

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA)
)
 v.)
) Crim. No. CR-2-93-46
 HAYTER OIL COMPANY, INC. OF GREENEVILLE,)
 TENNESSEE d/b/a MARSH PETROLEUM)
 COMPANY AND SONNY WAYNE MARSH,)
)
 Defendants.)

**RESPONSE OF THE UNITED STATES OPPOSING
DEFENDANT HAYTER OIL COMPANY'S MOTION
FOR DISCLOSURE OF ITS CO-CONSPIRATORS' STATEMENTS**

Defendant Hayter Oil Company moves this Court for an order granting the pretrial discovery of all statements of its co-conspirators and all other statements that the government will attribute to it at trial. Defendant's motion is based on readings of the rules of procedure and evidence that the federal circuit courts of appeals have consistently rejected as groundless and wholly without merit. For this reason, defendant's motion should be denied.

I. FACTUAL BACKGROUND

On July 21, 1993, a grand jury sitting in the Eastern District of Tennessee returned an indictment against defendant Hayter Oil Company of Greeneville, Tennessee d/b/a Marsh Petroleum Company ("Hayter Oil Company") and its president and

owner, Sonny Wayne Marsh. The indictment charged them with conspiring to fix retail gasoline prices in the Greeneville, Tennessee area, in violation of the Sherman Antitrust Act. 15 U.S.C. § 1.

On August 24, 1993, defendant Marsh moved for a bill of particulars. On September 14, 1993, defendant Hayter Oil Company filed several pretrial motions, including a motion for a bill of particulars and this motion for disclosure of its co-conspirators' statements.

II. INCORPORATION OF PLEADINGS

Because of the sequence in which the parties have filed their motions, the government has already submitted its arguments against the oil company's motion for its co-conspirators' statements in prior pleadings. Therefore, for the convenience of the Court, the government will base its opposition to this motion largely on its prior pleadings.

The first five demands for particulars in the defendants' motions for a bill of particulars are virtually identical, with the exception that defendant Hayter Oil Company deleted defendant Marsh's Demand 1(c) for disclosure of his co-conspirators' statements and submitted the demand in this motion. Consequently, the government has already addressed the oil company's motion for its co-conspirators' statements in its responses opposing defendant Marsh's and Hayter Oil Company's motions for a bill of particulars.

For the convenience of the Court, the United States now opposes this motion for disclosure of the oil company's co-conspirators' statements by relying primarily upon the arguments set forth at pages 13-16 of its Response Opposing Defendant Marsh's Motion For A Bill Of Particulars (Attachment 1), and the arguments set forth in pages 9 through 11 of its Response Opposing Defendant Hayter Oil Company's Motion For A Bill Of Particulars, (Attachment 2). The government's arguments opposing defendant Marsh's Demand 1(c) set forth in these responses are incorporated into this opposition as if fully set forth. The remainder of this response will briefly demonstrate why nothing in the oil company's memorandum supporting its motion compels this Court to reject uniform circuit court precedent and grant the motion.

III. ARGUMENT

Defendant argues, essentially, that the Federal Rules of Evidence are rules of criminal discovery. Defendant first notes that under Federal Rule of Criminal Procedure 16, defendants can discover their statements. Defendant cites a string of cases for this proposition of black letter law, and then takes the imaginative -- but legally unsupported -- leap to conclude that by blurring Rule 16 and the hearsay rules, it becomes entitled to discover its co-conspirators' statements. Defendant's argument is meritless.

Defendant's motion should be denied because, by attempting to transform the Federal Rules of Evidence into federal discovery rules, it attempts to expand the universe of discovery beyond the bounds set by the United States Court of Appeals for the Sixth Circuit. As that court has made clear, Rule 16, the Jencks Act, 18 U.S.C. § 3500, and Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d (1963) comprise "the universe of discovery to which the defendant is entitled" in a criminal case. United States v. Presser, 844 F.2d 1275, 1285-86 n.12 (6th Cir. 1988). As this Court noted in oral argument on September 27, 1993, the Federal Rules of Evidence simply are not rules of criminal discovery. For these reasons, the same argument that the oil company presents in this motion has been rejected by every federal circuit court to consider it to date. United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir. 1988) (per curiam), cert. denied, 488 U.S. 840 (1988); United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987); United States v. Roberts, 811 F.2d 257 (4th Cir. 1987) (en banc) (per curiam).

While the Sixth Circuit has not ruled on this issue, it cited both Orr and Roberts with approval in Presser. 844 F.2d at 1285. The decision in Tarantino, which also relied on Orr and Roberts, succinctly explained the lack of merit in defendant's motion:

we think it clear that as used in
Fed.R.Crim.P. 16(a)(1)(A) the phrase
"statements made by the defendant" does not
include statements made by co-conspirators
of the defendant, even if those statements

can be attributed to the defendant for purposes of the rule against hearsay.

