

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA, *

PLAINTIFF, *

V. * CR. No. 2:10CR186-MHT

JARRELL W. WALKER, JR., *

DEFENDANT. *

MOTION FOR PRODUCTION

Now comes the defendant, Jarrell W. Walker, Jr., by counsel, and moves the Court to order witness Jarrod Massey to produce and disclose to Mr. Walker his diary or list, pursuant to Rule 612, Federal Rules of Evidence, and the Sixth Amendment to the United States Constitution.

1. Jarrod Massey is currently testifying in this trial as a Government witness.

2. Mr. Walker previously subpoenaed certain jail phone calls of Mr. Massey that occurred prior to this trial. Mr. Massey lodged an objection to Walker's use of those calls, but this Court subsequently denied that objection, except for 4 attorney client calls. [Doc. 1424, 1455]

3. A review of the jail phone calls revealed certain conversations between Mr. Massey and/or his wife and father

that referenced a diary or journal¹ that Mr. Massey was keeping. During the course of Mr. Walker's cross examination of Massey, there were questions and testimony regarding those calls to the effect that Massey had kept a diary of his cooperation with the Government. It is counsel's remembrance that Mr. Massey testified he last referred to that diary a few days before taking the witness stand in this case.

4. Rule 612, F.R.E., provides, in part, that:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--

(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

5. It is Walker's position the diary should be produced as a document used by Massey to refresh his memory before testifying in this case, pursuant to subsection (2) of Rule 612. In addition to Mr. Massey testifying that he

¹The document will be referred to as a "diary" regardless of whether it is a list, journal, log or known by some other term.

referred to the diary prior to testifying, he also testified that he reviewed copies of a blog of this trial and news reports of this trial, before being told by the prosecution that as a witness he was subject to the Rule of Exclusion (Rule 615, F.R.E.). It is clear that Massey was interested in what was being said at the trial so that he could be prepared for his testimony, thus his review of the diary prior to testifying can be for no other purpose than to prepare for his testimony as a cooperating witness so as to maximize the benefit he will receive from the Government for his testimony.

6. Mr. Walker also contends that his Constitutional right to effective cross examination of Mr. Massey as a cooperating witness also mandates production of the diary.

7. In Crawford v. Washington, 541 U.S. 36, 42, 61, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) it was held that:

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.

It commands not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

It has also been stated that cross-examination serves not only to reveal a witness's perceptions and memory but also to expose his "biases, prejudices, or ulterior motives." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) it was stated:

We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

In Maryland v. Craig, 497 U.S. 836, 847, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) it was held that:

"[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony"

In Jenkins v. Wainwright, 763 F. 2d 1390, 1392 (11th Cir. 1985) it was said that:

This court has long recognized the particular importance of searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution

In United States v. Summers, 598 F. 2d. 450, 460 (11th Cir. 1979)² the court stated:

Where the witness the accused seeks to cross-examine is the "star" government witness, providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased.

8. In this case Mr. Massey is one of the star witnesses for the Government. There is evidence he has kept a diary of his cooperation with the Government. The information contained in his diary is about his cooperation against the defendants in this case. That makes it highly relevant to assess the truthfulness, credibility or bias of Mr. Massey. Therefore, Mr. Walker requests that this information be turned over to him for purposes of cross examination.

9. Counsel for Walker has discussed this matter with counsel for Mr. Massey. Mr. Massey does object to the production of the diary. Mr. Massey's attorney also

²The Eleventh Circuit in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

suggests that this matter may involve attorney client matters and requests that a hearing be held in camera.³ Even if this issue may involve attorney client matters, it is Walker's position that his Sixth Amendment right to confrontation trumps any privilege claimed pursuant to a rule of evidence. Murdoch v. Castro, 365 F. 3d 699, 702 (9th Cir. 2004) ("[E]videntiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment. See *Olden v. Kentucky*, 488 U.S. 227, 232, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988)"). The cases cited in Castro, indicate that courts conduct a weighing test to determine if the defendant has otherwise received a fair trial or the cross examination of the witness in question was sufficient without the requested information. It is Walker's position that no weighing process should occur in light of the recent decision of Bullcoming v. New Mexico, __U.S.__, __S.Ct.__, 180 L.Ed.2d 610, 622 (2011):

"the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it

³Mr. Massey's attorney, Joe Basgier, asked counsel to inform the court that he was in New York on Friday (July 14), and that in consideration of other previous commitments he has, he can be in Montgomery on Monday afternoon (July 18) or Wednesday afternoon (July 20).

does not follow that the rights can be disregarded so long as the trial is, on the whole, fair." [citation omitted] If a "particular guarantee" of the *Sixth Amendment* is violated, no substitute procedure can cure the violation, [citation omitted] and "[n]o additional showing of prejudice is required to make the violation 'complete.'"

Respectfully submitted this 15th day of July, 2011.

s/Jeffery C. Duffey
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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to Justin Shur, USDOJ, and all counsel of record. I also served Joe Basgier, counsel for Mr. Massey, by email.

s /Jeffery C. Duffey
JEFFERY C. DUFFEY