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IN THE EIGHTEEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 10CR3795
	)	
TERRY BLUM,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR DISCOVERY AND DISCLOSURE OF IMPEACHING INFORMATION

I.

INTRODUCTION

Defendant is moving for discovery and disclosure of "impeaching information." This raises the questions: Why must the State disclose; when must the disclosure occur; and, what must be disclosed?

A. The Duty of Disclosure

To begin with, due process requires that the State not suppress evidence favorable to the accused or discrediting to its own case, and, upon request, that it disclose to the defense all such information. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v.*

Agurs, 427 U.S. 97 (1976). *See also Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942). This requirement of candor by the sovereign encompasses information which bears upon the credibility of its witnesses as well as matters more directly material to guilt or innocence. *Napue v. Illinois*, 360 U.S. 264 (1959); *Giglio v. United States*, 405 U.S. 150 (1972). *See generally*, *Williams v. Dutton*, 400 F.2d 797 (5th Cir. 1968). As stated by the Supreme Court in *Napue v. Illinois*, 360 U.S. at 269:

> 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.

Moreover, the Court's supervisory power to safeguard the correct administration of justice reinforces the due process requirement of disclosure. *E.g.*, *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 571 (2nd Cir. 1961); *United States v. Miller*, 411 F.2d 825, 832 (2nd Cir. 1969); *United States v. Leja*, 568 F.2d 493, 499 (6th Cir. 1977). *See generally*, *Communist Party of the United States v. S.A.C.B.*, 351 U.S. 115, 124 (1956).

Finally, it must be remembered that the State's *Brady* obligation of disclosure extends to evidence in possession of law enforcement. *See Kyles v. Whitley*, 514 U.S. 419 (1995) (extending government's obligation to disclose *Brady* evidence to evidence in possession of the police; "any argument for excusing a prosecutor from disclosing what he does not happen to know about 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 fair trials").

B. Pre-trial Disclosure Should be Granted

Secondly, disclosure of information impeaching witnesses' credibility must be timed to enable effective *preparation* for trial. *E.g.*, *United States v. Polisi*, 416 F.2d 573, 578 (2nd Cir. 1969); *see United States v. Kaplan*, 554 F.2d 577, 580 (3rd Cir. 1977); *United States v. Baxter*, 492 F.2d 150, 173-74 (9th Cir. 1973). *Cf. United States v. Opager*, 589 F.2d 799, 804-05 (5th Cir. 1979) (crucial importance to accused of pre-trial interviewing and/or investigation of potential witnesses). As pointed out in *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976):

> Disclosure by the government must be made at such a 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. *See, e.g., United States v. Elmore*, 423 F.2d 775, 779 (4th Cir. 1970); *United States v. Deutsch*, 373 F. Supp. 289, 290-91 (S.D.N.Y. 1974).

See also Gorham v. Wainwright, 588 F.2d 178, 180 (5th Cir. 1979); *Grant v. Alldredge*, 498 F.2d 376, 381-82 & n.5 (2nd Cir. 1974); *Clay v. Black*, 479 F.2d 319, 320 (6th Cir. 1973) (per curiam); *Hamric v. Bailey*, 386 F.2d 390, 393 (4th Cir. 1967); *Ashley v. Texas*, 319 F.2d 80, 85 (5th Cir. 1963).

Significantly, this pre-trial motion does not call upon the Court to overturn a conviction or to weigh such questions as materiality and prejudice in retrospective review of a trial record, the usual vantage of the appellate decisions. *See United States v. Five Persons*, 472 F. Supp. 64, 68 (D.N.J. 1979). Rather, the Court must prospectively decide under *Brady* whether "the subject matter of the [specific] request is material, or indeed if a substantial basis for claiming materiality exists." *United States v. Agurs*, 427 U.S. 97, 106 (1976). Furthermore, the Court must also prospectively decide under K.S.A. 22-3212(b) whether the request embraces matter which is

"material to the case." As to the corresponding rule in federal courts, Fed. R. Crim. P. 16(a)(1)(C), one court noted the special materiality of impeaching information:

> . . . aside from outright exculpatory items, it is difficult to imagine information more material to the preparation of the defense than credibility items for critical or major government witnesses.

Five Persons, 472 F. Supp. at 67.

