

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MICHAEL HARRIS, et al.	:	NO. 05-598

MEMORANDUM

Baylson, J.

July 21, 2006

This is a multi-defendant case charging a conspiracy to distribute cocaine and related crimes including firearm charges. There are twelve Defendants who have filed a number of pretrial motions. The Court allowed Defendants to join in the pre-trial motions filed by other Defendants.

Pursuant to a schedule, hearings were held on these motions on June 15, 2006, at which time Defendants Whitted, McGurn, Montgomery and Anderson were represented by counsel. The motions of certain other Defendants were deferred because some of them are cooperating with the government.

A hearing on the motions as they pertain to Defendant Fahti Nelson was postponed until July 10, 2006, because Defendant Nelson had been recently incarcerated and could not be brought to the courthouse for the June 15 hearing. However, Defendant Nelson's attorney (Mr. Diamondstein) was present during the June 15 hearing. A hearing was subsequently held for Defendant Nelson on July 10, 2006.

A. Motion to Suppress Photographic Identifications

Defendant McGurn's Motion to Suppress Photographic Identifications, which is joined by other Defendants, attacks identifications made by a number of other witnesses (several of whom were referred to at the hearing as Witness No. 1, Witness No. 2 and Witness No. 3, because the Court determined that their identities should not be placed on the public record at this juncture). The defendants claim that the procedure utilized by the government in interviewing the cooperating witnesses (specifically, the procedure used by the government which led to the identification of the Defendants' photographs) was unnecessarily suggestive and therefore violated the Defendants' constitutional rights. In response, the Government contends that the procedures utilized meet constitutional muster.

FBI Special Agent Luke Church, who was the case agent for this prosecution, testified as to the circumstances of the photographic identification. Each of the witnesses who were shown photographs had prior knowledge of all of the Defendants, and often referred to them by their nicknames. After taking statements from these witnesses and hearing their accounts of dealings with the various Defendants, the Government showed the witnesses color photographs of the Defendants. The FBI had secured the displayed photographs from a law enforcement computer database (which primarily contains driver's license photographs). Agent Church testified that, as to each Defendant whose photograph was shown to a witness, the witness who was shown the photograph had mentioned that Defendant by specific name and/or nickname to the Government before the photograph was shown. See June 15, 2006 Hearing Transcript at 27.

To violate due process, an identification procedure used by the police must be unnecessarily suggestive and create a substantial risk of misidentification. Government of Virgin

Islands v. Riley, 973 F.2d 224, 228 (3d Cir. 1992) (citing Neil v. Biggers, 409 U.S. 188 (1972)).

The question of whether the suggestiveness created a substantial likelihood of misidentification is to be considered with reference to the “totality of the circumstances,” with particular attention paid to such relevant factors as the quality of the witnesses’ original opportunity to view the criminal, their degree of attention, their level of certainty when confronted with the subject or his image, and the length of time between the crime and the confrontation. Id. (citing United States v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988); Biggers, 409 U.S. at 199-200). Even a suggestive identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. Manson v. Brathwaite, 432 U.S. 98, 106 (1977); Reese v. Fulcomer, 946 F.2d 247, 258 (3d Cir. 1991) (suggestive interaction that creates no risk of misidentification does not violate due process). Additionally, this Court is aware of no precedent requiring that an investigating officer must use a photo array every time they seek identification of a witness from a photograph -- particularly where the witness has prior knowledge of the individual.

The Court finds that, here, the photographic identification procedure used by the Government was not unnecessarily suggestive and did not create a substantial risk of misidentification. Each of the witnesses interviewed who identified the defendants did so only after a thorough discussion with the agents concerning their involvement in the charged drug trafficking conspiracy. After each witness described his role in the conspiracy, he then described the roles of the other Defendants. When discussing the other Defendants, the witnesses referred to them by name or nickname. The witnesses were then shown photographs of certain Defendants, and they confirmed the identities of the people who they had previously described by

name or nickname when speaking about the role of their co-conspirators. June 15, 2006 Hearing Transcript at 27. Under the totality of circumstances, these witnesses' identifications demonstrate sufficient indicia of reliability because the witnesses were very familiar with the people whom they identified (i.e., they had delivered drugs to them and collected money from them as payment for the drugs; their relationship with them lasted for several months; and during that time they dealt with them often, sometimes more than one time per week). In short, the identification of the photographs merely confirmed what the witnesses had already told the agents (i.e., that the persons depicted in the photographs were the people who the witnesses spoke of when detailing their conspiratorial relationship).

