

**DECLARATION OF KEVIN McNALLY REGARDING UNREPORTED
DISCOVERY PRACTICES IN FEDERAL CAPITAL CASES**

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1. I currently serve as the Director of the Federal Death Penalty Resource Counsel Project, assisting court-appointed and defender attorneys charged with the defense of capital cases in the federal courts. I have served as Resource Counsel since the inception of the Resource Counsel Project in January, 1992. The Project is funded and administered under the Criminal Justice Act by the Office of Defender Services of the Administrative Office of the United States Courts.

2. My responsibilities as federal resource counsel include the monitoring of all federal capital prosecutions throughout the United States in order to assist in the delivery of adequate defense services to indigent capital defendants in such cases. This effort includes the collection of data on the initiation and prosecution of federal capital cases.¹

3. In order to carry out the duties entrusted to me, I maintain a comprehensive list of federal death penalty prosecutions and information about these cases. I accomplish this by internet news searches, by reviewing dockets and by downloading and obtaining indictments, pleadings of substance, notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with defense counsel or consultation with chambers. This information is regularly updated and is checked for accuracy by consulting with defense counsel. The Project's information regarding

¹The work of the Federal Death Penalty Resource Counsel Project is described in a report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May, 1998), at 28-30. www.uscourts.gov/dpenalty/1COVER.htm. The Subcommittee report "urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project ..., which has become essential to the delivery of high quality, cost-effective representation in death penalty cases" *Id.* at 50.

federal capital prosecutions has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

4. In the course of my project duties, I have conducted a survey of discovery practices in various federal capital prosecutions. During the course of these efforts, I have become aware of various unpublished orders or practices (such as voluntary disclosure by the government) regarding discovery in federal capital cases. The information below regarding unreported practices or orders in federal capital cases is accurate to the best of my knowledge and belief.

A. Broadened Discovery in Capital Prosecutions

5. In *United States v. Gonzales, et al.* (D. NM CR No. 1:95-CR-538 (MV)) (Vasquez), in an unpublished order on March 7, 1996, the defendants complained that “discovery provided so far by the government gives no indication why [the defendants] have been charged with various murders or what their alleged roles in those homicides were.” *Id.* at 3. Although “all presumptively mandatory discovery is virtually complete ... those defendants possibly facing the death penalty assert they have not received any basic evidentiary information about their alleged roles in the capital offenses.” *Id.* at 9. The district court rejected the defendants’ due process claims. However, “strong and overriding considerations of fundamental fairness and efficiency, particularly with regard to pretrial discovery, is required by the nature of the case.” *Id.* at 8. “*Highly unusual criminal cases of the type at bar are particularly appropriate for broadened discovery treatment in order to ensure a fair and expeditious trial.*” *Id.* at 9. The government had previously agreed to release 18 U.S.C. §3500 material “at least 30 days before trial.” In fact, the government released “investigation reports concerning the murders and attempted murders charged ... and redacted summaries of witness statements” to all capital defendants early. *Id.* at 10. Nevertheless, the district

court ordered “broader pre-trial discovery ... in the interests of fairness and the efficient administration of justice ...” *Id.* at 10. The Court feared that “if broader discovery is not ordered until just before trial commences, this Court is likely to be flooded with motions to continue ...” *Id.* at 10. The district court ordered the immediate production of: 1) “defendants’ statements”; 2) “any facts or evidence indicating defendants’ individual roles and relative roles in the crime charged”; 3) “facts or evidence showing any mitigating factor.” *Id.* at 11. The district court ordered production 60 days before trial of: 1) “full statements of all potential witnesses ... redacted only as to all information identifying ...”; 2) “all agreements by potential witnesses ... including monies paid and amenities provided ...”; 3) “each case in which each witness has testified for any government entity”; 4) “each witnesses’ prior recorded testimony”; and 5) “each witness’ criminal record.” Finally, the district court ordered production, 30 days before trial: 1) “names, addresses and full, unredacted statements”; 2) the reports generated by the Albuquerque police department ...”; 3) “evidence seized by the government from the homes of government witnesses ...”; and 4) “DEA reports from Los Angeles ...”. *Id.* at 12. On March 13, 1997, the Court also ordered disclosure of victim-related information 30 days prior to trial.

