

outrageous conclusion without so much as conducting an *in camera* inspection of these witness statements so as to allow her to make a proper judicial determination of whether these witness statements are in fact Jencks material or whether the statements contain other evidence requiring disclosure. Again, if it were not so tragic, it would be comical that rulings like this come out of a court system in this country.

4. The sheer speculative basis of the basis of the government for not disclosing these witness statement and the blind adoption of this speculative basis by the Magistrate Judge will create nothing short of a structural error requiring reversal in the event of a conviction.

5. The Discovery Order deprives Dr. Akula from any meaningful trial preparation including the ability to decide what pretrial motions he should file and the ability to decide appropriate experts to retain. The Discovery Order wholly endorses the government's bizarre assertion that all witness statements in this case are Jencks material without any inquiry into the prosecutorial misconduct in punishing Dr. Akula for the possibility that he may choose to exercise a constitutional right and sue one, two or all of these witnesses if their names and statements were to be disclosed in discovery.

6. The Magistrate Judge's Order was also clearly erroneous because the Magistrate Judge erroneously believed that this Court had already denied the same

request when the facts tell another story and the Order of this Court was not a denial, but rather a dismissal without prejudice. *See FN2 at Doc 196 and compare to Doc 161, pg 4.*

APPLICABLE LAW

Pursuant to Federal Rule of Civil Procedure 72(a), nondispositive pretrial matters decided by the U.S. Magistrate Judge may be appealed to the U.S. District Court Judge.

A magistrate judge's order on a nondispositive matter should be modified or set aside “where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.” *see Fed. R. Civ. P. 72(a), Calderon v. Waco Lighthouse for the Blind*, 630 F.2d 352, 354-55 (5th Cir. 1980).

The ‘clearly erroneous’ standard requires that the court affirm the decision of the magistrate judge unless ‘on the entire evidence [the court] is left with a definite and firm conviction that a mistake has been committed.’ ” *C.H., II v. Rankin Co. Sch. Dist.*, No. 3:08cv84-DPJ-JCS, 2010 WL 1541471, at *7 (S.D. Miss. Apr. 16, 2010), quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

OBJECTIONS TO THE DISCOVERY ORDER

A. Categories of Discovery to Be Compelled

Category One:

- a. Physician Interview Statements: not disclosed in the March 7, 2023 disclosure
- b. Documents Supporting the Statement that Some Physicians Were Not Involved or Aware of Canon's Billing services: not disclosed in the March 7, 2023 disclosure
- c. Medical Records for an Unidentified Beneficiary: unidentified medical record and not disclosed in the March 7, 2023 disclosure.
- d. Documents that support the Statement that examinations were completed by Akula's sister who is not a licensed physician: not disclosed in the March 7, 2023 disclosure

The Discovery Order presumes that these categories of documents were provided in the March 7, 2023 disclosure. They were not. There is nothing remotely similar to these categories of documents in the discovery. These documents are necessary for expert witness identification, for filing of motions in limine and for trial preparation in general.

The only basis of denial appears to be because Magistrate Judge speculates that these documents were produced. Since they were not produced, the district court

should compel the production. Dr. Akula cannot prepare a defense in the dark and without the benefit of discovery.

Category Two:

Medical Records of six (6) patient whom Akula alleges that the Government is arguing that he engaged in criminal conduct

Just as for **Category One**, the Discovery Order speculates that just because there was a production on March 7, 2023, that the relevant patient medical records as referenced in the indictment were disclosed. This is not the case.

The following Patient initials are the referenced patients in the indictment which purportedly is the government's evidence of criminal conduct by Dr. Akula and patients JoMo, EtWi and DoTu are missing medical and billing records as referenced in the indictment:

- (1) JoMo- this patient has been identified in more than 400,000 pages of patient medical records. While medical records have been located, billing records for Dates of Service for May 26, 2017, May 27, 2017 and August 18, 2017 as well as 6/1/2017-8/31/2017 as referenced in the indictment are **not** on the discovery provided by the government.
- (2) Yw Du- this patient has been identified and dates of service have been located.
- (3) Et Wi – this patient's full name has **not** been identified and no medical records can be found for this patient
- (4) CaDa – this patient has been identified and dates of service as referenced in the indictment have been located
- (5) DoTu- this patient's full name has **not** been identified and no medical records are included

(6) Pr A1 -patient records have been identified as well as claims for dates of service as referenced in the indictment

There was no competent, substantial evidence that Dr. Akula was actually provided with the medical records of the patients referenced in the indictment and just because the government produced a thumb drive to Dr. Akula on March 7, 2023, this was insufficient evidence for the Magistrate Judge to presume that the production was complete. The production was not complete as the records are missing as provided above.