The Court will therefore deny the Motion to Suppress the Photographic Identifications.

B. Motion to Compel Disclosure of Confidential Informants

The next issue as to which the Court held an evidentiary hearing was Defendant Whitted's Motion to Compel disclosure of the identity of confidential informants used by the government in its investigation.¹ The Court allowed Agent Church to testify to only a few salient facts about the investigation. Those facts established (1) that the government has several confidential informants, (2) that those informants did not relate to the Government that Mr. Whitted was a participant in the conspiracy until August 2005 (whereas the investigation itself started much earlier), and (3) that Agent Church had reason to believe that the informants were

¹ The Court notes that all counsel have withdrawn their requests for a hearing pursuant to Franks v. Delaware, 428 U.S. 154 (1978) (In order to obtain a Franks hearing, defendants needed to show that: (1) the affidavit in support of the warrant was deliberately false or demonstrated reckless disregard for the truth; and (2) any challenged statement or omission was essential to the magistrate's finding of probable cause.)

reliable.

It is well-established that the Government has the privilege of withholding the identity of confidential informants. “The purpose of the Government’s privilege to withhold from disclosure the identity of [confidential informants]. . . . is the furtherance and protection of the public interest in effective law enforcement.” Roviaro v. United States, 353 U.S. 53, 59 (1957). This privilege encourages law-abiding citizens to communicate their knowledge of the commission of crimes to law enforcement officials. Id. at 53; see also United States v. Johnson, 302 F.3d 139, 148–49 (3d Cir. 2002) (noting that, in order to encourage citizens to report criminal activity, the Government has a privilege to withhold from disclosure the identity of those persons who furnish information regarding illegal activity). However, the privilege is limited in its application by the “fundamental requirements of fairness.” Roviaro, 353 U.S. at 59. The Government’s privilege must give way where the disclosure of the informant’s identity or the contents of his communication is “relevant and helpful” to the defense of the accused or is “essential to the determination of cause.” Id. at 62; see also McCray v. Illinois, 386 U.S. 300, 308–09 (1967) (“What Roviaro thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer’s identity even in formulating evidentiary rules for federal criminal trials.”).

The defendant bears the burden of showing the significance of the informant’s testimony to his defense. Pickel v. United States, 746 F.2d 176, 181 (3d Cir. 1984) (citing United States v. Jiles, 658 F.2d 194, 197 (3d Cir. 1981)). Mere speculation that the disclosure of the identity of the informant will be helpful to the defendant’s case is not enough to override the government’s privilege. “[M]ere speculation that an eyewitness may have some evidence helpful to

defendant's case is not sufficient to show the specific need required by Roviaro." Jiles, 658 F.2d at 197. Rather, a defendant must show that the informant can provide material evidence that significantly helps the defendant establish a specific defense. United States v. Allen, 566 F.2d 1193, 1194 (1977); United States v. Thomas, 58 Fed. Appx. 915, 919 (3d Cir. 2003) (non-precedential).

If a defendant can meet his burden of showing that the disclosure of the informant will be "relevant and helpful" to his defense or "essential to the determination of cause," then the trial court must determine whether disclosure is justifiable by balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Roviaro, 353 U.S. at 62. This determination is within the trial court's discretion, and "no fixed rule with respect to disclosure is justifiable." Id. at 62. In making its determination, a court must look at the particular circumstances of each case, "taking into consideration the crime charged, the possible defenses, the possible significance of the informant's testimony and other relevant factors." Id. at 60–61.

Applying this broad framework, the Court concludes that Defendant Whitted has not established that the confidential informants at issue will provide material evidence that significantly helps him establish a specific defense. Defendant Whitted's mere speculation that the informants might have some relevant evidence is not sufficient under relevant precedent to override the Government's need to protect the identity of those who report and assist in the investigation of crimes.

Nor does the Court find persuasive Defendant Whitted's argument that he will not be able to either effectively cross-examine the confidential informants themselves should they be called

to testify at trial or effectively cross-examine other prosecution witnesses based on information provided by the confidential informants. As a threshold matter, not all of the Government's confidential informants may eventually be witnesses at trial (indeed, the Government may not yet have decided which witnesses will testify). Beyond that, however, the Third Circuit, in United States v. Brenneman, 455 F.2d 809, 811 (3d Cir. 1972), held that the defendant's speculation that testimony from the informant might have been used to impeach or cross-examine a prosecution witness did not mean that the testimony of the confidential informant was "essential" to the defense. Id. at 811.

In short, the Court finds that the Defendant has not met his burden of showing that the testimony of the confidential informant is "highly relevant" or "essential" to his case. The balance of interests involved here, therefore, tips in favor of the Government. Accordingly, the Court will deny Defendant Whitted's request for disclose the identity of the Government's confidential informants.

C. Motion to Suppress Physical Evidence

After several of the Defendants were arrested on September 15, 2005, the Government secured a warrant and subsequently searched Room 507 at the Renaissance Hotel near the Philadelphia Airport. Pursuant to the search, the Government seized various quantities of cocaine and other drug paraphernalia. Defendants seek to suppress the fruits of that search on the grounds that the Government lacked probable cause to secure the warrant.

The Fourth Amendment provides in part that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Probable cause must be assessed in

light of the “totality of the circumstances” known to the magistrate, not by rigid formulation. United States v. Martiez-Zayas, 658 F. Supp. 79, 82 (E.D. Pa. 1987) (citing Illinois v. Gates, 462 U.S. 213, 230-31 (1983)). The probable cause standard is a “practical, non-technical conception.” Martinez, 658 F. Supp. at 82 (citing Gates, 462 U.S. at 231). The issuing magistrate must simply make a practical, common sense decision whether, given the circumstances described in the affidavit, there is a fair probability that contraband or evidence of a crime will be found at that place. Id. The reviewing court should afford the magistrate’s decision “great deference” rather than reviewing the determination of probable cause de novo. Id. The court must simply ensure that the magistrate had a “substantial basis for . . . conclud[ing]” that probable cause existed. Id. (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). “[D]oubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.” Id. (citing Gates, 462 U.S. at 237 n.10).

The Court finds that, based on the evidence set forth in the affidavit, there was probable cause that evidence of the September 15, 2005 drug transaction would be found inside the hotel room. As summarized in the Government’s Omnibus Response, the affidavit submitted in connection with the search warrant detailed and included information supplied by, inter alia, police officers, confidential informants, cooperating witnesses, and electronic surveillance. The information included background on the Harris Organization, which was known to utilize hotels in the Philadelphia area (including the Renaissance) for drug trafficking activities. The information also included electronic surveillance that established (1) a major drug transaction occurred on September 15, 2005 and (2) Defendants Harris and Robinson used Room 507 on that same day. Surveillance even recorded references to a “can” being brought into the hotel room –

the term “can” being familiar to law enforcement officers as a reference to a can of acetone, a liquid used in the processing of cocaine for resale. Also on September 15, 2005, police officers observed vehicles outside the Renaissance Hotel belonging to Harris and Robinson, as well as a vehicle that Whitted had been observed driving earlier that same day. Finally, a police officer witnessed that day what he believed to be a passing of currency from Whitted to Harris.

The Court finds that Defendants have not articulated any persuasive reason to find fault with the judgment of the issuing magistrate in this case. The Court agrees with the Government that all of this information was sufficient for the magistrate judge to conclude that there was probable cause to believe that items relating to drug transactions would be found inside Room 507 of the Renaissance Hotel.

The Court also notes that, even if the Court were to determine that the affidavit was lacking, the officers’ good faith reliance on a facially valid warrant is justified. The Third Circuit has only found reliance on a facially valid warrant unreasonable when either (1) the issuing judge issued the warrant in reliance on a deliberately or recklessly false affidavit, (2) the magistrate judge abandoned his judicial role and failed to perform his neutral and detached function, (3) the warrant was based on an affidavit ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,’ or (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. United States v. Barnes, 2005 WL 1863213, at *5 (E.D. Pa. Aug. 3, 2005) (citing United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars, 307 F.3d 137, 146 (3d Cir. 2002)). Here, Defendants have provided no evidence that the Affidavit of Probable Cause was deliberately or recklessly false, that the magistrate judge abandoned his judicial role, that the affidavit was lacking in indicia of

probable cause, or that the warrant was facially deficient.

For these reasons, the Court will deny the Defendants' Motion to Suppress Physical Evidence.

