

offered to submit any withheld documents to the court for an *in camera* review to determine whether disclosure will be required. Gilley requests that the withheld materials be produced expeditiously to the court for review. The court finds that such expeditious production is unnecessary. Because Jencks Act material relates to witnesses at trial, and decisions about who may or may not testify at trial may change between now and the start of trial, it would be in the best interest of judicial economy for the Government to provide the withheld materials to the court three weeks prior to trial.

III. BRADY MATERIAL

Here, Gilley requests any draft plea agreements between any cooperating witness as well as any information related to the Government's possible contact with Larry Langford. The Government asserts that it has had no contact with Mr. Langford and has offered to submit the draft plea agreements to the court for an *in camera* review for possible *Brady* material. The court accepts the offer. The Government can hand deliver, to chambers, a copy of all draft plea agreements for cooperating witnesses. The court will conduct a review and determine if any information therein is subject to production.

IV. ELECTRONIC COMMUNICATIONS BETWEEN ANY WITNESS AND ANY GOVERNMENT AGENT.

Here again, this issue has been resolved, as the Government has agreed to turn over any Jencks Act material two weeks prior to trial.

V. TAPE RECORDINGS MADE BY HOUSTON COUNTY SHERIFF ANDY HUGHES

The Government has made these recordings available to defendant for review. Thus, this issue has been resolved.

VI. CONSENSUAL RECORDING INFORMATION

Defendant Gilley has moved for the production of: a) copies of all authorizations for consensual monitoring used in this case; b) copies of 302s reflecting consensual recordings conducted in this case, whether or not pertinent recordings were obtained; and c) documentation regarding the specific electronic devices, including the make, model, and serial number, used for consensual recordings in this case. The Government responded to the requests by asserting that it has produced all copies of all authorizations for consensual monitoring, thus satisfying the first request. However, the Government challenges the production of the other two requests.

1. Copies of 302s

Gilley maintains that the copies of these 302s are material to preparing a defense, because the 302s “are material to chain-of-custody issues and could provide a basis for suppression or other evidentiary ruling.” Def.’s Brief in Supp. (Doc. #312) at 8. The Government challenges that the internal chain-of-custody forms are irrelevant to the question of whose voice is on the recordings “[a]nd in any event, as defendant Gilley knows, chain-of-custody issues go to the weight—and not the admissibility—of the evidence at trial.” Response (Doc. #7) at 12.

The court agrees with Gilley that whether or not the chain of custody issue is relevant

for a suppression hearing, or to simply challenge the weight of the evidence at trial, it is clear that such challenges will go to the heart of the defense made in this case. Thus the court finds that this information is material to the preparation of defendant's case and orders its production.

2. *Specific information about the recording device.*

Here, Gilley has asked for the technical information regarding the recording equipment, and the Government has claimed a law enforcement privilege. The Government maintains that "disclosure of the technical specifications of FBI recording devices would expose critical investigative techniques and risk educating criminals on how to identify and circumvent them." Gov.'s Resp. (Doc. #348) at 6. The Government asserts that Gilley cannot establish necessity sufficient to overcome the law enforcement privilege and "[b]ecause defendant Gilley has failed to challenge the validity of any specific consensual recording, such that the recording equipment itself is at issue, the Court should reject his demand for information regarding the nature and specifications of FBI recording devices." *Id.* at 7.

Both parties rely on *United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986), in support of their arguments. The Government relies on *Van Horn* for the proposition that the technical information is privileged, and Gilley for the proposition that "[t]he privilege will give way if the defendant can show need for the information." *Id.* at 1508. The court also notes that in *Van Horn* the Court of Appeals "stress[ed] that the necessity determination

requires a case by case balancing process, and that we have established no fixed rules about the discoverability of electronic surveillance techniques in criminal cases.” *Id.*

With that in mind the court weighs the Government’s claim that the disclosure of this information might compromise investigative techniques with Gilley’s claim that he needs the information so that an expert can form an opinion about the reliability of the recordings based on factors such as any manufacturer recalls, defects, or known unreliability. At this point, the court finds Gilley’s basis for piercing the privilege too speculative. There has been nothing presented to the court to call into question the reliability of the recordings at this early juncture. The court in *Van Horn* made it clear that disclosing the “the precise specifications [of electronic surveillance equipment] will educate criminals regarding how to protect themselves against police surveillance” and that “[e]lectronic surveillance is an important tool of law enforcement, and its effectiveness should not be unnecessarily compromised.” *Id.* Thus, in conducting the balancing test, the court determines that the Government prevails and that this request is therefore denied.¹

