

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
NORTHERN DIVISION
at COVINGTON**

CRIMINAL ACTION NO. 11-70-DCR

UNITED STATES OF AMERICA

PLAINTIFF

V.

**MEMORANDUM IN SUPPORT OF
MOTION TO REQUIRE PRESERVATION
AND TIMELY PRODUCTION OF AGENTS' NOTES**

RONALD E. WEINLAND

DEFENDANT

* * * * *

Defendant Ronald E. Weinland, by and through his undersigned counsel, has moved this Court to enter an order directing the United States to preserve and timely produce all handwritten or typed notes of government agents, attorneys, officers or any other law enforcement investigators, state or federal, involved in any aspect of this case that may be discoverable under the Jencks Act, 18 U.S.C. § 3500, and Rule 16 of the Federal Rules of Criminal Procedure. In support of the Defendant's motion, the Defendant states as follows:

FACTS

The indictment in this matter resulted from the government's investigation that began as early as July 2, 2008. One of the central alleged acts of evasion listed in the indictment is that Mr. Weinland used church funds to pay personal expenses and did not report the funds as income on his tax return. Based upon defense counsel's ongoing review of the government's voluminous discovery, defense counsel understands that much of the government's allegation of unreported

income stems from the government's detailed analysis of five years of transaction and account activity that occurred through numerous church and personal accounts. Specifically, based on defense counsel's cursory review of the government's discovery, it appears that the government reviewed each individual transaction to determine the nature and character of each specific transaction (i.e., whether the transaction was a church expense or a personal expense).

The government's determination as to the nature and character of each specific transaction appears to have been based upon interviews that the government conducted with Mr. Weinland and other individuals associated with the church. Because these interviews seem to serve as the evidentiary basis for the government's determination that Mr. Weinland used church funds to pay personal expenses, the entire contents of such interviews are critical to Mr. Weinland's effective preparation of a defense to the pending charges. It is anticipated that the government will provide copies of memoranda that government agents prepared summarizing these interviews at a reasonable time prior to trial consistent with the Court's discovery order in this case and the government's general discovery obligations. However, experience shows that a summary memorandum of an interview may not contain all of the details of an interview or statements of the interviewee set forth in the agent's notes. Such omitted details or statements could be important to a defendant's effective preparation of a defense to the pending charges.

ARGUMENT

The Sixth Circuit has made it clear that a government agent's "rough notes" of an interview constitute a written record that is potentially subject to discovery. See United States v. Clark, 385 F.3d 609, 619 (6th Cir. 2004). The United States has an obligation to preserve all potentially

discoverable evidence gathered in the course of a criminal investigation. United States v. Pollock, 417 F. Supp. 1332 (D. Mass. 1976) (citing, United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971)). This obligation includes preservation of interviews by government agents with persons who are, or may be, witnesses. United States v. Johnson, 521 F.2d 1318, 1319 (9th Cir. 1975).

Accordingly, a defendant is entitled to require the government to instruct agents to retain such notes where the documents constitute material that is potentially discoverable. See United States v. Walker, 922 F. Supp. 732, 744 (N.D.N.Y. 1996). The government's obligation to preserve such material and inform its agents of the obligation to preserve is "well established by case law." United States v. Feola, 651 F. Supp. 1068, 1136 (S.D.N.Y. 1987) aff'd, 875 F.2d 857 (2d Cir. 1989), cert. denied, 493 U.S. 834 (1989).

Here, government agents and other investigators involved in the case are presumably in possession of interview notes that may be discoverable under the Jencks Act and/or Rule 16 of the Federal Rules of Criminal Procedure. It is the duty of "[t]he courts, not the investigators nor the prosecutors, [to] make the decision as to whether evidence is discoverable, and that decision cannot be made if the evidence has been destroyed." United States v. Harrison, 524 F.2d 421, 428 (D.C. Cir. 1975). Consequently, the agents' 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 of the Jencks Act.'" Id. at 433. (footnote and other citation omitted).

As a result, to ensure that Mr. Weinland's rights to due process, a fair trial and confrontation are not violated, this Court should enter an order directing the United States to preserve and timely produce all handwritten or typed notes of government agents, attorneys, officers or any other law

enforcement investigators, state or federal, involved in any aspect of this case. Such notes would include, but would not be limited to: (1) notes of the interview of Mr. Weinland and Laura G. Weinland on July 2, 2008; (2) notes of any interviews with any other persons who are or may be witnesses at trial or part of the investigation in this case; and (3) notes regarding the multi-state investigation of this matter. Preservation of such notes is necessary to ensure that this Court has an opportunity to determine whether the notes are discoverable or subject to the Jencks Act.

CONCLUSION

WHEREFORE, in light of the foregoing authority, Mr. Weinland respectfully requests this Court to enter an order requiring the United States to preserve and timely produce its agents' notes.

Respectfully submitted,

FROST BROWN TODD LLC

/s/ J. Christopher Coffman
Robert C. Webb
J. Christopher Coffman
Frost Brown Todd LLC
400 W. Market Street, Floor 32
Louisville, KY 40202-3363
Phone: (502) 589-5400
Fax: (502) 581-1087
bwebb@fbtlaw.com
ccoffman@fbtlaw.com

Counsel for Ronald E. Weinland

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2011, I electronically filed this document with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to Robert K. McBride, Robert.McBride@usdoj.gov.

By: /s/ J. Christopher Coffman
J. CHRISTOPHER COFFMAN
Counsel for Ronald E. Weinland