Category Three

Material Witness statements whom McHugh speculates Akula would sue if disclosed

Citing to an out of circuit case United States v. Safavian, 233 F.R.D. 12, 13 (D.D.C. 2005), Magistrate Judge speculates that these government witness statements, without the government even identifying the names of these witnesses or their participatory role, are Jencks witnesses. All that was required for the Magistrate Judge was for the Junior Prosecutor to say so. The Magistrate Judge did not bother to inquire or perform an in-camera inspection so as to review these witness statements and ensure (1) whether these witnesses do in fact fall under Jencks Act, and (2) whether these witness statements contain any impeaching or exculpatory evidence. It is curious that the Magistrate Judge would not engage in such an exercise especially given that even the out of circuit case cited by Magistrate

Judge establishes that *Brady* trumps Rule 16 and Jencks Act. Without establishing that there is no *Brady* material and without even identification of who these witnesses are, there was no competent, substantial evidence for the Magistrate Judge to conclude that these witnesses are Jencks witnesses.

Every witness in this health care fraud case is not a Jencks witnesses just because this Junior Prosecutor says so. Acceptance of this proposition without even so much as doing an in-camera inspection makes these proceedings a sham and outrageously unfair. This Court has been on the bench long enough to know that not a single other health care fraud case has been brought by the government where every single witness is purported to be a Jencks witness. That is wholly absurd and the fact that the Magistrate Judge did not understand the depth and width of how the government is setting this case as an ambush speaks volumes.

Moreover, absent from the Discovery Order is the consideration of prosecutorial misconduct. In the instant case, this Junior Prosecutor comes right out and shamelessly discloses to this Court and the Magistrate Judge that the reason she is not disclosing these witness statements is because she speculates that Dr. Akula will sue these individuals. This is not a permissible basis for denying a defendant discovery especially discovery of this magnitude.

Dr. Akula has a constitutional right to seek redress in civil courts and for doing so, this Junior Prosecutor cannot be allowed to abuse her authority to deny Dr. Akula

the necessary discovery. No defendant, much less a doctor defendant, goes to trial in this country on health care fraud charges without being provided witness statements. But because according to this Junior Prosecutor, every single witness in this health care fraud case, is all of a sudden Jencks witness because Junior Prosecutor speculates that there will be an imminent civil suit filed against these witnesses. Suing someone does not pose any danger under the laws of this country. That is a right that can be exercised. If a court finds that the civil suit is without merit, then there are remedies for that but this Junior Prosecutor cannot be allowed to take the position that every single witness, albeit, with unidentified names, is a Jencks witness in this case.

Additionally, nothing spoken out of this Junior Prosecutor's mouth can be taken as true. It was the Magistrate Judge who made the finding that this same prosecutor presented falsities to her and failed to correct these falsities being fully aware that they were falsities. *See Doc 66.*

Finally, the Discovery Order inaccurately presumes that this Court denied Dr. Akula's request regarding the so-called Jencks material. *See Doc 196, FN 2.* This Court did not deny, but rather dismissed without prejudice the matter of Jencks material. *See Doc 161, pg 4.* The Magistrate Judge must have read this Court's order a little too quickly believing it was a denial when it was a dismissal

without prejudice. For this reason as well, the Discovery Order is clearly erroneous.

Category Four

Audio recording a material witness “Sue May and Akula”

The Magistrate Judge mislabels this audio recording as being between “Sue May and Akula”. The audio recording is a conversation between Sue May and Kelly Anderson, two former Canon Hospice employees. The Magistrate Judge also continues with her speculative findings for this category of discovery to be compelled, making the following ruling:

The Court is not aware of any case law that requires the Government to provide a copy of the recording for Akula to transcribe in lieu of making the recording available for Akula to listen to. Akula could have used the opportunity to take down salient notes for use in the development of his defense. His failure to do so during his initial opportunity to listen to the recording does not create a reason to require production for transcription.

See Doc 196, pg 6.