Combining the force of *Brady* and K.S.A. 22-3212(b), the Defendant has a powerful case for pre-trial disclosure. *United States v. Thevis*, 84 F.R.D. 47 (N.D. Ga. 1979). Numerous courts have ordered such discovery. *E.g., id.*; *United States v. Five Persons*, 472 F. Supp. 64 (D.N.J. 1979); *United States v. Goldman*, 439 F. Supp. 337, 349 (S.D.N.Y. 1977); *United States v. Dillard*, 419 F. Supp. 1000, 1001 (N.D. Ill. 1976); *United States v. Deutsch*, 373 F. Supp. 289, 290-91 (S.D.N.Y. 1974); *United States v. Quinn*, 364 F. Supp. 432, 440 (N.D. Ga. 1973), *aff'd on other grounds*, 514 F.2d 1250 (5th Cir. 1975); *United States v. Houston*, 339 F. Supp. 762, 764 (N.D. Ga. 1972); *United States v. Eley*, 335 F. Supp. 353, 355-58 (N.D. Ga. 1972); *United States v. Ahmad*, 53 F.R.D. 186, 193-94 (M.D. Pa. 1971); *United States v. Gleason*, 265 F. Supp. 880, 884-87 (S.D.N.Y. 1967); *United States v. Moreno-Rodriguez*, 744 F. Supp. 1040 (D. Kan. 1990).

Indeed, even when the favorable information takes the form of a witness statement otherwise protected from pre-trial discovery by K.S.A. 22-3213, the state counterpart to the federal "Jencks Act," 18 U.S.C. § 3500, the State must nonetheless disclose it as far in advance of trial as due process may practically require for the defense to make fair use of it. *E.g., United States v. Narciso*, 446 F. Supp. 252, 270-71 (E.D. Mich. 1977); *United States v. Houston*, 339 F. Supp. 762, 764 (N.D. Ga. 1972); *United States v. Eley*, 335 F. Supp. 353, 355-58 (N.D. Ga.

1972); *United States v. Gleason*, 265 F. Supp. 880, 884-87 (S.D.N.Y. 1967); *see United States v. Harris*, 458 F.2d 670, 677 (5th Cir. 1972). *Compare United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979).

In conclusion, Defendant seeks meaningful preparation for cross-examination and, if necessary, for the presentation of defense evidence. He offers avoidance of both the trial conundrums arising from *Brady* too little, *Brady* too late, as well as the specter of collateral attacks arising from the same. *See United States v. Five Persons*, 472 F. Supp. 64, 68 (D.N.J. 1979). Pre-trial disclosure should be required in the interest of justice.

C. The Scope of Impeachment

The next question to be answered is what disclosure is in order. Wigmore has defined the process of impeaching testimonial evidence as the general logical process of explaining or discrediting the assertions of a witness by reference to the "human element in [the] testimony":

> But A's assertion that a street lamp was lighted at a given time or place is generally of a piece with hundreds of thousands of former evidential data, *viz.* it is a human assertion, resting for credit on human qualities. The human element in this testimony is an element in common, running through the vast mass of prior human testimonies. And even though human beings differ, yet their differences also are generic, each on a vast scale. Moral character, bias, experience, powers of perception in light and dark, powers of memory after a lapse of time, susceptibility to falsify under a torture, -- these and other qualities have been under observation in so many thousands of instances under varying conditions that we have built up generalizations (more or less correct or uniform), which pass up for general truths (or at least, as working guides) on those subjects. In short, we possess *a fund of general principles*, applicable to specific instances of this class of evidence, and almost totally lacking for specific circumstantial evidence.

3 Wigmore, Evidence, § 587 at 362-63 (3d Ed. 1940) (emphasis in original). Thus, we are concerned with these "general principles" of crediting and discrediting witnesses.

McCormick has identified "five main lines of attack upon the credibility of a witness":

> There are five main lines of attack upon the credibility of a witness. The first, and probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent with his present testimony. The second is an attack by showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt. The third is an attack upon the character of the witness. The fourth is an attack by showing a defect of capacity in the witness to observe, remember or recount the matters testified about. The fifth is proof by other witnesses that material facts are otherwise than as testified to by the witness under attack.

McCormick, Evidence, § 33 at 66 (2d Ed. 1972).

As can be seen, impeachment is not limited to discrediting character for veracity. 3 Wigmore, Evidence § 874 at 362 n.1. Nor is the process limited to cross-examination. Extrinsic evidence showing bias, for example, may be adduced. *E.g.*, *Johnson v. Brewer*, 521 F.2d 556, 562 & n.13 (8th Cir. 1975); *United States v. Lester*, 248 F.2d 329, 334 (2nd Cir. 1957).

With this introduction aside, the Defendant turns to the specifics of this motion.

