[4] There is authority for remanding a case to enable a plaintiff to prove the amount of damages when it has failed to do so originally. *Harding v. Coleman,* 388 So.2d 59 (La.App.1980). We do not feel that such a procedure is appropriate in this case, however, since the district court found that Standard could have proved its damages but simply elected not to.

We do not reach Standard's contention that six months was an inadequate notice period, since Standard failed to prove damages in any period.

We find that Standard failed to prove its damages although the necessary evidence was available to it, and therefore only nominal damages are appropriate. We therefore VACATE the award and REMAND the case for entry of an award not in excess of $1000.

VACATED and REMANDED.


**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Charles E. ROEMER, II and Carlos Marcello, Defendants-Appellants.**

**No. 82-3040.**

United States Court of Appeals, Fifth Circuit.

April 11, 1983.

Rehearing and Rehearing En Banc Denied May 16, 1983.

Following the denial of defendants' pretrial motion to dismiss, 508 F.Supp. 586, defendants were convicted before the United States District Court for the Eastern District of Louisiana, Morey L. Sear, J., 537 F.Supp. 1364, of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, and their motion for judgment of acquittal or for new trial was denied, and they appealed. The Court of Appeals held that: (1) affidavit in support of Government's application for electronic surveillance was adequate; (2) Government did not artificially create federal jurisdiction; (3) evidence sustained conviction; (4) jury instructions correctly and adequately stated the law; and (5) evidence sustained finding that the hand written notes of FBI agent prepared after a meeting with one of the defendants did not constitute a "statement" which prosecution was required to disclose to defendant, and because the report which was released to defendant was substantially identical to the notes, any error in failing to disclose the notes would have been harmless.

Affirmed.

**1. Telecommunications ⇐515**

Record on appeal disclosed no intentional reckless misrepresentations or omissions such as would render affidavits insufficient to establish probable cause for issuance of wiretap orders.

**2. Constitutional Law ⇐257.5**

Government's involvement in sting operation, in which undercover government agents posing as representatives of an insurance company made cash payments to various state officials, employees, and candidates for public office or their representatives for the purported purpose of obtaining state employee's insurance contract was not so unusually pervasive as to violate due process principles and did not result in the artificial creation of federal jurisdiction.

**3. Conspiracy ⇐47(3)**

Evidence sustained defendants' convictions of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C.A. § 1962(d).

**4. Conspiracy ⇐48.2(2)**

In prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, trial court's jury instructions on the agreement element of the offense and the interstate commerce element of the offense were proper and adequate.

**5. Criminal Law ⇐627.6(4), 1166(1)**

Evidence in prosecution for conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act sustained finding that the handwritten notes of FBI agent prepared after a meeting with one of the defendants did not constitute a "statement" which prosecution was required to disclose to defendant, and because the report which was released to defendant was substantially identical to the notes, any error in failing to disclose the notes would have been harmless. 18 U.S.C.A. §§ 3500, 3500(e)(1).

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Glass & Reed, John W. Reed, John R. Martzell, New Orleans, La., for defendants-appellants.

Arthur A. Lemann, III, New Orleans, La., for Carlos Marcello.

John P. Volz, U.S. Atty., L. Eades Hogue, Asst. U.S. Atty., Albert J. Winters, Jr., 1st Asst. U.S. Atty., John Voorhees, Dept. of Justice, Strike Force, New Orleans, La., for plaintiff-appellee.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

PER CURIAM:

Appellants Roemer and Marcello were convicted of conspiring to violate the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962(d) (1976). On appeal they argue (1) the affidavit in support of the government's initial application for electronic surveillance was inadequate; (2) the government artificially created federal jurisdiction; (3) the evidence was insufficient to support their convictions; and (4) the jury instructions incorrectly stated the law. Also, we have carried with the case a motion to disclose material pursuant to the Jencks Act, 18 U.S.C. § 3500 (1976).

[1-4] We have carefully examined the briefs, all portions of the record directed to our attention by the parties or the opinions of the court below, and all authorities cited by the parties or the opinions of the court below. We have found that the verdicts below are supported by the law and evidence and must be affirmed. This case has been thoroughly briefed and well handled by all parties from the earliest stages, and all of the arguments presented to us on the four points of alleged error were also presented to the trial court below. The trial court was conscientious and thorough in its exposition of the law and we affirm the judgments below based upon the portions of the trial court's opinions relating to the four points of appeal. *United States v. Marcello,* 508 F.Supp. 586, 601–07 (E.D.La. 1981) (affidavit); *United States v. Marcello,* 537 F.Supp. 1364, 1367, 1369–77 (E.D.La. 1982) (artificial creation of jurisdiction); *id.* at 1379–80, 1382–84 (sufficiency of evidence);[1] *id.* at 1384–86 (jury charge).

