

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	CASE NO. 1:06CR394
)	
Plaintiff,)	JUDGE ANN ALDRICH
)	
-VS-)	
)	
)	DEFENDANT ANTON ZGOZNIK'S
)	MOTION FOR DISCLOSURE OF
JOSEPH SMITH and)	IMMUNITY OR OTHER
ANTON ZGOZNIK)	PROMISES OR INDUCEMENTS
)	TO WITNESSES
Defendants.)	

Defendant, Anton Zgoznic, by and through undersigned counsel, requests immediate disclosure of any and all formal or informal grants of immunity, leniency, or financial or other rewards that have been or have been promised, formally or informally, to government witnesses.

Defendant respectfully requests that the Court impose upon the Government a continuing obligation to supplement their responses to this motion should any transactions with government witnesses occur subsequent to the making of this motion

DISCUSSION AND ARGUMENT

The indictment in this case charges defendants Joseph Smith and Anton Zgoznic with conspiracy to commit mail fraud under 18 U.S.C. §§ 371 and 1349 (Count 1), mail fraud under 18 U.S.C. §§ 1341 and 1346 (Counts 2 through 9), conspiracy to defraud the IRS under 18 U.S.C. § 371 (Count 18) and corruptly endeavoring to obstruct and impede the due administration of the Internal Revenue Laws under 26 U.S.C. § 7212(a) (Count 23). Defendant

Smith only is charged with money laundering under 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 10 through 17) and defendant Smith only is charged with making false tax returns for the tax years 1999 through 2002 relative to his Forms 1040 for those years under 26 U.S.C. § 7206(1) (Counts 19 through 22). Defendant Zgoznic only is charged with aiding and assisting in the preparation of a false document under 26 U.S.C. § 7206(2) (Count 24) and with aiding and assisting in the preparation of a false return, relative to corporate tax returns of Institutional Financial Advisors, Inc. (IFA) for the tax years ended June 2001, June 2002 and December 2002 (Counts 25 through 27).

The General Allegations of the Indictment as well as Counts 1 through 9 allege four separate "schemes." First is payments to defendant Smith by Defendant Zgoznic. Second is the creation of an account labeled "The DOC Fidelity Account Scheme" although defendant Zgoznic does not appear to be actually charged for this conduct. Third are payments to Defendant Smith through the Catholic Cemeteries Association ("CCA"). Defendant Zgoznic is definitely not charged in connection with this "scheme." Fourth is payments to defendant Smith from a national insurance brokerage firm with an office in Cleveland. Again, Zgoznic is not charged in connection with the payments to Smith by the insurance broker.

Essentially, if the Indictment is to be believed and actually alleges crimes, it alleges possibly three or four conspiracies, depending on whether the first two "schemes" are viewed as one or not. Clearly with regard to The DOC Fidelity Account "scheme," the CCA "scheme" and the Willis "scheme," there were co-conspirators in each of these "schemes." The DOC Fidelity Account "scheme" specifically mentions the Financial and Legal Secretary. With the CCA "scheme" and the insurance broker "scheme" certainly someone other than Smith wrote the

checks and was "in on" the transactions. Yet no other person is charged besides Smith and Zgoznic.

Obviously, the government has made many deals in its investigation of this case. They may be formal or informal, immunity, leniency, financial or not. In fact, many may relate to activity not mentioned in the Indictment. In whatever form they were made, they should be disclosed to the Defendants immediately so that Defendants have adequate opportunity to fully vet the evidence provided by the persons granted deals.

In the seminal decision in *Giglio v. United States*, 405 U.S. 150 (1972), the Supreme Court held that the Government is mandatorily compelled to disclose, to the defense, all formal and informal assurances of immunity, leniency, or financial "rewards" that have been given to Government witnesses. In *Giglio*, the Court reversed a conviction because the Government had failed to disclose the fact that some understanding of leniency had been reached with its principal trial witness. The absence of disclosure prevented the defense from effectively attacking the witness' credibility. As the Court explained: "The suppression of material evidence justifies a new trial, 'irrespective of the good faith or bad faith of the prosecution.' When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." 405 U.S. at 154 (citations omitted).

