

ADMINISTRATIVE PROCEEDING
FILE NO. 3-11330

SECURITIES AND EXCHANGE COMMISSION

MAR 10 2004

FIRST CLASS

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
March 8, 2004

In the Matter of

RITA J. McCONVILLE,
and KEVIN M. HARRIS, C.P.A.

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:
: RULINGS FOLLOWING IN
: CAMERA INSPECTION
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On March 2, 2004, the Division of Enforcement (“Division”) delivered to me for in camera inspection thirteen sets of materials, which it refused to produce to Respondents under claims of privilege. The Division characterized the materials as interview notes, and some of the materials are marked “privileged work product” or “attorney-client confidentiality/attorney work product.”

At the request of Respondent McConville, I have reviewed this material to determine whether the Division should have made them available to Respondents pursuant to the doctrine of Brady v. Maryland, 373 U.S. 83, 87 (1963) and the Jencks Act, 18 U.S.C. § 3500. See 17 C.F.R. § 201.230(b)(2), .231(a).

Ruling

The key to whether material is covered by the Brady doctrine is whether the material contains exculpatory evidence. Using this standard and the Order Instituting Proceedings as my guide, I FIND that none of these materials contained exculpatory material as to these Respondents.

Rule 231(a) of the Commission’s Rules of Practice allows a respondent to move for inspection and copying of any statement that pertain to the direct testimony of any person called, or to be called, as a witness that the Division would be required to produce pursuant to the Jencks Act. 17 C.F.R. § 201.231(a). The Jencks Act defines a “statement” as either a written statement signed or approved in some way by a witness, a substantially verbatim recital of a witness’s oral statement recorded contemporaneously, or a statement however recorded made to a grand jury. 18 U.S.C. § 3500(e). The Supreme Court in Palermo v. United States,

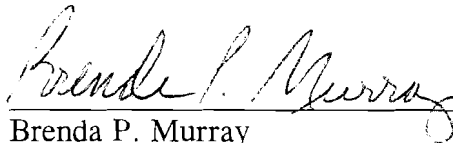
360 U.S. 343 (1959), determined that Congress mandated the application of a very restrictive standard in determining what constitutes a Jencks Act statement. According to Palermo, a Jencks statement consists of:

only continuous, narrative statements made by the witness recorded verbatim, or nearly so, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions, or conclusions of the person or persons making such notes.

Id. at 358-60 (citation omitted).

There is nothing in the materials I reviewed that can be characterized as a witness “statement” under Jencks. Two sets of material are marked, “This is an organized synopsis, not necessarily word-for-word notes,” two sets of materials are chronological outlines, and the remaining materials are either typed or written notes mainly from telephone interviews. Accordingly, I FIND that the Jencks Act covers none of the material.

I will return to the Division the materials it submitted for in camera review.


Brenda P. Murray
Chief Administrative Law Judge