IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	Criminal No. 00-033
	)	
v.	)	Judge Marvin Katz
	)	
MITSUBISHI CORPORATION,	)	Violations: 15 U.S.C. § 1 and 18 U.S.C. § 2 (a)
	)	
Defendant.	)	Filed:

ORDER

AND NOW, this day of January 2001, upon consideration of Defendant's Request for Attorney Notes and the Government's Response in Opposition thereto, it is ORDERED that the motion is DENIED.

By the Court:

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UNITED STATES DISTRICT JUDGE

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	)	
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	)	
Defendant.	)	Filed: 01/17/01

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR ATTORNEY NOTES

For the reasons stated in the accompanying memorandum of law, the United States respectfully requests that the Court issue an Order denying the Defendant's Motion for Attorney Notes.

Dated:

Respectfully submitted,

_____

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MEMORANDUM OF LAW IN SUPPORTING GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S REQUEST FOR ATTORNEY NOTES

I. INTRODUCTION

The Government submits this memorandum of law in support of its response in opposition to defendant Mitsubishi Corporation's (Mitsubishi) motion to compel the Government to produce all notes and other documents reflecting interviews and proffers (including attorney proffers) of all witnesses the Government intends to call at trial. Defendant maintains that such disclosure is required under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). The Government opposes this request as beyond the purview of *Brady, Giglio* and Third Circuit law.

II. THE GOVERNMENT'S BRADY PRODUCTION

As the defendant notes, the Government began its *Brady* production very early in this case, affording Mitsubishi every opportunity to pursue leads and developments based on potentially exculpatory information known to the Government. As outlined in defendant's motion, *Brady* disclosure began on June 21, 2000 and has been ongoing. The Government has just responded to recent defense interrogatories in a letter dated January 16, 2001 (see Government Attachment 1). Moreover, the Government has turned over all *Jencks* material two

weeks before trial which, given the length of the trial, means the defense will have witness statements anywhere from two weeks to perhaps two months before the witness actually testifies. Finally, the Government produced to the defense, at the time it made its *Jencks* disclosure, all paralegal notes taken at interviews of Government trial witnesses.

III. LEGAL ARGUMENT

There is no dispute that the Government began producing *Brady* material many months before trial. Additionally, the Government continued to supplement its *Brady* response as the defendant posed further interrogatories or the Government became aware of additional potential exculpatory evidence. In short, the Government has produced all *Brady* material.[1] The issue now is whether the defense is nonetheless entitled to all attorney notes of trial witness interviews, including notes of any conversations the Government attorneys may have had with counsel for such witnesses.

Defendant's argument is twofold. First, it argues that only the defense can determine what is *Brady* material and, therefore, the defense as matter of law should have complete access to all attorney notes. Second, it contends that all investigatory notes of interviews, whether taken by attorneys, agents or paralegals, must be produced to the defense as a matter of law, because only then can the defense compare the witness's recollection at trial to what notes may indicate the witness might have said at an earlier time. Defendant's argument is wrong.

A. Brady Does Not Require Pretrial Disclosure of Attorney Interview Notes

Defendants argue that since neither the Government nor the Court is privy to the defense

[1] The Government has also produced all *Jencks* material and all Rule 16 material. Thus, all known discovery material has been provided well in advance of trial.

trial strategy, neither can determine whether attorney notes contain *Brady* material and, accordingly, all attorney notes must be turned over to the defense. Defendant's argument is without merit. Were it meritorious, *Brady* would require production of attorney notes in all cases, something *Brady* clearly does not require.[2]

Brady and *Giglio* are not general discovery tools for open access to the prosecutors file. Rather, the Third Circuit recognizes that:

> In Brady, the Supreme Court held that due process required that the government produce all 'exculpatory' evidence, which includes both '[m]aterials . . . that go to the heart of the defendant's guilt or innocence and materials that might affect the jury's judgment of the credibility of a crucial prosecution witness.'

United States v. Ramos, 27 F.3d 65, 68 (3d Cir. 1994)(citations omitted). In *United States v. Agurs*, the Supreme Court itself said *Brady* does not establish a "duty to provide defense counsel with unlimited discovery of everything known by the prosecutor...." *United States v. Agurs*, 427 U.S. 97, 106 (1976). Furthermore, it is well settled that "mere speculation about materials in the government's files [does not require] the district court... under *Brady* to make materials available for [the appellants] inspection. The possibilities for abuse in such a procedure are manifest." *United States v. American Radiator & Standard Sanitary Corp.* 433 F.2d 174, 202 (3d Cir. 1970)[3]

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[2] In its Rule 16 production, the Government has already turned over to the defense all statements, including interview notes of all employees of the defendant (including its wholly owned subsidiary Mitsubishi International corporation), all documents obtained in the grand jury investigation, all exhibits, all translations to be offered and translations made of other documents during the investigation.

