

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:08-cr-00107

**FRANK E. MELTON
MICHAEL RECIO
MARCUS WRIGHT**

**GOVERNMENT’S OPPOSITION TO DEFENDANTS’ MOTION TO COMPEL
DISCLOSURE OF GOVERNMENT’S INTERNAL MEMORANDA**

The United States, by its undersigned counsel, respectfully opposes Defendants Recio and Melton’s Motion to Compel Production. The defendants inappropriately seek internal Department of Justice (DOJ) documents based on mere speculation that they contain exculpatory evidence. The defendants are using the unsubstantiated Brady claim to obtain privileged documents to which they are not otherwise entitled in order to discover the “justification” for the government’s continued prosecution of the defendants. In a piece of circular reasoning, the defendants question the prosecution’s discretion in choosing to proceed with the re-trial of the defendants and conclude that any such decision must rely on invalid reasons. Consequently, the defendants seek the documents created by government counsel in connection with complying with DOJ’s Petite Policy, which requires that federal prosecutors obtain approval from an Assistant Attorney General (AAG) before initiating federal prosecution of a case in which a prior state or federal prosecution based on substantially the same facts has occurred. Failing to cite,

and flatly ignoring, the cases that unequivocally declare that the Petite Policy creates no rights for a defendant, Melton and Recio simply assert that they are entitled to the documents.

The defendants' Motion to Compel Production should be denied because: (1) it is well-established that the Petite Policy, which is an internal DOJ policy, confers no substantive or procedural rights on defendants; (2) the requested documents are specifically exempt from production under Fed.R.Crim.P. 16(a)(2); (3) the requested documents are protected from disclosure by the deliberative process privilege; and (4) the government has complied with its Brady obligations, and the defendants' are not entitled to use an unsubstantiated Brady claim to conduct a fishing expedition into the basis for the government's prosecution. In addition, government counsel sought and obtained approval from the Assistant Attorney General for the Civil Rights Division before initiating the prosecution in this case in accordance with the Petite Policy.

In further support of its opposition, the government states:

The Petite Policy

The DOJ's Dual and Successive Prosecution Policy – also known as the Petite Policy – requires federal prosecutors to obtain approval from the appropriate Assistant Attorney General before initiating prosecution of a case in which a prior state or federal prosecution based on substantially the same acts or transactions has already occurred.¹ *United States Attorney's Manual*, Section 9-2.031.² The Petite Policy applies when a prior state or federal prosecution has resulted in “an acquittal, a conviction, including one resulting from a plea agreement, or a dismissal or other termination of the case on the merits after jeopardy has attached.” *USAM*,

¹ The Supreme Court first recognized this policy in Petite v. United States, 361 U.S. 529 (1960).

² The *United States Attorney's Manual* is an internal DOJ publication that contains general policies and procedures relevant to federal prosecutions.

Section 9-2.031(C). To obtain AAG approval, the Petite Policy requires federal prosecutors to show that three prerequisites have been satisfied: 1) that the matter involves a substantial federal interest; 2) that the prior prosecution left that interest demonstrably unvindicated; and 3) that the defendant's conduct constituted a federal offense and the admissible evidence will be sufficient to obtain and sustain a conviction. *USAM*, Section 9-2.031(A). The Petite Policy specifically states that it was created "solely for the purpose of internal Department of Justice guidance" and that "[i]t is not intended to, and does not, and may not be relied upon to create any rights, substantive or procedural." *USAM*, Section 9-2.031(F).

I. The DOJ's Petite Policy is an Internal, Self-Regulation Mechanism that Confers No Rights on Defendants.

In accordance with the Petite Policy, government counsel sought and obtained approval from the Assistant Attorney General for the Civil Rights Division before initiating the prosecution in this case.³ For this reason, the defendants' motion should be denied. Even if government counsel had not complied with the Petite Policy, however, such non-compliance would not entitle the defendants to any relief. The Supreme Court has held that the Constitution does not bar prosecution by the federal government after completion of a state prosecution and that the Constitution does not mandate the Petite Policy. See *Rinaldi v. United States*, 434 U.S. 22, 28-9 (1977). The Petite Policy is simply an "internal policy of self-restraint that should not

³ The defendants asserted that, in order to comply with the Petite Policy, government counsel not only should have obtained AAG approval to initiate the prosecution in this case, but also must obtain AAG approval to retry the defendants. This assertion is incorrect. The Petite Policy explicitly states the instances in which the conclusion of a prior proceeding results in application of the Petite Policy to a subsequent federal prosecution, and a mistrial is not listed as one of those instances. *USAM*, Section 9-2.031(C). In addition, the Petite Policy has not been interpreted within DOJ as requiring federal prosecutors to obtain AAG approval to retry a case after a mistrial has been declared. A mistrial can result in triggering application of the Petite Policy but only in a limited situation not present here; that is, when a federal trial has already begun, and a state trial then reaches a verdict or results in a guilty plea, and then the federal trial subsequently ends in a mistrial. *USAM*, Section 9-2.031(C). In this case, the prior proceeding – the state trial – reached its conclusion in April 2007, well before the federal trial began in February 2009 and ended in a mistrial.