846 F.2d at 1418.

Defendant's memorandum includes many citations to cases that stand for propositions of law that are not in dispute in this case. See, e.g., United States v. Crisona, 416 F.2d 107, 112-16 (2d Cir. 1969) (individual defendant entitled to discover tape recordings of his conversations with third parties that the government possessed); United States v. Morrison, 43 F.R.D. 516, 519 (N.D. Ill. 1967) (individual defendant entitled to discover summaries of his statements contained in federal agent's notes).

Curiously, the central argument in defendant's memorandum rests on citations to cases of highly questionable viability. Specifically, defendant cites United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985), and United States v. Konefal, 566 F. Supp. 698 (N.D.N.Y. 1983), for the proposition that defendants can discover the non-Jencks statements of co-conspirators whom the government does not intend to call as witnesses. But Jackson has been vacated and reversed in relevant part, and Konefal has been rejected in several recent decisions.

In United States v. Roberts, 811 F.2d 257 (4th Cir. 1987) (en banc) (per curiam), the Fourth Circuit expressly rejected the split-panel decision in Jackson and adopted Judge Wilkinson's concurring opinion in that case, in which he stated that Rule 16 does **not** give a defendant the right to discover his co-conspirators' statements. Roberts, 811 F.2d at 259 (citing

Jackson, 757 F.2d at 1492-94) (Wilkinson, J., concurring). Thus, for defendant's purposes, Jackson was reversed nearly six years ago.

Similarly, Konefal has been rejected in at least two recent circuit courts of appeals decisions. See Tarantino, 846 F.2d at 1418 (rejecting Konefal as allowing discovery not authorized by statute or the Constitution); Jackson, 757 F.2d at 1493 (same) (Wilkinson, J., concurring), aff'd, Roberts, 811 F.2d at 259. The subsequent history of Hayter Oil Company's cited authority reveals that the oil company's motion rests on dissolving or overruled precedent.

Finally, as far as defendant seeks discovery of the statements of potential government witnesses, the defendant's motion collapses under the Jencks Act. As the Sixth Circuit has explained, if evidence being sought in discovery falls "within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery," as "[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 1283. The United States already has agreed to provide this all Jencks material to the defendants in advance of trial.

IV. CONCLUSION

Federal Rule of Criminal Procedure 16 does not permit defendants to discover their co-conspirators' statements, "even if those statements can be attributed to the defendant for purposes of the rule against hearsay." Tarantino, 846 F.2d at 1418. Hayter Oil Company's attempt to use the Federal Rules of Evidence as a discovery tool has no foundation in law and, therefore, should be rejected. For the foregoing reasons, as well as those set forth in the government's responses to the defendants' motions for a bill of particulars, the oil company's motion seeking disclosure of its co-conspirators' statement should be denied.

DATED: October ____, 1993 Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on October 1, 1993 the Response Of The United States Opposing Defendant Hayter Oil Company's Motion For Disclosure Of Its Co-Conspirators' Statements was served on the following counsel by sending photocopies of the response to them via United States mail to the following addresses:

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Please refer
to: 60-5541-0030

October 1, 1993

Federal Express

R. Murry Hawkins, Clerk
Eastern District of Tennessee
Office of the Clerk
Federal Building, Room 212
101 Summers Street, West
Greeneville, TN 27743

Attention: Ms. Connie Lamb

Re: United States v. Hayter Oil Company, Inc. of
Greeneville, Tennessee d/b/a Marsh Petroleum Oil
Company and Sonny Wayne Marsh, CR-2-93-46

Dear Ms. Lamb:

Please find enclosed an original and two photocopies
of the following pleadings:

- (i) Response Of The United States
Opposing Defendant Hayter Oil
Company's Motion For Disclosure Of
Its Co-Conspirators' Statements;
- (ii) Response Of The United States
Opposing Defendant Hayter Oil
Company's Motion To Dismiss
Indictment; and
- (iii) Response of the United States
Opposing Defendants Hayter Oil
Company and Sonny Wayne Marsh's
Motions for a Juror Questionnaire.

Please forward a copy to Judge Tilson and return a
file-stamped copy of these documents to us in the enclosed
self-addressed envelope.

Thank you very much for your help and cooperation in
this matter.

Sincerely,

William D. Dillon
Attorney

Enclosures

cc: Roger W. Dickson, Esquire
Frank Johnstone, Esquire
John T. Milburn Rogers, Esquire

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