B. Court Ordered Early Discovery Before Federal Capital Trials

6. In *United States v. Llamas* (E.D. NC CR No. 7:97-CR-63-1-H) (Howard), the district court ordered *Brady*, *Giglio*, *Jencks* material and a witness list produced 20 days before trial. In *United States v. Kaczynski* (E.D. CA CR No. S-96-259 (Burrell), the district court ordered *Brady* material provided five months before trial. An *in camera* review of possible *Giglio* material was ordered one month before trial. *Jencks* material was ordered produced one month before trial, 2 ½ months before witness testimony. In *United States v. Otero* (M.D. PA CR No. 3:CR-96-005)

(Rambo), the district court ordered *Brady*, *Giglio* and *Jencks* material and a witness list produced 30 days before trial. In *United States v. Murray* (M.D. PA CR No. 92-200) (Rambo), the Court ordered *Brady*, *Giglio*, and *Jencks* material produced 20 days before trial. In *United States v Tipton* (E.D. VA CR No.3-92-CR-68) (Spencer), the district court ordered *Brady*, *Giglio*, and *Jencks* material produced two months before trial. A court order was also entered in *United States v. Pena-Gonzalez* (D. PR CR No. 97-284 (JAF)) (Fuste), requiring that *Jencks* be provided two months before trial; police reports released; all *Giglio*, *Jencks* material regarding witness Chester by March 31, 1999; all other *Giglio* and *Jencks* material produced 60 days before trial. The district court also set a May 3rd deadline for government expert reports and required a witness list be produced 30 to 60 days before trial. In *United States v. Brown, et al.* (N.D. WV CR No. 1:98CR34) (Keeley) the Court, on November 6, 1998, ordered “Rule 404(b), *Giglio*, and *Rovario* evidence ... be disclosed on or before July 16, 1999 ...” and “*Jencks* Act material on or before July 16, 1999 ...” [Order at 4 - 5], approximately two months prior to trial. In *United States v. Friend* (E.D. VA CR No. 3:99CR201) (Payne), the witness list was ordered produced 15 days prior to trial. In *United States v. Kee* (S.D. NY CR No. S1 98-CR-778 (DLC)) (Cote), the government agreed to produce 3500 material 45 days in advance of trial. In addition, the Court ordered “basic outline” of penalty-phase proof two months before trial.

In *United States v. Burton* (D. MD No. 1:07-CR-00149-WDQ) (Quarles), the Court ordered that *Jencks* be disclosed four months before trial. In *United States v. Duong* (N.D. CA No. 5:01CR20154 JF) (Fogel), the Court ordered disclosure of an outline of witnesses to be called by the United States.

In *Neliz Figueroa-Cartagena, et al.* (D. PR No. 3:07-CR-00186 (JAF)) (Fuste), the judge

ordered a deposition of the chief investigator for the Puerto Rico Police Department who claimed to have no documents produced during their investigation of the murder.

C. Voluntary Early Disclosure by the Government in Federal Capital Prosecutions

7. In other cases, the United States voluntarily disclosed information and/or documents well in advance of trial. In *United States v. Cooper* (N.D. IL CR No. 89-CR-580) (Shadur, J.), the United States agreed to produce *Brady* and *Jencks* material several months in advance of two separate trials. In *United States v. Frank* (S.D. NY CR No. 97 CR 269 (DLC)) (Cote), a witness list and *Jencks* material was provided “34 days before the beginning of jury selection, approximately 6 weeks before the ... evidence ...” [TH, 3/11/99 at 53].² (The district court in *Frank* had ordered *Brady* material immediately disclosed.) In *United States v. Johnson* (N.D. IL CR No. 96-CR-379) (Conlon, J.), the government voluntarily provided *Brady* and *Jencks* material several months in advance of trial. In *United States v. McVeigh and Nichols* (D. CO CR No. 96-CR-68-M) (Matsch, J.), *Jencks* material was voluntarily provided by the government a year before trial. Many months before trial the government voluntarily provided a witness list including penalty phase witnesses with a summary of each witness’s proposed testimony. In *United States v. Spivey* (D. NM CR No. 95-491-LH) (Hansen, J.), *Brady* material was voluntarily produced two months before trial. In *United*

²“The Government and defense counsel agreed that the Government would produce by May 1, 1998, with one exception, a list of its witnesses for both the liability and penalty phases, as well as the materials related to these witnesses' testimony, that is, the impeachment material that it must produce pursuant to *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) ("Giglio material"), and the prior statements of witnesses that it must produce pursuant to 18 U.S.C. § 3500 ("3500 material")... The one exception involves the information with respect to witnesses for whom the Government has safety concerns, which the Government proposed to produce on June 3, 1998...The selection of the jury who will try this case is scheduled to begin on June 4, 1998, with the submission of a written questionnaire to members of the venire; the presentation of evidence is scheduled to begin on June 15. ” *United States v. Frank*, 1998 WL 272894 (SDNY 1998).