be enforced against the government.” United States v. Nelligan, 573 F.2d 251, 255 (5th Cir. 1978). See also United States v. Harrison, 918 F.2d 469, 474 (5th Cir. 1990) (“Even if the government failed to adhere to the *Petite* policy in this case, this failure would be irrelevant.”); United States v. Patterson, 809 F.2d 244, 249 (5th Cir. 1987)(“Since we adhere to the established rule that the *Petite* policy may not be enforced against the government by defendants, we must reject the defendants’ claim that they should not have been prosecuted because the government failed to adhere to the *Petite* policy.”); United States v. Michel, 588 F.2d 986, 1004 (5th Cir. 1979); United States v. Paternostro, 966 F.2d 907, 912 (5th Cir. 1992). Because the existence of the Petite Policy does not form the basis of any rights of the defendants, the defendants’ motion should be denied.

II. Federal Rule of Criminal Procedure 16(a)(2) Exempts from Disclosure the Documents Requested by the Defendants.

Under the heading, “Information Not Subject to Disclosure,” Federal Rule of Criminal Procedure 16(a)(2) specifically exempts from discovery or inspection, “reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case.” Citing to the Advisory Committee Notes, the Fifth Circuit in United States v. Mann, 61 F.3d 326, 331 (5th Cir. 1995), held that Rule 16(a)(2) was meant to incorporate into the Rules the work product privilege of the common law in order to “ensure that government attorneys’ litigation preparations are protected from discovery.” The documents requested by the defendants – “all documents, memos or other materials submitted as required by [the Petite Policy]” – are internal government documents prepared by government attorneys in connection with prosecuting this

case, and thus are expressly exempt from disclosure under Rule 16(a)(2).⁴ See Mann 61 F.3d at 331 (holding that Internal Revenue Service agents' investigative reports containing, among other things, assessments of the strength of the case "clearly f[e]ll within the ambit of [Rule 16(a)(2)]" and were exempt from discovery).

III. The Documents Requested by the Defendants Are Protected from Disclosure by the Deliberative Process Privilege.

The defendants are also not entitled to the requested documents because the documents are protected by the deliberative process privilege. The Supreme Court has recognized a "deliberative process" privilege, which protects from discovery all "documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formed." NLRB v. Sears, Roebuck and Co., 421 U.S. 132, 150 (1975) (internal quotations removed). This "privilege" is premised on the notion that if the governmental officials know their reports or memoranda could be made public, they might be inhibited in their discussion of analysis of critical issues. Such inhibition could result in less deliberate decision making, thereby compromising the integrity or quality of any final decision." Id. at 150-51.

In order to be protected by the deliberative process privilege, "a document must be both (1) 'predecisional' or 'antecedent to the adoption of agency policy' and (2) 'deliberative,' meaning 'it must actually be related to the process by which policies are formulated.'" National Wildlife Fed'n v. United States Forest Serv., 861 F.2d 1114, 1117 (9th Cir. 1988) (quoting Jordan v. United States Dept. of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978)). The defendants request internal DOJ documents related to the pre-indictment decision-making process. Any

⁴ See Defendants' Motion to Compel Production, p. 4.

such documents are clearly part of a deliberative and pre-decisional process. Accordingly, they fall within the deliberative process privilege, and the government should not be compelled to produce them.

IV. Invoking Brady Does Not Entitle the Defendants to Conduct a Fishing Expedition.

The defendants asserted, without citation to law or other authority, that the requested documents should be produced because “[a]ny reasons for continued prosecution not consistent with [the Petite Policy] are potentially exculpatory.” See Defendants’ Motion to Compel Production, p. 4. “Under Brady, exculpatory evidence is discoverable by the defendant where it is material to guilt or punishment.” United States v. Maloof, 205 F.3d 819, 825 (5th Cir. 2000)(internal quotations and citation omitted). To establish a Brady violation, a defendant “must show that (1) the prosecution suppressed evidence, (2) the evidence was favorable to the defense, and (3) the evidence was material.” United States v. Villafranca, 260 F.3d 374, 379 (5th Cir. 2001). Brady does not “ensure access to all government material in order that [a defendant] might be able to find something exculpatory for his case.” United States v. Davis, 752 F.2d 963, 976 (5th Cir. 1985). The defendants have absolutely no basis for suggesting, nor can the defendants establish that, the requested internal government documents contain exculpatory evidence. The request is a blatant attempt to conduct an impermissible fishing expedition in the government’s files, and it therefore should be denied.

Wherefore, based upon the foregoing, the government respectfully requests that the Court deny the defendants’ Motion to Compel Production.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel for the United States, hereby certify that on the 24th day of March, 2009, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

John Reeves, Attorney for Frank E. Melton

John M. Colette and Matt Baldrige, Attorneys for Defendant Marcus Wright; and

Cynthia Stewart, Attorney for Michael Recio.

/s/ Mark Blumberg