

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

UNITED STATES OF AMERICA)	Criminal No. 3-95CR-294-R
)	
v.)	Filed: 12/4/95
)	
MRS. BAIRD'S BAKERIES, INC. and)	Violation: 15 U.S.C. § 1
FLOYD CARROLL BAIRD,)	
)	
Defendants.)	

**GOVERNMENT'S RESPONSE TO DEFENDANTS' MRS. BAIRD'S BAKERIES, INC.
AND FLOYD CARROLL BAIRD'S MOTION AND BRIEF
FOR DISCLOSURE OF BRADY MATERIAL**

The United States of America, through its undersigned attorneys, hereby responds to Defendants' Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird's Motion and Brief for Disclosure of Brady Material. The government is aware of its obligations with respect to exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), and either has, or will, produce to the Defendants all such information properly falling within the scope of Brady and its progeny.

However, the defendant is not entitled to use Brady as a discovery device to gain general access to the prosecution's files. The rule under Brady is not a discovery rule, but rather a rule of fairness and minimum prosecutorial obligation. United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in the preparation of his defense, but, rather, to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him.

United States v. Bagley, 473 U.S. 667, 675 (1985); United States v. Ruggiero, 472 F.2d 599, 604 (2nd Cir.), cert. denied 412 U.S. 939 (1973).

Brady does not require the Court to ensure the defendant's access to all government material so that the defendant might find something exculpatory. United States v. Davis, 752 F.2d 963, 977 (5th Cir. 1985). Nor does it require the government to search its files for "possibly" exculpatory material. United States v. Agurs, 427 U.S. 97, 110-11 (1976); North American Rockwell Corp. v. N.L.R.B., 389 F.2d 866, 873 (10th Cir. 1968) ("Brady did not declare that a prosecutor must on demand comb his file for bits and pieces of evidence which conceivably could be favorable to the defense"). Therefore, the government will provide the Defendants with all Brady material in its possession. However, beyond these requirements, the government will not afford the defendant general discovery of information and evidence within its files.

In any event, the government will respond to each specific request contained in defendant's motion. The paragraph numbers of this response correspond directly to the numbering of the request in the motion.

1. Any written statements, interview notes, transcripts of testimony, or substance of any oral statements made by any persons who were interviewed or questioned by any agent of the government and denied any participation in improper or illegal price fixing, bid rigging, etc.

The government has previously provided Defendants with information concerning at least six persons who, in response to questioning by an agent of the government, denied participation in at least one of the conspiracies charged in the Indictment. However, Defendants

are not entitled to all written statements, interview notes, transcripts of testimony or the substance of any oral statements where the basis for the request is Brady. Brady is not a discovery tool and therefore requires only that the government provide the defendant with the exculpatory or impeachment material in some form.

2. Any written statements, interview notes, transcripts of testimony, substance of any oral statements of any persons, or any documents which indicate or reflect that no overt act was committed in furtherance of the conspiracy charged in Count 2 of the Indictment after September 28, 1990.

The government is unaware of any responsive material that has not been disclosed.

3. Any information, including internal government memoranda, letters, notes, or the substance of any oral communications between any agents of the government, and any other persons or parties reflecting the basis of the government's decision not to seek an indictment against Campbell Taggart, Inc., and Continental Baking Company in this investigation.

The decision who and when to indict generally rests entirely within the discretion of the prosecutor, provided the prosecutor has probable cause to believe that the accused committed an offense. Wayte v. United States, 470 U.S. 589, 607-8, 105 S. Ct. 1524, 1530-31 (1985). Because an examination of the basis of a prosecution may threaten to chill law enforcement and undermine prosecutorial effectiveness, courts are properly hesitant to examine the decision whether to prosecute. Id.

The Defendants make no showing that the exercise of prosecutorial discretion in this case operates to exculpate these Defendants or could be used to impeach a witness's credibility. Indeed, because neither Campbell-Taggart nor Continental Baking Company has been named a co-conspirator in either conspiracy charged in the Indictment, it is difficult to determine how the decision not to name them as Defendants could be relevant to any issue in this case. Therefore, because the requested information is neither exculpatory, impeaching nor material, Brady does not authorize its disclosure

4. Any information, including internal government memoranda, documents or writings of any nature or oral communications not reduced to writing, reflecting the government's desire to have this matter presented to the grand jury prior to September 30, 1995, in order to enhance the Antitrust Division's statistics reflecting cases indicted in that fiscal year.

As stated above, the Defendants have not made any showing that the exercise of prosecutorial discretion in this case is in any way exculpatory to the accused, could be used to impeach a witness's credibility or is otherwise material to any issue in this case. Therefore, disclosure is not authorized by Brady or its progeny.

5. Any information reflecting any prior convictions of any unindicted co-conspirators in this case or of any government witness.

This request duplicates request number 10 in Defendant's Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses, and is answered there.

6. Any information reflecting that any unindicted co-conspirators or any government witnesses have been the subjects of any cease and desist orders, consent decrees, or orders, or other administrative orders or disciplinary proceedings of the Federal Trade Commission, the Antitrust Division of the Department of Justice, or any other agency or department of the U.S. government or any state government or entity.

This request duplicates an unnumbered request contained in Defendant's Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses, and is answered there.

7. Any information, including internal government memos, letters, notes, writings of any nature, or oral communications not reduced to writing, scrutinizing, examining, questioning, criticizing or evaluating the handling of the grand jury investigation in this matter by former Antitrust Division, Department of Justice, Attorney J. Oliver Lee, Jr.

The government is aware that defense counsel have made an allegation regarding Mr. Lee's handling of a portion of the grand jury investigation which preceded the Indictment in this case. See, Government's Response to Defendants' Pretrial Motion and Brief to Require Disclosure of Evidence Adversely Affecting the Credibility of Government Witnesses. However, defense counsel have not explained how the requested information could in any way be exculpatory as to these Defendants nor have they explained how the requested information could be considered impeachment material as to any potential government witness. Because the requested information is neither exculpatory, potential impeachment, nor material, the government refuses to provide it.

8. Any information, including memoranda, or the substance of any oral discussions between the government and agents, representatives, or attorneys for Campbell Taggart, Inc. and/or Continental Baking Company, Inc. as to those companies' status with regard to any investigation as to Sherman Act violations within the State of Texas.

The government's investigation of price fixing in the bread industry in the State of Texas is continuing. Disclosure of the status of Campbell Taggart, Inc. and Continental Baking Company with regard to that investigation is prohibited by Rule 6, Fed. R. Crim. P. See, In Re Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299, 1302-03, (M.D. Fla. 1977). In any event, the requested information is neither exculpatory, potential impeachment, nor material. See government's answer to Request 3.

9. Any statements made by government witnesses which conflict, either with statements made previously by the witness or with statements made by other witnesses as to material facts which the government intends to bring before the jury.

As required by the Court's Pretrial Order, filed October 13, 1995, the government will provide each defendant with Jencks Act material on the day prior to the testimony of the witness to whom such material relates.

10. Any information, including internal government memoranda, letters, writing of any nature, or the substance of any oral communications not reduced to writing as to the reason to the recent grand jury investigation involving Flowers Bakery and others in the Macon, Georgia was terminated.

For the reasons stated in response to request 3, the information requested is neither exculpatory or material, nor is it impeachment material as to any probable government witness and, therefore, is not subject to disclosure.

11. Any grand jury testimony of any witness before a federal grand jury investigating this matter wherein they were advised by any government attorney of the penalties of perjury for failure to answer questions truthfully, or wherein they were in any way advised, threatened, coerced, intimidated or were otherwise subject of any such conduct by government attorneys indicating that the government attorneys conducting the grand jury questioning did not believe the witness was being truthful in their answers.

It is the practice of the Antitrust Division to routinely warn a witness about the danger of prosecution for perjury and false statements at the beginning of that witness' testimony. Indeed, it is sometimes appropriate to remind the witness that he is under oath and of the possible penalties for untruthful testimony. See Antitrust Division Grand Jury Practice Manual, Section IV (F)(12). In any event, the government is aware of no instance where a witness was threatened, coerced, or intimidated while appearing before a federal grand jury investigating this matter.

Charles Johnson has stated his belief that the government attorneys conducting his grand jury questioning did not believe that his answers were truthful. Subsequently, Mr. Johnson agreed to plead guilty to a one-count information charging him with making false statements during his grand jury appearance.

The Defendants request the grand jury testimony of Emilie Slovak both here and in their Motion and Brief for Discovery of Grand Jury Testimony of Emilie Slovak. Ms.

Slovak's testimony does not qualify for disclosure under either Rule 16 or Brady. It is neither exculpatory, potential impeachment, or material as to any issue in this case.

12. Any information reflecting that the government has consulted or conferred with any expert witnesses, including but not limited to economists, relating to price changes in the market areas the subject of the Indictment in this case where such experts have given any opinions favorable to the defenses' contention that no illegal price fixing occurred.

No such information exists.

CONCLUSION

The government reiterates that it is aware of its obligation under Brady and its progeny and either has, or will, produce all such information falling within the scope of Brady. However, defendants are not entitled to use Brady as a discovery device to gain general access to the prosecution files. Consequently, because defendants' motion requests information not authorized under Brady, their motion must be denied.

Respectfully submitted,

_____/s/_____
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ORDER

The Court, having considered the Defendants' Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird's Motion and Brief for Disclosure of Brady Material and the Government's Response hereby finds that the motion should be denied.

IT IS SO ORDERED this ____ day of _____, 1995.

JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT

CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Government's Response to Defendants' Mrs. Baird's Bakeries, Inc. and Floyd Carroll Baird's Motion and Brief for Disclosure of Brady Material and Order were mailed via Federal Express on the ____ day of December 1995, to

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