II.

SPECIFIC REQUESTS FOR DISCLOSURE

To help focus the duty of disclosure, the Defendant is making specific requests for disclosure, itemizing likely sources of impeaching information within the knowledge or reach of the prosecution. *See United States v. Agurs*, 427 U.S. 97, 106 (1976); Note, *The Prosecutor's Duty to Disclose after United States v. Agurs*, 1977 U. Ill. L. F. 690, 696, 698, 705, 709, 718.

1. Defendant's request for information regarding prior criminal history invokes a classic avenue of impeachment and appears directly within the ambit of K.S.A. 60-421. *Davis v. Alaska*, 415 U.S. 308 (1974); *State v. Wilkins*, 215 Kan. 145 (1972). *See also Lewis v. United States*, 408

A.2d 303, 307 (D.C. 1979) (discussing federal counterpart, Fed. R. Evid. 609). *See generally*, *Beaudine v. United States*, 368 F.2d 417, 421-22 (5th Cir. 1966). The inclusion of "guilty verdicts" in the request results from decisions authorizing their use, even though not reduced to judgment, for purposes of impeachment. *United States v. Canaday*, 466 F.2d 1191 (9th Cir. 1972) (per curiam); *United States v. Rose*, 526 F.2d 745 (8th Cir. 1976). Disclosure is plainly in order. *E.g.*, *United States v. Quinn*, 364 F. Supp. 432, 445 (N.D. Ga. 1973), *aff'd on other grounds*, 514 F.2d 1250 (5th Cir. 1975); *United States v. Moceri*, 359 F. Supp. 431, 435 (N.D. Ohio 1973); *United States v. Leta*, 60 F.R.D. 127, 131 (M.D. Pa. 1973); *United States v. Houston*, 339 F. Supp. 762, 766 (N.D. Ga. 1972); *United States v. Eley*, 335 F. Supp. 353, 358 & n.4 (N.D. Ga. 1972); *United States v. Jepson*, 53 F.R.D. 289, 291-92 (E.D. Wis. 1971); *United States v. Leichtfuss*, 331 F. Supp. 723, 736 (N.D. Ill. 1971); *United States v. Tanner*, 279 F. Supp. 457, 471-72 (N.D. Ill. 1967); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979). Discovery should extend to production of any and all so-called "rap sheets" for the witness. *United States v. Leichtfuss*, 331 F. Supp. 723, 736 (N.D. Ill. 1971); *see United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977). Discovery should also extend to production of any and all juvenile offender records for the witness. *State v. Wilkins*, 215 Kan. 145 (1974).

Pre-trial disclosure should be ordered so that defense counsel can conduct appropriate investigation and interviews and otherwise prepare for trial. It should be ordered so that counsel can participate intelligently in jury selection, present a knowledgeable opening statement and, of course, undertake effective cross-examination. And, it should be ordered so that the Court and jury are spared unnecessary delays at trial. The plain, practical consideration of judicial economy

have been ably described in McCarthy, "Pre-Trial Discovery in Federal Court," Chap. 3B, Illinois Criminal Practice (2d ed. 1974), at 3b-39:

> In moving for the criminal records of government witnesses, trial judges should be reminded of the trial difficulty and delay which might otherwise arise where the motion is denied. Assume the government witness did have a criminal record, one usable to impeach. Assume further this fact became known to defense counsel during trial. (Were this fact, known to the prosecutor, not brought to counsel's attention, *Brady v. Maryland, supra*, could be expected to be urged at a subsequent appeal or post-conviction proceeding when and if this information does become known). To properly impeach, counsel should inquire of the crime of, say, robbery on February 5, 1971, in the Circuit Court of Cook County. If, however, counsel does not have the information required - *I.e.*, the nature of the offense, the conviction date and the court--his impeachment may be formally incomplete and possibly precluded. More drastically, assume the witness does not recall or denies the past conviction[.] [I]n order to impeach[,] Defendant's counsel would need to introduce in evidence proof of the prior conviction in the form of a certified record of the conviction. Obtaining this evidence might well delay the trial.

In recognition of such problems, some courts routinely require pre-trial disclosure of criminal records of government witnesses by standing discovery order or otherwise. *E.g.*, *United States v. Campagnuolo*, 592 F.2d 852, 857 n.1 (5th Cir. 1979) (Southern District of Florida Standing Discovery Order); *United States v. Leichtfuss*, 331 F. Supp. 723, 736 (N.D. Ill. 1971) (Presiding Judge's standard practice).

