UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

CRIMINAL ACTION NO. 5:06CR-19-R

UNITED STATES OF AMERICA PLAINTIFF

v.

STEVEN D. GREEN DEFENDANT

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION FOR PRESERVATION OF NOTES OF GOVERNMENT AGENTS

Comes the United States of America, by counsel, for its response to the motion of the Defendant, Steven D. Green, for Preservation of Agents' Notes in this case. Green seeks an order from the Court "to compel any and all governmental law enforcement officials who aided in the investigation of the acts, transactions and matters indicated in the indictment ... to preserve their rough notes."

The United States is under no obligation to preserve notes, memoranda, and reports made by government agents in the course of an investigation. The Supreme Court has held that destruction of notes made by FBI agents while interviewing witnesses "did not constitute an impermissible destruction of evidence nor deprive petitioner of any rights" if destroyed "in good faith and in accord with their normal practices." *Killian v. United States*, 368 U.S. 231, 242 (1961).

Since then the Sixth Circuit has held that "destruction of [interview] notes does not constitute a violation of the Jencks Act," and that the witness is not precluded from testifying at trial. *United States v. Frederick*, 583 F.2d 273, 274 (6th Cir. 1978), *cert. denied*, 444 U.S. 860

(1979). *See also* *United States v. McCallie*, 554 F.2d 770, 773 (6th Cir. 1977) ("This Circuit has held that routine destruction of interview notes after preparation of a full 302 Report did not violate either the Jencks Act [], or case law such as *Brady v. Maryland*, 373 U.S. 83 (1963)").

The three cases cited by the Defendant in principal support of his argument are either inapposite or do not reflect the law in this Circuit. Specifically, Green cites the Third Circuit's decision in *United States v. Ammar*, 714 F.2d 238, 259 (3d Cir. 1983) for the proposition that "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." *Ammar*, however, makes clear that in analyzing the issue "it is important to distinguish between three categories of documents: (1) contemporaneous rough notes taken by a government agent of meetings, conversations, or interviews during the course of his or her investigation; (2) the agent's subsequently prepared drafts of his reports of these incidents; and (3) the final report signed by the agent." *Ammar* at 258. The Third Circuit's decision in *Ammar* did not address the issue of preservation of an agent's rough notes of interview. Rather, the decision addressed the question whether a DEA agent's testimony should have been allowed, or a mistrial declared, where preliminary, handwritten drafts of his reports of meetings and telephone conversations with the defendants conducted while the agent was posing as a heroin buyer had been destroyed. Defendants claimed they were entitled at trial to the handwritten drafts of these reports on the theory that some of these drafts were the most nearly contemporaneous record of the events at issue.[1] The Third Circuit held that the United States

[1]The Third Circuit had previously held in *United States v. Vella*, 562 F.2d 275, 276 (3d Cir. 1977)(per curiam) with regard to contemporaneous rough notes taken by a government agent of meetings, conversations, or interviews during the course of his or her investigation that "the

must retain and, upon motion, make available to the district court both the rough notes and drafts of reports of its agents to facilitate the trial court's determination whether they should be produced. The Sixth Circuit, however, has not followed adopted the Third Circuit's holding in *Ammar*.

Green also cites *United States v. Harrison*, 524 F.2d 421, 423 (D.C. Cir. 1975) asserting that FBI agents' rough, handwritten notes of interviews "fall within the category of potentially discoverable materials required to be preserved and produced." In *McCallie*, however, the Sixth Circuit Court of Appeals noted that while two Circuits had found that the destruction of FBI interview notes *is* a violation of the Jencks Act or the *Brady* doctrine, it declined to review the settled case law in this Circuit on the subject, or to follow the rulings of the D.C. Circuit in *Harrison* or the 9th Circuit in *United States v. Harris*, 543 F.2d 1247 (9th Cir. 1976). *See McCallie*, 554 F.2d at 773.

Green cites to one Sixth Circuit case for the proposition that an FBI agent's "rough notes" of a defendant's interrogation qualify as a written record which "requires the disclosure of 'the portion of any written record containing the substance' of such an oral statement." *United States v. Clark*, 385 F.3d 609, 619 (6th Cir. 2004). While this quote is literally correct, taking it out of the context of the rest of the Sixth Circuit's opinion perhaps over represents the significance of that single statement. *Clark* involved a defendant who was charged with two counts of distributing crack cocaine. The defendant was interviewed by an FBI agent after his arrest. Before trial, Clark moved to suppress the post-arrest statement he had given to the FBI. At the

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rough interview notes of FBI agents should be kept and produced so that the trial court can determine whether the notes should be made available to the [defendant] under the rule in *Brady v. Maryland*, 83 S.Ct. 1194 (1963) or the Jencks Act."

suppression hearing, the agent testified about statements the defendant had made regarding his sale of crack cocaine. The agent also testified that he took contemporaneous notes of his interview, which was later summarized in a Form FD-302. Later, Defendant Clark filed a motion to compel the United States to produce copies of any notes taken by law enforcement agents during their interrogation of Defendant, but the district court denied the motion.

