

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
) Criminal Action No.
v.) 05-00344-01-CR-W-ODS
)
GARY EYE,)
)
 Defendant.)

**ORDER DENYING MOTION FOR PRODUCTION OF
REGENNIA RIOS'S PRE-SENTENCE INVESTIGATION REPORT**

Before the court is a motion filed by defendant Gary Eye for production of a pre-sentence investigation report ("PSI") of Regennia Rios, who pled guilty in case number 06-00182-01-CR-W-ODS to making false statements to federal investigators and was sentenced to five years in prison. I find that Ms. Rios's PSI is not discoverable at this time. Therefore, defendant's motion will be denied.

I. BACKGROUND

On September 29, 2005, an indictment was returned charging defendant with two counts of interference with federally protected activities, in violation of 18 U.S.C. § 245(b)(2)(B); one count of using or discharging a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii); two counts of using or discharging a

firearm during a crime of violence causing murder, in violation of 18 U.S.C. §§ 924(c)(1)(A)(iii) and (j)(1); one count of tampering with a witness, in violation of 18 U.S.C. §§ 1512(a)(1)(C) and (a)(3)(A); one count of obstruction of justice, in violation of 18 U.S.C. § 1519; and one count of using fire to commit a felony, in violation of 18 U.S.C. § 844(h)(1).

Defendant filed the instant motion for production of Rios's PSI on November 2, 2006 (document number 206). On November 17, 2006, the government filed a response (document number 210) arguing that defendant is not entitled to Rios's PSI, and the government has agreed to provide Brady and Giglio material 60 days before trial.

II. PRODUCTION OF A PRE-SENTENCE INVESTIGATION REPORT

Defendant argues that he is entitled to inspect Ms. Rios's PSI as it may contain Brady material. Such a request by a criminal defendant has been routinely denied by the courts because pre-sentence investigation reports "are prepared by probation officers for the court's use in sentencing and are not public documents subject to prosecutorial control." United States v. Alvarez, 358 F.3d 1194, 1208 n.9 (9th Cir. 2004). Disclosure of pre-sentence

reports is not compelled by Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act, 18 U.S.C. § 3500, or Rule 16 of the Federal Rules of Criminal Procedure if the reports are in the hands of the court or the probation office. United States v. Zavala, 839 F.2d 523, 528 (9th Cir.), cert. denied, 488 U.S. 831 (1988); United States v. Trevino, 556 F.2d 1265, 1270 (5th Cir. 1977).

The district courts have substantial supervisory powers over their records and files. Nixon v. Warner Commun., Inc., 435 U.S. 589 (1978). Control over these documents is a discretionary matter with the district court. See United States v. Schlette, 842 F.2d 1574, 1577 (9th Cir. 1988), amended by 854 F.2d 359 (9th Cir. 1988). The Supreme Court has commented that "in both civil and criminal cases the courts have been very reluctant to give third parties access to the presentence investigation report prepared for some other individual or individuals." United States Dep't of Justice v. Julian, 486 U.S. 1, 12 (1988). This observation by the Supreme Court supports the "general presumption that courts will not grant third parties access to the presentence reports of other individuals." United States v. Huckaby, 43 F.3d 135, 138 (5th Cir. 1995) (internal

quotation and citation omitted). This presumption is due, in part, to a general concern that the disclosure of PSIs to third parties will have a "chilling effect on the willingness of various individuals to contribute information that will be incorporated into the report." United States Dep't of Justice v. Julian, 486 U.S. 12.

Many courts have performed an en camera review of the PSI to determine whether any Brady material is contained therein. No en camera review of a testifying witness's PSI is required without a threshold showing of a good faith belief that a witness's PSI contains exculpatory evidence "not available elsewhere." United States v. Molina, 356 F.3d 269, 275 (2nd Cir. 2004). A third party requesting disclosure of a PSI must demonstrate a "compelling, particularized need for disclosure" before en camera review by the court is justified. Id. The compelling need must be one stated with particularity, as opposed to an abstract and conclusory expression of need.

In this case, defendant seeks to have his attorney review the PSI under seal. He fails to identify any particular information other than "critical impeaching information." Defendant argues that Ms. Rios was the only

eye-witness to the alleged murder in this case, and that the government will contend at trial that she lied on other occasions and left out certain events when she testified before the grand jury. The government has already agreed to turn over grand jury transcripts 60 days before trial, in addition to Brady and Giglio material. Defendant has failed to indicate how the PSI could contain additional impeaching information about the different versions of the offense given by Ms. Rios in the past.

Compare that with the facts of United States v. Gomez, 323 F.3d 1305 (11th Cir. 2003), wherein the defendant was charged in federal court with Medicare Fraud. He was awaiting sentencing in federal court while he was awaiting trial in state court for murder. He intended to claim diminished capacity as a defense to the murder charge. Therefore, the state sought disclosure of portions of the PSI addressing Gomez's mental status, theorizing that if Gomez was suffering from post-traumatic stress at the time of the murder, he should have mentioned it during the preparation of the federal PSI since they both occurred at about the same time. The court reviewed the PSI en camera and ordered certain relevant portions of the PSI disclosed to the state prosecutors.

Whereas the state in Gomez requested very particular information and gave a very particular reason for needing that information, defendant Eye simply requests disclosure of Rios's PSI to his attorney in order to fish around for any impeaching information that "might" be in the PSI. Defendant has failed to meet the threshold showing of a good faith belief that the PSI contains exculpatory evidence not available elsewhere. Once defendant has reviewed the exculpatory and impeaching material and the grand jury transcripts that will be provided by the government, he may renew this motion at that time, providing the basis for a good faith belief that the PSI contains exculpatory evidence not available elsewhere. However, defendant is reminded that his attorney will not be granted leave to inspect the file under seal. The remedy, as discussed above, once the threshold showing has been made is en camera review by the court.

III. CONCLUSION

Because defendant has failed to demonstrate a compelling, particularized need for disclosure of the PSI, and because he has failed to show a good faith belief that the PSI contains exculpatory evidence not available elsewhere, it is

ORDERED that defendant's motion for disclosure of
Regennia Rios's pre-sentence investigation report is denied.

/s/ Robert E. Larsen
ROBERT E. LARSEN
United States Magistrate Judge

Kansas City, Missouri
December 6, 2006