There was no evidence that Dr. Akula did not take notes while listening to the audio recording. Magistrate Judge made this up to justify her denial of discovery to Dr. Akula. Again, making rulings on speculation and made up facts would be comical if they were not so tragic as they dictate the liberty and a 40-year hard earned professional status of a physician. Dr. Akula did in fact take notes while listening to the audio recording. *See Exhibit 1.* However, Dr. Akula is not a stenographer and the conversation between these two individuals contains substantial racist remarks like

calling Dr. Akula “little Brown man” as well as other material facts pertinent to Dr. Akula’s preparation for trial that Dr. Akula needs the exact statements in the audio recording. The setting at the FBI evidence room is not conducive for Dr. Akula to be able to take down every word that is spoken on this audio recording and moreover Dr. Akula does not have such a skill. Dr. Akula needs a copy of this audio recording for proper transcription so he can adequately prepare to cross examine these witnesses at trial. Moreover, the government’s basis for not providing the audio recording was for the same reason- Jencks Act- and again because the Junior Prosecutor speculates that Dr. Akula will file civil suit against these two individuals. *See Exhibit 2: McHugh’s email stating no witness statements will be provided in response to Dr. Akula requesting a copy of the recording.* It is oxymoronic that Dr. Akula would be permitted to listen to the audio recording of these two individuals but not be provided with the actual audio recording for purposes of transcription based on a theory that he is going to sue these people. He can sue them based on what he just heard as these people were calling Dr. Akula “little brown man” on the recording. If Dr. Akula did not know better, the proceedings sure could be labeled as circus with these kind of absurd positions taken by the government and adopted blindly without any evidence or even the most minimum inquiry of an *in camera* inspection by the Magistrate Judge.

B. The Discovery Order Creates a Structural Error that Would Mandate Reversal in the Event of a Conviction

“The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial, and, thus, the defining feature of a structural error is that it affects the framework within which the trial proceeds, rather than being simply an error in the trial process itself.” *Weaver v. Massachusetts*, 198 L. Ed. 2d 420, 137 S. Ct. 1899 (2017).

The Junior Prosecutor, who was found to present falsities to the court and fail to correct them, takes the position that every single witness statement in this health care fraud case is Jencks material and therefore has taken the position of not disclosing a single witness statement for the past 18 months since the filing of the indictment. The Junior Prosecutor disclosed her intentions for the first time in November 2022 to former counsel, Bernard Cassidy who sat on the information until December of 2022 when he finally disclosed to Dr. Akula who became enraged about the fact that Cassidy had done nothing to address this outrageousness.

In a case where the allegations in the indictment consist of assertions like Dr. Akula told employees to submit fraudulent billing, denial of these witness statements to Dr. Akula until a few days before trial will affect the framework of this trial because it will deprive Dr. Akula from conducting the necessary discovery to be able rebut these statements if Dr. Akula is given only a few days before trial to read these

witness statements. And even if this Court were to take the drastic and unprecedented steps to take a recess after the testimony of *each witness* so Dr. Akula can conduct the discovery that he needs to, without even addressing the kind of colossal disruption this would cause to the trial proceedings, this Court could not remedy the fact that he will not have the benefit to any witness statement when the deadlines for all pretrial motions come and go. Dr. Akula needs these witness statements so he can file the proper pretrial motions, find the proper experts, make the proper witness list and exhibit list. Dr. Akula cannot do any of these necessary pretrial steps that have strict deadlines without the benefit of these witness statements. “The right of a defendant to conduct his own defense is based on the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty.” *Id.*

Therefore, even if this Court decides to turn a blind eye to this outrageous unfairness, the Fifth Circuit will not tolerate this conduct by the prosecution because this conduct introduces a structural error that will require reversal in the event of a conviction.

Other than this Junior Prosecutor’s hurt feelings dating back to August 2021 because of an unpleasant Press Release about the Junior Prosecutor, and other than the fact that this Junior Prosecutor got caught red handed with her attempt to ex parte communicate with the Magistrate Judge so she can easily remove an organization

who would have been instrumental and critical help in Dr. Akula's defense, there is absolutely no legal basis for this Junior Prosecutor not to disclose all of the witness statements in this case.

Given that the Magistrate Judge did not conduct an *in camera* inspection to review whether the witness statements contain Jencks material, at the very minimum if there were any Brady material that would clearly trump Jencks material, and given that the government's sole basis for not providing any of the witness statements to Dr. Akula is the speculation that Dr. Akula would file civil suits against these witnesses, the ruling by the Magistrate Judge was clearly erroneous and contrary to law. There is no judicial role if magistrates simply take the government's proposition about the discovery without engaging in any inspection of the evidence that is being withheld by the government. The Discovery Order demonstrates that it was based on speculation and not on any competent evidence even with respect to the audio recording where the Magistrate Judge felt comfortable making the speculation that Dr. Akula did not take notes, going on to chastise him for a purported failure to take notes when Dr. Akula had clearly taken notes of the audio recording.

Dr. Akula is entitled to a ruling at the very minimum following an *in camera* inspection of these witness statements. The government's speculative theories cannot be the basis for non-disclosure of the most pertinent discovery in this case. And the government cannot design the punishment of non disclosing all of the

witness statements in this case until a few days before the trial on the whim that Dr. Akula may exercise his constitutional right to sue one, two or all of these witnesses. “Prosecutors may not argue that a defendant should be punished for exercising his constitutional rights”. *Chapman v. California*, 386 U.S. 18, 20-21 (1967).

