

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
vs.)
)
SCOTT CRAWFORD,)
)
 Defendant.)

ORDER ON DEFENDANT'S PRETRIAL MOTIONS

Presently before the court are the following eight (8) pretrial motions filed on April 6, 2004, by the defendant, Scott Crawford:

1. Motion for Disclosure of Grand Jury Testimony (Doc. No. 80);
2. Motion for Tangible Objects, Accelerated Jencks Material, Notes, Destroyed or Preserved (Doc. No. 81);
3. Motion for Names and Statements of Un-Indicted Co-Conspirators (Doc. No. 87);
4. Motion for Law Enforcement Agents' Identities (Doc. No. 91);
5. Motion for Disclosure of Informants (Doc. No. 95);
6. Motion for Names of Witnesses, Co-Conspirators, and Knowledgeable Person (Doc. No. 96);
7. Motion for James Hearing (Doc. No. 101); and
8. Motion for Bill of Particulars (Doc. No. 105).

On April 15, 2004, the government filed timely responses to

each motion. These motions were referred to the United States Magistrate Judge for determination. For the reasons set forth below, the defendant's motions are denied.

ANALYSIS

A. Motions Related to Pretrial Discovery¹

The defendant has filed two (2) motions that seek broad pretrial discovery from the government. One of the first categories of items requested by Crawford are items enumerated as discoverable under Federal Rule of Criminal Procedure 16. In the government's response to Crawford's request, it has stated that it will provide items enumerated as discoverable under Rule 16 after it receives the defendant's letter of request in compliance with the local rules. Accordingly, Crawford's motion as it pertains to the production of these enumerated items is denied as moot. The defendant, however, may renew his request should the government fail to provide the enumerated items as required.

With respect to the remainder of Crawford's motions for tangible objects, accelerated Jencks material, notes, and for the identities of law enforcement agents, Crawford cites *Brady v. Maryland*, 373 U.S. 83 (1963), 18 U.S.C. § 3500 (Jencks Act), and Rule 16 of the Federal Rules of Criminal Procedure as authority for the requests. As a general matter, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

¹ Motion for Tangible Objects, Accelerated Jencks Material, Notes, Destroyed or Preserved and Motion for Law Enforcement Agents' Identities.

punishment." *Brady*, 373 U.S. at 87. However, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). "[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." *United States v. Bagley*, 473 U.S. 667, 675 (1985). The prosecution's duty to disclose information when appropriate applies even though the defense makes no formal request for information, and continues throughout the adversarial proceedings. See *United States v. Agurs*, 427 U.S. 97, 107 (1976). Neither *Brady* nor *Giglio* grants the defendant a general right to pretrial discovery of impeachment or bias evidence in the government's possession. See *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988). Furthermore, the government is not required to make files available to the defendant for an open-ended "fishing expedition" for possible *Brady* material. *United States v. Davis*, 752 F.2d 963, 976 (5th Cir. 1985).

Federal Rule of Criminal Procedure 16(a) governs pretrial discovery in criminal matters and sets forth the general guidelines governing the government's duty to disclose information to the defense. Rule 16(a)(2) expressly provides:

Except as Rule 16(a)(1) provides otherwise, this rule does not authorize discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

FED. R. CRIM. P. 16(a)(2). The Jencks Act, 18 U.S.C. § 3500, requires production of a witness statement after the witness has testified on direct examination. Rule 26.2 likewise requires production of witness statements only after a witness has testified. The defense is not entitled to know in advance of trial who will testify for the government. *United States v. Perkins*, 994 F.2d 1184, 1190 (6th Cir. 1993); *United States v. McCullah*, 745 F.2d 350, 353 (6th Cir. 1984).

The defendant, through his broad requests, seeks to compel the government to produce witness statements and other evidence prematurely. Crawford has failed to demonstrate its need for disclosures beyond that required by Rule 16, the local rules, and *Brady*. Additionally, the Sixth Circuit has stated that "[t]he clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial." *Presser*, 844 F.2d at 1284. Therefore, the defendant's motions related to pre-trial discovery are denied.