[5] This case carries with it a motion to unseal handwritten notes of an FBI agent prepared after a meeting with Roemer and subsequently incorporated into a standard "302" report. The 302 was produced under the Jencks Act, 18 U.S.C. § 3500 (1976), but the notes were not. The issue before us is whether the notes were a statement by the agent, who testified at trial. To be a statement, the notes must be "signed or otherwise adopted" by the agent. *Id.* § 3500(e)(1). The trial court found that the

1. In particular, there was sufficient evidence to support the finding of agreement by Roemer to commit mail fraud. "It was not necessary to prove that [the defendant] actually did the mailing, 'he need only have had a reasonable basis to foresee that his actions would result in the use of the mails.' " *United States v. Martino,* 648 F.2d 367, 401 (5th Cir.1981), *cert. denied,* 456 U.S. 943, 102 S.Ct. 2006, 72 L.Ed.2d 465 (1982), 456 U.S. 943, 102 S.Ct. 2007, 72 L.Ed.2d 465 (1982), 456 U.S. 949, 102 S.Ct. 2020, 72 L.Ed.2d 474 (1982) (quoting *United States v. Georgalis,* 631 F.2d 1199, 1206 (5th Cir.1980)). As the trial court below stated, the evidence in this case "shows not only the expectation that the mail and interstate phone calls would be used to further the scheme, but also the defendants' assent and approval of the use of those means of effecting the plan." *United States v. Marcello, supra,* 537 F.Supp. at 1384.

notes were not a statement, observing that the notes were full of abbreviations and difficult to interpret. The trial court also found that the 302 was almost totally duplicative of the rough notes.

One circuit has held that rough notes are not statements. *See, e.g., United States v. Griffin,* 659 F.2d 932, 937–38 (9th Cir.1981), *cert. denied,* 456 U.S. 949, 102 S.Ct. 2019, 72 L.Ed.2d 473 (1982); *United States v. Spencer,* 618 F.2d 605 (9th Cir.1980). Other courts have held to the contrary. *See, e.g., United States v. Walden,* 465 F.Supp. 255, 259–61 (E.D.Pa.1978), *aff'd,* 590 F.2d 85 (3rd Cir.), *cert. denied,* 444 U.S. 849, 100 S.Ct. 99, 62 L.Ed.2d 64 (1979); *United States v. Hilbrich,* 232 F.Supp. 111 (N.D.Ill.1964), *aff'd,* 341 F.2d 555 (7th Cir.), *cert. denied,* 381 U.S. 941, 85 S.Ct. 1775, 14 L.Ed.2d 704 (1965). This circuit has not adopted any hard or fast rule, but has consistently held that a determination of whether a writing was a statement was a factual determination to be reversed only if clearly erroneous. *See, e.g., United States v. Cole,* 634 F.2d 866, 867 (5th Cir.), *cert. denied,* 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981); *United States v. Medel,* 592 F.2d 1305, 1317 (5th Cir.1979); *United States v. Cathey,* 591 F.2d 268, 274 (5th Cir.1979). Our circuit has noted that the roughness of the notes may be relevant to a finding that they were not adopted by the author as a statement. *See United States v. Surface,* 624 F.2d 23, 26 (5th Cir.1980); *United States v. Jiminez,* 484 F.2d 91, 92 (5th Cir.1973).

Given the trial court's proper reliance on the roughness and abbreviations of the notes, its finding that the notes were not a statement is not clearly erroneous and must be affirmed. In any event, because the released 302 is substantially identical to the retained notes, had there been error it would have been harmless. *United States v. Surface, supra,* 624 F.2d at 26; *United States v. Medel, supra,* 592 F.2d at 1316–17; *United States v. Jiminez, supra,* 484 F.2d at 92.

AFFIRMED.

**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Juan Alberto GONZALEZ, Defendant-Appellant.**

**No. 82–2266.**

United States Court of Appeals, Fifth Circuit.

April 12, 1983.

Defendant was convicted in the United States District Court for the Southern District of Texas, James DeAnda, J., of conspiracy to possess and possessing marijuana with intent to distribute, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that evidence was insufficient to sustain defendant's convictions.

Reversed.

**Conspiracy ⇐47(12)**
**Drugs and Narcotics ⇐123**

Evidence was insufficient to sustain defendant's convictions for conspiracy to possess and possessing marijuana with intent to distribute.

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Roland E. Dahlin, II, Fed. Public Defender, George M. Secrest, Jr., Asst. Fed. Public Defender, Houston, Tex., for defendant-appellant.

Daniel K. Hedges, U.S. Atty., John M. Potter, William W. Torrey, Asst. U.S. Attys., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, GEE and RANDALL, Circuit Judges.

GEE, Circuit Judge:

Late in the afternoon of New Year's Day two years ago, peace officers surveying an