UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA	)	Criminal No.: H-97-93
	)	
v.	)	Violations:
	)	
MARK ALBERT MALOOF,	)	15 U.S.C. §1
	)	18 U.S.C. § 371
Defendant.	)	Filed 8/25/97

UNITED STATES' RESPONSE TO DEFENDANT'S
MOTION TO COMPEL PRODUCTION OF CO-CONSPIRATORS' STATEMENTS

The United States of America, through its undersigned attorney, hereby responds to Defendant's Motion to Compel Production of Co-conspirators' Statements ("Defendant's Motion"). In his Motion, Defendant repeats his earlier request for production of statements of his co-conspirators under Fed. R. Crim. P. 16(a)(1)(A). See Def. Mot. for Prod. and Discl., paragraphs 3, 4. The Defendant attempts to circumvent the disclosure rules of the Jencks Act by seeking early discovery of witness statements under the guise of Rule 16. Witness statements are not covered by Rule 16. Further, non-witness statements are not subject to discovery under Rule 16. Therefore, Defendant's Motion should be denied.

STATEMENTS OF DEFENDANT'S CO-CONSPIRATORS WHO ARE PROSPECTIVE GOVERNMENT WITNESSES ARE NOT STATEMENTS OF DEFENDANT FOR PURPOSE OF RULE 16 DISCOVERY AND ARE INSTEAD GOVERNED BY THE JENCKS ACT

Only statements made directly by the Defendant are subject to discovery under Rule 16; statements made by co-conspirators, even if those statements are attributed to the defendant under the Federal Rules of Evidence, are not discoverable under the plain language of Rule 16. Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure provides in pertinent part that "the government shall permit the defendant to inspect . . . any relevant . . . statements made by the defendant." Fed. R. Crim. P. 16(a)(1)(A). In Defendant's Motion, he argues that because statements made by his co-conspirators may be treated as the Defendant's own for hearsay analysis under Federal Rule of Evidence 801(d)(2)(E), the statements are "made by the defendant," and thus discoverable under Rule 16(a)(1)(A). What Defendant fails to mention is that every circuit court that has addressed this issue, including the circuits from which the defendants cases emanate, has rejected this reasoning. United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir. 1988) ("we think it clear that . . . 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 . . . . We note that this is in agreement with every other circuit that has examined the question."); United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987) (a more recent case from the same circuit as the district court opinion, United States v. Thevis, 84 F.R.D. 47 (N.D. Ga. 1979) cited by the Defendant; "We agree with the Fourth Circuit that Rule 16(a)(1)(A) does not apply to coconspirator statements."); United States v. Roberts, 811

F.2d 257 (4th Cir. 1987) (in banc) ("[R]ule [16(a)(1)(A)] does not mention and is not intended to apply to the discovery of statements made by co-conspirators."); United States v. Percevault, 490 F.2d 126 (2d Cir. 1974) (a more recent case from the same circuit as the district court opinion, United States v. Agnello, 367 F. Supp. 444 (E.D.N.Y. 1973) cited by Defendant, that holds that statements by co-conspirators are not discoverable under Rule 16); United States v. Mayberry, 896 F.2d 1117, 1122 (8th Cir. 1990) (same).

Furthermore, not only does the defendant's argument contradict well-established precedent in every circuit that has addressed this issue, but it also ignores the plain language of the Jencks Act, 18 U.S.C. § 3500. The Jencks Act provides in pertinent part that "no statement . . . in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified . . . in the trial of the case." Id. The Jencks Act is the exclusive vehicle for disclosure of statements made by government witnesses. Palermo v. United States, 360 U.S. 343 (1959). In addition, lower courts consistently hold that a "coconspirator who testifies on behalf of the government is a witness under the [Jencks] Act," and therefore discovery of statements by such persons is governed by the Jencks Act and not Rule 16. In re United States, 834 F.2d 283, 286 (2d Cir. 1987). See also Roberts, 811 F.2d at 259; United States v. Metropolitan Enterprises, Inc., 728 F.2d 444, 451 (10th Cir. 1984); United States v. Collins, 652 F.2d 735, 738 (8th Cir. 1981). Therefore, the statements by the alleged co-conspirators in this case that are scheduled to be called as witnesses by the government are governed by the provisions of the Jencks Act, and not Rule 16(a)(1)(A) as defendant

suggests. Therefore, the government will produce the statements to the Defendant two weeks before trial, when it has agreed to provide the Jencks Act statements.

