IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

UNITED STATES OF AMERICA,	*
PLAINTIFF,	*
	*
v.	* **CASE NO. 2:10-cr-00186-MHT-WC-10**
	*
JARRELL W. WALKER, JR,	*
DEFENDANT.	*

WALKER'S SPECIFIC BRADY REQUESTS PERTAINING TO RONNIE GILLEY AND OTHER COOPERATING WITNESSES

Ronnie Gilley is a Government witness. He will testify at Walker's trial as part of a favorable plea agreement. Pursuant to *Kyles v. Whitley*, 514 U.S. 419 (1995), *United States v. Bagley*, 473 U.S. 667 (1985), *United States v Agurs*, 427 U. S. 97 (1976), *United States v. Giglio*, 405 U. S. 150 (1972), *Brady v. Maryland*, 373 U. S. (1963), and *Napue v. Illinois*, 360 U. S. 264 (1959), Walker moves this Court for an order directing the Government to disclose the specific information requested below as it pertains to Gilley and any cooperating Government witnesses. Gilley does not believe this request is covered under the Court's standing order on discovery. This motion was not filed earlier as the full content of Gilley's information as it relates to Walker was just disclosed last week.

Walker requests that the Government specifically and with particularity respond to each request for information. The Supreme Court has held that "[w]hen a prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 472 U. S. at 106. The Court further explained the government's obligation to respond with specificity in *United States v. Bagley*, 473 U. S. 667, where it recognized that

> an incomplete response to specific [Brady] requests not only deprives the defense of certain evidence but has the effect of representing to the defense that the evidence does not exist. In reliance on this misleading representation, the defense might abandon lines of independent investigation, defense or trial strategies that it otherwise would have pursued.

> We agree that the prosecutor's failure to respond fully to a Brady request may impair the adversary process in this manner. And the more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the non-disclosure that the evidence does not exist, and to make pretrial and trial decisions on the basis of this assumption.

Accordingly, the Government must respond to these requests with the specificity and particularity with which each request is made. Moreover, the Government must take affirmative steps to determine whether the information sought in this requests exists. "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure a fair trial.....[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Kyles*, 115 S. Ct. at 1568 (emphasis added).

SPECIFIC REQUESTS

With regard to Ronnie Gilley and any other cooperating witnesses (hereinafter referred to as "the witness"), please provide:

1. **BENEFITS: All information regarding promises of immunity, leniency, or preferential treatment or other inducements made to the witness, or to the witness' family member, friend or associate, including dismissal or reduction of charges, assistance in matters pertaining to bond, probation, sentencing, or deportation, or promises or expectancies regarding payments for evidence, information, expenses, or testimony, or eligibility for any award. As to Gilley, the Government should be forced to disclose any agreements or benefits Gilley has received from the Government as to his present or future custody assignment. Further, the Government should disclose the substance and/or notes of any Gilley conversations between his lawyers and the Government regarding his voluntary surrender, designation, and recommendation to jail and/or prison personnel.**

It is requested that the Court compel disclosure of the existence and substance of any payments, promises of immunity, leniency, or preferential treatment, or other inducements made to prospective State witnesses. Walker seeks a full record of all consideration given to the witness and his family, friends, or associates. Such detailed information and records are necessary

to prove the witness' motive and bias and are discoverable.[1]

A witness' motive to curry favor with the State is not only a matter open to discovery, but also fair game on cross-examination.[2] In fact, the Eleventh Circuit Pattern Criminal Jury Instructions, Special Instructions 1.1, 1.2 and 1.3, highlight the importance of such evidence in judging the credibility of testimony:

[A] paid informer, or a witness who has been promised he will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because he wants to strike a good bargain with the government.[3]

Walker also seeks all information pertaining to threats or promises made to the witness or his family to motivate the bias or hospitality of the witness. It is proper impeachment to question a cooperating witness about the dismissal of charges against him/her, the granting of bond or other bond considerations, the reduction of sentences, or other preferential treatment given to him or his family.[4] The threats/benefits evaluation is not limited to the witness.[5]

Similarly, the unconsummated promises of financial or other awards or benefits are discoverable. Thus, where the witness harbors an exception of future award (financial or otherwise) for his services, such evidence is crucial to the defense and highly relevant to one of the core issues at trial: the cooperating witness' credibility.[6] Accordingly, Walker seeks

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[1] *Giglio v. United States,* 405 F.2d 668 (11th Cir. 1992)

[2] *See United States v. Arnold*, 117 F.3d 1308, 1315-17 (11th Cir. 1997) (reversing conviction becuase government failed to turn over tapes of cooperating witness indicating he was expecting a "big time" sentence reduction for his cooperation).

[3] 11th CIRCUIT PATTERN CRIMINAL JURY INSTRUCTIONS, SPECIAL INSTRUCTION 1.1. *See also United States v. D'Antignac*, 628 F.2d 428, 435-436 n. 10 (5th Cir. 1980); *United States v. Abravaya*, 616 F.2d 250 (5th Cir. 1980).

[4] *United States v. Nickerson,* 669 F.2d 1016, 1018 (5th Cir. 1982).

[5] *United States v. Partin*, 492 F.2d 750, 757 (5th Cir. 1974).

[6] *United States v. Williams,* 954 F.2d 668 (11th Cir. 1992).

disclosure of any promise, formal or informal, that would lead the witness to have an expectation of award or reward, whether financial or otherwise.

2. **MISCONDUCT: All information pertaining to**

a. criminal activity by the witness for which the government has elected, formally or informally, not to prosecute;

b. misconduct by the witness in his role as a cooperating witness, including refusal to testify or assist the government, allegations that the witness entrapped another, allegations that the witness lied in any proceedings, any information tending to suggest that the witness is unreliable or untrustworthy, and any "blackballing" of the witness by any law enforcement agency; and

c. misconduct by the witness other than in his or her role as a cooperating government witness, including misconduct that reflects on the witness' lack of candor and lack of truthfulness or law-abiding character, such as uncharged misconduct, conduct or fraud.

Bad acts committed by a Government witness after the commencement of his/her cooperation with the Government are admissible to show the witness' bias and motive to curry favor with Government.[7] Similarly, bad acts committed by Government witnesses prior to their execution of cooperation plea agreements are relevant to prove the scope of the immunity (and thus the benefit) conferred by the Government on those witnesses to induce them to plead guilty and cooperate.[8]

Moreover, evidence that Government witnesses have violated their plea agreements and committed other crimes while cooperating with the Government is highly probative of the bias and motives of those witnesses. Since these bad acts are admissible, they are extrinsically provable. *United States v. Calle*, 822 F.2d 1016, 1021 (11th Cir. 1987) ("[E]vidence that happens

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[7] *See United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984); *United States v. Phibbs*, 999 F.2d 1053, 1089 (6th Cir. 1993), cert. denied, 114 S. Ct. 1070 (1994).

[8] *United States v. Owens*, 933 F. Supp. 76, 87 (D.Mass. 1996) ("That means, it seems to me, that within the scope of the statute of limitations all prior bad acts must be disclosed and if we're dealing with a witness who has received either immunity or any sort of promise, inducement, or reward, the prior bad acts which must be revealed must be within the scope of the statute of limitations read backward from the time the witness received the promise, inducement, or reward").

to include prior misconduct still may be admissible when offered to show the witness' possible bias or self-interest in testifying"). Defense counsel needs particularization of any bad acts of Government witness Gilley and others that are cooperating to conduct a reasonable investigation of these allegations, as is the responsibility of defense counsel under the Sixth Amendment.

A witness's history of criminal activity and other misconduct is also relevant to the witness' credibility, bias, motive and *modus operandi*. The witness' history and pattern of criminal activity and misconduct illustrate the methods normally employed by the witness. Such evidence "might easily extend beyond that of mere impeachment."[9] In *Espinosa-Hernandez*, the Eleventh Circuit reversed the district court's failure to grant full discovery as to an undercover agent's misconduct relating to the handling of witnesses.[10]

Along the same line, courts have held discoverable and highly relevant any information regarding prior or contemporaneous perjury or bizarre testimony of a witness and other evidence of the unreliability of a cooperating witness.[11] In fact, in *United States v. Cuffie*, the Court of Appeals for the D.C. Circuit reversed and remanded for a new trial after it was discovered that the government failed to disclose that its cooperating witness had lied in a prior proceeding.[12]

Law enforcement agencies generally maintain at least two files on cooperating witnesses. One is the investigative file and the other the witness' background, payments, and false identity. In *United States v. Brumel-Alvarez,* [13] the court held that an internal DEA memorandum regarding the witness' conduct directly impacted on the witness' credibility, requiring disclosure pursuant to *Brady*. Also, the First Circuit has explained that an AUSA "using a witness with an

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[9]*United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990).

[10]*See id. Cf. Harber v. Wainwright,* 756 F.2d 1520 (11th Cir. 1985) (prior criminal conduct relevant where witness may have been promised immunity).

[11]*United States v. Mesarosh*, 352 U. S. 1 (1956).

[12]80 F.3d 514, 517-18 (D.C. Cir. 1996).

[13]991 F.2d 1452 (9th Cir. 1992).

impeachable past has a constitutionally derived duty to search for and produce impeachment information requested regarding a witness."[14]

In *United States v. Deutsch,*[15] the court compelled disclosure of a postal employee's personnel file where evidence failed to negate indications that the employee, who had acted in the role of a witness, may have had disciplinary problems. Similarly, in *United States v. Andrews*, the District Court held that the government must disclose evidence in the disciplinary records of a cooperating government witness that show the witness has engaged in misconduct while in custody.[16] Also, in *United States v. Garrett*[17] the court reversed the defendant's conviction where the district court foreclosed discovery and cross-examination as to an agent's disciplinary records relating to his use of narcotics and failure to submit to urinalysis. The court noted that such evidence was relevant because the agent "might well have looked upon a successful prosecution of [the defendant] as a means of having his [own] suspension [from duty] lifted."[18]

Under Rule of Evidence 608(b), a witness may be cross-examined about specific instances of conduct "concerning the witness' character for truthfulness or untruthfulness." Thus, courts have held that in given circumstances, a witness may be questioned regarding prior arrests not leading to conviction.[19] Similarly, uncharged misconduct of a witness is fair game for impeachment on cross-examination.[20]

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[14] *United States v. Osorio*, 928 F.2d 753, 760 (1st Cir. 1991).

[15] 475 F.2d 55, 58 (5th Cir. 1973).

[16] 824 F. Supp. 1273, 1283-85, 1288-90.

[17] 542 F.2d 23, 26 (6th Cir. 1976).

[18] Id.

[19] *United States v. Croucher*, 532 F.2d 1042, 1045 (5th Cir. 1976) (witness full arrest record relevant to showing motive to strike a good bargain with the government).

[20] *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984) (reversible error to refuse to permit cross-examination of government witness as to alleged post-plea drug activities); *United States v. Espinosa-Hernandez*, 918 F.2d 911, 914 (11th Cir. 1990) (government witness' misconduct bears directly on credibility); *United States v. Cohen*, 888 F.2d 770, 776-777 (11th Cir

3. POLYGRAPH: If given a polygraph, the results of any examination and all information concerning the refusal of any witness to submit to a polygraph examination.

The Eleventh Circuit in *United States v. Piccinonna*[21] recognized that polygraph examination results are admissible to impeach or bolster a witness' credibility.[22] Polygraph results which tend to show that a witness has made false or conflicting statements to the government are therefore relevant and discoverable. While admissibility issues may be resolved at trial the underlying facts material to impeachment must be disclosed prior to trial to allow for adequate defense preparation.[23]

4. **IMPAIRMENT: All information revealing**

a. potential impairment of the witness' capacity to observe, recollect, or testify, including impairments of sight, hearing, memory, language, or other physical or psychological disability;

b. that the witness may suffer from, or sought treatment for, a mental or emotional disease, or illness from January 1, 2008 to present; and

c. that the witness may have used any controlled substance or used alcohol to excess at any time from January 1, 2008 to the present time.