2. K.S.A. 60-420 permits a defendant cross-examination of a witness as to specific instances of misconduct, so-called "bad acts," even though such behavior does not amount to felony conviction, if the evidence impeaches the witness's truthfulness. *See also* Fed. R. Evid. 608(b). The purpose of such testimony is specifically to attack the witness's character and not to establish bias, interest, or prejudice. *See* McCormick, Evidence § 52 at 83. The importance of this variety of cross-examination to defense counsel has been widely recognized:

> Where the testimony of a witness is critical to the Government's case, the defendant has a right to attack the witness' credibility by wide ranging cross-examination. *United States v. Dennis*, 625 F.2d 782, 798 (8th Cir. 1980). Under Fed. R. Evid. 608(b) a defendant may impeach a Government witness by cross-examining him about specific instances of conduct not resulting in conviction if such conduct is probative of the witness' character for truthfulness or untruthfulness.

United States v. Morales-Quinones, 812 F.2d 604, 613 (10th Cir. 1987).

Since this is a permissible area of inquiry, the prosecution must disclose to the defense any behavior by its witnesses which arguably constitutes such "bad acts."

3. The State has an institutional obligation to disclose any and all consideration which it has held out to a witness or which the witness subjectively hopes for or anticipates since such consideration directly gives rise to the inference of bias or interest. *See generally United States v. Mayer*, 556 F.2d 245, 248 (5th Cir. 1977) (cross-examination of a prosecution witness who has had prior dealings with the prosecution or other law enforcement officials "ought to be given the largest possible scope"; conviction reversed). A common example of such matter which must be disclosed to the defense is the making of promises or the holding out of other inducement for a witness to cooperate and testify against the defendant. *E.g.*, *Annunziato v. Manson*, 566 F.2d 410 (2nd Cir. 1977); *United States v. Sanfilippo*, 564 F.2d 176 (5th Cir. 1977); *Boone v. Paderick*, 541 F.2d 447 (4th Cir. 1976); *United States v. Tashman*, 478 F.2d 129 (5th Cir. 1973); *United States v. Harris*, 462 F.2d 1033 (10th Cir. 1972). In *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court made plain that this duty is an affirmative one which the government must discharge responsibly and that the ignorance of one prosecutor as to the promises made to a government witness by another prosecutor does not excuse the failure to disclose.

In the instant case, the State is obliged to exercise due diligence to determine what consideration, broadly defined, it has offered to its witnesses, or bestowed upon them or which they hope or expect and to disclose this impeaching information to the defense:

> Although the determination of what impeaching evidence must be disclosed under this standard must necessarily be subjective, the court believes that the better practice is to err on the side of disclosure. *See United States v. Penix*, 516 F. Supp. 248, 254-55 (W.D. Okl. 1981). The court also believes that any promises of favorable treatment or leniency could rarely be deemed immaterial under either Rule 16 or *Brady*. *See United States v. Bloom*, 78 F.R.D. 591, 616-17 (E.D. Pa. 1977). Thus, the government is ordered to disclose any evidence of agreements or arrangements, whether formal or informal, between the government and any of its witnesses. Finally, to avoid any unnecessary delay, the government is ordered to disclose this information in a timely manner before trial. *See id.*

United States v. Moreno-Rodriguez, 744 F. Supp. 1040, 1042 (D. Kan. 1990). The obligation includes the *total* compensation or benefits paid to or expected by each witness, *e.g.*, *United States v. Leja*, 568 F.2d 493 (6th Cir. 1977); *United States v. Partin*, 493 F.2d 750, 757-60 (5th Cir. 1974); *see United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (attorney's fees paid by state law enforcement officers cooperating in the investigation); any beneficial treatment in the tax, *e.g.*, 21 U.S.C. §§ 7122 and 7623, or administrative realms, *e.g.*, *United States v. Wolfson*, 437 F.2d 862, 874-75 (2nd Cir. 1970); any assistance in the business world, *e.g.*, *United States v. DiCarlo*, 575 F.2d 952, 958-60 (1st Cir. 1978); any assistance in avoiding prosecution by other authorities, *e.g.*, *Azbill v. Pogue*, 534 F.2d 195, 196 (9th Cir. 1976); any immunity grants, *e.g.*, *United States v. Dillard*, 419 F. Supp. 1000 (N.D. Ill. 1976); omission from being *named* in an indictment as an unindicted co-conspirator, relief from forfeiture, *e.g.*, *United States v. Parness*, 408 F. Supp. 440, 444-45 (S.D.N.Y. 1975); assistance in bonding out of custody, *e.g.*, *United States v. Garza*, 574 F.2d 298, 301-02 (5th Cir. 1978); placement in protective custody,

e.g., *United States v. Librach*, 520 F.2d 550 (8th Cir. 1975); and status as an informer, *e.g.*, *United States v. Mele*, 462 F.2d 918 (2nd Cir. 1972). These examples, of course, are only intended to make the principle clear and do not exhaust the range of "consideration."