[3] Defendant requests not only proffer interview notes of Government witnesses, but all attorney notes which would include pre-trial preparation interviews. Such disclosure could give the defense a detailed road map of the governments trial strategy which while indeed helpful, is not the type of information required under *Brady*.

Defendant's effort to turn *Brady* into an open file discovery rule was specifically rejected by the Supreme Court in *Pennsylvania v. Ritchie* wherein it held that:

> . . . [W]here a defendant makes only a general request for exculpatory material under Brady . . . it is the State that decides which material must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.

480 U.S. 39, 59 (1987) (citation omitted).

B. The Possibility that A Witness's Recollection May Vary at Trial does not Require the Production Of all the Evidence Contained in the Government's Notes

Defendant's second basis for arguing that disclosure of attorney notes is warranted is the possibility that one or more witnesses may testify at trial differently from that which he previously told the Government. Defendant contends it needs attorney notes to determine if that, in fact, happens. This mere speculation on defendant's part is not sufficient to require disclosure of attorney notes.

The Government recognizes that a change in a witness's recollection over time may become discoverable as *Brady*, if the change of recollection is about a material matter. This is true whether or not such a change is recorded in notes.[4]

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[4] Defendant argues the attorney notes are in essence *Jencks* material and thus will fairly reveal any variations in a witness's testimony over time. Such is not necessarily the case. As the Third Circuit noted in *United States v. Ramos* in holding the fact that some investigator notes were destroyed did not require reversal on *Brady* grounds:

> [The destroyed notes] clearly do not constitute 'statements' of the cooperating co-conspirators, for they are neither 'substantially verbatim recitals' of what those witnesses said during their proffers nor writings which they signed or otherwise adopted or approved. *Ramos*, 27 F.3d at 69-70.

In the instant case, the defendant has information relating to a witness' recollection over time. For each witness it presently intends to call at trial, the Government has produced any paralegal notes from witness interviews and any statements of the witness, either grand jury transcript or written statement (see Government Attachment 1). Defendant also has the summarized *Brady* disclosures previously provided by the Government. In addition, the defendant of course will have the actual trial testimony of the witness. For example, with respect to Robert Krass, a key conspirator at UCAR, the defense has paralegal interview notes from two proffer interviews, (October 14, 1999 and December 10, 1999), Krass's declaration of January 15, 2000, and summarized Brady disclosures.[5] Moreover, notwithstanding this production, the Government recognizes that its obligation to disclose material changes in a witness's recollection is a continuing one.

Defendant cites only one case in which a trial court required the production of attorney notes of witnesses cooperating with the Government. *United States v. Sudikoff*, 36 F. Supp. 2d 1196 (C.D. Cal. 1999). *Sudikoff*, however, is distinguishable from the instant case. Unlike the defendant in *Sudikoff*, the defendant here has been provided with material including notes and prior statements or grand jury testimony that cover a witness's dealing with the Government over

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The *Ramos* Court cited *Palermo v. United States*, 360 U.S. 343, 350 (1959) where the Supreme Court itself had noted that:

> it [would be] "grossly unfair" to permit defendants to use statements to impeach a witness which could not fairly be said to be the witness' [sic] own rather than the product of the investigator's selections, interpretations and interpolations.

[5] The Government has provided the defendant with materials from at least one of the three categories of (1) paralegal notes, (2) statements, and (3) summarized *Brady* disclosures, for every witness the Government presently intends to call at trial.

time. The Government has also provided defense counsel with summaries of plea negotiations, regardless of whether the negotiations were recorded in notes. To the extent that *Sudikoff* is deemed on point, the Government simply notes that it is not the law in the Third Circuit, nor has it been followed or cited to by any other court. Indeed, if Sudikoff were followed to its logical conclusion, all attorney notes in every case would be discoverable, turning *Brady* into the general discovery tool it was not intended to be.

IV. CONCLUSION

For the reasons set forth above, the Government respectfully submits that defendant's motion to compel the Government to produce all notes and other documents reflecting interviews and proffers (including attorney proffers) of all witnesses the Government intends to call at trial be denied.

Dated:

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

This is to certify that on the 17th day of January 2001, a copy of the Government's Response in Opposition to Defendant's Request for Attorney Notes, has been hand delivered to counsel of record for the defendant as follows:

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