

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 1:04-cr-165

v.

Hon. Ellen S. Carmody

JEFFERY ALAN VISSER,

Defendant.

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**DISCOVERY ORDER**

If the parties in this action have not already done so, they shall within twenty-one (21) days from the date of this order, confer, and the following shall be accomplished:

- A. Upon request of the defendant, to be made within seven (7) days from the date of this order, the government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, the existence of which is known or by the exercise of due diligence may become known to the attorney for the government:
1. Any relevant written or recorded statements made by the defendant including, but not limited to, the rough notes of any interrogations of the defendant before or after arrest by any persons then known to be government agents.
  2. The defendant's arrest and conviction record.
  3. Results or reports of physical or mental examinations, and of scientific tests, including, without limitation, any handwriting analysis or experiments, which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.
- B. Upon request of the defendant, to be made within seven (7) days from the date of this order, the government shall permit the defendant to inspect and copy the following items or copies thereof, or supply copies thereof, which are within the possession, custody or control of the government, or the existence of which is known or by the exercise of due diligence may become known to the government:
1. The substance of any oral statement made by the defendant before or after his arrest

in response to interrogation by a person then known to be a government agent which the government intends to offer in evidence at trial.

2. Recorded grand jury testimony of the defendant relating to the offenses charged.
  3. Books, papers, documents, photographs, tangible objects, buildings or places which the government intends to use as evidence at trial to prove its case in chief, or were obtained from or belong to each defendant.
- C. Upon receipt by a defendant of materials in A(3) or B(3) from the government, the defendant shall permit the government to inspect and copy the following items, or copies thereof, or supply copies thereof, which are within the possession, custody or control of the defendant, the existence of which is known or by the exercise of due diligence may become known to the defendant:
1. Books, papers, documents, photographs or tangible objects which each defendant intends to introduce as evidence in chief at trial.
  2. Any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case which the defendant intends to introduce as evidence in chief at trial, or which were prepared by a defense witness who will testify concerning the contents thereof.
- D. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, or intends to introduce expert testimony relating to a mental disease, defect or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall give written notice thereof to the government.
- E. The government shall reveal to the defendant and permit inspection and copying all information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment within the scope of Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976).
- F. The government shall obtain and copy impeachment information relating to its witnesses that is within the ambit of the Jencks Act and within the ambit of Brady, including any prior criminal record of any alleged informant who will testify for the government at trial, so that the documents are available for effective use at the time of trial. This Court cannot compel the government to disclose Jencks Act statements prior to the trial. United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988). The Sixth Circuit Court of Appeals has noted, however, that "the better practice . . . is for the government to produce such material well in advance of trial so that defense counsel may have an adequate opportunity to examine that which is not in dispute and the court may examine the rest in camera, usually in chambers." United States v. Minsky, 963 F.2d 870, 876 (6th Cir. 1992). This Court urges the

government to follow the recommendation of the Sixth Circuit and produce Jencks Act and other impeachment material in a timely fashion.

- G. The government shall state whether the defendant was identified in any lineup, showup, photo spread or similar identification proceeding, and produce any pictures utilized or resulting therefrom.
- H. The government shall advise its agents and officers involved in this case to preserve all rough notes.
- I. The government shall advise the defendant of its intention to introduce during its case in chief proof of evidence, pursuant to Rule 404(b) of the Federal Rules of Evidence pursuant to Rule 12(d)(2) of the Federal Rules of Criminal Procedure.
- J. The government shall state whether the defendant was an aggrieved person, as defined in 18 U.S.C. Section 2510(11) of any electronic surveillance conducted in connection with the investigation of the charges pending herein and, if so, shall set forth in detail the circumstances thereof.
- K. Upon request of the defendant, to be made within seven (7) days from the date of this order, the government shall provide the defense, for independent expert examination, copies of all latent fingerprints or palm prints which have been identified by a government expert as those of the defendant.
- L. The parties shall make every possible effort in good faith to stipulate all facts or points of law, the truth and existence of which is not contested and the early resolution of which will expedite the trial.
- M. The parties shall collaborate in preparation of a written statement to be signed by counsel for each side, generally describing all discovery material exchanged, and setting forth all stipulations entered into at the conference. No stipulation made by defense counsel at the conference shall be used against the defendant unless the stipulation is reduced to writing and signed by the defendant and his counsel.

It shall be the continuing duty of counsel for both sides to immediately reveal to opposing counsel all newly discovered information or other material within the scope of this order.

Upon a sufficient showing, the Court may at any time, upon motion properly filed, order that the discovery or inspection provided for by this order be denied, restricted or deferred, or make such other order as is appropriate. It is expected by the Court, however, that counsel for both

sides shall make every good faith effort to comply with the letter and spirit of this order.

All motions shall be filed in this cause no later than the date established at the initial pretrial conference. If no date is established at the initial pretrial conference, all motions must be filed within 28 days of the date of this order. Responses to non-dispositive motions shall be due no later than two weeks from the filing of said motions.

In setting forth the discovery required by this order, the Court notes that "in most criminal prosecutions, the Brady rule [Brady v. Maryland, 373 U.S. 83 (1963)], Rule 16 [Fed. R. Crim. P. 16] and the Jencks Act [18 U.S.C. § 3500], exhaust the universe of discovery to which the defendant is entitled." United States v. Presser, 844 F.2d 1275, 1285 n.12 (6th Cir. 1988). The Court accordingly directs the parties to engage in discovery consistent with Brady, Rule 16, and the Jencks Act. This order is designed to exhaust the discovery to which a defendant is ordinarily entitled and to avoid the necessity of counsel for the defendant(s) filing routine motions for routine discovery. Accordingly, counsel for the defendant(s) shall make a request of the government for each item of discovery sought and be declined the same **prior to the filing of any motion**. Further, any motion filed on behalf of the defendant(s) **shall include an accompanying certification** by counsel for the defendant(s) that either:

(1) The item of discovery sought in the motion is not included in or covered by this discovery order; that a formal request for the item has been made to the government, and the government has declined the request, or

(2) The item of discovery sought in the motion is included in or covered by this discovery order; that a formal request for the item has been made to the government, and the government has declined the request.

Sanctions may be imposed for failure to follow this procedure.

**IT IS SO ORDERED.**

Date: December 23, 2004

/s/ Ellen S. Carmody  
ELLEN S. CARMODY  
United States Magistrate Judge