To be clearer, the State should disclose such sources of bias, motive or interest as potential financial reward, by the state or federal governments, *Wheeler v. United States*, 351 F.2d 946 (1st Cir. 1965), or through their efforts, *United States v. McCrane*, 547 F.2d 204 (3rd Cir. 1976) (per curiam); *Patriarca v. United States*, 402 F.2d 314, 319 (1st Cir. 1968); or, on the other hand, the potential of civil tax liability to the state or federal governments -- even though no promises of consideration or compromise may have been made. Although such inducements are, of course, relevant, a witness's expectations or hopes are what tells. *United States v. Mayer*, 556 F.2d 245, 249-50 (5th Cir. 1977); *Farkas v. United States*, 2 F.2d 644, 647 (6th Cir. 1924), cited with approval in *Alford v. United States*, 282 U.S. 687, 693 (1931).

4. In addition to promises of consideration which might promote a witness's cooperation with the prosecution, the Defendant is entitled to be advised of any matter which might cause a witness to color his testimony in favor of the prosecution out of fear or interest in self-preservation. The State must disclose both the stick and the carrot. *E.g.*, *United States v. Sutton*, 542 F.2d 1239 (4th Cir. 1976) (threat by FBI agent to prosecute witness intended to induce witness cooperation).

With regard to the stick, sometimes it is overlooked that evidence of witness's wrongdoing, even though not amounting to a felony conviction or comparable evidence of moral turpitude or bad character, may nonetheless be adduced when relevant to show the bias or self-

interest of the witness. McCormick, Evidence § 40 at 78-80; *United States v. Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977). Typical of this category is information concerning the witness's possible vulnerability to prosecution, parole or probation revocation, or other sanction by the government.

In *United States v. Bonanno*, 430 F.2d 1060 (2nd Cir. 1970), the court condemned the government's failure to disclose an outstanding indictment against its witness since the pendency of the charge would have shown "possible motivation of the witness to testify favorably for the government." *Id.* at 1062. Similarly, in *United States v. Padgent*, 432 F.2d 701 (2nd Cir. 1970), the court reversed the defendant's conviction because his counsel had been denied the right to question a government witness on cross-examination with regard to the witness's vulnerability to future indictment for bail jumping. *See also United States v. Crumley*, 565 F.2d 945, 949-50 (5th Cir. 1978); *United States v. Gerard*, 491 F.2d 1300, 1304 (9th Cir. 1974).

In an important decision, the Supreme Court of the United States granted habeas corpus relief to a defendant who was precluded from similar inquiry. *Davis v. Alaska*, 415 U.S. 308 (1974). In *Davis,* the Court held that the petitioner's constitutional right of confrontation had been denied when the State of Alaska, out of solicitude to maintain confidentiality of juvenile convictions, successfully prevented cross-examination as to the probationary status of an important witness against the accused. Since the witness might have colored his story in favor of the state to avoid the possibility of revocation, the defendant was entitled to prove this source of possible bias or interest. *See also Meeks v. United States*, 163 F.2d 598, 600 (9th Cir. 1947) (parole status). In a vigorous opinion by Chief Justice Burger, the *Davis* Court underscored the

necessity and legitimacy of searching out possible biases, prejudices and ulterior motives of the witness:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perception and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. Once way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to the issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, *Evidence,* Section 940, p. 775 (Chadbourne rev 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496 (1959).

415 U.S. at 316-17 (footnote omitted).

Of course, other motivations besides fear of criminal sanctions are also material. For example, a threat to revoke citizenship, *see, e.g.*, *United States. v. Haderlein*, 118 F. Supp. 346 (N.D. Ill. 1953), or to deport the witness would surely qualify. Even without threats, so would the mere fact of a witness's imprisonment since he might well be "affected by fear or favor growing out of his detention." *Alford v. United States*, 282 U.S. 687, 693 (1931). *See also United States v. Croucher*, 532 F.2d 1042, 1044-46 (6th Cir. 1976) (refusal to permit cross-examination of informer, a key government witness, as to prior arrests, other than ones resulting in convictions or felonies or misdemeanors involving moral turpitude; conviction reversed); *United States v. Garcia*, 531 F.2d 1303, 1306-07 (5th Cir. 1976) (evidence of a witness's mere