WHEREFORE, Defendant, DR. SHIVA AKULA, respectfully objects to the Discovery Order at *Doc 196*, and submits that the Order is due to be overruled with this Court issuing an order for the discovery to be compelled for each category of discovery, and for this Court to grant any other and further relief as the Court may deem just and proper.



Shiva Akula, MD
1750 St. Charles Ave. 7th Floor #D
New Orleans, LA 70130
Tel: (504) 669-3825
Email: akulashiva12@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Clerk of District Court which will electronically transmit same to all counsel of record, including Assistant United States Attorney Kathryn McHugh, via email on this 20th day of April, 2023.



Shiva Akula, MD

EXHIBIT 1

Recording of 12/20/2018 phone call between Sue May and Kelly Anderson.

It was a call by Kelly Anderson to Sue May

Kelly said

I am worried about FBI coming to my home and showing me different version of paperwork that dont make any sense

Stuff about the audit is not good

They said if they need me they will call me

What do I need to do?

I will call attorney barzee

Going to see Dad in florida on sunday

The interview was for 45 mins and power went off after they left

Asaki was pissed said Kelly to Sue may and Sue agreed

Sue may have said

Little brown man said they would be a global settlement

I was not charged yet 2 days later got a letter ?target letter

Sue said she talked to Brian Capitelli and he said it's not going away

It will go away if give brown man a platter now. Maybe it will go away

Sue said Dr Akula doesn't want him there anymore ?Raj

Sue said I changed paperwork because I am allowed to as a supervisor

Kelly said

her ex husband used to track her

Kelly said can't get the big guy so they get us

Kelly said there were 20 chat audits then 50 charts and finally 99 charts

Sue said

They are after me

Kelly said

audits were addressed by Diana, John, Laurie

Sue said

I fucked up I shouldnt have done this

Kelly said

my heart beating out of chest

Kelly and Sue work together on this audit

Sue said

something about Leah whiting out on a document? marketing material

1

Kelly said

she knew nothing about billing until it got changed from in house

sue said I only gave \$5000 to Brian capitelli

Julie told we were not allowed in EJGH

They are going after EJGH(hospital)

Dr Akula is taking all steps to stop/resolution

Our documentation is the problem

somebody is going down

Regina hates me

Doc dont visit Baton Rouge

Kelly said

Jamie did not get all information

Sue Kay and Jamie were getting fired

Kelly further told jamie to go get the lawyer as she cant sign a check

Sue told

Kelly to call pauline harrdin

FBI crysta bradford sue said she is fucking bitch

The black girl was writing all *over*

Date: Thu, Mar 23, 2023 at 4:11 PM

Subject: RE: Audio Recording Question

To: S Akula <akulashiva12@gmail.com>

Cc: McLaren, Ryan (USALAE) <Ryan.McLaren@usdoj.gov>

Dr. Akula,

We will not be providing copies of witness statements for the same reasons we stated in our opposition to your discovery motion before Judge Roby. If you want to return to the FBI to listen to the recordings again, you can schedule a time with us to do so. These are the only audio recordings in our possession.

Additionally, we intend to file a motion to request a telephonic status conference for Monday, March 27 with the Court and the parties to discuss the new June 12, 2023 trial date. Do you oppose our request for a telephone conference with the Court and the parties?

From: S Akula <akulashiva12@gmail.com>

Sent: Thursday, March 23, 2023 11:03 AM

To: McHugh, Kathryn (USALAE) <KMchugh@usa.doi.gov>

Subject: Re: Audio Recording Question

Ms McHugh,

Please send me a copy of what I listened to yesterday

EXHIBIT 2

Are there any other recordings

shiva akula

On Thu, Mar 23, 2023 at 10:35 AM McHugh, Kathryn (USALAE) <Kathryn.McHugh@usdoj.gov> wrote:

Dr. Akula,

We labelled this "Consent Recording" because the person making the recording did so consensually.

Katie

From: S Akula <akulashiva12@gmail.com>
Sent: Wednesday, March 22, 2023 8:55 PM
To: McHugh, Kathryn (USALAE) <KMcHugh@usa.doj.gov>
Subject: Audio Recording Question

Ms. McHugh,

When I got back from the FBI office and reviewed your excel sheet, it indicated that the audio recording that I listened to while I was at the FBI office was with "consent". However, you did not play any recording to me that would establish that the audio recording between Kelly Anderson and Sue May was with "consent" and who the consent was given by.

Please provide this information to me.

Sincerely,

Shiva Akula, MD