

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

UNITED STATES,

Plaintiff,

v.

JARRELL W. WALKER, JR.,

Defendants.

CASE NO. 2:10-cr-00186-MHT-WC

**DEFENDANT JARRELL W. WALKER, JR.'S MOTION FOR RECONSIDERATION OF
ORDER DIRECTING DEFENDANTS' ADVANCE DISCLOSURE
OF IMPEACHMENT MATERIAL FOR CROSS-EXAMINATION**

Defendant Jarrell W. Walker, Jr. respectfully submits this memorandum of law in support of his oral objection to the Court's order directing defense counsel to disclose impeachment material to the Government prior to the commencement of cross-examination.

1. The Court's order requiring advance disclosure of impeachment material that Mr. Walker might draw upon in cross-examining the Government's witnesses improperly imposes the Government's disclosure obligations under *Brady v. Maryland*, 373, U.S. 83 (1963), upon Defendant Walker in violation of his Sixth Amendment right to meaningfully confront the witnesses testifying against him. *See Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (right to cross-examine is implicit in the right to confrontation).

2. While the Federal Rules of Criminal Procedure and the Federal Rules of Evidence do not – as a general matter – contemplate litigation by surprise, they do contemplate defendants' right to elicit *unprepared* testimony on cross-examination as necessary to test the veracity of a witness's direct testimony. That the federal rules contemplate a defendant's use of undisclosed

material for purposes of impeachment is evidenced by federal courts' repeated determinations that it is error for a defendant to be precluded from using undisclosed material for impeachment purposes during cross-examination. *See, e.g., United States v. Medearis*, 380 F.3d 1049, 1057 (8th Cir. 2004) (finding that the district court erred in prohibiting defendant from using a letter to impeach a government witness because it had not been disclosed to the government); *United States v. Moore*, 208 F.3d 577, 579 (7th Cir. 2000) ("Moore sought to use the note to impeach the testimony of a witness for the prosecution; it was not properly excludable under Rule 16). As the Seventh Circuit explained in *United States v. Cerro*, 775 F.2d 908, 915 (7th Cir. 1985) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974)), the omission of any obligation on the part of a defendant to disclose impeachment material is

not surprising when we consider that a defendant's interest in being able to conduct a vigorous and effective cross-examination – an interest central to the right of a criminal defendant under the Sixth Amendment 'to be confronted with the witnesses against him,' would be impaired if he had to give a précis of his cross-examination to the prosecution before trial.

Id.

3. The undersigned counsel further submits that the Court's order directing disclosure of impeachment material improperly invades the work product privilege recognized by Federal Rule of Evidence 501 without any showing by the Government sufficient to satisfy the predicates for disclosure under federal law. *Cf. Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982); *In re Grand Jury Proceedings*, 601 F.2d 162 (5th Cir. 1979). It is well-established that the disclosure of work product must be preceded by a showing, among other things, of an adversary's inability to obtain vital material from any other source. *See Upjohn*, 449 U.S. at 401; *In re Sealed Case*, 676 F.2d at 809. At this point in the trial, for example, the Government has independently obtained much

of the material in question by subpoena or other means. Compelling the undersigned to disclose work product – specifically, the material intended for use in testing the veracity of Government witnesses – is flatly contrary to the spirit of the law developed by the federal courts in applying the common law work product doctrine as well as to its letter.

4. For the reasons set forth above, Mr. Walker respectfully requests that the Court reconsider its order directing advance disclosure of defense impeachment materials that may be used during cross-examination.

Dated: July 12, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HERBY CERTIFY that the foregoing *Motion for Reconsideration of Ruling Regarding Advance Disclosure of Impeachment Materials on Cross-Examination* was served by ECF Filing and electronic mail on all counsel of record listed below this 12th day of July, 2011.

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