At trial, the same FBI agent testified that Clark had admitted during his post-arrest interview to selling crack cocaine from the two specific locations charged in the indictment. Clark's admission regarding the locations of the drug sales did not appear in the FD-302 interview summary, but was contained in the rough interview notes upon which the agent had based the FD-302. Defendant's counsel broke off cross-examination and moved for a mistrial because the FBI agent's rough notes had not been produced before trial. The district court denied the motion for a mistrial, the United States offered to produce the notes, and the Court indicated that Clark could cross-examine the agent on the notes. After a jury found Clark guilty, the Defendant moved for a new trial on grounds that the trial court had committed error when it allowed the FBI agent to testify regarding the statement given during his post-arrest interview that he had admitted selling crack cocaine from a specific location when that fact was not included in the narrative summary of the interview prepared by the agent and produced in discovery. The trial court rejected any error with regard to the alleged non-disclosure of the agent's notes containing Defendant's statement about locations of the crack sales to which he had admitted. The Sixth Circuit Court of Appeals affirmed Clark's conviction, and disagreed with Clark's argument that the trial court had abused its discretion when it refused to compel the pre-trial disclosure of the notes taken by the FBI agent during Defendant's post-arrest interview.

The Sixth Circuit concluded that Defendant had arguably suffered a Rule 16 discovery violation because the agents "rough notes" of the Defendant's interview contained, in writing, the substance of Defendant's post-arrest oral statement made in response to interrogation by a person the defendant knew was a government agent which was subject to disclosure pursuant to Fed. R. Crim. P. 16(a)(1)(B)(ii). The Sixth Circuit concluded that the Defendant suffered no prejudice because, although the statement was not reflected in the agent's FD-302 which was produced by the United States in pre-trial discovery, the statement was not exculpatory but inculpatory. Because it was inculpatory, the statement's non disclosure did not materially affect Defendant's guilty verdict, and the Sixth Circuit concluded that the government's Rule 16 violation was harmless error. The Sixth Circuit also concluded that the trial court's refusal to grant defendant's motion for a mistrial was not an abuse of discretion stating:

> "Rule 16 does not *require* federal courts to exclude evidence not turned over to the discovering party in violation of a discovery order." *United States v. Bartle*, 835 F.2d 646, 649 (6th Cir. 1987)(emphasis in original). Rule 16 provides, "if a party fails to comply with this rule, the court *may* ... prohibit that party from introducing the undisclosed evidence[] or ... enter any other order that is just under the circumstances." Fed.R.Crim.P. 16(d)(2)(emphasis added). Thus, the district court did not necessarily abuse its discretion by failing to declare a mistrial due to the government's failure to turn over [the agent's] rough notes prior to trial.

Clark at 621.

In this case, Green seeks from the Court a pre-trial order far broader than the issue addressed in *Clark*. Defendant seeks an order compelling the United States to preserve "all rough notes, memoranda, resumes, or synopses taken as part of their investigation." The law in this Circuit does not compel so sweeping an order. As a practical matter, there are generally policies in place which require federal agents to retain for investigative purposes notes taken of

an interview of a target or other significant witness. These notes are not subject to production as Jencks Act material as required by 18 U.S.C. § 3500. To the extent such notes contain any exculpatory information which is not reflected in the composite FD-302 or other narrative summary of the interview, that exculpatory information should be disclosed to defense counsel in time for effective use at trial pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

Finally, it should be noted the Defendant raised a very similar issue early in the life of this case. On July 11, 2006, Defendant moved for an Order from the Court to require the United States to provide a list of all documents, records, information or other evidence of any kind which has been destroyed, including rough notes of interviews. Motion to Preserve Evidence, Doc. No. 13. The United States responded at that time that it was unaware of any federal agent, whether Army or civilian, destroying or altering any records or evidence of any kind in this case. As the United States then stated, [t]he investigators' interest is in preserving the results of their investigation, not destroying or discarding it," and that the Court is entitled to presume that the investigating agents have and will properly discharge their official duties. *United States v. Armstrong*, 517 U.S. 456 (1996). Response to Motion to Preserve Evidence, Doc. No. 18, p. 5. Accordingly, the Court entered an Order on August 30, 2006, denying Defendant's motion to preserve evidence as moot. Order, Doc. No. 22.

For the foregoing reasons, the motion of the Defendant for an Order compelling any law enforcement officials who aided in this investigation to preserve all rough notes should be denied as such an Order is not supported by the law in this Circuit, is over broad, and would place an undue burden on the United States.

Respectfully submitted,

DAVID L. HUBER
United States Attorney

/s/ Marisa J. Ford
Marisa J. Ford
James R. Lesousky, Jr.
Assistant U.S. Attorneys
510 West Broadway, 10th Floor
Louisville, Kentucky 40202
(502) 582-5911

/s/ Brian D. Skaret
Brian D. Skaret
Trial Attorney
United States Department of Justice
Domestic Security Section
950 Pennsylvania Ave. NW, Ste. 7645
Washington, DC 20530
(202) 353-0287

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2008, I electronically filed the foregoing Response with the Clerk of the Court by using the CM/ECF system, which will send notice of electronic filing to Scott T. Wendelsdorf, Federal Defender, Patrick J. Bouldin, Assistant Federal Defender, and Darren C. Wolff, counsel for Defendant, Steven D. Green.

/s/ Marisa J. Ford
Marisa J. Ford
Assistant U.S. Attorney