The Fifth Circuit in *United States v. Partin*[24] explained why such impeachment information must be disclosed.

> It is just as reasonable that a jury be informed of a witness' mental incapacity at a time about which he proposes to testify as it would be for the jury to know that he then suffered an impairment of sight or hearing. It all goes to the ability to comprehend, know and correctly relate the truth.

1989) (conviction reversed where trial court excluded evidence offered under Fed. R. Evid. 404(b) that prosecution witness had previously concocted and managed a fraudulent scheme); *United States v. McClure*, 546 F.2d 670, 673 (5th Cir. 1977) (conviction reversed where trial court excluded evidence offered under Fed. R. Evid. 404(b) to show that witness had previously entrapped other defendants.

[21]885 F.2d 1529 (11th Cir. 1989).

[22]See Fed. R. Evid. 403 & 608(b).

[23]*Giglio v. United States*, 405 U.S. 150 (1972).

[24]493 F.2d 750, 762 (5th Cir. 1974).

Particularly relevant is evidence that the witness is undergoing psychiatric treatment.[25]

In *United States v. Walker,* [26] the court held that the government violated Brady when it failed to disclose drug use by a cooperating government witness looking to cut his sentence in exchange for testimony.[27] Furthermore, in *United States v. Collins,*[28] the court acknowledged that a witness' narcotics use is material and the testimony of a narcotics user is to be considered with extreme caution. Similarly, in *United States v. Fowler*[29] the court held that the defendant was entitled to know whether a government witness was a narcotics user, and in *United States v. Garner*[30] the court held that the testimony of witnesses who had formerly used heroin should be weighed with caution. The *Garner* court explained that even though the witness had undergone methadone treatment and was no longer using heroin at the time the witness observed the events of the case, it was left to the jury "Take this information into account in weighing the witnesses' credibility"[31]

Walker is entitled to disclosure of all information the Government may have regarding use of controlled substances, including any admission that he may have made during debriefings by law enforcement. Additionally, any admission by this cooperator made to his probation officer about drug use must be disclosed under *Brady*.

Counsel has spoken with AUSA Louis Franklin regarding the substance of this motion.

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[25]*See United States v. Lindstrom*, 698 F.2d 1154 (11th Cir. 1983), *United States v. Butt*, 955 F.2d 77, 82-83 (1st Cir. 1992). *United States v. Collins*, 472 F.2d 1017 (5th Cir. 1972); *United States v. Fowler*, 465 F.2d 664 (D.C. Cir. 1972); *United States v. Romano*, 482 F.2d 1183 (5th Cir. 1973).

[26]856 F. Supp 1293 (N.D. III. 1994).

[27]Id at 1295-96.

[28]472 F.2d 1017, 1018 (5th Cir. 1972).

[29]465 F.2d 664, (D.C. Cir. 1972).

[30]581 F.2d 481, 485 (5th Cir. 1978).

[31]Id.

Franklin was unable to address all matters contained in this motion prior to filing the motion.

Counsel on behalf of Walker is filing the motion in an abundance of caution in the event the Government is unable to respond to the matters contained in the motion or in the event Gilley is not forthright in some of the areas addressed in the motion.

Should the Government provide the information addressed in the motion then the motion may become moot.

CONCLUSION

For the reasons stated above, Jarrell Walker, Jr. respectfully requests that the Government provide him with the requested information as it pertains to Ronnie Gilley, and any other cooperating Government witness. Counsel was unable to obtain the Government's position on this motion as it was filed after hours.

Respectfully submitted,

s/Susan G. James
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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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Respectfully submitted,

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