arrest by the government without further prosecution might well furnish impeaching evidence of bias or prejudice); *Hart v. United States*, 565 F.2d 360 (5th Cir. 1978); *United States v. Gurney*, 393 F. Supp. 683 (M.D. Fla. 1974) (prosecution's use of legal process to compel the attendance of witnesses for the purpose of pre-trial interview prohibited because it is unauthorized and it puts the witness in a compromising position conducive to involuntary cooperation with the government); Smaltz, *Tactical Considerations for Effective Representation During a Government Investigation*, 16 Amer. Crim. L. Rev. 383, 398-403 (1979) (prosecution's requiring a witness to proffer and give it a preview of testimony as a condition precedent to granting him statutory immunity condemned as unauthorized and having "dramatic potential for influencing and shaping a witness' recollection and testimony to meet the government's needs"). Sticks, real or only feared, appear in many shapes.

5. The existence and identification of each occasion on which the witness has testified or otherwise narrated relative to the facts should be disclosed so that defendant can, for example, order transcripts of testimony for use in cross-examination or investigate sources of extrinsic impeachment. McCormick points out:

> When a witness testifies to the facts material in a case the opponent may have available proof that the witness has previously made statements that are inconsistent with his present testimony. Under a modern view of the hearsay rule, these previous statements would be admissible as substantive evidence of the fact stated.

McCormick, Evidence, § 34 at 67. *See also* Fed. R. Evid. 801(d)(1), 806. If the State has available information which may lead to proof of prior inconsistent statements or other evidence helpful to the Defendant, fundamental fairness requires that it be turned over to the defense

without further delay.[1] *See Kyles v. Whitley*, 514 U.S. 419 (1995). *See also Monroe v. Blackburn*, 607 F.2d 148 (5th Cir. 1979); *United States ex rel. Butler v. Maroney*, 319 F.2d 622 (3rd Cir. 1963). *See generally United States v. Barash*, 365 F.2d 395, 400-01 (2nd Cir. 1966) (cross-examination by use of prior statements).

As the Ninth Circuit has stated in a similar context:

> We agree with the trial court that [the witness's] statement was in part exculpatory material and should have been turned over to the defense. The fact that the Government concluded in good faith that the evidence would not be very helpful to Miller does not excuse its failure to disclose the statement. The prosecutor is not merely an advocate for a party; he is also an administrator of justice. Considering the vast investigatory resources and powers at the Government's disposal, an elemental sense of fair play demands disclosure of evidence that in *any* way may be exculpatory. If the Government, upon request by the accused, has serious doubts about the usefulness of the evidence to the defense, the Government should resolve all doubts in favor of full disclosure. Such a rule

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[1] This motion is not directly concerned with prior statements which may be producible only at the time of a witness's testimony because of K.S.A. 22-3213 (the state counterpart to the "Jencks Act," 18 U.S.C. § 3500), or because used to refresh the recollection of a witness. *See, e.g.*, Fed. R. Evid. 612; *see Bradford v. United States*, 271 F.2d 58 (9th Cir. 1959). Rather, it seeks early disclosure of Jencks material only to the extent required by due process, *e.g.*, *United States v. Narciso*, 446 F. Supp. 252, 270-01 (E.D. Mich. 1977); *United States v. Houston*, 339 F. Supp. 762, 765-66 (N.D. Ga. 1972); *United States v. Eley*, 335 F. Supp. 353, 358 (N.D. Ga. 1972); *United States v. Gleason*, 265 F. Supp. 880, 887 (S.D.N.Y. 1967)) and primarily seeks identification of statements not solely "in the possession of the prosecution," K.S.A. 3213(b), 18 U.S.C. § 3500(a)-(b), so that they may be obtained from other sources.

> appears particularly appropriate since disclosure could cause no harm to the Government while suppression could very well prejudice the defendant.

United States v. Miller, 529 F.2d 1125, 1128 (9th Cir. 1976) (emphasis in original) (footnote omitted).

Thus, the State should identify the sources of information which will allow the Defendant to make his own pursuit of impeaching information. *Cf. Britt v. North Carolina*, 404 U.S. 226 (1971) (indigent defendant entitled to free transcript, or adequate transcript substitute, of prior trial).

