

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

UNITED STATES OF AMERICA,)	Case No. 5:01-CR-30058
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
IZELLE FRYE, et. al.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

On July 10, 2001 the grand jury indicted thirteen defendants on a single count of conspiracy to possess and distribute crack cocaine in the Western District of Virginia and elsewhere between January 1998 and February 2001. The matter before the court is a series of pretrial discovery motions raised by defendant Izelle Frye (“Frye”). Frye seeks a bill of particulars, and disclosure of materials covered under Fed. R. Crim. Pro. 16, Fed. R. Evid. 404(b), the Jencks Act, Brady, and Giglio. The court will consider these motions in turn.

I. Bill of Particulars

Frye’s many requests in his motion for a Bill of particulars fall into two general categories: (1) the dates, locations and nature of any acts manifesting the alleged conspiracy and (2) the identities of unindicted co-conspirators, witnesses, and other persons present during the commission of these acts. Frye argues that without this information he is unable to prepare even a minimal defense. In response, the Government argues that it is not required by law to provide the requested information and that doing so might endanger the safety of the individuals whose identities would be disclosed. The court finds that the government must disclose, as outlined below, further information regarding the dates and locations of the alleged acts. The court also finds, however, that the government need not reveal the identities of unindicted co-conspirators,

witnesses, or any other persons present.

The purpose of a bill of particulars is “to enable a defendant to obtain sufficient information on the nature of the charge against him so that he may prepare for trial, minimize the danger of surprise at trial, and enable him to plead his acquittal or conviction in bar of another prosecution for the same offense.” United States v. Schembari, 484 F.2d 931, 934-35 (4th Cir. 1973). Thus, a defendant is entitled to those “central facts” that will permit him to conduct his own investigation into the charges against him and thereby mount an adequate defense. See United States v. Stroop, 121 F.R.D. 269, 272 (E.D.N.C. 1988). A defendant, however, is not entitled to detailed disclosure of the evidence the government plans to introduce at trial. See United States v. Gottlieb, 493 F.2d 987, 994 (2d Cir. 1974); United States v. Walker, 922 F. Supp. 732, 738-39 (N.D.N.Y. 1996); United States v. Lobue, 751 F. Supp. 748, 756 (N.D. Ill. 1990). In the context of conspiracy charges, “[i]t is well settled that defendants need not know the means by which it is claimed they performed acts in furtherance of the conspiracy nor the evidence which the Government intends to adduce to prove their criminal acts.” United States v. Feola, 651 F. Supp. 1068, 1132 (S.D.N.Y. 1987), aff’d, 875 F.2d 857 (2d Cir. 1989), cert. denied, 493 U.S. 834 (1989). The government is not required to reveal in advance the time and manner in which the conspiracy was formed nor disclose when each participant entered or abandoned the conspiracy. See id.; United States v. White, 753 F. Supp. 432, 433 (D. Conn. 1990). The government also need not disclose the names of its witnesses prior to trial. See United States v. Sanders, 462 F.2d 122, 123 (6th Cir. 1972); United States v. Johnson, 504 F.2d 622, 628 (7th Cir. 1974). The rationale for this rule is based in part upon the fear of witness intimidation. See United States v. Malinsky, 19 F.R.D. 426, 428 (S.D.N.Y. 1956) (denying a

motion for a bill of particulars and noting that “[d]iscovery in criminal proceedings is not comparable to discovery in civil because of the nature of the issues, the danger of intimidation of witnesses, and the greater danger of perjury and subornation of perjury”). Furthermore, the government is not required to reveal the names of unindicted co-conspirators or to disclose the identities of other persons present when the offenses took place. See United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991) (“As long as the indictment is valid, contains the elements of the offense, and gives notice to the defendant of the charges against him, it is not essential that a conspirator know all other conspirators.”); United States v. Gotti, 784 F. Supp. 1017, 1017-19 (E.D.N.Y. 1992); United States v. Lobue, 751 F. Supp. 748, 756 (N.D. Ill. 1990). With these principles in mind the court will order a bill of particulars, albeit a much more limited bill of particulars than the one requested.

The bare elements of a substantive offense coupled with the date the government alleges the offense occurred are ordinarily sufficient to avoid unfair surprise and permit the defendant to prepare his defense. In the present case, however, the government alleges a conspiracy that spans a three-year period. If the government offers evidence of discrete acts involving Frye evidencing his involvement in the conspiracy, Frye would be hard pressed to counter it at trial and mount an effective defense. If Frye has a legitimate alibi, for instance, but does not learn the date of a sale in which Frye is alleged to have participated and have been present, he may be unable to prepare adequately and present that defense. Accordingly, the court will require the government to disclose the date and location, if it has that information, of each sale, delivery, purchase, or actual possession of cocaine by Frye or which he aided and abetted and was present.

Frye also seeks to compel the government to reveal the identities of unidentified co-

conspirators, witnesses, and persons present during the overt acts allegedly committed in furtherance of the conspiracy. As stated above, the government is not required to reveal the identities of government witnesses or persons present during alleged events. Frye is entitled only to those “central facts” that will enable him to avoid unfair surprise and prepare a defense. The disclosure of the discrete acts detailed above sufficiently enables Frye to avoid unfair surprise. Therefore, the court will deny Frye’s request for the disclosure of identities.

II. Rule 16 Material

Next, Frye moves for the disclosure of a host of material under Fed. R. Crim. Pro. 16. These materials may be summarized as (1) all relevant statements of defendants, including his own statements and those of his alleged co-conspirators, (2) all documents and tangible objects, (3) all reports of physical or mental examinations and scientific tests or experiments, and (4) a written summary of expert witness testimony that are material to Frye’s defense or that the government intends to use at trial. The government responds that it has turned over all the materials required by Rule 16, and Frye has not shown otherwise. Therefore, the court will deny Frye’s motion as moot.¹

¹Frye contends that he is entitled to the disclosure of statements made by his co-conspirators under Fed. R. Crim. Pro. 16 (a)(1)(A). Co-conspirator statements are not mentioned in the language of Rule 16(a)(1)(A), which governs the pretrial disclosure of statements made by the defendant. However, Fed. R. Evid. 801(d)(2)(E) permits the government to introduce the statements of a co-conspirator against the defendant as if they were his own. Frye argues that since the statements of his alleged co-conspirators may be attributed to him, the government should have to disclose those statements before trial pursuant to Rule 16(a)(1)(A). The Fourth Circuit has settled the issue to the contrary, however, holding that Rule 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. Roberts, 811 F.2d 257, 258-59 (4th Cir. 1986). Since the government claims that it has otherwise complied with the requirements of Rule 16 and Frye has not identified any specific information that the government has failed to produce, this court will order no further pretrial production under Rule 16.

III. Fed. R. Evid. 404(b) Evidence

Frye has also moved to compel the government to disclose the nature of any evidence it intends to introduce at trial pursuant to Federal Rule of Evidence 404(b). However, it is unclear whether the government intends to offer any Rule 404(b) evidence.² If the government intends to introduce Rule 404(b) evidence it must make the requisite disclosure within seven days.

IV. Jencks Act Material

Next, Frye moves for early disclosure of materials covered by the Jencks Act. The Jencks Act specifies that “no statement or report 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 . . . discovery or inspection until said witness has testified on direct examination in the trial of the case.” 18 U.S.C. § 3500(a). Thus the court “may not require the government to produce Jencks Act material relating to one of its witnesses until after the witness has testified.” United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994). Consequently, the court denies Frye’s motion for early disclosure of Jencks Act material.