The Sixth Circuit has consistently applied *Giglio* to hold that the Government is obligated to disclose to the defense its promises, assurances, rewards and other transactions with witnesses. The Court explained in *United States v. Presser*, 844 F.2d 1275, 1282 (6th Cir. 1988), "The decisions in both *Giglio* and *Brady* doctrine is based, that is fundamentally unfair for the government to achieve a conviction through the concealment of evidence which undermines the

strength of the Government's case against the defendant."

In *United States v. Katsakis*, No. 90-1164 (6th Cir. Sept. 21, 1992) (attached), a Government witness had received immunity for drug offenses from state authorities. Although Federal officers had agreed to honor the state immunity, this "informal agreement" was not disclosed by the Government before trial. The Court held that the prosecution had erred in failing to disclose its informal agreement with the witness.

Furthermore, in *Thompson v. Foltz*, No. 87-1415 (6th Cir. Jan. 18, 1989) (attached), a habeas corpus appeal, the Court recognized that a prosecution's grant of immunity to a key witness and subsequent revocation of immunity to a key witness and subsequent revocation of immunity with initiation of contempt proceedings was subject to disclosure. The defendant was entitled to impeach the witness with the fact that he was subject to severe sanction if he did not testify in a fashion which inculpated the defendant. The Court remanded the habeas corpus action for determination of whether the defense had been made aware of the immunity revocation and contempt proceedings before the trial.

In *United States v. Feaster*, No. 87-1340 (6th Cir. Apr. 15, 1988) (attached), the Court reversed a conviction on one count of theft of Government property which was based upon testimony of a single witness of doubtful credibility. The witness "had a very large loan released by the Government." Because the Government had failed to disclose the financial concession with the witness to the defense prior to trial, the conviction was reversed and the case was remanded for retrial on the left offense.

Finally, in *Armour v. Salisbury*, 492 F.2d 1032 (6th Cir. 1973), the Court applied *Giglio* to reverse a conviction upon a petition for habeas corpus. In that case, the prosecution had misled

the jury during the closing argument by asserting that the key witness had "nothing to gain: by testifying against the defendant. In reality, the prosecution had promised to assist the witness in obtaining probation. This "critical error" misled the jury and required reversal of the conviction. 492 F.2d at 1037.

Thus, *Giglio* and its progeny mandate pretrial disclosure of all formal and informal assurances provided by the Government to any of its witnesses. See, e.g., *United States v. Leja*, 568 F.2d 493, (6th Cir. 1977); *United States v. Antone*, 603 F.2d 566 (5th Cir. 1979) (payment of witnesses' attorney fees by State); *United States v. DiCarlo*, 575 F.2d 952 (1st Cir. 1978); *United States v. Garza*, 574 F.2d 299 (5th Cir. 1978) (forbearance for future indictments and reduction in bail).

The Government may argue that it is entitled to withhold *Giglio* material until the time of trial. *United States v. Presser*, *supra*, (allowing delayed production of *Jencks* material, not the immunity promises and other types of assurances sought by the defendants in this motion). This argument should not be given weight by the Court. Defendants will be deprived of fundamental fairness if they are not granted pretrial disclosure of *Giglio* material so that they and their lawyers can effectively prepare for the cross-examination of witnesses at trial.

In some cases, the Government has escaped the consequences of failing to provide pretrial disclosure of *Giglio* materials. e.g., *United States v. Katsakis*, *supra*, (eventually reaffirming conviction because defense counsel skillfully elicited disclosure of otherwise nondisclosed "deal" during the cross-examination of the witness during trial). However, the Government cannot rely upon the luck or skill of the defense in determining if *Giglio* materials should be disclosed or withheld. It is incumbent upon the Government and the Court to insure

that the trial proceeds fairly and that the defendant receives all of the requested impeachment material, significantly in advance of trial, so that defendants are effectively represented throughout the proceedings. All of the defendant's requests for disclosure of *Giglio* materials should be granted immediately.

CONCLUSION

For the foregoing reasons, the Court is urged to grant Defendants' Motion for Disclosure of Immunity or Other Promises and Inducements to Witnesses.

Respectfully submitted,

/s/ J. Scott Broome

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ATTORNEYS FOR THE DEFENDANT
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CERTIFICATE OF SERVICE

A true copy of the foregoing Motion for Disclosure of Immunity or Other Promises or Inducements to Witnesses was filed via the Court's electronic filing system and will be served upon the persons listed therein.

/s/ J. Scott Broome

J. Scott Broome