STATEMENTS OF DEFENDANT'S CO-CONSPIRATORS WHO ARE NOT PROSPECTIVE GOVERNMENT WITNESSES ARE NOT STATEMENTS OF DEFENDANT FOR PURPOSE OF RULE 16 DISCOVERY

Defendant's Motion further requests production of statements made to the government by six other individual co-conspirators who may not testify as government witnesses. These statements are not those of prospective witnesses and are therefore not covered by the Jencks Act. However, like the statements of the prospective witnesses above, these statements are not subject to discovery under Rule 16(a)(1)(A). Roberts, 811 F.2d at 258; Orr, 825 F.2d at 1541; Tarantino, 846 F.2d at 1418. In Roberts, the Fourth Circuit faced exactly this issue when it reconsidered its earlier panel opinion in that case. United States v. Roberts, 793 F.2d 580, 584 (4th Cir.), rev'd, 811 F.2d 257 (4th Cir. 1987) (in banc). In reversing the opinion of the panel, which notably cited to each of the cases the Defendant in this case offers in support of his claim, the in banc court held that under no circumstances does Rule 16 apply to statements made by any persons other than the defendant. Roberts, 811 F.2d at 258. The D.C. Circuit has also addressed a claim similar to that of the defendant in the case at bar. Tarantino, 846 F.2d at 1418. In Tarantino, the court noted that "some courts have ordered disclosure of co-conspirator statements where the prosecution does not propose to put the co-conspirator on the stand," but held that because of the unambiguous language of Rule 16 "we are without authority to order such discovery." Tarantino, 846 F.2d at 1418. The court went on to hold that "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." Id. Every circuit court that has addressed this issue has held that Rule 16(a)(1)(A) does not apply regardless of whether or not a co-conspirator is a prospective witness. The defendant therefore relies on scattered, and rather dated, lower court rulings that in some cases are specifically criticized in more recent circuit and district court opinions. See, for example, Tarantino, 846 F.2d at 1418; United States v. Lopez, 1997 WL 205294, at *3 (N.D.N.Y. 1997).

Courts characterize the arguments made by the Defendant that Rule 16 covers statements made by co-conspirators as the equivalent of statements made by the defendant as "legal legerdemain," In re United States, 834 F.2d at 287, and as "a resourceful process of reasoning, whose apparent logical consistency evaporates under closer analysis," Percevault, 490 F.2d at 130. For these reasons, the language of Rule 16(a)(1)(A) and the policy considerations addressed by courts strongly militate against applying such an overly broad reading of the words "made by the defendant." Defendant's Motion should be denied.

Respectfully submitted,

/s/

MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
(214) 880-9401

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the United States' Response to Defendant's Motion to Compel Production of Co-conspirators' Statements was sent via Federal Express this __ day of August, 1997, to:

J. Mark White, Esq.
White, Dunn & Booker
290 North 21st Street
Birmingham, AL 32503

Albert C. Bowen, Esq.
Beddow, Erben & Bowen, P.A.
Second Floor - 2019 Building
2019 3rd Avenue, North
Birmingham, AL 35203

George McCall Secrest, Jr.
Bennett, Secrest & Meyers, L.L.P.
333 Clay Street, Suite 3830
Houston, TX 77002

/s/

MARK R. ROSMAN
Attorney-in-Charge
Florida State Bar No. 0964387
U.S. Department of Justice
Antitrust Division
1601 Elm Street, Suite 4950
Dallas, Texas 75201-4717
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ORDER

Before the Court is Defendant's Motion to Compel Production of Co-conspirators' Statements. The government having acknowledged its continuing responsibility to provide defendant with access to all Rule 16 and Brady materials,

IT IS HEREBY ORDERED that Defendant's Motion is hereby DENIED.

DONE AND ENTERED THIS ____ day of _____, 1997.

_____

United States District Judge