6. If a government informant or employee serves as a prosecution witness, the Defendant is entitled to have access to his or her government personnel file in order to ascertain whether there is information within it which could be of an impeaching nature. *United States v. Deutsch*, 475 F.2d 55, 57-58 (5th Cir. 1973), *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984). *Cf. Denver Policemen's Protective Association v. Lichtenstein*, 660 F.2d 432 (10th Cir. 1981). Similarly, in *United States v. Morell*, 524 F.2d 550, 552-55 (2nd Cir. 1975), the Court of Appeals held that defense counsel was entitled to impeaching information in the confidential file of an informant witness. *See also United States v. Beekman*, 155 F.2d 580 (2nd Cir. 1946).

For purposes of the present motion, Defendant's requests are aimed at files to which the prosecution has access. As to government files generally, all should at least be identified so that specific and appropriate motions or process can then be addressed to them.

7. This item is a catch-all. The request embraces information which impeaches the witness's competency and his capacity and opportunity to observe, remember, recall and narrate as well as his character for veracity and his partiality (prejudice, bias, motive, interest and corruption). Thus, specifically the State cannot suppress, and must disclose, evidence of "basic mental trouble" suffered by a witness. *Wiman v. Powell*, 293 F.2d 605, 606 (5th Cir. 1961); *Powell v. Wiman*, 287 F.2d 275, 278-79 (5th Cir. 1961). *See generally United States v. Partin*, 493 F.2d 750, 762-64 (5th Cir. 1974). Further, for a bizarre example, if the government knows that hypnosis or hypnotic age regression have been used in the preparation of its witnesses, defendant is entitled to pre-trial disclosure of the facts. *United States v. Miller*, 411 F.2d 825 (2nd Cir. 1969); *Emmett v. Ricketts*, 397 F. Supp. 1025 (N.D. Ga. 1975). Likewise, if the prosecution knows that "truth serum," polygraph examination or other so-called "lie detection" techniques have been used in the preparation of witnesses, it must disclose the facts, *United States v. Hart*, 344 F. Supp. 522 (E.D.N.Y. 1971), at once so that the Defendant can employ expert advice to analyze the impact upon the witnesses. Any argument that evidence, such as polygraph results, is inadmissible only buttresses the argument for discoverability for purposes of fairly gauging the effect of such unscientific methods. The same requirement of disclosure, of course, would be true if the government knew a witness had an appetite for narcotic drugs at the time of the relevant events, *see United States v. Fowler*, 465 F.2d 664 (D.C. Cir. 1972), or during trial, *see Wilson v. United States*, 232 U.S. 563, 568 (1914), or even a distaste for the defendants. *See United States v. Haggett*, 483 F.2d 396 (2nd Cir. 1971). Even the State's interest in protecting the confidentiality of its investigative files regarding child abuse claims must yield to the

Defendant's rights under the Sixth and Fourteenth Amendments to discover favorable, material evidence. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). Impeachment comes in many forms and to the extent that the prosecution recognizes it -- either by virtue of the flagging in the motion or otherwise -- it should not be suppressed.

8. And, if the prosecution seeks to make its proof against Defendant by introducing the declarations of non-witnesses, the Defendant is still permitted to impeach the declarant. Indeed, such statements in the nature of common law hearsay authorize impeachment in the same way as if the declarant were offered on the witness stand. *E.g.*, *People v. Mayfield*, 23 Cal. App. 3d 236, 241-44, 100 Cal. Rptr. 104 (1972) (prosecution witness used to admit former identification of defendant by non-witness declarant; no cross-examination of testifying witness allowed for purpose of showing possible bias, interest, motive or unreliability of absent declarant; conviction reversed); *Am-Cal Investment Co. v. Sharlyn Estates, Inc.*, 255 Cal. App. 2d 526, 541-44, 63 Cal. Rptr. 518 (1967) (hearsay declaration of trust company admitted on behalf of plaintiff; refusal to admit defense testimony of inconsistent statements by company's agent for the purpose of impeaching the hearsay testimony; prejudicial error); *United States v. Glenn*, 473 F.2d 191, 195 & n.1 (D.C. Cir. 1972) (suggesting that under proposed Rule 806 an excited utterance, admitted as a hearsay exception under proposed Rule 803(2), could be attacked by proof of the high percentage of alcohol in the declarant's blood contemporaneous to her making the statement). *See generally*, 3 Wigmore, Evidence, § 884 at 376-77; McCormick, Evidence, § 37 at 73-74.

The principle is simple. The Advisory Committee's Note to Fed. R. Evid. 806 puts it this way:

> The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609 . . .

