addition, copies of the above-captioned pleading were served upon the defendants via Federal Express on this 27th day of April 2001.

Richard Alan Anderson, Esq.  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

Michael P. Gibson  
Burleson, Pate & Gibson, L.L.P.  
2414 N. Akard, Suite 700  
Dallas, TX 75201

\_\_\_\_\_  
“/s/”  
RICHARD T. HAMILTON, JR.