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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 04-20017-DV**
	)	
RANDE LAZAR, M.D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS,	)	
Defendant.	)	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR IMMEDIATE DISCLOSURE OF ALL EXCULPATORY EVIDENCE, WITNESS STATEMENTS, AND DOCUMENTS UNDER *BRADY v. MARYLAND* (Doc. No. 75)

Before the court is the August 27, 2004, motion of the defendant, Rande H. Lazar, for immediate disclosure of all exculpatory evidence, witness statements, and documents pursuant to *Brady v. Maryland*. This motion was referred to the United States Magistrate Judge for determination. For the following reasons, the motion is granted in part and denied in part.

A. <u>Witness Statements Made by Prospective Government Witnesses</u>

The majority of Lazar's requests are for statements made by prospective government witnesses. It is thus necessary for the court to identify the existing Sixth Circuit law concerning conflicts between *Brady* material and the Jencks Act, 18 U.S.C. § 3500. Under *Brady v. Maryland* the government has a continuing obligation to produce whatever evidence it has in its possession

that is both favorable to the accused and material to guilt or innocence. *Brady v. Maryland*, 373 U.S. 83 (1963). Under the Jencks Act, as interpreted by the Sixth Circuit, the government is not required to disclose statements or reports made by government witnesses or prospective government witnesses until said witnesses have testified on direct examination in the trial of the case. *United States v. Presser*, 844 F.2d 1275 (6th Cir. 1988). Where witness statements sought by a defendant are exculpatory and thus covered by both *Brady* and the Jencks Act, "the terms of [the Jencks] Act govern the timing of the government's disclosure." *United States v. Bencs*, 28 F.3d 555 (6th Cir. 1994).[1] The court in *Presser* reasoned that "[a]ny prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it." *Presser*, 844 F.2d at 1283-84.

Both the Jencks Act and Federal Rule of Criminal Procedure

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1. Lazar cites non-Sixth Circuit authority for the proposition that exculpatory evidence must be produced despite the mandates of 18 U.S.C § 3500. While it is not yet universally settled whether the constitutional right to exculpatory evidence requires earlier disclosure or whether it is sufficiently protected by the *Jencks* Act by producing the statement after the witness has testified, the Sixth Circuit law is quite clear. The court cannot find a reason presented by this case, nor has Lazar presented one, to challenge existing precedent.

26.2 attempt to limit what writings or recordings are subject to production through provisions defining the word "statement." The first category of "statements" consists of a written statement made by the witness and signed or otherwise adopted or approved by the witness. The second category consists of stenographic, mechanical, electrical, or other recordings, or transcriptions thereof, that are substantially verbatim recitals of oral statements that were made by the witness and that were recorded contemporaneously with the making of such oral statements. The third category consists of statements, however taken or recorded, or transcriptions thereof, made by the witness to a grand jury. Statements made by prospective government expert witnesses fall under the first category as a written statement made by or adopted by an expert witness. Therefore, under the Jencks Act, the government would not be required to produce these statements, even if they are exculpatory, until after the expert testifies at trial. Likewise, as indicated by the third category, statements made by a prospective government witness at a grand jury proceeding are not subject to production until the time set forth by the Jencks Act.

There is no doubt that the witness statements requested by Lazar may potentially fall within the ambit of exculpatory evidence defined by *Brady* and its progeny. However, these statements are also covered by the Jencks Act and are thus not discoverable until

after the government's witness has testified at trial. Accordingly, Lazar's request for immediate disclosure of all prospective witness statements, including grand jury testimony and expert statements, is denied.

B. Statements Made by Persons Not Expected to be Called as Witnesses

Lazar asks that the government be ordered to produce exculpatory statements made by all persons whom the government does not intend to call to testify at trial. Lazar also asks that the government produce exculpatory evidence found by experts whom the government has consulted but does not intend to call to testify. Because these requests involve persons who will not be called to testify at trial, the protections afforded to prospective government witnesses under the Jencks Act are not applicable. Therefore, pursuant to *Brady v. Maryland*, the government is ordered to produce any exculpatory statements it may have in its possession from persons it does not intend to call to testify and any exculpatory evidence found by experts who have been consulted but will not be called to testify.

C. Implied Promises and Improper Side Agreements

Lazar contends that the government has failed to produce any evidence of promises to, agreements with, or threats against certain government witnesses who Lazar asserts filed alleged false

claims covered by the indictment in return for their testimony. Lazar claims that such promises or agreements must be disclosed because they show witness bias as well as potential prosecutorial abuse and overreaching in violation of his due process rights announced in *Brady*. The government denies all allegations of prosecutorial misconduct and claims to have turned over all discoverable information, but does not respond specifically to Lazar's request for evidence regarding "implied promises" and "improper side agreements" with government witnesses.

Promises of leniency or threats of punishment are tools used often by prosecutors to secure witness testimony. If in fact a deal exists between the prosecution and alleged co-schemers, it is only fair that the defendant have access to this information before the trial begins. Evidence which may be used to impeach a prosecution witness or test the reliability of a witness falls within the scope of the *Brady* rule and, therefore, must be disclosed upon defense counsel's request. *United States v. Farley*, 2 F.3d 645 (6th Cir. 1993). By presenting this information at trial, a jury will have a greater reason to question the veracity of the witnesses' testimony. It must be noted however, that the government is only responsible, under *Brady*, to reveal impeachment evidence, including promises or

threats made to government witnesses, that are material to the guilt or innocence of the defendant. *United States v. Parks*, 30 Fed. Appx. 534 (6th Cir. 2002). Accordingly, the government is ordered to produce any promises to, agreements with, or threats against any of its witnesses who may constitute putative co-conspirators which are material to the guilt or innocence of the defendant.

D. Remaining Requests

As to the remaining requests made by Lazar, the government avows that the defendant has already been provided with all discoverable documents, that the documents are in the defendant's possession or the government does not have access to the requested information. *Brady* is relevant to those cases in which the government possesses information which the defendant does not, and the government's failure to disclose the information deprives the defendant of a fair trial. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Similarly, the purpose of *Brady* and its progeny is not to require the government to search out exculpatory evidence but rather to divulge whatever exculpatory evidence it already has. *Id*. Accordingly, the government is not required to produce or reproduce evidence that the defendant has in his possession, nor is it required to disclose evidence that it does not have access to,

despite the fact that the evidence may be exculpatory.

"The Supreme Court has made clear that the *Brady* rule is not an evidentiary rule which grants broad discovery powers to a defendant and that '[t]here is no general constitutional right to discovery in a criminal case.' " *United States v. Todd,* 920 F.2d 399, 405 (6th Cir.1990) (quoting *Weatherford v. Bursey,* 429 U.S. 545, 559, 97 S.Ct. 837, 845, 51 L.Ed.2d 30 (1977)). "The Court also has made it clear that while the *Brady* rule imposes a general obligation upon the government to disclose evidence that is favorable to the accused and material to guilt or punishment, the government typically is the sole judge of what evidence in its possession is subject to disclosure." *United States v. Presser,* 844 F.2d 1275, 1281 (6th Cir.1988). Furthermore, "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States v. Agurs,* 427 U.S. 97, 108, 96 S.Ct. 2392, 2399-2400, 49 L.Ed.2d 342 (1976). Consequently, if the government fails to comply adequately with its *Brady* obligations, it does so at its own peril.

Accordingly, the court accepts the government's averments that it has complied with its *Brady* obligations, and Lazar's remaining requests for evidence are denied.

IT IS SO ORDERED this 8th day of December, 2005.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE