## UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION

UNITED STATES OF AMERICA,	) Case No. 1:06-CR-00394
Plaintiff,	)
v.	) JUDGE ANN ALDRIGH
JOSEPH SMITH, et al.,	
Defendants.	) ) <u>MEMORANDUM AND ORDER</u> )
	)

Before the court is defendant Anton Zgcznik's ("Zgoznik") motion for disclosure of immunity or other promises or inducements to witnesses [Docket No. 19]. For the following reasons, the court denies Zgoznik's motion.

Zgoznik, asserting that because the indictment [Docket No. 1] contains allegations of a number of different schemes engaged in by Zgoznik and defendant Joseph Smith, the plaintiff United States of America (the "Government") must "obviously" have "made many deals in its investigation." Def.'s Mot. at 3. Zgoznik argues THAT those "deals" must be "disclosed to the Defendants immediately so that Defendants have adequate opportunity to fully vet the evidence provided by the persons granted deals." *Id*.

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the Government must turn over all exculpatory evidence to Zgoznik immediately, and the court has the power to order such pre-trial disclosure. *United States v. Presser*, 844 F.2d 1275, 1281 (6th Cir. 1988). However, Zgoznik's motion quite clearly does not seek exculpatory material. Instead, the motion seeks disclosure of material that would impeach a potential witness's credibility.

Zgoznik relies on Giglio v. United States and Presser in arguing that the Government must produce all evidence, pre-trial, relating to impeachment of potential witnesses. 405 U.S. 150 (1972); 844 F.2d 1275. However, as both Supreme Court and Sixth Circuit precedent make clear, the Government's only duty with respect to evidence relating to impeachment is to produce evidence relating to witnesses that actually testify, and then only to do so at trial, giving defense counsel enough time to review that material before conducting its cross-examination.

The Supreme Court in *Giglio* held that obtaining a conviction while withholding impeachment evidence concerning a material witness was a violation of due process. 405 U.S. at 154-55. It did not, however, hold that such material must be provided to the defendant pre-trial. In fact, both the Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure expressly permit the Government to refuse disclosure until after a witness has actually testified at trial. 18 U.S.C. § 3500(a); FED. R. CRIM. P. 26.2(a).

In *Presser*, the Sixth Circuit held that neither *Giglio* nor *Brady* "gives the defense a general right to pre-trial discovery of evidence impeaching defense witnesses, where the prosecution denies that any such material is exculpatory and material under *Brady*." 844 F.2d at 1283. Such impeachment evidence is generally governed by the Jencks Act and Rule 26.2. *Id.* (holding that "[t]he clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial") (citations omitted).

Therefore, so far as Zgoznik's motion seeks pre-trial disclosure of material "within the ambit of the Jencks Act, then the express provisions of the Jencks Act control" and his motion is denied. So far as Zgoznik seeks non-Jencks material on promises made to potential witnesses where that evidence is not exculpatory, the court lacks the power to order pre-trial disclosure.

For the foregoing reasons, Zgoznik's motion for immediate disclosure [Docket No. 19] is denied.

IT IS SO ORDERED.

/s/ Ann Aldrich
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

Dated: November 3, 2006