

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION**

UNITED STATES OF AMERICA,)

)

)

v.)

)

**CHARLES WESLEY GILMORE AND
WALTER LEFIGHT CHURCH,**)

)

Defendants.)

Case No. 1:00CR00104

Case No. 1:03CR30014

)

OPINION

)

UNITED STATES OF AMERICA,)

)

By: James P. Jones

United States District Judge

)

v.)

)

SHERI LYNN HOWELL NICHOLS,)

)

Defendant.)

Anthony P. Giorno and Rick A. Mountcastle, Assistant United States Attorneys, Abingdon and Roanoke, Virginia, for United States of America; Anthony F. Anderson, Roanoke, Virginia, and Stephen J. Kalista, Big Stone Gap, Virginia, for Defendant Charles Wesley Gilmore; James C. Turk, Jr., Stone, Harrison & Turk, P.C., Radford, Virginia, and Beverly M. Davis, Davis, Davis & Davis, Radford, Virginia, for Defendant Walter Lefight Church; Timothy W. McAfee, Norton, Virginia, for Defendant Sheri Lynn Howell Nichols.

The defendants Charles Wesley Gilmore and Walter Lefight Church are charged with various federal crimes arising out of the murders of Robert Davis, Una Davis, and Robert Hopewell, Jr., on April 16, 1989, in Pocahontas, Virginia.¹ Defendant Sheri Lynn Howell Nichols was indicted separately by the government for allegedly committing perjury at Church's previous trial that ended in a hung jury and mistrial. I have consolidated the cases for trial, and in this opinion I set forth the reasons for my prior denial of certain pretrial motions.²

I

Defendant Gilmore has moved to dismiss Counts One, Two, Three, and Four on double jeopardy grounds.³

On December 6, 1989, Gilmore pleaded guilty in the United States District Court for the Southern District of West Virginia to an information charging him with

¹ The government's theory of the case is that Gilmore, a drug kingpin, hired Church and another man to murder Robert Davis because Gilmore understood that Davis, a member of his drug ring, was about to inform on him to federal authorities. According to the government, Church and his accomplice Sam Ealy killed Davis at his home in the early morning hours of April 16, 1989, and immediately thereafter murdered his wife Una and her fourteen-year-old son Robert because they had witnessed Davis' murder. Ealy has already been convicted.

² An Order was entered on January 29, 2004, denying the motions.

³ The Double Jeopardy Clause provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb" U.S. Const. amend. V.

engaging in a continuing criminal enterprise (“CCE”) from in and about 1980 up to and including October 1, 1988, in violation of 21 U.S.C.A. § 848 (West 1999). The continuing series of violations of the drug laws alleged in the information as predicate acts of the CCE were distributing drugs and using a communication facility to possess or distribute a controlled substance. *See* 21 U.S.C.A. §§ 841(a)(1), 843(b) (West 1999). Pursuant to a plea agreement, other charges against Gilmore, including conspiring to distribute cocaine in violation of 21 U.S.C.A. § 846 (West 1999),⁴ were dismissed.

Count One of the present indictment charges Gilmore with violating § 846 by conspiring to murder Robert Davis while engaged in and while working in furtherance of a CCE and Counts Two, Three, and Four charge him with violating § 848(e) by murdering Robert Davis (Count Two), Una Davis (Count Three), and

⁴ Section 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C.A. § 846. The offense in subchapter I that Gilmore had allegedly conspired to commit was § 841(a)(1), which prohibits knowingly or intentionally distributing or possessing with intent to distribute cocaine. 21 U.S.C.A. § 841(a)(1).

Robert Hopewell (Count Four) while engaged in and while working in furtherance of a CCE.⁵

Gilmore has moved to dismiss Counts One through Four of the indictment on the ground of double jeopardy. Gilmore claims that Count One (the § 846 conspiracy to murder in furtherance of a CCE charge) is barred by the 1989 dismissal of his § 846 conspiracy to distribute cocaine charge. He also claims that Counts Two, Three, and Four (the § 848(e) CCE-murder charges) are barred by his prior CCE conviction.⁶

I find that Gilmore's double jeopardy motion is without merit.

