

1 WO

2

3

4

5

6

IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	06 MJ 04175 PCT MEA
)	06 MJ 04182 PCT MEA
v.)	
)	ORDER
NATHAN GENE BEGAYE,)	
)	
Defendant.)	
_____)	

BACKGROUND

On June 19, 2006, a complaint was filed charging Defendant with possession with intent to distribute methamphetamine in violation of 21 U.S.C. § 841, in a case docketed as 3:06 MJ 4175. This charge was the result of a traffic stop conducted on May 12, 2006, by an Arizona Department of Public Safety Officer (Officer Whitehair) on a United States highway located within the boundaries of the Navajo Nation. The complaint was issued based upon an affidavit filed by an agent of the Federal Bureau of Investigation, Special Agent Rominger. In case number 3:06 MJ 4182, Defendant is charged with two counts of violating 21 U.S.C. § 841, possession with the intent to distribute methamphetamine and cocaine, charges arising from the discovery of drugs in Defendant's possession at the time of

1 his arrest on the first complaint (06 MJ 4175) on June 27, 2006.

2 Joint preliminary hearings and detention hearings
3 regarding both complaints were held in this matter on June 29,
4 2006. Two statements of probable cause regarding the charges
5 were entered into evidence by the government. One statement of
6 probable cause was completed by FBI Special Agent Rominger and
7 one statement of probable cause was completed by Navajo Nation
8 Criminal Investigator Michael Begay.

9 At the hearing, Navajo Nation Criminal Investigator
10 Michael Begay testified on behalf of the government. Criminal
11 Investigator Begay was the sole witness to testify for the
12 government at the hearing. Criminal Investigator Begay
13 testified that, in preparation for the hearings, he had reviewed
14 the statement of probable cause completed by Special Agent
15 Rominger. Criminal Investigator Begay also testified he had
16 reviewed the Arizona Department of Public Safety report of
17 Officer Whitehair, regarding the traffic stop of Defendant on
18 May 12, 2006; Defendant and his brother were stopped by a DPS
19 officer for speeding and during the traffic stop methamphetamine
20 was located in the vehicle.

21 During cross-examination, defense counsel moved the
22 Court to order the government to disclose Officer Whitehair's
23 police report pursuant to Rule 26.2, Federal Rules of Criminal
24 Procedure. The government then voir dired Criminal Investigator
25 Begay, who stated the DPS report was not a document prepared by
26 him. In response to the Court's inquiry, Criminal Investigator
27 Begay indicated the report did not detail any of his own

28

1 investigative efforts. The government then objected to the
2 request to produce the police report, arguing the report was not
3 "Jencks Act" material pursuant to Rule 26.2 because the report
4 did not reflect any activity by Criminal Investigator Begay.
5 Defense counsel responded that, because all of Criminal
6 Investigator Begay's testimony was predicated on the report, the
7 report was incorporated by the testimony and should be produced.

8 The Court denied Defendant's Rule 26.2 request. The
9 Court found there was probable cause to support the charges in
10 the complaints. Defendant was bound over to District Court for
11 further proceedings. Defendant was also detained as a danger
12 and a flight risk.

13 Defense counsel moved for the government to produce all
14 "statements" of the witness, i.e., Criminal Investigator Begay,
15 relevant to the witness's direct testimony, pursuant to Rule
16 26.2, Federal Rules of Criminal Procedure. The Court denied
17 defendant's Rule 26.2 motion, noting the Court disagreed with a
18 published decision of another judge of the District of Arizona,
19 United States v. Wicktor, 403 F. Supp. 2d 964, 966-67 (D. Ariz.
20 2005). The motion was denied for the reasons that follow.

21 **Legal Analysis**

22 Defendant sought disclosure of witness statements at
23 the preliminary hearing, pursuant to Rule 26.2, Federal Rules of
24 Criminal Procedure. Historically, defendants were not entitled
25 to discovery at preliminary hearings other than that
26 incidentally learned as a result of the hearing.