D. Motions to Quash the Indictment

Defendants have moved to quash the superseding indictment. However, the law is absolutely clear that the Defendant may not attack the sufficiency of the indictment unless they can show some irregularity in the proceedings before the grand jury. "An indictment returned by a legally constituted and unbiased grand jury . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." Costello v. United States, 350 U.S. 359, 363 (1956). A defendant is not entitled to challenge an indictment on the ground that it is not supported by adequate or competent evidence. United States v. Calandra, 414 U.S. 338, 344-45 (1974); United States v. Labate, 270 F.2d 122, 123-24 (3d Cir. 1959) (citing Costello, 350 U.S. at 363-64); see also In re Grand Jury Proceeding Impounded, 241 F.3d 308, 312 (3d Cir. 2001) (citing Costello with approval and noting "the judiciary's limited authority over the grand jury's subpoena and indictment power"); United States v. Maceo, 873 F.2d 1, 3 (1st Cir. 1989) (stating that a court should not inquire into the sufficiency of the evidence before the indicting grand jury).

In accordance with the case law discussed above, the Court will not entertain a challenge to the indictment based on sufficiency of the evidence. Defendants have not presented evidence of any other compelling basis to fault the indictment (e.g., a facial defect or an irregularity in the grand jury proceedings). The Motion to Quash the Indictment will therefore be denied.

At the hearing, the Court granted leave to counsel for Defendant Whitted to more closely

examine the grand jury testimony and to pursue the issue further. Counsel for Defendant Whitted subsequently filed a Supplemental Motion to Quash the Indictment (Doc. No. 197), to which the Government has filed a response. The gravamen of the supplemental motion is that FBI Agent Church, during his grand jury testimony, stated that Defendant Whitted had previously been convicted of drug trafficking. Specifically, the grand jury transcript reveals the following exchange:

Question: Now, prior to September 15th, 2005, had Michael Harris been convicted of a felony offense?
Answer: Yes.
Question: And that felony offense was drug trafficking; correct?
Answer: Yes.
Question: And James Whitted had he also been convicted of a felony offense?
Answer: Yes he had.
Question: In fact he had been convicted of more than one?
Answer: Correct.
Question: One of those convictions was conspiracy to commit murder?
Answer: Yes.
Question: And he served a period of time in jail for that conviction?
Answer: Yes he did.
Question: Is it also true that Mr. Whitted had been convicted in the past of drug trafficking?
Answer: Yes it is.
Question: And that's also a felony offense; correct?
Answer: Correct.

Grand Jury Transcript at 24-25. The Government has admitted that this testimony was incorrect; i.e., while Defendant Whitted was arrested and charged with drug trafficking, he was convicted only of drug possession. However, the Government asserts that the error was not prejudicial or legally significant because Defendant Whitted does have a prior felony conviction and the evidence was offered on the limited issue of whether Defendant Whitted was a convicted felon (which was an element of the charge of being a convicted felon in possession of a firearm).

The Court may not dismiss an indictment for prosecutorial misconduct where the

misconduct does not prejudice the defendant. Bank of Nova Scotia v. United States, 487 U.S. 250, 252 (1988). Prejudice is established when the asserted violation “substantially influenced the grand jury’s decision to indict, or . . . there is grave doubt that the decision to indict was free from the substantial influence of [the asserted violation].” Id. at 256. The Government correctly observes that courts have routinely rejected arguments for dismissal of indictments that did not involve constitutional violations stemming from racial or gender discrimination. For example, courts have declined to dismiss indictments based on lack of prejudice even where there has been serious errors including presentation of perjured testimony, violation of ethical rules by prosecutors, presentation of forged documents, and grand juror misconduct in selling information concerning deliberations. See Government’s Response at 4 (collecting cases).

Here, in addition to the incorrect testimony about a conviction for drug trafficking, the Government also presented correct testimony that Defendant Whitted had been convicted of a different felony – namely, conspiracy to commit murder. That correct testimony was, by itself, enough to satisfy the felony conviction element of the charge of being a felon in possession of a firearm. The Court finds that, because sufficient testimony was offered irrespective of the incorrect statement about a drug trafficking conviction, the error did not substantially influence the grand jury’s decision to indict Defendant Whitted. Stated differently, the Court has no “grave doubt” about the influence of the asserted violation; to the contrary, the Court finds that the error did not prejudice the Defendant. See, e.g., United States v. Lopez-Gutierrez, 83 F.3d 1235, 1244 (10th Cir. 1996) (declining to dismiss an indictment based on unintentional presentation of false evidence to a grand jury by the Government concerning a defendant’s criminal history and characterizing such occurrence as a technical error that did not infringe upon the grand jury’s

ability to exercise independent judgment).²

The Court will therefore deny the Supplemental Motion to Quash the Indictment.