B. Motion for Disclosure of Informants

In determining whether the identity of an informant is subject to disclosure, a court must balance the defendant's need for disclosure to ensure a fair trial against the public interest in preserving informant anonymity and encouraging citizens to report crimes. *Rovario v. United States*, 353 U.S. 53, 59 (1957). It is well-established, however that a defendant is not entitled to know in advance of trial who will testify for the government. *United States v. McCullah*, 745 F.2d 350, 353 (6th Cir. 1984). In

addition, the burden is on the defendant "to show how disclosure of the informant would substantively assist his defense." *United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992). "Mere conjecture or supposition about the possible relevancy of the informant's testimony is insufficient to warrant disclosure." *United States v. Sharp*, 778 F.2d 1182, 1187 (6th Cir. 1985) (quoting *United States v. Gonzales*, 606 F.2d 70, 75 (5th Cir. 1979)). Here, the defendant's motion reflects only a generalized desire to know the identity of all informants before trial. The defendant has articulated no reason why pre-trial disclosure of the identities of informants is necessary. The government has stated to the court that it is unaware of any informant possessing exculpatory information. Furthermore, the government has indicated that it does not anticipate calling any confidential informants as witnesses at trial in the instant case. If, however, the government does call a co-defendant to testify at trial, the government has stated to the court that it will make any material producible under *Giglio* available at trial. Accordingly, the defendant's motion for the disclosure of informants is denied.

C. Motions Related to Co-Conspirators²

___ In these motions, the defendant seeks discovery of the identities and statements of the government's witnesses and potential witnesses, as well as all evidence of the alleged conspiracy and all co-conspirators statements. As a general rule, the government is not required to disclose witness lists and

² Motion for *James* Hearing; Motion for Names of Witnesses, Co-Conspirators, and Knowledgeable Persons; Motion for Names and Statements of Unindicted Co-Conspirators.

information about witnesses in non-capital cases. *United States v. McCullah*, 745 F.2d 350, 353 (6th Cir. 1984). Although Crawford cites 18 U.S.C. 3432 as authority for his request as it relates to co-conspirators, that statute does not apply in the instant case because it is limited to death penalty cases. Additionally, the government is under no obligation to disclose information about merely potential witnesses. *United States v. Mullins*, 22 F.3d 1365, 1371-72 (6th Cir. 1994). Crawford is not entitled to general access to the investigative file or to statements other than his own. Therefore, Crawford's motion as it pertains to the disclosure of the names and identifying information of witnesses, co-conspirators, and knowledgeable persons is denied.

___Crawford has also requested a preliminary *James* Hearing on the admissibility of statements made by co-conspirators under Federal Rule of Evidence 801(d)(2)(E). In *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979), the Fifth Circuit held that a district court "should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a co-conspirator." The *James* court, however, went on to say that a district court could admit co-conspirator statements "subject to being connected up." *Id.* The government argues that Crawford's present request for a preliminary hearing on the admissibility of the statements of co-conspirators "is a thinly disguised effort to circumvent Rule 16 of the Federal Rules of Civil Procedure" and to obtain otherwise impermissible discovery. (Government's Consolidated Resp. to Def.'s Pre-Trial Motions at 14.) This court agrees. At this time, the defendant has not demonstrated that a preliminary hearing on

the admissibility of co-conspirator statements is warranted and this court is not bound by the Fifth Circuit's decision in *James*.³ Accordingly, the defendant's motion for a preliminary *James* hearing is denied without prejudice at this time.

D. Motion for Bill of Particulars

Without referring to any particular count of his indictment, the defendant seeks a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Civil Procedure. He contends, in a conclusory fashion, that the allegations charged in the indictment are vague, ambiguous, and uninformative and requests that the government be required to provide the particulars of all overt acts committed by the defendant and all named and unnamed co-conspirator who acted in furtherance of the conspiracy. The decision to order a bill of particulars is within the sound discretion of the trial court. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993).

