

Trial Transcript

Judge Mark Fuller

instructs the Federal Prosecutors to provide all (exculpatory) Brady information to the Defense.

1 THE COURT: Let's try to cut this off as closely as we
2 can. Let me hear from you, Mr. Leach, if you have anything else
3 to add to what you've already raised as an objection on the
4 record.

5 MR. LEACH: Judge, what counsel has just done is tried
6 to shift the issue. I'm not saying that he -- that counsel did
7 or did not reveal that he was uncertain of the date of the
8 meeting. You can read his 302s and gather that. The issue here
9 is the day the government knew. The day that the witness
10 reveals to the government that he is now uncertain as to the
11 date of that meeting, uncertain about the check being present,
12 uncertain of those things, that's the *Brady* material.

13 And it is a big deal to us, Judge, because what you've
14 got in this case is you've got him repeatedly telling the agents
15 that Richard Scrusby is there, that he's got the check in his
16 possession, that it was signed by him. And it's just impossible
17 under the facts. Once they realize that it's impossible, Judge,
18 that's *Brady* material.

19 And I respectfully think, Judge, that when you're
20 looking at it, you know, all these cases that we have on *Brady*
21 is after a conviction, but what *Brady* really speaks to is what's
22 the government's responsibility here in a trial. And their
23 responsibility in a trial is to timely produce information
24 that's exculpatory so I can use it. The analysis of prejudice,
25 that's after there's been a conviction. We're talking about

1 getting me material so that I can use it on this witness while
2 he's on the stand.

3 THE COURT: Here's my order.

4 MR. KILBORN: Can I join in on behalf of Governor
5 Siegelman? Mr. Bailey --

6 THE COURT: Every objection by any defendant is good as
7 to all. That's the ruling that the Court has already made.
8 Unless you need to add to that, your objection would be
9 preserved.

10 MR. KILBORN: I want to emphasize on behalf of Governor
11 Siegelman what we don't want to find out is after this case is
12 over, then the government finds some kind of *Brady* material, so
13 we've got to retry the case. I have gotten convicted murderers
14 off on this identical thing that the Court says turn it over and
15 it wasn't. And I want the Court to specifically order the
16 public integrity section, because this material might have gone
17 to Washington -- I want the whole government to get this
18 material if it exists. Thank you, Your Honor.

19 THE COURT: Any other defendant need to add to what has
20 already been said?

21 MR. DEEN: No, sir. We'll stand behind Mr. Leach and
22 Mr. Kilborn.

23 THE COURT: Mr. Roberts?

24 MR. BAXLEY: Nothing.

25 THE COURT: Here is the ruling from the Court on this

1 point. As to the material that deals with the date of the
2 meeting for the purposes of the testimony of Mr. Bailey, first
3 of all I find that that material or that information and that
4 discrepancy is certainly known to you, Mr. Leach. And if there
5 are other *Brady* material discoverable evidence that has not been
6 produced to you involving Mr. Bailey, I'm ordering the
7 government to review their records, to include every agent that
8 has been involved, every attorney that has been involved, and
9 every agency that has been involved, and to make a report back
10 to the defense before we begin trial on Monday. Mr. Bailey will
11 not be released from his subpoena, so he can certainly be
12 recalled to testify if need be.

13 As to your objection as to the dates of the meetings
14 that he has purportedly been inconsistent about through either
15 his 302s or his testimony here at trial, the Court finds first
16 that you have that information, that it is not prejudicial to
17 Mr. Scrushy by the fact that you did not know about it before
18 trial, assuming that you did not, and I believe from hearing
19 your opening statements that you did. Third, I find that it was
20 not not produced in bad faith by the government. And lastly, to
21 the extent that there are other *Brady* discoverable matters by
22 any witness, I would also order the government to review
23 those -- agents, agencies, attorneys, investigators, any
24 classification who had any involvement with any witness in this
25 case, and to turn over those materials to the defense before

1 court starts on Monday.

2 MR. LEACH: I have one extra request that you add --

3 MR. FEAGA: Before he goes to that one, can I just
4 straighten up the record, Your Honor, before he changes the
5 subject?