⁵ Gilmore and Church are also charged with killing Robert Davis with the intent to prevent him from communicating with federal authorities (Count Five) (18 U.S.C.A. § 1512(a)(1)(C) (West 2000 & Supp. 2003)) and Church is charged with killing Una Davis and Robert Hopewell to prevent their communication with federal authorities (Counts Six and Seven). The government is seeking the death penalty for Church and Gilmore under Counts One, Two, Three, and Four.

⁶ Gilmore also asserts that he cannot be convicted of both the murder of Robert Davis in furtherance of a CCE (Count Two) and conspiracy to murder Robert Davis in furtherance of a CCE (Count One). (Def.'s Brief in Supp. of Mot. to Dismiss 5.) He argues that he cannot be convicted of both Counts One and Two because they allege the same agreement to murder Robert Davis. *See United States v. Rutledge*, 517 U.S. 292, 300 (1996) (holding that conspiracy to distribute drugs in violation of § 846 is a lesser included offense of distributing drugs in furtherance of a CCE in violation of § 848 when the "in concert" element of the § 848 CCE offense is based on the same agreement as the § 846 conspiracy offense). But this is not an issue unless he is actually convicted of both. *See, e.g., United States v. Ziskin*, No. 02-50443, 2003 WL 22939217, at *12 (9th Cir. Dec. 15, 2003) (explaining that although "[c]onspiracy is considered a lesser-included offense of a CCE, and a court may not impose punishment for both offenses without violating the Double Jeopardy Clause . . . [,] the Double Jeopardy Clause [does not] prohibi[t] a *trial* on both conspiracy and CCE charges; it merely precludes the imposition of cumulative punishments") (citations omitted).

In challenging Counts Two, Three, and Four, Gilmore argues that CCE is a lesser included offense of CCE-murder, and therefore prosecuting him for CCE-murder following his conviction for CCE violates the Double Jeopardy Clause.⁷ In

⁷ The portion of the CCE statute that Gilmore pled guilty to in 1989, 21 U.S.C.A. § 848(c), provides:

[A] person is engaged in a continuing criminal enterprise if –

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter –

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C.A. § 848(c) (West 1999). The provisions of subchapter I charged against Gilmore were 21 U.S.C.A. §§ 841(a)(1) and 843(b), which together prohibit knowingly or intentionally using a communication facility to possess or distribute a controlled substance. *See* 21 U.S.C.A. §§ 841(a)(1), 843(b).

The CCE-murder portion of the statute, 21 U.S.C.A. § 848(e)(1)(A), provides that:

[A]ny person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death.

a case such as this, “[w]here the same conduct violates two statutory provisions,” I must first determine whether Congress “intended that each violation be a separate offense.” *United States v. Garrett*, 471 U.S. 773, 778 (1985). Second, I must examine the instant charges and compare them to the defendant’s past conviction in order to assess whether he is being charged with the same offense. *Id.* at 787. *See United States v. McHan*, 966 F.2d 134, 141 (4th Cir. 1992) (describing the *Garrett* analysis and applying it to an interlocutory appeal of defendant’s motion to dismiss his CCE charge on grounds of double jeopardy).⁸

21 U.S.C.A. § 848(e)(1)(A) (West 1999).

⁸ Gilmore relies upon *Brown v. Ohio*, 432 U.S. 161 (1977), to support his argument that CCE is a lesser included offense of CCE-murder and that he therefore has already been convicted of the lesser included offense with which he is now charged. *See* 432 U.S. at 162-63, 166 (stating that “where the same act or transaction constitutes a violation of two distinct statutory provisions,” the appropriate test to determine whether there are two offenses or only one for double jeopardy purposes is “whether each provision requires proof of an additional fact which the other does not”); 284 U.S. at 304 (same). But the *Brown* analysis is generally inapplicable to CCE offenses. *See United States v. Felix*, 503 U.S. 378, 390 (1992) (stating that “[r]eliance on the lesser included offense analysis, however useful in the context of a ‘single course of conduct’ . . . falls short in examining CCE offenses that are based on previously prosecuted predicate acts”); *Garrett v. United States*, 471 U.S. at 790 (expressing “serious doubts” as to whether a predicate offense was a lesser included offense of a multilayered crime, such as a CCE offense); *see also United States v. Arnoldt*, 947 F.2d 1120, 1126 (4th Cir. 1991) (holding that “prosecutions under statutes such as RICO and CCE—statutes targeted at ‘multilayered’ instances of criminal conduct invariably occurring at different places and times—call for a calculus reflecting the concerns expressed in *Garrett*” instead of the single transaction view applied in *Brown*).

The Fourth Circuit has squarely held that Congress intended CCE-murder to be a “separate substantive” offense from engaging in a CCE. *United States v. NJB*, 104 F.3d 630, 632-35 (4th Cir. 1997).⁹

Moreover, “[i]n the circumstances where a person has been convicted of an offense which also constitutes an element of a factually larger and multilayered offense, . . . [the Fourth Circuit has] held that the offenses are not the same and thereby prohibited by the Double Jeopardy Clause.” *McHan*, 966 F.2d at 140 (citing *United States v. Arnoldt*, 947 F.2d 1120 (4th Cir. 1991)). In *Arnoldt*, the defendant was convicted of a RICO violation in which the indictment alleged that he had committed eight predicate acts. 947 F.2d at 1125. The first four predicate acts constituted four counts of drug-related conduct for which he had already been convicted. *Id.* *Arnoldt* argued that the use of his prior convictions as predicate acts in a subsequent RICO prosecution violated the Double Jeopardy Clause. *Id.* The court upheld the government’s use of *Arnoldt*’s prior convictions as predicate acts in its successive RICO prosecution.¹⁰ *Id.* at 1127. *See also McHan* at 139-41 (relying

⁹ Other courts have also held that § 848(e) CCE-murder is a separate offense from CCE. *See United States v. Chandler*, 996 F.2d 1073, 1099-1100 (11th Cir. 1993); *United States v. Villarreal*, 963 F.2d 725, 727-28 (5th Cir. 1992); *United States v. Holland*, 3 F. Supp. 2d 1293, 1295 (N.D. Ala. 1998), *aff’d*, 198 F.3d 263 (11th Cir. 1999).

¹⁰ It should be noted that *Arnoldt*’s past convictions were “used as evidence of the ‘pattern of racketeering activity’ element of the RICO offense,” but that evidence would not, “standing alone, [have] establish[ed] an essential element of the RICO offense.” *Arnoldt* at

on *Arnoldt* in rejecting a double jeopardy claim challenging the use of a prior § 846 conviction as one of the predicate acts for the CCE charge).¹¹

Because the Fourth Circuit has determined that Congress intended CCE and CCE-murder to be two separate offenses and because it has further held that the government can allege predicate acts that the defendant has already been convicted of in its prosecution of an offense involving multilayer conduct, I find that the CCE-murder charges against Gilmore do not violate the Double Jeopardy Clause.¹²

1127, n.8. The court indicated that it would have rejected the double jeopardy claim even if “the prior convictions alone established the RICO pattern element.” *Id.*

¹¹ The Fourth Circuit has previously affirmed convictions for both CCE-murder and its predicate offense, CCE. *See United States v. Cole*, 293 F.3d 153, 156-57, 164 (4th Cir. 2002); *United States v. Peterson*, Nos. 95-5407, 95-5449, 95-5518, 95-5519, 2000 WL 305137, at *6, 13 (4th Cir. March 24, 2000) (unpublished); *United States v. Tipton*, 90 F.3d 861, 869, 903 (4th Cir. 1996); *see also United States v. Jones*, 101 F.3d 1263, 1266, 1272 (8th Cir. 1996).

¹² I disagree with Gilmore’s argument that the burden of proof has shifted to the government on his motion to dismiss. *See United States v. Ragins*, 840 F.2d 1184, 1191-92 (4th Cir. 1988). In *Ragins*, the Fourth Circuit shifted the burden of proof on the defendant’s motion to dismiss on grounds of double jeopardy to the government because the issue was “obviously a close one” based on the face of the two indictments and because the defendant had to rely upon the indictments, his own testimony, and third-party and co-defendant testimony to construct a double jeopardy argument since there was “as yet no record from the second trial, and the rules of criminal procedure g[a]ve the defendant little opportunity to discover the proof on which the government intend[ed] to rely in that trial.” *Id.* Gilmore’s case is distinguishable from *Ragins* because the charging documents plainly resolve the double jeopardy issue. Here, the 1989 information and the present indictment allege the violation of two separate offenses, *see, e.g., NJB*, 104 F.3d at 633-35, whereas in *Ragins* the indictments alleged two separate conspiracies to violate the same immigration laws. *Id.* at 1187. Moreover, the discovery issue in *Ragins* is not present in this case as Gilmore clearly is aware of the facts alleged in the instant charge and that the government is using his past

Gilmore also asserts that the § 846 conspiracy to murder charge (Count One) violates the Double Jeopardy Clause and should be dismissed because the federal court in West Virginia dismissed § 846 conspiracy charges against him in 1989. (Def.'s Brief in Supp. of Mot. to Dismiss 4-5.) Gilmore overlooks that Count One is based on the alleged violation of a different statute than his prior § 846 charge. The prior § 846 charge was for *conspiracy to distribute and possess with intent to distribute drugs in violation of § 841(a)(1)*, whereas Count One in the instant indictment charges him with *conspiracy to commit murder in furtherance of a CCE in violation of § 848(e)*. Because § 841(a)(1) and § 848(e) are separate offenses, a § 846 prosecution for conspiracy to violate § 848(e) following a § 846 prosecution for conspiracy to violate § 841(a)(1) does not violate the Double Jeopardy Clause. *See Cole*, 293 F.3d at 158 (evaluating the totality of the circumstances, including “the substantive statutes alleged to have been violated,” along with other factors, in order to determine whether successive conspiracy charges violate the Double Jeopardy Clause); *McHan*, 966 F.2d at 138 (same); *Ragins*, 840 F.2d at 1189 (same). The present conspiracy charge is based on a different statute and alleges a different

conviction as a predicate act of CCE-murder.

agreement than the prior conspiracy charge. Accordingly, I find that there is no double jeopardy violation as to Count One.

II

Gilmore has also moved for additional jury peremptory challenges at trial.

The Federal Rules of Criminal Procedure provide “[e]ach side with 20 peremptory challenges when the government seeks the death penalty.” Fed. R. Crim. P. 24(b)(1). Rule 24 further provides that “[t]he court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.” Fed. R. Crim. P. 24(b). I have previously directed that each side in this case will have twenty-two peremptory challenges to be exercised jointly.¹³ Gilmore has asked me to exercise my discretion by granting the defendants additional peremptory challenges because there are three defendants and two of them are facing the death penalty. For the following reasons, I will deny Gilmore’s motion.

Although Rule 24 permits the court to grant additional challenges in multi-defendant cases, it is within the court’s discretion to grant or deny additional

¹³ Because there will be four alternate jurors, I have added four additional peremptory challenges. *See* Fed. R. Crim. P. 24(c)(4) (providing that each side is entitled to two additional peremptory challenges when four alternates are impaneled).

peremptory challenges. *See Stilson v. United States*, 250 U.S. 583, 586 (1919). In *Stilson*, two co-defendants appealed their convictions claiming that their Sixth Amendment right to an impartial jury was violated when they were denied ten “separate and independent” peremptory challenges in a trial where the applicable statute provided them with ten to be exercised jointly. *Id.* at 585-86. The Supreme Court stated that “[t]he requirement to treat the parties defendant as a single party for the purpose of peremptory challenges has long been a part of the federal system” and held that “there is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured.” *Id.* at 586. Thus, the only restriction on the district court’s discretion in granting or denying additional peremptory challenges beyond those required by statute is the defendant’s right to an impartial jury.