Accordingly, in fairness the prosecution should be required to disclose the requested impeaching information. K.S.A. 22-3213 does not serve as a bar since it only bans the early production of "statements" and, further, such statements must be ones "made by a state witness or prospective state witness." K.S.A. 22-3213(1). There is little need, after all, to protect a "witness" who will not be called to the stand to testify. Once the hearsay declaration has been introduced, both the spirit of K.S.A. 22-3213 and regard for proper "standards for the administration of justice in the . . . courts," *see Jencks v. United States*, 353 U.S. 657, 668 (1957), would compel immediate production of all prior and subsequent statements made by the declarant touching the subject matter of the declaration. In the case of non-witness declarants, there is simply no reason for delaying production until the last minute.

9. The Sedgwick County District Attorney's Office maintains a Victim Advocacy Center, the function of which, counsel for Mr. Blum submits, is approximately the same as the function of the "victim-witness advocate" described by the Massachusetts Supreme Judicial Court as follows:

> Advocates guide crime victims, their family members, and witnesses through the criminal justice process. They explain the process of a criminal prosecution; notify victims and witnesses of the scheduling of proceedings and the final disposition of a case; and provide information about the availability of witness protection, witness fees, financial assistance, and other social services, including creditor and employer intercession services, where appropriate. They help victims and witnesses "cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma."

Commonwealth v. Liang, 434 Mass. 131, 134, 747 N.E.2d 112, 115 (2001) (citations omitted). In this recent decision, the Massachusetts court held that the prosecution is obligated to produce the notes of a victim-witness advocate if those notes contain exculpatory evidence or statements of witnesses. *Id.* at 132, 747 N.E.2d at 114.

Since victim-witness advocates perform as a part of the prosecution team, their work is subject to the same discovery obligations as that of prosecutors. *Id.* at 135, 747 N.E.2d at 116. Pursuant to the requirements of due process, prosecutors have a duty to disclose exculpatory facts within their possession, custody or control. *Id.* at 135, 747 N.E.2d at 116 (citing, *inter alia*, *United States v. Agurs*, 427 U.S. 97 (1976)).[2]

> Prosecutors similarly are subject to a duty to disclose exculpatory evidence that advocates obtain from conversations with victims or witnesses, as advocates are agents of the prosecution. Prosecutors have the primary burden of determining whether the advocates possess exculpatory information. Although advocates may have acquired extensive knowledge of the legal system, they generally are not attorneys and may be unable to determine whether their notes contain exculpatory evidence. Further, they may be unaware whether a victim or witness has communicated a different version of events to the police, grand jury, prosecutor, or others. Prosecutors therefore are responsible for asking advocates about their conversations with victims or witnesses, reviewing the advocates' notes, and disclosing any exculpatory evidence therein. Although the primary burden in this area rests on prosecutors, advocates themselves have a duty to relay to the prosecutor any information they obtain that they believe is exculpatory.

Id. at 136, 747 N.E.2d at 117 (citations and footnotes omitted). It is the prosecutor's "affirmative duty . . . to review the notes of advocates and inquire about their conversations with victims." *Id.* at 140, 747 N.E.2d at 119.

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[2] The law in Kansas is the same. *See supra* section I of this brief.

By this request, counsel for Mr. Blum seeks discovery of the notes, files, etc. of the advocate(s) who have been involved in the above-captioned case at any time during its pendency. Counsel for Mr. Blum requests that the prosecution be directed to review these materials to determine whether any exculpatory evidence or witness statements are contained therein.

III.

CONCLUSION

The right of counsel for the accused to confront, cross-examine and impeach is cherished and remains "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). The Defendant's specific requests for impeaching information are highly material to defense counsel's investigation and preparation for precisely this venerable mission. *See generally United States v. Opager*, 589 F.2d 799 (5th Cir. 1979). Therefore, both the Federal and State Constitutions require the prosecution to disclose it or to show good reason why not. *United States v. Agurs*, 427 U.S. 97, 106 (1976); *see Brady v. Maryland*, 373 U.S. 83 (1963). Based on these fundamental precepts, the Defendant requests that the motion be granted.

Respectively submitted,

John B. Sullivan # 21672
Attorney for Defendant

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing motion was hand delivered to the Sedgwick County District Attorney's Office this ___ day of October, 2011.

John B. Sullivan

NOTICE OF HEARING

Please take notice and be advised that Mr. Blum's foregoing Motion will be heard on November 4th, 2011 at 9:00 a.m. before the Honorable Judge Wilbert.