1 The mission of the hearing is an investigation into
2 probable cause for further proceedings against the
3 accused. It does not include discovery for the sake of
4 discovery. To be sure, the evidence the Government
5 offers to establish probable cause is by nature also
6 discovery for the accused. So also is information
7 adduced on cross-examination of Government witnesses on
8 the aspects of direct-examination testimony tending to
9 build up probable cause. In those senses, some
10 discovery becomes a by-product of the process of
11 demonstrating probable cause. But in no sense is
12 discovery a legitimate end unto itself.

13 Coleman v. Burnett, 477 F.2d 1187, 1199-1200 (D.C. Cir. 1973).
14 See also United States V. Mulligan, 520 F.2d 1327, 1330 (6th
15 Cir. 1975); United States v. Foster, 440 F.2d 390, 392 (7th Cir.
16 1971); 2 Charles Wright, Federal Practice and Procedure § 85 (2d
17 ed. 1982).

18 However, with the advent of Rule 26.2 and its
19 subsequent amendments the legal landscape with regard to
20 preliminary hearings has changed. The principles of the "Jencks
21 Act," codified at 18 U.S.C. § 3500 and providing for the
22 disclosure to the parties of statements made by testifying
23 witnesses, have been specifically incorporated into the rules
24 governing preliminary hearings held pursuant to Rule 5.1,
25 Federal Rules of Criminal Procedure, and 18 U.S.C. § 3060. As
26 a result, an avenue of discovery during preliminary hearings,
27 not previously available to the defense, or to the government,
28 has been established. The question before the Court is how
broad an avenue is available at this time?

Rule 26.2(a), Federal Rules of Criminal Procedure, provides:

After a witness other than the defendant has testified
on direct examination, the court, on motion of a party
who did not call the witness, must order an attorney
for the government or the defendant and the defendant's

1 attorney to produce, for the examination and use of the
2 moving party, any statement of the witness that is in
3 their possession and that relates to the subject matter
4 of the witness's testimony.

5 Rule 26.2 also defines the type of statement to be produced
6 at the conclusion of the witness's direct testimony as follows:

7 As used in this rule, a witness's "statement" means:
8 (1) a written statement that the witness makes and
9 signs, or otherwise adopts or approves;
10 (2) a substantially verbatim, contemporaneously
11 recorded recital of the witness's oral statement that
12 is contained in any recording or any transcription of
13 a recording; or
14 (3) the witness's statement to a grand jury, however
15 taken or recorded, or a transcription of such a
16 statement.¹

17 (emphasis added).

18 Therefore, assuming relevancy, a statement is a Jencks
19 "statement," which must be disclosed pursuant to Rule 26.2, if
20

21 ¹The definition parallels that found in the present version of
22 18 U.S.C. § 3500(e).

23 e) The term "statement", as used in subsections (b),
24 (c), and (d) of this section in relation to any
25 witness called by the United States, means--
26 (1) a written statement made by said witness and
27 signed or otherwise adopted or approved by him;
28 (2) a stenographic, mechanical, electrical, or other
recording, or a transcription thereof, which is a
substantially verbatim recital of an oral statement
made by said witness and recorded contemporaneously
with the making of such oral statement; or
(3) a statement, however taken or recorded, or a
transcription thereof, if any, made by said witness
to a grand jury.

29 For simplicity, the Court will refer to such statements as
30 "Jencks Act" statements as there is limited authority discussing Rule 26.2
31 as it applies to preliminary hearings and the Court must rely principally
32 upon authority defining the scope of the Jencks Act in traditional trial
33 settings. Cf. Fed. R. Crim P. 26.2(f) Advisory Committee note, 1979
34 amendments (stating that Rule 26.2 places the substance of 18 U.S.C.
35 § 3500 in the criminal rules while also providing for the production
36 of defense witness statements).