The court may deny additional peremptory challenges even when there are multiple defendants. *See, e.g., United States v. Meredith*, 824 F.2d 1418, 1423 (4th Cir. 1987). In *Meredith*, seven defendants were charged with drug trafficking offenses and appealed their convictions on the basis that the trial court erred in failing to provide them with additional peremptory challenges. *Id.* at 1421-22. Since they were charged with felonies, Rule 24 provided that they “jointly have 10 peremptory challenges” and the government six. Fed. R. Crim. P. 24(b)(2). During jury

selection, the court did grant the defendants one additional peremptory challenge to strike a prospective juror who had a hearing impairment, which meant that each defendant would individually exercise less than one and a half challenges. *Meredith* at 1423. The defendants claimed that this low ratio denied each individual defendant a role in the jury selection. *Id.* The Fourth Circuit rejected the defendants' ratio argument and held that the permissive language of Rule 24(b) ("the court may allow additional challenges") provided the trial court with the discretion to deny additional challenges. *Id.* The court found that the trial judge had acted within his discretion in denying each defendant additional challenges because the judge had offered defense counsel the opportunity to explain why additional challenges were necessary as well as granting the defendants one additional challenge in order to strike the prospective juror with a hearing impairment. *Id.* at 1423-24.

The court may deny defendants additional peremptory challenges even when the government seeks the death penalty. As stated by the advisory committee notes to Rule 24:

In capital cases the number of challenges is equalized as between the defendant and the United States so that both sides have 20 challenges [T]he rule vests in the court discretion to allow additional peremptory challenges to multiple defendants and to permit such challenges to be exercised separately or jointly.

Fed. R. Crim. P. 24 advisory committee's note. The rule clearly provides the trial court with the discretion not only to grant or deny additional peremptory challenges in multiple defendant cases, but also to determine whether the challenges will be exercised separately or jointly.

The Fourth Circuit has upheld the denial of additional peremptory challenges in capital cases in unpublished decisions. *See United States v. Cowan*, Nos. 95-5508, 95-5509, 1996 WL 521049, at *9-10 (4th Cir. Sept. 16, 1996) (unpublished); *United States v. Smith*, Nos. 94-5741, 94-5742, 94-5762, 1996 WL 88056, at *1-2 (4th Cir. March 1, 1996) (unpublished). In *Cowan*, two defendants appealed their murder convictions on the basis that the district court had erred in denying their motion to have twenty challenges each. *Cowan*, 1996 WL 521049, at *9. The Fourth Circuit held that multiple defendants in a capital case must exercise their twenty statutorily mandated challenges jointly and there was no right to additional challenges in capital, felony, or misdemeanor cases. *Id.* at *10.

In *Smith*, three defendants received life sentences for murder charges. *Smith*, 1996 WL 88056, at *1. The Fourth Circuit held that the district court did not err by refusing to grant the three defendants any more than the twenty challenges statutorily required because Rule 24 provides the district court with discretion in denying or granting additional challenges and the defendants did not “suggest that the district

court abused its discretion or that they were denied a fair and impartial jury.” *Id.* at *2. *See also United States v. Tuck Chong*, 123 F. Supp. 2d 559, 561-63 (D. Haw. 1999) (rejecting the single capital defendant’s motion arguing that the same 6:10 ratio used in non-capital felony cases must also be applied to capital cases).

No good reason exists for me to exercise my discretion to grant additional peremptory challenges, nor has any been suggested. Because a trial court has the discretion to grant or deny additional peremptory challenges, even in multiple defendant capital cases, so long as it provides the statutory minimum number of challenges and does not violate the defendants’ right to an impartial jury, I will deny Gilmore’s motion.

III

Church has moved to exclude any jailhouse informant testimony elicited by the government.¹⁴

¹⁴ I have previously described this testimony in detail in considering objections to its admissibility on other grounds. *See United States v. Gilmore*, No. 1:00CR00104, 2003 WL 21360274, at *1-5 (W.D. Va. June 11, 2003). In summary, the government intends to call a number of witnesses who claim that Gilmore and Church admitted their involvement in the Davis family murders while incarcerated with the witnesses. Such “jailhouse snitch” testimony is not uncommon. *See C. Blaine Elliott, Life’s Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 Va. Capital Case Clearinghouse 1, 2 (2003).