VII. TITLE III WIRETAP INFORMATION

The parties have distilled the issues to the following three requests: a) additional

¹ To the extent Gilley is attempting to distinguish his request from the one made in *Van Horn* by arguing that he only seeks the make, model, and serial number of the recording equipment, and not the precise specifications as requested in *Van Horn*, the court finds this to be a distinction without a difference. Revealing the make, model, and serial number of the recording device would clearly lead to the release of the precise specifications of the device. The Court in *Van Horn* stated that the privilege applies to the “nature” and type of equipment. *Id.* at 1508.

session history reports; b) synopses; and c) identification of call monitors and production of VoiceBox requests. With the session history reports request, the Government does not oppose Gilley's request for "non-pertinent" session histories, but does oppose the release of "pertinent" ones. Gilley argues he needs this information in order to mount specific challenges to the Title III recordings. The Government argues that the release of the "pertinent" session histories could compromise other ongoing investigations. The synopses are user created-summaries of interceptions. Gilley contends that he requires these synopses to be able to cross-examine government agents about any shifting theory of prosecution. With regard to the VoiceBox request, the Government has provided a means for the identification of all call monitors, but lists one of the monitors as "194privileged." Gilley "seek[s] to compel the production of any and all call monitors who monitored calls under this identification for each call in which this identification was utilized." *Id.* at 9. Further, Gilley has made other requests for VoiceBox reports that the Government has denied.

Gilley asserts that he is entitled to all of these requests and that the Government's claim that Gilley has failed to make a sufficient showing that he is entitled to the requested items is flawed because the Government has failed "to articulate a basis for its non-production and simply responds by challenging the basis for Mr. Gilley's request." *Id.* at 7.

As an initial matter, the court must point out that "[t]here is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559, (1977). Thus, Gilley must provide the basis for each of his discovery requests, be it either statutory,

based on case law, or an argument regarding the constitutionality of his trial. Here, Gilley relies on Federal Rule of Criminal Procedure 16(a)(1)(E), which states in pertinent part that

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:

(I) the item is material to preparing the defense;

Fed. R. Crim. P. 16. While Gilley focuses on the requirement that the Government must turn over such items, he fails to properly explain their materiality to his defense. Instead of providing "some indication that the pretrial disclosure of the [item] would ... enable [] the defendant significantly to alter the quantum of proof in his favor," *United States v. Jordan*, 316 F.3d 1215, 1251 (11th Cir. 2003) (quoting *United States v. Buckley*, 586 F.2d 498, 506 (5th Cir.1978)), Gilley provides the court with speculation and conjecture.

For example, in requesting the synopses, Gilley proffers that the Government "*may have* deemed an audio recording inconsequential in its synopsis of the recording, but at trial, [contend] that the same recording is at the heart of its case against Mr. Gilley." Def.'s Reply (Doc. #355) at 8 (emphasis added). In his brief in support of the motion, Gilley states that:

Specifically, the requested Voicebox data (none of which the Government has stated it cannot produce from the Voicebox system) will allow Mr. Gilley to determine *whether* mistakes were made, *if* there was a violation of any ethical obligations, *whether* there was a reckless disregard of the Title III requirements, *whether* the Government adopted reasonable measures to reduce the interception of conversations unrelated to the criminal activity to a practical minimum and *whether* Mr. Gilley's Fourth, Fifth and/or Sixth Amendment rights were violated. This information is material and vital to Mr.

Gilley *being able to adequately determine whether* his fundamental constitutional rights were violated as the result of the widespread use and abuse of electronic surveillance techniques.

Def.'s Brief (Doc. #312) at 10. If "a conclusory argument that the requested item is material to the defense," will not suffice, *Jordan*, 316 F.3d at 1250, then certainly speculation and hypothetical arguments will not suffice. Here, the court finds that Gilley has not shown "more than that the [items] bear[] some abstract logical relationship to the issues in the case." *Id.* at 1251. The same is true about any arguments made by Gilley regarding a fair trial. At this point, it is mere speculation. Accordingly these requests are due to be denied.

VIII. CONCLUSION

For the reasons stated above, it is

ORDERED that the Motion to Compel (Doc. #311) is GRANTED in part and DENIED in part, in accordance with the rulings above.

Done this 26th day of January, 2011.

/s/ Wallace Capel, Jr.
WALLACE CAPEL, JR.
UNITED STATES MAGISTRATE JUDGE