E. Motion to Sever

Regarding Defendants' Motion to Sever, defense counsel argued that evidence admissible against one Defendant in the trial of this conspiracy indictment would be prejudicial against other Defendants and that there would be a "spillover" effect. However, counsel were vague concerning any specifics. The Government asserts that Defendants have not demonstrated the level of potential prejudice required to justify severance.

As a threshold matter, as to joinder of the Defendants in the indictment, Rule 8(b) of the Federal Rules of Criminal Procedure provides in relevant part:

The indictment or information may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately.

FED. R. CRIM. P. 8(b). If the evidence to be introduced at trial "connects each of the defendants to an overall general scheme, joinder is proper." United States v. Stout, 499 F. Supp. 598, 599 (E.D. Pa. 1980). Rule 8(b) does not require that all the joined defendants participated in all aspects of the alleged scheme. Id. Indeed, the court in Stout stated that it did not matter that the

² Lopez-Gutierrez is particularly analogous to the instance scenario. In Lopez-Gutierrez, during the grand jury proceeding, one of the grand jurors asked a special agent whether Lopez-Gutierrez had ever been indicted for or tried for drug offenses in the past. The agent responded that he had, and mistakenly indicated that Lopez-Gutierrez had been convicted of two separate offenses, one for cocaine and one for marijuana. In fact, while Lopez-Gutierrez had been arrested on cocaine and marijuana charges, he had only been convicted for marijuana offenses.

indictment did not charge the defendants with a conspiracy, but it was sufficient that the government alleged a “common link” between the defendants and charges. Id. The court in United States v. Eufrazio, 935 F.2d 553, 567 (3d Cir. 1991), held that the joinder of conspiracy counts with the substantive offenses provides the common link necessary for joinder. The court further noted that it is appropriate for a judge to determine proper joinder based on the charges alleged in the indictment. Id.

As the case law indicates, courts allow very liberal joinder of charges and defendants. Precedent indicates that where the charges involve commonality of proof, there exists a logical relationship between the charges sufficient to justify joinder under Rule 8(b). As such, the law is well-settled in the Third Circuit that defendants who are charged with conspiracy in a single indictment are generally tried together. Here, having reviewed the conspiracy charges in Count I of the indictment carefully, the Court does not discern any impropriety in the government joining all the Defendants in the same indictment.

Having found that the Defendants were properly joined, the Court considers whether they had made the requisite showing to justify severance. Rule 14 of the Federal Rules of Criminal Procedure provides in relevant part, “If it appears that a defendant or the government is prejudiced by a joinder of . . . defendants . . . for trial together, the court may order an election or separate trials of counts, grant severance of defendants or provide whatever other relief justice requires.” FED. R. CRIM. P. 14.

The Supreme Court has stated that “[t]here is a preference in the federal system for joint trials of defendants who are indicted together.” Zafiro v. United States, 506 U.S. 534, 537 (1993). This is particularly the case in conspiracy trials where “joint trials . . . [can] aid the

finder of fact in determining the ‘full extent of the conspiracy.’” United States v. Voigt, 89 F.3d 1050, 1094 (3d Cir. 1996) (quoting United States v. Provenzano, 688 F.2d 194, 199 (3d Cir. 1982)). A district court should grant a severance only in the event of a “serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” Zafiro, 506 U.S. at 539. The decision of whether or not to grant a trial severance is within the court’s discretion. Voigt, 89 F.3d at 1095.

Case law directs courts contemplating Rule 14 severance to consider both the degree of complexity of the charges and the possibility of a clear and substantial prejudice to a defendant in a joint trial. Zafiro, 506 U.S. at 539. Prejudice can result from a “spillover” effect of evidence, where the overwhelming evidence introduced at trial is inapplicable to one or more defendants and where a joint trial would compromise a specific trial right, such as the right to a speedy trial or a Sixth Amendment right to confront one’s witnesses. See, e.g., United States v. McGlory, 968 F.2d 309, 340 (3d Cir. 1992); United States v. Branker, 395 F.2d 881, 887-88 (2d Cir. 1968). However, as the Government details in its Omnibus Reponse, virtually every Circuit in this country has held that the possibility of evidence against one defendant spilling over on another defendant is insufficient, by itself, to demonstrate the compelling prejudice necessary to warrant a severance of defendants properly joined. See Omnibus Response at 16 (collecting cases).

The degree of the complexity of the charges also bears on the possibility of prejudice to particular defendants in a joint trial. The main determinant is whether the jury can appropriately compartmentalize the evidence in a case so as to consider the evidence only as it relates to the relevant defendant. United States v. McGlory, 968 F.2d at 340. It is not enough to show that a separate trial would increase a particular defendant’s chance for acquittal. Id.