States v. Brown (E.D. MI CR No. 92-81127-2) (Cohn, J.), *Brady* and *Jencks* material was voluntarily provided by the United States several months in advance of trial. In *United States v. Dean* (D. VT CR No. 2:98M0021), the government voluntarily provided a witness list with locating information 11 months before trial. Reports relating to witnesses the government did not intend to call were provided one year prior to trial. *Jencks* material was promised one month before trial. *Giglio* material in the government's personal files was offered. *Brady* material was provided 11 months before trial. Oral statements by the defendant were provided 1 year before trial. The government's sentencing guideline analysis was provided 1 year before trial. In *United States v. Valle-Lassalle* (D. PR CR No. 97-284 (JAF)), there was an agreed order that the government would furnish a witness list 30 days prior to trial. The government did so and listed almost 200 witnesses. In *United States v. Lee* (D. VT 00-M-66-ALL), the United States immediately produced 3500 material upon indictment. In *United States v. Acosta-Martinez* (E.D. PA CR No. 98-362), *Jencks* was produced on December 1, 2000, in advance of a January 16, 2001 trial date. The case was then continued. In *United States v. Fernandez* (C.D. CA CR No. 99-83-(A)-DT), *Brady*, *Giglio* and *Jencks* materials were produced months before trial. In *United States v. Thomas* (E.D. VA CR No. 99-477-A), detailed 302s and grand jury testimony were provided at least three months in advance of the trial. In *United States v. Vialva* (W.D. TX CR No. W99CR070), *Jencks* was provided beginning four months after a July 13, 1999 indictment. Jury selection began May 15, 2000. In *United States v. Johnson, Jr.* (E.D. Va No. 00-26), within several months after indictment the government produced its entire file, which was more than 8,000 pages of materials, including grand jury transcripts and 302s. In *United States v. Brown, et al.* (N. D. WV Criminal No. 1:98CR34), pursuant to a local rule, the government produced over 8000 pages of transcribed interviews, grand jury transcripts, tapes

of the interviews that were transcribed. In *United States v. Bass* (E.D. MI CR No. 97-80235), 302's were provided months in advance of trial and belated arrival of an additional 300 pages prompted a continuance of the trial. In *United States v. Kee* (S.D. NY CR No. S1 98-CR-778 (DLC)), the government agreed to produce 3500 material 45 days in advance of trial. In *United States v. Charland* (E.D. NC CR No. 5:06-CR-00010-FL), extensive discovery was voluntarily provided before the Attorney General's death penalty decision. In *United States v. Lujan* (D. NM No. 05-924), several thousands of pages of discovery, including police reports and witness statements, were voluntarily disclosed prior to the Attorney General's death penalty decision. Grand jury transcripts, police reports and witness statements were provided shortly after indictment in *United States v. Tolliver* (D. NV CR No. S-04-0482-RCJ (RJJ)). Likewise, in *United States v. Atwater* (M.D. NC No. 1:08-CR-00384-JAB), witness statements, law enforcement investigative names and Grand Jury testimony was disclosed during the Department of Justice capital case review process.

. In *United States v. Friend* (E.D. VA No. 3:99CR201), the United States voluntarily produced FBI 302s and equivalent reports from state and local police agencies in Virginia, Texas, Tennessee and Georgia; medical records on the surviving victim, his FBI 302s; custodial statements by the defendants; background records on all four defendants; education, employment, medical, criminal, detention, and DMV records and grand jury testimony. This discovery was provided before consideration of the death penalty. In *United States v. Ballinger* (N.D. GA CR No. 2:99-CR-26), the government provided all witness statements, forensic materials about two months after indictment and before consideration of the death penalty. In *United States v. Stewart* (W.D. KY CR No. 4:99-CR-11-M), the government voluntarily disclosed *Brady* prior to the death penalty decision.

In *United States v. Andrews and Bellinger* (N.D. WV No. 1:08-MJ-00010-JSK), the government provided many hours of video, DNA reports, property logs, medical reports and the medical examiner report prior to indictment.

Finally, some districts, such as the Western District of North Carolina, maintain an open file policy in all prosecutions, including capital cases. “Open file discovery” has been used in various “authorized” federal capital cases, such as *United States v. Lecco and Friend* (S.D. WV CR No. 2:05-00107), *United States v. Galan* (N.D. OH No. 3:06-CR-00730-JGC-1) and *United States v. Duong* (N.D. CA No. 5:01CR20154 JF), and in cases that were not “authorized,” such as *United States v. Milburne* (E.D. KY No. 7:09-CR-00013-GFVT) and *United States v. Byrd* (E.D. MI No. 2:06-CR-20335). In *United States v. Taylor and Waggoner* (D. AZ CR No. CR 99-315 TUC JMR), there was open file discovery during "authorization" process, including 1800 pages of witness statements, grand jury transcripts, wiretap transcripts in a prosecution involving the killing of a DEA informant.

