

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

UNITED STATES OF AMERICA

v.

RICHARD BROWN,

Defendant

CRIMINAL No. 6:07cr00008-002

MEMORANDUM OPINION and ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on several pre-trial motions filed by Defendant, including: Defendant's Motion for Discovery, filed on August 8, 2007 (docket entry no. 26); Defendant's Motion To Disclose Exculpatory Evidence, filed on August 8, 2007 (docket entry no. 27); and Defendant's Motion To Disclose Evidence Pursuant to Rule 404(b), filed on August 8, 2007 (docket entry no. 28).

Defendant was charged in four counts of a three-defendant, fifteen-count indictment with: conspiracy to distribute and to possess with the intent to distribute cocaine base; and three counts of distribution of cocaine.

I. Rule 16 of the Federal Rules of Criminal Procedure

In his Motion for Discovery, Defendant seeks discovery of certain items pursuant to Rule 16 of the Federal Rules of Criminal Procedure. Rule 16 requires, upon a non-organizational defendant's request, that the Government disclose certain oral statements made by the defendant, Fed. R. Crim. P. 16(a)(1)(A), certain written or recorded statements made by the defendant, Fed. R. Crim. P. 16(a)(1)(B), the defendant's prior criminal record, Fed. R. Crim. P. 16(a)(1)(D), certain documents and objects, Fed. R. Crim. P. 16(a)(1)(E), certain reports of examinations and tests, Fed. R. Crim. P. 16(a)(1)(F), and the summary of the testimony of certain expert witnesses,

Fed. R. Crim. P. 16(a)(1)(G).

Here, Defendant has requested the items enumerated above, and, as such, I hereby GRANT Defendant's Motion for Discovery (docket entry no. 26) and hereby ORDER the Government to comply with the discovery rules pursuant to Rule 16 of the Federal Rules of Criminal Procedure.

II. *Brady v. Maryland, Giglio v. United States, and Exculpatory Evidence*

The Supreme Court held in *Brady v. Maryland*, 373 U.S. 83 (1963), that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In *Giglio v. United States*, 405 U.S. 150 (1972), the Court held that if disclosure of evidence or information that would tend to discredit or impeach the credibility of a government witness could be determinative of guilt or innocence, that information must be disclosed. *Giglio*, 405 U.S. at 150. The Supreme Court treats pretrial disclosure of *Giglio* material in the same manner as it treats *Brady* material. *See, e.g., United States v. Bagley*, 473 U.S. 667, 676 (1985).

Defendant requests in his Motion To Disclose Exculpatory Evidence (docket entry no. 27) that the Government provide to him *Brady* and *Giglio* material. Without suggesting that the Government is not complying with *Brady* or *Giglio*, the Court hereby GRANTS that portion of Defendant's motion and hereby orders the government to provide to Defendant any impeaching information pursuant to *Brady, Giglio* and those cases' progeny.

III. The Jencks Act and Rule 26.2 of the Federal Rules of Criminal Procedure

Also in his Motion To Disclose Exculpatory Evidence, Defendant requests that I order the Government to produce all Jencks Act statements of any prospective witness.

The Jencks Act, codified at 18 U.S.C. § 3500, provides that certain statements made by

government witnesses may not be the subject of subpoena, discovery, or inspection until after that witness has testified on direct examination at the trial. *See* 18 U.S.C. § 3500(a) (2000). After the witness has testified on direct examination and upon the defendant’s motion, however, the court *must* order the government to produce any statement made by the witness that comports with § 3500(e). *See id.* § 3500(b). It is then within the court’s discretion whether and for how long to recess proceedings for such time as is necessary for the defendant to examine the statement. *See id.* § 3500(c).¹

Under the plain language of the statute, then, it is clear that the Court cannot require the government to produce Jencks Act statements until *after* the witness has testified.² But as the Fourth Circuit has stated, “nothing in the Jencks Act prevents the government from voluntarily disclosing covered material prior to trial.” *United States v. Lewis*, 35 F.3d 148, 151 (4th Cir. 1994). Such early disclosures help both the government and the defendant. *See, e.g., id.* (“We prefer to encourage such early disclosures. In fact, we believe that both sides benefit when the government’s file is completely open to a criminal defendant.”).