Church urges this court to establish a rule that jailhouse informant testimony is inadmissible unless the government provides the defendants with complete records, preferably video recordings, of all of its communications with these witnesses. Church relies on the Due Process Clause of the Fifth Amendment to support this argument, reasoning that its concern for reliability demands that the jury be permitted to view the totality of the circumstances in which the informants chose to testify against the defendants, just as it requires the evaluation of the totality of the circumstances in assessing the reliability of confessions and line-up identifications. Because Church cannot cite a single source extending the confession and line-up identification cases to the testimony of jailhouse informants, and indeed no court has addressed such a proposition, I will deny Church's motion to exclude the testimony of jailhouse informants.

Church relies on *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny in moving for disclosure of all of the government's recorded communication with the informants; information on all the other instances in which the informants have provided or have offered to provide substantial assistance; the names, addresses, and statements of all the incarcerated persons that the government contacted regarding the defendants and the crimes they are charged with but who did not provide any information; all the records of the informant witnesses, including their presentence

reports; a report of all possible rewards and benefits discussed with the informants; and a number of items relating to one of the witnesses, Richard Laszczynski, who is confined in the federal Witness Security Program (“WitSec”).

Due process requires the government to disclose to the defendant any favorable evidence in its possession that is material to guilt or punishment. *Brady*, 373 U.S. at 87. “Favorable” evidence includes exculpatory evidence as well as impeachment evidence that the defendant can use against the government’s witnesses. *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Evidence is considered “material” if there is a reasonable probability that it will affect the result of the proceeding. *See Bagley*, 473 U.S. at 682. However, “the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.” *Id.* at 675. *Brady* material must be disclosed “in time for its effective use at trial.” *United States v. Smith Grading & Paving, Inc.*, 760 F.2d 527, 531 (4th Cir. 1985). If the government possesses *Brady* material that it considers to be privileged, the defendant must specifically request its production, or else its production is left to “the prosecutor’s discretion.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

The government has an obligation to produce *Brady* material independent of any specific orders by the court. While it is possible that some of the material requested may contain *Brady* information, there has been no such showing at this point.

Church makes two additional arguments to support his motion to exclude the government's witnesses. First, he claims that the government prosecutors have violated ethical rules of conduct by paying off witnesses. Because Church fails to identify even one instance where the government has offered compensation to a witness contingent upon the content of that witness's testimony or the outcome of the case, I will deny his motion.

Second, Church claims that the government prosecutors have violated 18 U.S.C.A. § 201 (West 2000) by bribing its witnesses.¹⁵ He states that he is making this claim now only to preserve the issue for appeal because he realizes that the Fourth Circuit has previously rejected this argument. *See, e.g., United States v.*

¹⁵ That section provides that

[Whoever] directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C.A. § 201(c)(2).

Levenite, 277 F.3d 454, 458-61 (4th Cir 2002) (rejecting argument that government violated bribery statute by compensating informant for his testimony); *United States v. Anty*, 203 F.3d 305, 311 (4th Cir. 2000) (holding that § 201 does not prohibit the United States from “acting in accordance with long-standing practice and statutory authority to pay fees, expenses, and rewards to informants even when the payment is solely for testimony, so long as the payment is not for or because of any corruption of the truth of testimony”). Due to the clear precedent in this circuit, as well as Church’s failure to allege a single fact to support his claim, I will deny his motion.

IV

All of the defendants have moved for production of any existing presentence report (“PSR”) concerning any government cooperating witness. Normally PSRs are prepared prior to sentencing by the sentencing court’s staff and contain background information on the defendant to be sentenced, in order to assist the sentencing judge in arriving at the appropriate sentence.

