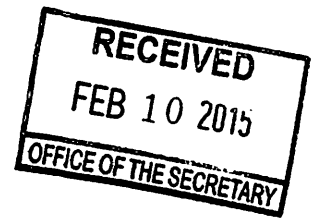


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of
THOMAS A. NEELY, JR.
Respondent.

Administrative Proceeding File No. 3-15945

**NEELY'S DEMAND FOR EARLY DISCLOSURE OF JENCKS MATERIAL
AND SPECIFIC DEMAND FOR GIGLIO MATERIAL**

Respondent THOMAS A. NEELY, JR. ("Neely"), by and through counsel, hereby requests that this Court enter an order directing the Securities and Exchange Commission Division of Enforcement ("Division") to produce all *Jencks* and *Giglio* materials in this case.

I. *Jencks*

1. The *Jencks* Act, 18 U.S.C. § 3500, provides that the government is required to produce a verbatim statement or report made by a government witness or prospective government witness (other than the defendant). *Jencks* is made applicable to SEC administrative proceedings by its own Rule 231. While the *Jencks* Act does not require the production of a prior statement until the witness actually takes the stand, it is Neely's understanding that "ALJs in Commission proceedings often require production of such statements prior to the start of the hearing." Kirkpatrick & Lockhart Preston Gates Ellis LLP, *THE SECURITIES ENFORCEMENT MANUAL* at 376 (2nd ed. 2007).

2. Neely requests that any *Jencks* material should be provided to the defense so as to provide sufficient time for Neely to examine and utilize this material in a meaningful manner before and during trial. See *United States v. Holmes*, 722 F.2d 37, 40 (4th Cir. 1983) ("Many times

. . . the government will agree, or it may even be ordered, to deliver material at an earlier time so as to avoid lengthy delays before the beginning of cross-examination.”). It is clear, however, that a court, pursuant to the Fifth and Sixth Amendments to the U.S. Constitution, and its inherent supervisory powers, has the authority to override the timing provisions set forth in the Act. The prosecution should disclose *Jencks* material to defense counsel as soon as practicable because it will not only assist the defendant in achieving a fair trial but also serve the public interest in expediting the fair resolution of cases. See *ABA Standards for Criminal Justice*, § 11-2.2; see, e.g., *United States v. Tarantino*, 846 F.2d 1384, 1415 n.12 (D.C. Cir.), cert. denied, 488 U.S. 840 (1988); *United States v. Poindexter*, 727 F.Supp. 1470, 1484-85 (D.D.C. 1989).

3. In *United States v. Hinton*, 631 F.2d 769 (D.C. Cir. 1980), the District of Columbia Circuit recognized the potential impact of late *Jencks* disclosure upon the defendant's Sixth Amendment rights. *Hinton*, 631 F.2d at 782. There, during a suppression hearing, defense counsel was provided with "voluminous Jencks material" in the form of FBI 302s. *Id.* at 781. The Circuit Court held that "in the rush and confusion" of the hearing, counsel failed to recognize "the critical importance of the 302's" and, as a result, the appellant was deprived of her constitutional right to the "informed, professional deliberation of counsel guaranteed by the Sixth Amendment." *Id.* at 782.

4. In order to accomplish even a rudimentary investigation so as to begin to be able to provide effective assistance to the defendants, the defense will require obtaining the *Jencks* material well before the witness testifies. In *United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983), the court noted that providing materials one day before trial began did not "afford[] a reasonable opportunity to examine and digest" the documents. Given that this trial is expected to take weeks, the recesses which will be required by defense counsel will substantially delay what promises to be an already protracted proceeding. In addition to the obvious adverse impact on the

court's calendar, such delays will unfairly prejudice the Neely's Fifth and Sixth Amendment rights because Neely and his counsel will be viewed as responsible for the delays and for the overall length of the trial. The remedy is obvious. As has been noted, it is not uncommon, particularly "in cases where there are many statements or where the bulk of witness statements is large," for the government to agree or for the court to order early disclosure of *Jencks* material. *Holmes*, 722 F.2d at 40.

5. *Jencks* material includes any prior recorded statement(s) of a government witness including grand jury testimony. *See Dennis v. United States*, 384 U.S. 855, 870 (1966). A witness's "statement" is defined as:

(1) a written statement that the witness makes and signs, or otherwise adopts or approves;

(2) a substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in any recording or any transcription of a recording; or

(3) the witness's statement to a grand jury, however taken or recorded, or a transcription of such a statement.

Fed. R. Crim. P. 26.2(f).

II. *Giglio*

5. The Supreme Court made clear in *Giglio v. United States*, 405 U.S. 150, 155 (1972) that evidence favorable to an accused includes evidence that would impeach the credibility of the government witness. *See Giglio*, 405 U.S. at 155. This includes any "evidence of any understanding or agreement as to a future prosecution," even if the agreement is oral and not written. *Id.* at 153-55. *Giglio* is an application of the rule announced in *Brady v. Maryland*, 373 U.S. 83, (1963). *Giglio*, 405 U.S. at 151; *see also Ventura v. Attorney Gen., Fla.*, 419 F.3d 1269, 1276 (11th Cir. 2005) ("*Giglio* error is a species of *Brady* error"); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1197 (C.D. Cal. 1999) ("*Giglio* is a subcategory of *Brady*"). While Neely's

previously filed Request for *Brady* materials and List of Documents Withheld should be understood as including any and all *Giglio* material, this specific request is made in an abundance of caution and in an effort to preclude any misunderstanding as to what Neely is seeking. Neely specifically requests the production of all material required under *Brady*, *Giglio*, and their progeny.

CONCLUSION

Neely requests this Court to order the immediate production of (1) any and all *Jencks* material including any statement or report made by a government witness or prospective government witness and (2) under *Giglio*, any evidence (whether oral or documentary) which would impeach the credibility of the government witness including any agreement between the Division (or any other government agency) and the witness.

In the alternative, Neely requests this Court to order the immediate production of all *Giglio* material and the production of all *Jencks* material at least one day prior to trial.

Respectfully submitted,

/s/ Augusta S. Dowd
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