In light of the explicit language of the Jencks Act and governing case law and absent extraordinary circumstances, this Court is generally disinclined to grant motions seeking pretrial disclosure of statements otherwise not discoverable under the Act. The Court recognizes, however, that a defendant is entitled to a reasonable opportunity to inspect a witness’s relevant statements before cross examining that witness. If these statements are voluminous, a prudent attorney may then ask for a recess or continuance to review the material, resulting in a trial delay.

Defendant here requests “all Jencks Act statements of any prospective Government witness.”

¹ As the Fourth Circuit noted in *United States v. Smith*, 31 F.3d 1294 (4th Cir. 1994), Rule 26.2 of the Federal Rules of Criminal Procedure was intended to replace Jencks Act provisions dealing with discovery of a testifying witness’s prior statements “on the notion that provisions [that] are purely procedural in nature should appear in the Federal Rules of Criminal Procedure rather than in Title 18.” *Smith*, 31 F.3d at 1301 n.6 (citing the Advisory Committee Note to Rule 26.2). The result would be the same here whether Defendant’s request was analyzed under Rule 26.2 or under the Jencks Act. *See id.*

² This is true to the extent that such material is not exculpatory. Otherwise, the material falls under the rule from

As is clear from the discussion above, the Jencks Act does not require pre-trial disclosure of such statements.

Additionally, nothing in Defendant's motion indicates that a failure on the Government's part to release any Jencks Act material before trial would result in a trial interruption. It is unclear from Defendant's motion why this case deserves special attention or how he knows—at least at this time—what Government witnesses will testify on direct examination, and, therefore, how much Jencks Act material the Government will have to offer at trial.

Jencks Act material must be made available to Defendant, but not until *after* a witness has testified on direct examination. That portion of Defendant's motion (docket entry no. 27) addressing Jencks Act material is therefore DENIED.

IV. Disclosure of Rule 404(b) Evidence

In his Motion To Disclose Evidence Pursuant to Rule 404(b), Defendant requests the Government disclose to him, in “a reasonable period of time in advance of trial, any evidence” covered by Rule 404(b) of the Federal Rule of Evidence.

Rule 404(b) of the Federal Rules of Evidence states that evidence of other crimes, wrongs, or acts is inadmissible to prove action in conformity therewith. Such evidence may, however, be admissible for other purposes. To be admissible, however, the defendant must first request that the government provide reasonable notice in advance of trial of “the general nature of any such evidence it intends to introduce at trial.”

Without suggesting that the Government is not complying with Rule 404(b), I hereby GRANT Defendant's Motion to Disclose Evidence Pursuant to Rule 404(b) (docket entry no. 28).

V. Conclusion

Brady v. Maryland, 373 U.S. 83 (1963), and must be disclosed. *Brady* is discussed above.

For the foregoing reasons and in accordance with the discussion above, it is hereby ORDERED as follows:

1. Defendant's Motion for Discovery (docket entry no. 26) is hereby GRANTED and I hereby ORDER the Government to comply with the discovery rules pursuant to Rule 16 of the Federal Rules of Criminal Procedure;
2. Defendant's Motion To Disclose Exculpatory Evidence (docket entry no. 27) is hereby GRANTED IN PART and DENIED IN PART:
 - a. without suggesting that the Government is not complying with *Brady* or *Giglio*, I hereby ORDER the Government to provide to Defendant any impeaching information pursuant to *Brady*, *Giglio* and those cases' progeny; and
 - b. Defendant's request for pre-trial discovery of Jencks Act material is DENIED;
3. Defendant's Motion To Disclose Evidence Pursuant to Rule 404(b) (docket entry no. 28) is hereby GRANTED; without suggesting that the Government is not complying with Rule 404(b), I hereby ORDER the Government to comply with that rule;

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Memorandum Opinion and Order to all counsel of record.

ENTERED: _____
United States District Judge

Date