²Rule 404(b) provides that evidence of other “crimes, wrongs, or acts,” while not admissible to establish personal character to show that a defendant acted in conformity therewith, may be admissible for other purposes, including proving motive or intent. Fed. R. Evid. 404(b). Rule 404(b) further provides that “the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial,” but allows the court to excuse pretrial notice “on good cause shown.” Id. The Advisory Committee Notes provide that the pretrial notice requirement is “intended to reduce surprise and promote early resolution on the issue of admissibility.” Fed. R. Evid. 404 Advisory Committee’s Notes. “[N]o specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case.” Id. “Likewise, no specific form of notice is required.” Id. Instead, the prosecution need only “apprise the defense of the general nature of the evidence of extrinsic acts.” Id.

V. Brady and Giglio Material

Frye has also moved for production of exculpatory materials as required by Brady v. Maryland, 373 U.S. 83 (1963) and for materials affecting the credibility of government witnesses pursuant to Giglio v. United States, 405 U.S. 150 (1972). Frye argues that this material may include, but is not limited to, plea agreements, promises of leniency by the government, inducements to testify, financial assistance offered by the government, and criminal records. Giglio and Brady materials are governed by the same legal principles, see United States v. Bagley, 473 U.S. 667, 676 (1985) (finding that impeachment evidence is just like exculpatory evidence because it is “evidence favorable to the accused”) (quoting Brady, 373 U.S. at 87.), and, therefore, those materials which are “material” and “favorable” must be turned over to the defendant “in time for [their] effective use at trial,” United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985); see also United States v. Levenite, 277 F.3d 454, 462 (4th Cir. 2002) (“[A] witness-fee payment arrangement must be disclosed to each defendant against whom the witness will testify before the proceeding at which the witness testifies.”).

The court finds that efficiency and justice will be served by the government’s early release of its Giglio and Brady materials. The court will therefore direct the government to disclose all Giglio and Brady material to the defense. However, if the government believes that any material subject to disclosure will endanger its witnesses or other persons, or if it is unsure whether the material is material and favorable to the defense, then the government may submit the material to the court for *in camera* review.

VI. Conclusion

For the foregoing reasons, the court will (1) grant in part and deny in part Frye’s motion

for a Bill of particulars; (2) deny Frye's motion for discovery under Fed. R. Crim. Pro. 16 as moot; (3) grant Frye's motion for disclosure of Fed. R. Evid. 404(b) material; (4) deny Frye's motion for early disclosure of Jencks Act material; and (5) grant Frye's motion for disclosure of Brady and Giglio material. The court will further direct the government to comply with its order within seven days of entry.

ENTER: This ___ day of February, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

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

UNITED STATES OF AMERICA,)	Case No. 5:01-CR-30058
)	
v.)	<u>Order</u>
)	
IZELLE FRYE, et. al.,)	By: Samuel G. Wilson,
)	Chief United States District Judge
Defendants.)	

In accordance with the Memorandum Opinion entered this day, it is hereby **ORDERED**
and ADJUDGED that:

- (1) Frye’s motion for a Bill of particulars is **GRANTED IN PART** and **DENIED IN PART**. The Government is ordered to provide the date and location of each actual procurement, sale, delivery, transportation or distribution of drugs by Frye or which he aided and abetted and was present, that the government intends to introduce at trial.
- (2) Frye’s motion for discovery of materials provided for under Fed. R. Crim. Pro. 16 is **DENIED**;
- (3) Frye’s motion for disclosure of Fed. R. Evid. 404(b) material is **GRANTED**;
- (4) Frye’s motion for early disclosure of Jencks Act material is **DENIED**; and
- (5) Frye’s motion for disclosure of Brady and Giglio material is **GRANTED**. However, if the government believes that any material will endanger its witnesses or other persons, or if it is unsure whether the material is material and favorable to the defense, then the government may submit the material to the court for *in camera* review;

(6) The government shall comply with this order within seven days of entry.

ENTER: This ___ day of February, 2002.

CHIEF UNITED STATES DISTRICT JUDGE