Courts are generally disinclined to disclose PSRs to third parties. *See, e.g., United States v. Trevino*, 89 F.3d 187, 192 (4th Cir. 1996) (“the confidentiality of PSRs has always been jealously guarded by the drafters of the federal rules, and by the federal courts”); *U.S. Dep’t of Justice v. Julian*, 486 U.S. 1, 12 (1988) (explaining

that “courts have been very reluctant to give third parties access to the presentence investigation report[s]” due to fear that “disclosure of the reports will have a chilling effect on the willingness of various individuals to contribute information that will be incorporated into a report” and because of “the need to protect the confidentiality of the information contained in the report”). In *Trevino*, the Fourth Circuit reasoned that because the existence of presentence reports are “a foregone conclusion” and their “general contents are predictable,” “an experienced advocate may avail himself of a ‘free shot’ by couching what is actually a general request for a witness’s PSR in seemingly specific terms that might suffice as ‘some plausible showing’ of materiality and favorability.” 89 F.3d at 192. To prevent such “fishing expeditions,” the court held that in order to obtain an in camera review of a government witness’s PSR, the defendant must “first clearly specif[y] the information contained in the report that he expects will reveal exculpatory or impeachment evidence” and “plainly articulate how the information contained in the PSR will be both material and favorable to his defense.” *Id.* at 192-93.

In this case, the defendants ask this court to conduct an in camera review of the PSRs of all of the government’s informants on the basis that they may contain impeachment evidence that should be disclosed pursuant to *Brady*. The defendants have suggested that the reports may provide information as to the witnesses’ mental

states. This general suspicion fails to specifically identify what information in the individual reports will have impeachment value and, if such evidence exists, why it will be material to the defense. The defendants' suspicions are just the kind of "free shot" that the court sought to avoid in *Trevino*.

Church has made a more particularized claim as to one witness's PSR. He asserts that an FBI agent on the case has informally acknowledged that generally the criminal histories provided in PSRs are more detailed than the criminal histories that are provided to the defendants from the National Crime Information Center ("NCIC"). Specifically, Church claims that the NCIC criminal history of one witness, Alan Barry Crewey, did not list a murder conviction that was disclosed in a "302 form" (a form summarizing an FBI agent's witness interview). It should be noted that in evaluating a defendant's motion for an in camera review of a witness's PSR, I may consider the defendant's ability to obtain the desired information through other means. *See Trevino* at 193, n.6 ("In evaluating the probable materiality and favorability of the requested information, the district court may consider, among other things, whether the material may be available from other sources"); *United States v. Wilson*, 901 F.2d 378, 380-81 (4th Cir. 1990) ("the *Brady* rule does not apply if the evidence in question is available to the defendant from other sources") (citation omitted). In this case, clearly Church has obtained a more complete criminal

history from other sources, such as Crewey's 302. Furthermore, the defendant's access to an accurate criminal history may or may not significantly affect his ability to impeach that witness. To the extent that Church may be able to point to specific information in the report that he expects to include impeachment evidence that will be material to his defense, he may advise me of it and I will consider it.

Although I will deny Church's motion for an in camera review of the federal PSRs, the government has an obligation under *Brady* and its progeny to disclose all impeachment evidence in its possession, including any impeachment evidence in any PSR that may be in its possession. Additionally, should the government possess a PSR that contains statements typically disclosed under the Jenks Act, such as a verbatim quotation, from the government witness pertaining to his testimony at trial, it is obliged to disclose those statements after the witness's direct testimony pursuant to the Jenks Act. *See United States v. Beckford*, 962 F. Supp. 780, 797 (E.D. Va. 1997) (denying defendants' motions for production of PSRs but holding that the government must produce any Jenks statements that may be contained within a PSR).

Gilmore and Nichols have additionally moved for the issuance of pretrial subpoenas duces tecum for any existing state presentence reports. While Federal Rule of Criminal Procedure 17(c) permits the issuance of such subpoenas with leave of court, *see Beckford*, at 1020, the procedure is not to be used simply for discovery.

See id. Accordingly, absent a showing of relevance and specific need, the requests will be denied.

DATED: February 4, 2004

United States District Judge