1 (1) the witness makes a written statement which the witness
2 signed or otherwise adopted or approved; (2) the witness made an
3 oral statement which was recorded in a substantially verbatim
4 and contemporaneously manner and is contained in any recording
5 or transcript of the recording; or (3) the witness testified
6 before a grand jury and the testimony was recorded in some
7 manner. In this matter, Defendant sought a statement made by a
8 person other than the witness who testified at the hearing,
9 which third-party's statement Defendant contended was
10 "otherwise" adopted or approved by the witness who testified.
11 In essence, Defendant contended that, by reviewing investigative
12 reports compiled by others and testifying as to their contents
13 at the preliminary hearing, the government's witness "adopted or
14 approved" the contents of the reports and they constitute
15 producible Jencks Act statements of the witness.

16 A review of the limited published opinions from the
17 federal courts regarding this issue indicates that resolving the
18 question of whether a third-party agent's investigative report
19 is a "statement" of an agent testifying at a preliminary hearing
20 is analogous to trying to place a square peg in a round hole.

21 In Campbell v. United States, 296 F.2d 527 (1st Cir.
22 1961), the First Circuit defined how a Jencks Act statement
23 might be "signed, or otherwise adopted or approved" by a witness
24 in a trial setting, stating:

1 Where the statute says "signed, or otherwise adopted or
2 approved," by ordinary principles of noscitur a
3 sociis,² we think this means an approval comparable to
4 a signature, and refers to the written statement
5 itself, not merely approval of a general account of
6 which the writing may be representative.

7 296 F.2d at 532-33.

8 The court in United States v. McCarthy, 301 F.2d 796,
9 797-98 (3rd Cir. 1962), also interpreted the same language. In
10 McCarthy, two FBI agents, Smith and Carrig, interviewed the
11 defendant and both took notes. Carrig later prepared a report
12 of the interview utilizing the notes. Both agents checked and
13 discussed the report for accuracy. At trial, Smith testified
14 regarding the interview, but he no longer possessed his
15 interview notes, indicating they may have been destroyed.
16 Defense counsel moved for production of Carrig's report of the
17 defendant's interview. The motion was denied and the defendant
18 was convicted. On appeal, the Third Circuit, relying upon
19 Clancy v. United States, 365 U.S. 312 (1961), concluded denying
20 the motion was a Jencks Act violation and remanded the matter
21 for a new trial. The Third Circuit held that Carrig's written
22 report had been adopted or approved by Smith even though not
23 actually authored by Smith.

24 In Government of the Virgin Islands v. Lovell, 410 F.2d
25 307, 309-10 (3rd Cir. 1969) the court again had occasion to
26 determine what the term "approved" meant in the context of the
27 Jencks Act. Prior to trial, a detective Torres interviewed the

28 ² "A thing is known by its associates," i.e., the words of
a statute are to be construed in their context.

1 defendant outside of the presence of detective Groneveldt. When
2 the report of the defendant's interview was completed by
3 detective Torres, detective Groneveldt, detective Torres'
4 supervisor, signed off on the report as "approved."

5 At trial, detective Groneveldt testified. At the
6 conclusion of the detective's direct testimony, defense counsel
7 moved for production of all Jencks Act statements of the
8 witness, including detective Torres' report. The Third Circuit
9 held detective Groneveldt's signature and use of the term
10 "approved," as found on the report, did not equate with the
11 Jencks Act's use of "signed or otherwise adopted or approved"
12 and ruled that a Jencks Act violation did not occur.

13 Based upon the above authority, it would appear in the
14 context of Jencks Act statements that a limited joint
15 investigation doctrine has been recognized by the courts, i.e.,
16 a report is a Jencks statement even if the testifying witness
17 did not author the report, if the testifying witness
18 participated in the investigative activity specified in the
19 report and concurs in the report's accuracy. However, there
20 does appear to be limits to the doctrine. In United States v.
21 Gotchis, 803 F.2d 74, 77 (2d Cir. 1986), an informant gave
22 certain information to Drug Enforcement Agency ("DEA") agent
23 Cash regarding the defendant. Agent Cash conveyed the
24 information to DEA agent Candell, who wrote the information down
25 and, relying upon the information, subsequently arrested the
26 defendant at an airport. At a suppression hearing, at the close
27 of agent Candell's direct testimony, the defendant, pursuant to