D. “Pre-Authorization” Court Ordered Discovery in Federal Capital Cases

8. In another unpublished order in *United States v. Rosado-Rosario, et al.* (D. PR CR No. 97-049 (JAF)) (Fuste) (August 1, 1997) (opinion and order at 2), the Court “expansively defin[ed] [a capital] defendant’s right to discovery ...”. The district court ordered that unredacted statements and transcripts of witness interviews be provided to the defense during authorization process, well in advance of trial. In *United States v. Dean* (D. VT CR No. 2:98M0021), the Government agreed to release everything but witness statements as part of the pre-authorization discovery process. Rule 17 subpoenas were issued pre-authorization. Exculpatory evidence regarding the misconduct of the deceased was provided defense counsel. Rule 16 and “local rule” discovery was provided as the

government received it. The local rule requires a witness list and a preliminary witness list was provided before the issue of the death penalty was considered. In *United States v. Gray, et al.* (S.D. AL CR No. 01-00007-CB) (Butler) (April 5, 2001), the Court ordered “production of all underlying facts, ... that were relevant and material to the certification issues pending before the Attorney General.”

E. 404(b) Related Discovery

9. In *United States v. Gilbert* (D. MA CR No. 98-30044-MAP) (Ponsor) the government was ordered to file motions seeking admission of 404(b) evidence by February 1, nine months before trial, 14 months after indictment. In *United States v. Joseph Bullock, III* (E.D. VA CR No. 3:98CR150-01) (Spencer) ((December 21, 1988) the government was ordered to provide a detailed proffer regarding any unadjudicated misconduct that it will seek to introduce against the defendant in the sentencing phase of the case, no later than January 26, 1999 “in advance of a trial date of March 2, 1999. “The government may not rest on bare assertions or allegations in its proffer, but instead must identify the information that underlies its allegations of unadjudicated misconduct and outline the method of proof it intends to use at trial, e.g., eyewitness testimony or a victim’s statements.” In *United States v. Furrow* (CD CA Ind. No. CR 99-838(A)-NM) (Manella), the court ordered on 6/5/00 that the government "amend its notice to indicate to whom and in what manner such threats were communicated... To whom and in what manner the defendant reported having such thoughts... Specify when, where, and in what manner the defendant allegedly threatened physical harm to the woman he refers to as his wife... In what manner he communicated a threat to deliver the son’s head to her on a platter... Amended notice shall be filed no later than 6/30/00,” 6 weeks before the trial date. In *United States v. Horton* (D. MD CR No. AW00-0105) (Williams), the

government offered to disclose FRCP 404(b) evidence at the same time as Rule 16 disclosure.

F. Victim Related Discovery

10. In *United States v. Gonzales, et al.* (D. NM CR No. 95-538-MV) (Vasquez) (March 13, 1997) (order granting and denying defendant's motions regarding victim impact evidence; discovery of victim-related information ordered), a federal capital case, the Court was faced with requests for disclosure "of exculpatory evidence pertaining to victim impact evidence" [Order at 5]. The Court held that: "Defendants are entitled to rebut victim impact evidence" relying on 18 U.S.C. §3593(c). "In order to effectively rebut victim impact evidence, defendants must have access to discovery." *Id.* at 6.

Appropriate areas of discovery include, but are not limited to, the names of witnesses who will provide victim impact evidence, evidence that impugns the character or life of the victim or the loss suffered by the family, and evidence tending to diminish the credibility of witnesses. Access to discovery must be provided a sufficient amount of time prior to trial [so] that defendants may conduct independent investigations to develop the information necessary to effectively refute testimony or attack witness credibility.

Id. at 7. In *United States v. Furrow* (CD CA Ind. No. CR 99-838(A)-NM) (Manella), the court ordered on 6/5/00 that: "No later than 6 weeks before trial the government shall identify the family members affected and the nature of the harm they have suffered, as well as any personal characteristics of the victim on which the government intends to rely in demonstrating victim impact..."

I declare under the penalty of perjury under the laws of the United States of American, 28 U.S.C. §1746, that the foregoing is true and correct. Executed this 9th day of October, 2009.

/s/ Kevin McNally