

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division - Felony Branch**

UNITED STATES	:	
	:	Criminal No. _____
v.	:	Honorable _____
	:	Trial Date: _____
[DEFENDANT]	:	

**MOTION FOR A REPORT ON THE GOVERNMENT’S EFFORTS TO COMPLY
WITH ITS OBLIGATIONS UNDER *BRADY V. MARYLAND***

[DEFENDANT], through undersigned counsel, pursuant to his rights under the Fifth and Sixth Amendments and Rule 57(b) of the Superior Court Rules of Criminal Procedure and this Court’s inherent authority to regulate the proceedings before it and to uphold the Constitution, respectfully moves this Court for an order (1) requiring the government to file a report on or before [INSERT DATE] (four weeks prior to trial) detailing the efforts made in this case to comply with its “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Brady v. Maryland*, 373 U.S. 383 (1963), and, (2) if questions about the government’s *Brady* disclosures remain, permitting [DEFENDANT] to request a pre-trial hearing to confirm that all favorable information to which he is entitled pursuant to *Brady* has been disclosed.

Pre-trial judicial oversight of the government’s *Brady* disclosures is both warranted and legitimate. The government’s persistent practice of disclosing *Brady* information belatedly and incompletely results in a huge waste of Superior Court resources. The late disclosure of *Brady* information not only increases pre-trial litigation, and often requires the court to reschedule trial dates, thereby disrupting the Courts’

already crowded calendars, but it also often necessitates post-conviction proceedings in the Superior Court to clarify the breadth of the government's nonfeasance and determine its impact on defendants' right to a fair trial. In addition to the needless waste of judicial resources, the government's late and often deficient *Brady* disclosures threaten defendants' right to due process of law because the defendant is not provided with the favorable information to which he is entitled at such a time when he can use it to investigate his case and prepare his defense.

Certainly, this Court has the authority to order the government to file a report prior to trial documenting its efforts to comply with its *Brady* obligations. Pursuant to Rule 57(b) and its inherent powers, this Court is authorized to set up whatever procedures it deems necessary to manage the litigation proceedings in its courtroom. In addition, as a guardian of the constitution, this Court is empowered and obligated to ensure that the defendants tried before it receive due process of law. The proposed reporting requirement will both promote the efficient use of judicial resources and due process and thus it is clearly within this Court's power to require such a report.

Accordingly, as a prophylactic measure to prevent added stress on limited judicial resources and to ensure that, before [DEFENDANT] stands trial, [DEFENDANT] is provided with all the information to which he is constitutionally entitled to defend himself, the government should be required to confirm at least thirty days prior to trial that it has fulfilled its obligation to identify, locate and disclose all *Brady* information in its possession. Specifically, the government should be required to file a report that catalogues and certifies: (1) the measures the government has taken to identify and/or locate *Brady* information; (2) the information was identified as *Brady* as a result of this

search; (3) the date that this information was located or identified as *Brady*; and (4) the date that this *Brady* information was disclosed to the defense. In addition, to the extent that the government has considered certain information to be *Brady* but ultimately determined that this information could be lawfully withheld, the government should file a separate report, *ex parte*, both identifying the withheld information, and explaining the justification for nondisclosure.

In support of this motion, counsel states the following:

1. **[INSERT CHARGING INFORMATION AND PROCEDURAL HISTORY TO DATE, E.G.,] [DEFENDANT]** is charged with **[INSERT CHARGES]**. A preliminary hearing was held on **[INSERT DATE]**. Trial is currently scheduled for **[INSERT DATE]**.

2. In order to adequately investigate his case and prepare for trial, **[DEFENDANT]** must be assured that he has all the information favorable to his defense to which he is entitled under *Brady v. Maryland*, at such a time as he can use this information effectively.

3. The aim of disclosure under *Brady* is to ensure Due Process by expanding the record to the benefit of the accused. To that end, the prosecutor in every case has a duty “to assist the defense in making its case.” *United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985); *see also Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (duty to disclose exculpatory information is “a rule of fairness and minimum prosecutorial obligation [that] is necessary to ensure the effective administration of the criminal justice system”).