28

1 Rule 26.2, moved for production of agent Candell's rough notes
2 regarding agent Cash's tip. The motion was denied and the
3 defendant convicted. On appeal, the Second Circuit stated:

4 Rule 26.2(f)(1), it seems to us, contemplates writings
5 that the witness has in some manner vouched for.
6 Candell, who apparently just wrote down what Cash told
7 him, did not sign, approve, or adopt the notes. He was
8 in no position when he took the notes to vouch for the
9 accuracy of Cash's tip. Although he later acted on the
10 information Cash had given him, nursing the belief or
11 hope, no doubt, that the information was accurate, he
12 did not thereby "adopt" Cash's description of the
13 suspect in any way we think the rule embraces.

14 803 F.2d at 77. See also United States v. Bobadilla-Lopez, 954
15 F.2d 519, 522-23 (9th Cir. 1992).

16 In a case more analogous to the present matter, United
17 States v. Blas, 947 F.2d 1320, 1326-27 (7th Cir. 1991), the
18 court analyzed the scope of the Jencks Act's applicability to
19 sentencing proceedings. At sentencing, DEA agent Andrews
20 indicated that, prior to testifying, he had reviewed a number of
21 agencies' reports, not authored by himself nor reflecting agent
22 Andrews' investigation, but relating to the defendant's other
23 arrests and activities. Defense counsel moved for production of
24 the reports pursuant to Federal Rule of Evidence 612 and the
25 Jencks Act.

26 The Seventh Circuit rejected the defendant's argument
27 that he was entitled to production of the written materials
28 pursuant to Rule 612, Federal Rules of Evidence. Rule 612
provides that if a witness refreshes his or her memory from a
writing prior to testifying the adverse party is entitled to
have the writing produced for inspection and use at the hearing.

1 The court noted the relevant proceeding in the case was a
2 sentencing hearing and stated:

3 Initially, we note that Rule 1101(d)(3) explicitly
4 makes the evidentiary rules, "other than with respect
5 to privileges," inapplicable to sentencing proceedings:
6 "The rules (other than with respect to privileges) do
7 not apply in the following situations: ...
8 Proceedings for extradition or rendition; preliminary
9 examinations in criminal cases; sentencing, or granting
10 or revoking probation ..." [] But even if Rule 612 were
11 applicable, the appellant's argument would fail.

12 947 F.2d at 1327.³

13 In regard to defendant's Jencks Act argument, the court
14 stated:

15 Blas has failed to assert and the record is void of any
16 evidence that the records Andrews reviewed prior to
17 testifying contained statements "made by" Andrews.
18 Thus, the documents were not Andrews' "statements" and
19 do not require production under the Jencks Act.

20 Id. at 1327.⁴

21 ³ The Ninth Circuit has similarly held the Rules of Evidence
22 generally do not apply to preliminary hearings. See United States v.
23 Brewer, 947 F.2d 404, 410 (9th Cir. 1991). Likewise, the Rules of
24 Evidence generally do not apply to detention hearings held pursuant
25 to the Bail Reform Act. See 18 U.S.C. § 3142(f) (2000 & Supp. 2006).

26 ⁴ A similar conclusion was reached by the Sixth Circuit
27 Court of Appeals in an unpublished opinion, which is noted here
28 because of the lack of published persuasive authority on point. See
United States v. Robinson, 48 F.3d 1220 (Table), 1995 WL 106117 at *1
(6th Cir.).