District Courts have a significant amount of discretion on this subject. Indeed, courts have affirmed the denial of motions for trial severances where the trial court made an effort to cautiously instruct the jury and the government presented its case clearly enough to distinguish charges and defendants. See United States v. DiPasquele, 740 F.2d 1282, 1294 (3d Cir. 1984) (affirming the conviction of various extortion conspirators, where the trial court did not abuse its discretion in denying severance to any of the defendants because specific instructions to the jury and a well-presented case by the government avoided the possibility of prejudice).

The Court finds that Defendants have not, at this stage, identified a clear and substantial risk of prejudice that is serious enough to constitute a denial of any Defendant's right to a fair trial. Moreover, the Government has asserted that there will not be any suggestion by any Government witness that any Defendant was involved in anything other than the illegal activities charged. In its discretion, the Court concludes that Defendants have failed to meet Rule 14's stringent requirements for severance. The jury will be able to appropriately compartmentalize the evidence and consider it only as it relates to the relevant defendant. At the trial, the Court will maintain close vigilance over possible prejudicial evidence admissible against one Defendant but not admissible against all Defendants, and the Court will instruct the jury appropriately (either during the trial or during the closing instructions).

The Court will therefore deny the Motion to Sever.

F. Motions Concerning Preservation and Disclosure of Evidence

Defendants have brought a Motion for Agents to Preserve Rough Notes, in which Defendants ask the Court to require the Government to (1) preserve and (2) produce all rough notes of any interviews or memoranda related to this case (Doc. No. 130).

Interview notes and rough draft of memoranda are subject to production only if they constitute statements falling under the Jencks Act or contain Brady material. United States v. Ramos, 27 F.3d 65, 68-69 (3d Cir. 1994). In Ramos, the Third Circuit reaffirmed its prior directives that the government preserve all notes of interviews with witnesses in criminal cases and rough draft of investigative reports. Id. (citing United States v. Vella, 562 F.2d 275, 276 (3d Cir. 1977); United States v. Ammar, 714 F.2d 238, 259 (3d Cir. 1983)). However, the Court did not order that such preserved documents be automatically disclosed to defense counsel as part of routine discovery. To the contrary, the Court explained that this rule exists only to permit prosecutors and then, if necessary, trial judges to review the notes to assure that no Jencks or Brady material is present in the notes. If no such material exists in the notes, the notes are not produced to the defense. See Ramos, 27 F.3d at 68.

Accordingly, the Court will grant the Defendants' Motion for Agents to Preserve Rough Notes in part and require that the Government preserve the rough notes and rough drafts of investigative reports generated by the investigating agents in this case, but will deny Defendants' motion that the preserved documents be produced as part of discovery.

Defendants have also brought a Motion to Compel Disclosure of Evidence Subject to Suppression Under Fed R. Crim. P. 12(b)(3) (Doc. No. 129). This motion shall be denied.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
MICHAEL HARRIS, et al.	:	NO. 05-598

ORDER

AND NOW, this 21st day of July, 2006, after careful consideration of the parties' briefing and the arguments of counsel at several hearings, it is hereby ORDERED that:

1. Defendants' Motion To Suppress Identification (Doc. No. 181) is DENIED.
2. Defendants' Motion to Compel Disclosure of Confidential Informants (Doc. No. 36) is DENIED.
3. Defendants' Motion to Suppress Physical Evidence (Doc. No. 24) is DENIED.
4. Defendants' Motion to Quash the Indictment (Doc. No. 33) is DENIED.
5. Defendant's Supplemental Motion to Quash the Indictment (Doc. No. 197) is DENIED.
6. Defendants' Motion to Sever (Doc. No. 35) is DENIED.
7. Defendants' Motion for Agents to Preserve Rough Notes (Doc. No. 130) is GRANTED in PART and DENIED in PART. The Government shall preserve all notes and memoranda drafts of the investigators in this case, however such material will not be produced to Defendants as part of discovery.

8. Defendants' Motion to Compel Disclosure of Evidence Subject to Suppression Under Fed R. Crim. P. 12(b)(3) (Doc. No. 129) is DENIED.
9. Defendants' Motion to Suppress Fruits of Illegal Electronic and Other Surveillance (Doc. No. 125) is referred to the Judge who approved the surveillance, pursuant to Local Rule 41.1(b).

BY THE COURT:

/s/ MICHAEL M. BAYLSON

Michael M. Baylson, U.S.D.J.