

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)**

**CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA,**

PLAINTIFF,

vs.

STEVEN DALE GREEN,

DEFENDANT.

MOTION TO PRESERVE AGENTS' NOTES

Comes the Defendant, Steven Dale Green, by counsel, pursuant to the Fifth, Sixth, and Fourteenth Amendments and respectfully moves this Court to enter an order directing all government agents and all military and local investigative personnel involved in any aspect of this case to retain and preserve all notes made during the course of the investigation in this case.

Specifically, defendant requests the preservation of all rough notes, memoranda, resumes, synopses, etc., which were taken as part of their investigation, whether or not the contents of the same were incorporated into any official records such as, but not limited to, FBI reports, military reports, Department of Defense reports, polygraph reports, and rough notes taken during both pre-polygraph and post-polygraph interrogation.

In addition, these rough, handwritten notes, resumes, synopses, etc., taken during the course of the investigation or while interviewing witnesses are potentially discoverable material at trial under the Jencks Act and are required to be preserved and produced even if these notes are not discoverable prior to trial.

In addition, experience teaches that when investigating agents synopsize material in official reports, they sometimes omit details contained in their rough notes which are significant to defense counsel under Brady v. Maryland, 373 U.S. 83, 87 (1963) in which the Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” Impeachment evidence also falls within the Brady rule. United States v. Bagley, 473 U.S. 667, 676 (1985). See also Giglio v. United States, 405 U.S. 150, 154 (1972). “Such evidence is ‘evidence favorable to an accused,’ ... so that, if disclosed and used effectively, it may make the difference between conviction and acquittal.” Bagley, 473 U.S. at 676 quoting Brady, 373 U.S. at 87. The prosecution’s affirmative duty to disclose exculpatory evidence was emphasized in Kyles v. Whitley, 514 U.S. 419, 437-438 (1995) (other citation omitted) “the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith ...), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” See also Youngblood v. West Virginia, 547 U.S. 867, 869-870 (2006) quoting Kyles, 514 U.S. at 438, (recognizing that “Brady suppression occurs when the government fails to turn over even evidence evidence that is “known only to police investigators and not to the prosecutor ...”

Thus, to insure that the defendant's rights to due process, a fair trial, and confrontation are not violated, it is submitted that this Court must enter an order to compel any and all governmental law enforcement officials who aided in the investigation of the acts, transactions and matters indicated in the indictment, including, but not limited to, Federal Bureau of Investigation, CID, and all other investigative officials of the federal government to preserve their rough notes. See

United States v. Ammar, 714 F.2d 238, 259 (3d Cir. 1983) cert. denied 464 U.S. 936 (1983) in which the court held “the government must retain and, upon motion, make available to the district court both the rough notes and the drafts of reports of its agents to facilitate the district court's determination whether they should be produced.” In United States v. Clark, 385 F.3d 609, 619 (6th Cir. 2004) the Sixth Circuit held that an FBI agent’s “rough notes” of the defendant’s interrogation qualify as ... a written record” under Fed.R.Crim.P. 16(a)(1)(B)(ii) which “requires the disclosure of ‘the portion of any written record containing the substance’ of such an oral statement.” Id. The Court in Clark found that “the government violated Rule 16 by failing to turn over Agent Poff’s rough notes upon Defendant's request.” Id. In United States v. Harrison, 524 F.2d 421, 423 (D.C. Cir. 1975), the court ruled that FBI agents’ rough, handwritten notes of interviews with eyewitnesses to a bank robbery “fall within the category of potentially discoverable materials required to be preserved and produced ...” Id. at 423. The potential exculpatory value of such note is readily apparent. “It seems too plain for argument that rough notes from any witness interview could prove to be Brady material.” Id. at 427. Thus, preservation of a law enforcement officer’s notes is essential to maintain the status quo because “[t]he courts, not the investigators nor the prosecutors, make the decision as to whether evidence is discoverable, and that decision cannot be made if the evidence has been destroyed.” Id. at 428. Consequently, such notes, “‘should be kept and produced’ so that the trial court can determine whether the notes ‘should be made available to the defendant under Brady or the Jencks Act.’” Id. at 433. (footnote and other citation omitted).”

Granting the instant request imposes no undue burden upon the government since, as a matter of policy, FBI agents are already required to preserve all investigative notes until there has been final disposition of a matter.

WHEREFORE, the defendant, Steven Dale Green , by counsel, respectfully moves the

Court for an order requiring all federal and military law enforcement personnel or other investigative personnel, to retain their investigative notes of all transactions and matters leading to the present indictment.

Respectfully submitted,

/s/ Scott. T. Wendelsdorf
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Certificate of Service

I hereby certify that on October 1, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney.

/s/ Scott T. Wendelsdorf