29 Defendant argues that the district court erred in
30 refusing to require the disclosure of the entire
31 case file of an FBI agent who testified at the
32 detention hearing pursuant to Rule 26.2, Fed. R.
33 Crim. P. The district court did, however, require
34 the government to produce certain witness
35 interview reports prepared by the agent that
36 related to the subject matter of his testimony at
37 the hearing. Rule 26.2 does not mandate the

1 The Court respectfully disagrees with the conclusion
2 reached in United States v. Wicktor, 403 F. Supp. 2d 964, 966-67
3 (D. Ariz. 2005). In Wicktor, a different judge of the District
4 of Arizona concluded investigative reports prepared by
5 detectives who did not testify at a preliminary hearing must be
6 disclosed pursuant to Rule 26.2. Although the authors of the
7 reports did not testify at the hearing, a detective Susuras
8 testified and based his testimony on his own knowledge and his
9 review of the other detectives' reports. The court concluded
10 the reports were "statements" of the testifying agent because he
11 had otherwise adopted or approved the reports by stating in his
12 testimony that he adopted and approved the other detectives'
13 reports as official reports in the case.

14 Here, the detectives' reports are properly considered
15 Detective Susuras' own words. Detective Susuaras
16 drafted a criminal complaint based on those reports,
17 supported his claim of probable cause based on those
18 reports, and adopted them as official reports. Although Detective Susuras
19 neither uttered nor drafted the words in the detective reports, he adopted the
20 detectives' words as his own. As such, the reports of
21 Detectives Kellog, Kiefger, and Diaz are Rule 26.2(a)
22 "statements" as to Detective Susuras who testified at
23 the preliminary hearing.

24 403 F. Supp. 2d at 967.

25 The Wicktor decision cites the Fifth Circuit Court of
26 Appeals' conclusion in United States v. Sink, 586 F.2d 1041,
27 1049-50 (5th Cir. 1978), as instructive. In Sink, Secret
28 Service agent Stebbins prepared a report regarding the

disclosure of third-party statements, or of
statements not related to the subject matter
concerning which the witness has testified.

1 defendant's criminal activity and testified at the defendant's
2 trial. The arresting agent, Secret Service agent Conelly, also
3 testified at trial. Defendant moved for production of the
4 report which the trial court denied. After remand for an
5 evidentiary hearing, the Fifth Circuit concluded agent Stebbins'
6 report was a Jencks Act statement with regard to Agent Conelly,
7 because Conelly had "endorsed" the report and "verified" its
8 accuracy. See 586 F.2d at 1049-50. The court did not describe
9 how agent Conelly endorsed and verified the report but
10 previously described the agents' joint investigative activities.
11 See id. at 1044-45. A review of those activities lead this
12 Court to conclude the Fifth Circuit was applying, in a
13 traditional sense, the joint investigation doctrine described
14 supra. See United States v. Welch, 810 F.2d 485, 490 (5th Cir.
15 1987). Therefore, Sink is consistent with Campbell, McCarthy,
16 Lowell, and Blas.

17 In further support of this conclusion, the Court notes
18 the rules of discovery found in Rule 16, Federal Rules of
19 Criminal Procedure, are not applicable to preliminary hearings
20 and do not contemplate the production of witness statements to
21 the defense in this context. See Sciortino v. Zampano, 385 F.2d
22 132, 134 & n.2 (2d Cir. 1967) ("Those who advocate broadening
23 the scope of discovery in criminal cases do not suggest
24 expanding the functions of the preliminary hearing as a means of
25 accomplishing this result."). Even if Rule 16 were directly
26 applicable to preliminary hearings, Rules 16(a)(2) and (b)(2)
27 prohibit the general disclosure of investigative reports in a

1 criminal matter: "Nor does this rule authorize the discovery or
2 inspection of statements made by prospective government
3 witnesses except as provided in 18 U.S.C. § 3500." Rule
4 16(a)(2), Fed. R. Crim. P. (2006).

5 **Conclusion**

6 The Court finds Blas controlling regarding the issue before
7 the Court. Granting Defendant's motion would have engrafted
8 upon Rule 26.2 the production doctrine found in Rule 612,
9 Federal Rules of Evidence, which is prohibited by Rule
10 1101(d)(3), Federal Rules of Evidence. Therefore, based upon
11 the foregoing, Defendant's Rule 26.2 motion was denied.

12 DATED this 3rd day of July, 2006.

13
14
15 
16 _____
17 Mark E. Aspey
18 United States Magistrate Judge
19
20
21
22
23
24
25
26
27
28