6 MR. LEACH: I'm not going to change the subject.

7 THE COURT: Let's let him -- go ahead, Mr. Leach.

8 MR. LEACH: Judge, in the process of seeking a RICO
9 indictment, the government has to prepare what is known as a
10 prosecution memo. It's what's known as a pros memo in the
11 vernacular of the Department of Justice. As a result of that
12 pros memo, there's going to be a stream of e-mails back and
13 forth with the organized crime and racketeering section in D.C.
14 I have reason to suspect, just because I know how that process
15 works, Judge, that this area of inquiry was a topic of
16 electronic conversations between OCRS, organized crime and
17 racketeering section, and people in this team. And I don't know
18 who was responsible for the preparing of the prosecution memo.

19 THE COURT: This will help you out. My order would
20 include any correspondence -- written, verbal, electronic -- by
21 or between any agency, any agent within that agency, whether it
22 be state or federal.

23 MR. LEACH: Okay. Thank you, Judge. That covers it.

24 THE COURT: Mr. Feaga.

25 MR. FEAGA: Your Honor, what I just want to say is as

1 far as we know, we've turned over everything to them that we
2 have. And we will double-check.

3 THE COURT: I'm just ordering that you make a review of
4 your documents, review of your agency's memorandum, their
5 knowledge of the testimony of these witnesses. If there are any
6 discrepancies that have been discussed in any form or fashion,
7 if those have not been disclosed to the defense, do so before
8 Monday.

9 MR. FEAGA: Yes, sir. And again, just for the record,
10 I want to make it clear. They knew well prior to trial about
11 this issue. I -- you know --

12 THE COURT: I've ruled on it, so we don't need to carry
13 this topic any further.

14 Any further topics that we need to bring up?

15 MR. LEACH: Yes, Your Honor. I am requesting this
16 morning that you issue an order to Mr. Feaga that when he's
17 going to make an objection, that he simply states objection and
18 the basis for the objection. And I'm doing this, Your Honor,
19 because my next motion is going to be that you impose sanctions
20 upon counsel.

21 I have tried to go back and organize how many times you
22 have had to tell counsel not to make speaking objections. In my
23 estimation, it's no less than 36 occasions that this Court has
24 directed Mr. Feaga to stop making speaking objections in front
25 of the jury. I believe that there is a tactical aspect to

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1 (The above case coming on for trial at Montgomery, Alabama,
2 May 1, 2006, before the Honorable Mark E. Fuller, United
3 States District Judge, and a jury, the following
4 proceedings were had outside the presence of the jury on
5 May 8, 2006, commencing at 8:35 a.m.):

6 THE COURT: The record will reflect that we're outside
7 of the presence and the hearing of the jury. We're starting a
8 few minutes late this morning because of a problem with a
9 witness; is that correct?

10 MR. FEAGA: That is, Your Honor.

11 THE COURT: While we're outside the presence of the
12 jury, there are a few things that we need to take up. First of
13 all, I need to confirm whether the government has had the
14 opportunity to confer with all of the investigative agencies,
15 law enforcement officials who were involved in the investigation
16 of each of the defendants in this case, and has discovered that
17 there has not been exculpatory material that would be available
18 to the defendants pursuant to the *Brady* opinion.

19 MR. FRANKLIN: Your Honor, we did. We checked with all
20 the agents. They have no other reports that have not been
21 turned over in this matter. The agents even contacted the IRS
22 agents who participated early on in this investigation and who
23 were not participating at some of the instances where Mr. Bailey
24 was being interviewed. They have no additional reports. The
25 AG's Office has also confirmed by going through its file that

1 there are no additional reports regarding Mr. Bailey.

2 THE COURT: Thank you, Mr. Franklin. I know that
3 counsel has also been provided with copies of the ex parte
4 communications that this Court has had with various jurors
5 throughout the proceedings who brought potential conflicts to
6 the Court's attention. And by the agreement with counsel in
7 this case, I just remind counsel that all of these copies of the
8 transcripts have been ordered to remain under seal during the
9 pendency of the litigation for obvious reasons.

10 And there's no reason for me to make this statement
11 other than just as a reminder to counsel. I'm not aware of any
12 disclosure of any information. I just want to make sure that
13 counsel is reminded of that order. So if we do need to take up
14 anything regarding any of these transcripts, we probably should
15 do so at sidebar.

16 MR. LEACH: I just want to point out to the Court that
17 we have one, which is a male. And I understand that there was
18 an interview with one that was a female, and I don't know if
19 that's been done or not.

20 COURT REPORTER: Everything except the very last one on
21 Friday afternoon.

22 MR. LEACH: Okay. That's fine.

23 Second point, if I may, Judge, is one of our very
24 specific requests with regard to *Brady* had to do with the fact
25 that Mr. Bailey stated that there was a meeting with Mr. Feaga,