The purposes of a bill of particulars are "to inform the defendant of the nature of the charge against him with sufficient

³ The government has directed the court's attention to the Supreme Court's ruling in *Bourjaily v. United States*, which partially abrogated the Fifth Circuit's holding in the *James* decision. (Government's Consolidated Resp. to Def.'s Pre-Trial Motions at 15 n.10.) In *Bourjaily*, the Supreme Court held that a trial court may examine all evidence, including the co-conspirators' hearsay statements, in ruling on the preliminary question of admissibility. 483 U.S. 171, 180 (1987); see also *United States v. Perez*, 823 F.2d 854, 855 (5th Cir. 1987). Additionally, the government identified several other decisions noting that the *James* decision does not require a pretrial hearing on the issue of admissibility. (See Government's Consolidated Resp. to Def.'s Pre-Trial Motions at 15 n.10 (citing *United States v. Hoover*, 246 F.3d 1054, 1059 (7th Cir. 2001); *United States v. Baltas*, 236 F.3d 27, 34 (1st Cir. 1956).)

precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead [double jeopardy] when the indictment itself is too vague, and indefinite for such a purpose." *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976); accord *United States v. Kendall*, 665 F.2d 126, 134 (6th Cir. 1981). However, a bill of particulars is not meant as "a tool for the defense to obtain detailed disclosure of all evidence held by the government before trial." *Salisbury*, 983 F.2d at 1375. The paramount inquiry in any given case is whether adequate notice of the charge has been given to the defendant. See 1 CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 129 (2d ed. 1982). A defendant's need for the information, however, must be clear: "[It] should be established by a demonstration that the need is real; a bare statement that the need exists is not enough." *United States v. Dolan*, 113 F. Supp. 757, 760 (D. Conn. 1953).

Here, Crawford has made no attempt in his motion to explain the necessity for the information aside from citing to the general language from Rule 7(f) regarding the prevention of surprise at trial and to prepare an adequate defense. Moreover, Crawford has failed to specify what information he seeks from the government aside from the specific overt acts taken in furtherance of the conspiracy. The counts in the indictment are straightforward and sufficiently detailed to provide adequate notice to Crawford regarding the charges brought against him. If Crawford seeks information about the manner in which his alleged violations occurred, an order for a bill of particulars that provides this type of information would impermissibly demand evidentiary detail

and unduly intrude upon the government's theories. See *United States v. Andrews*, 381 F.2d 377, 378 (2d Cir. 1967); *United States v. Kelly*, 120 F.R.D. 103, 107-108 (E.D. Wis. 1988). Accordingly, the defendant's motion for a bill of particulars is denied.

E. Motion for Disclosure of Grand Jury Testimony

Lastly, Crawford seeks disclosure of essentially everything bearing on the grand jury proceeding that resulted in his indictment in this case. Federal Rule of Criminal Procedure 6(e) prohibits access to grand jury records except to those persons specified by the rule's plain language. See *United States v. John Doe, Inc. I*, 481 U.S. 102, 108 (1987). To access grand jury proceedings, the defendant must demonstrate a "particularized need" for those materials. See *Dennis v. United States*, 384 U.S. 855, 870 (1966). In order to satisfy the "particularized need" standard, the defense must show that (1) the material requested is needed to avoid a possible injustice in another proceeding, (2) disclosure outweighs any need for secrecy, and (3) his narrowly tailored request covers only the material needed. See *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 222 (1979). The court has discretion to determine whether or not the defendant has satisfied the "particularized need standard." See *John Doe, Inc. I*, 481 U.S. at 116. The defendant's motions for disclosure of grand jury material is overly broad and fails to set forth a "particularized need," and therefore, the motion is denied.

IT IS SO ORDERED this 3rd day of May, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE