

IN THE CIRCUIT COURT OF THE  
NINTH JUDICIAL CIRCUIT  
IN AND FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,  
Plaintiff,

CASE NO.: 2022-CF-000688-A-O

vs.

KELLI RENEE LYNCH,  
Defendant.

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**MOTION FOR DISCLOSURE OF IMPEACHING INFORMATION**  
**AND EVIDENCE FAVORABLE TO DEFENDANT**

The Defendant, by and through undersigned counsel, and respectfully moves this Court for an Order directing the Government forthwith to make inquiry and disclose all the following which is within the possession, custody or control of the State Attorney's Office, or any other prosecutorial or law enforcement agency personnel, the existence of which is known, by the attorney for the Government or any member of the prosecutorial team:

1. The criminal records of any proposed witnesses whose credibility may be an issue at trial, including juvenile adjudications and pending criminal charges.
2. Any and all records and information revealing prior misconduct or bad acts, probative of untruthfulness, attributed to proposed government witnesses whose credibility may be in issue at trial.
3. The present status of, and any and all threats, express or implied, made to a proposed Government witness as to: criminal investigations, prosecutions or potential prosecutions which are pending or could be brought against the witness; any probationary, parole or deferred prosecutions pending or which could be initiated against the witness; any tax, immigration, administrative, or judicial claim or dispute which may be instituted against the witness by the

Government or any state.

4. The existence and identification of each occasion on which a proposed Government witness has testified or after having been ordered to testify or given the opportunity to testify, has refused to testify before any court, grand jury or other body or otherwise narrated in relation to Defendant or the facts surrounding the charges contained in the Indictment.
5. Any and all other records and information which arguably could be beneficial or useful to the probative forces of the Government's evidence or which arguably could lead to such records or information, and any such records or information which minimizes the involvement of Defendant and as a result is material to punishment.
6. All the above five items with respect to any non-witness or declarant whose statements will or may be offered in evidence during trial.
7. Any documentary evidence which is inconsistent with a proposed witness's expected testimony on a material or substantial matter.
8. Any written, recorded, or oral statement, concerning a material or substantial matter, which was made by a proposed Government witness, any individual interviewed by the prosecutorial team, a co-defendant, or an unindicted co-conspirator, that is inconsistent with statements made by another individual.

**WHEREFORE**, defendant moves for an Order requiring disclosure of the requested information.

#### **MEMORANDUM IN SUPPORT**

Due process prohibits the suppression by the Government of evidence favorable to the accused or discrediting its own case. Upon Defendant's request, the Government must disclose all such information. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). This requirement of disclosure includes any information which concerns

witnesses' credibility as well as matters concerning the guilt or innocence of the defendant. Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1967); Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)

As observed by the Supreme Court in Napue v. Illinois:

*"The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."* 360 U.S. at 269.

Disclosure of information tending to impeach witnesses' credibility must be timed to enable effective preparation for trial. United States v. Polisi, 416 F. 2d 573, 578, (2<sup>ND</sup> Cir. 1969); United States v. Baxter, 492 F. 2d 150, 173-174 (9<sup>th</sup> Cir. 1973); cert. denied, 417 U.S. 940 (1974). As stated in United States v. Pollack, 534 F. 2d 964, 973 (D.C. Cir. 1976):

"Disclosure by the government must be at such time as to allow the defense to use the favorable material effectively in preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure".

Likewise, the Fifth Circuit has recognized that the timing of disclosure must be "appropriate" to allow proper implementation of Brady v. Maryland and that disclosure may come too late if it is only given at trial. See: United States v. Campagnuolo, supra; United States v. Harris, 458 F. 2d 670,677 (5<sup>th</sup> Cir. 1972), cert. denied 409 U.S. 888, 93, S. Ct. 195, 34 L. Ed. 2d 145 (1972).

1. Information concerning prior convictions and juvenile adjudications is squarely within Rule 609, Federal Rule of Criminal Procedure. See also: Davis v. Alaska, 415 U.S. 308; 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (allowing cross-examination into prosecution witness's juvenile probation status imposed following adjudication of delinquency).

Since the Government has ready access to the F.B.I. computerized “rap sheet” and defendant does not, it is appropriate that the Government make the requested disclosure. There is an affirmative “obligation on the part of the prosecution to produce certain evidence actually or constructively in its possession or accessible to it in the interests of inherent fairness.” Calley v. Callaway, 519 F. 2d 184, 223 (5<sup>th</sup> Cir 1975) (**en banc**) ; see also United States v. Auten, 623 F. 2d 478 (5<sup>th</sup> Cir. 1980).

2. Federal Rules of Evidence 608 (b) allows impeachment of a witness through specific instances of conduct for the purpose of attacking his credibility, if probative or untruthfulness.
3. Exposure of a witness’s motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Davis v. Alaska, supra. Allowing cross-examination as to a witness’s credibility to “the largest possible scope” is especially important where a prosecution witness has had prior dealings with the prosecution or other law enforcement officials. The possibility exists that his testimony was motivated by the desire to please the prosecution in exchange for the prosecutor’s actions in having some or all of the charges against him dropped, secured immunity, or assuring lenient treatment in sentencing. United States v. Mayer, 556 F. 2d 245 (5<sup>th</sup> Cir. 1977). Giglio v. United States, 405 U.S. 105, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972).

Likewise, the defendant is entitled to be advised of the negative as well as the positive inducements which may motivate prosecution witnesses to “color” their testimony. See: United States v. Bonnano, 430 F. 2d 1060 (2<sup>nd</sup> cir. 1970) (indictment

pending against government witness should be disclosed to defense).

4. The request paragraph 4 of the Motion seeks in part early disclosure of Jencks materials to the extent that due process requires. United States v. Campagnuolo, supra.

A previous refusal to testify by a Government witness who later testifies at trial is probative of his motivations in testifying and should be disclosed. Similarly, the frequency and nature of an informer's or co-conspirator's testimony on behalf of the Government is probative of his credibility and motivations.

5. Since impeachment necessarily embodies many forms, to the extent that the prosecution may recognize such information, it may not be suppressed.
6. Defendant is entitled to impeach the credibility of non-witnesses whose hearsay statements have been introduced. Federal Rules of Evidence 806. Thus, any disclosure of impeachment information to which the defense is entitled applies to non-witness declarants as well as witnesses who actually testify.
7. An effective method of testing the credibility of a witness is to impeach him with his prior inconsistent statements. Such requests have been held valid even if the declarant is an accomplice or the Government elects not to present the declarant at trial. See Scurr v. Niccum, 620 F. 2d 186 (8<sup>th</sup> Cir. 1980) (prior inconsistent statements of accomplice); Monroe v. Blackburn, 607 F. 2d 148 (5<sup>th</sup> Cir. 1979) (victim's prior statement to police inconsistent with trial testimony); United States v. Polisi, 416 F. 2d 573 (2<sup>nd</sup> Cir. 1969) (prosecutor erred in failing to give defense counsel statements of a non-testifying co-defendant which were inconsistent with testifying co-defendants and material

to issue of punishment).

### **CONCLUSION**

Should doubt arise as to whether information is subject to disclosure, there is no alternative but that “*the prudent prosecutor will resolve doubtful questions in favor of disclosure.*” Cannon v. Alabama, 558 F.2d 1211 (5<sup>th</sup> Cir. 1977), quoting United States v. Agurs, 427 U.S. 97, 108, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

“It is now clear the Brady imposes an affirmative duty on the prosecutor to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence.” Williams v. Dutton, 400 F. 2d 797, 800 (5<sup>th</sup> Cir. 1968), cert denied 393 U.S. 1105, 89 S. Ct. 908, 21 L.Ed.2d(1969).

The constitutional principles of fairness, due process, and right to confrontation inperplay to require, as a matter of Constitutional right, the requested disclosure.

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of this document has been furnished by eportal delivery to the Office of the State Attorney on November 03, 2023.

/s/ Gary Jay Schwartz

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