4. Contrary to this fundamental Due Process objective, in this jurisdiction, the de facto rule for *Brady* disclosures has become that “the prosecutor may hide [and the] defendant must seek.” *Banks v. Dretke*, 124 S. Ct. 1256, 1275 (2004). For whatever reason – perhaps a lack of training about the nature of prosecutor’s obligations under *Brady* and how to fulfill these obligations, inadequate lines of communication with the MPD, or simple inattention – prosecutors in the United States Attorneys office for the District of Columbia (“USAO”) regularly disclose obvious *Brady* material on the eve or in the midst of trial and then assert that they only recently became aware of this information.¹

5. The recent prosecution of Leonard Toney for murder, *see United States v. Leonard Toney*, No. F-8237-02, Keary, J., is one of the more egregious examples of the government’s *Brady* nonfeasance. In that case, the trial court ruled that the USAO had violated the mandate of *Brady* after it came to light that the USAO had suppressed – for 16 months, until 6 days prior to an already rescheduled trial date – obvious *Brady* information, namely, a detailed eyewitness statement in which the eyewitness identified a third party as the shooter. Notably, the *Toney* case implicated the *Brady* practices of the entire USAO, because the decision to withhold from the defense information about the

¹ For the purposes of this motion, it does not matter why this has become the de facto rule. *Brady*, 373 U.S. at 87 (suppression of *Brady* material violates Due Process “irrespective of the good faith or bad faith of the prosecution”). But, to be clear, [DEFENDANT] is not suggesting that in allowing *Brady* disclosures to be downgraded from a constitutional obligation to a “matter of prosecutorial grace,” *Lewis v. United States*, 408 A.2d 303, 306 (D.C. 1979), prosecutors are systematically acting in bad faith. The good faith, institutional belief that the USAO only prosecutes when it “get[s] the right guy,” can just as easily lead to the conclusion that nothing is really *Brady* and, thus, that there is little need to be concerned about the adequacy of the government’s disclosure to the defense. *Id.* at 309 (“[t]he government is not in a position to be a perfect arbiter of . . . a defendant’s constitutional rights”).

exculpatory eyewitness was approved by multiple supervisors. *See* Transcript of Hearing on April 22, 2004, p. 22.²

6. The *Toney* case demonstrates the waste of judicial resources that attend the government's failure to disclose *Brady* information in a timely and complete manner. In an effort to get to the bottom of the matter, the Court had to review five comprehensive pleadings and had to hold two separate hearings on the government's *Brady* nonfeasance. After finding that the government had violated its obligations under *Brady*, the Court was then compelled to delay, by almost five months, an already once-rescheduled trial date. Finally, in the end, this expenditure of judicial resources came to naught, because the government opted to voluntarily dismiss the case. This decision to dismiss was made in the wake of the defense's motion for a report from the government (much like the report requested here), regarding the government's efforts to comply with its *Brady* obligations. Presumably the government decided to dismiss its weak case, after it finally conducted the *Brady* review that should have been conducted well before trial and concluded that it did not have sufficient grounds to proceed with the prosecution.

7. Although the government's *Brady* obligations exist independent of a request from the defendant, *see Bagley*, 473 U.S. at 683, undersigned counsel has already put the government on notice of its *Brady* obligations in this case in the following correspondence: **[DETAIL CORRESPONDENCE SENT: e.g., model letter**

² A comprehensive review of the relevant facts in the *Toney* case can be found in Judge Keary's May 6, 2004 ruling that the USAO had committed a *Brady* violation, and Mr. Toney's supplemental pleading in support of his motion to dismiss the indictment. Both parties' *Brady* pleadings and the relevant transcripts are posted on the SLD System Resources page of the PDS website. *See* <http://www.pdsdc.org/SpecialLitigation/SLDSystemResources/>.

explaining what constitutes *Brady* and model letter explaining where the government must look for *Brady*] [DETAIL THE GOVERNMENT'S RESPONSE, IF ANY].

8. A reporting requirement that requires the government to certify in a written pleading all efforts to identify, locate and disclose all *Brady* information in the government's possession will ensure that the government fulfills its *Brady* obligations in a timely manner, and thus foster this court's resources, obviate the need for delay of trial proceedings and uphold [DEFENDANT'S] fundamental right to Due Process of law.

9. Such a report should not unduly burden the government, given that it merely requires the government to document that which it is already obligated to do.

10. Accordingly, Mr. Toney respectfully requests that this Court issue an order requiring the prosecution to file a report no later than four weeks before trial (INSERT DATE) that catalogues and certifies:

- The measures the government has taken to identify and/or locate *Brady* information; \
- The information was identified as *Brady* as a result of this search;
- The date that this information was located or identified as *Brady*; and
- The date that this *Brady* information was disclosed to the defense.

In addition, to the extent that the government has considered certain information to be *Brady* but ultimately determined that this information could be lawfully withheld, the government should file a separate report, *ex parte*, both identifying the withheld information, and explaining the justification for nondisclosure.

11. If after this report is filed, questions about the completeness of the government's search for and disclosure of *Brady* information remain, [DEFENDANT]

may then request a pre-trial hearing to confirm that all favorable information to which he is entitled pursuant to *Brady* has been disclosed.

ARGUMENT

THIS COURT HAS THE RIGHT AND THE RESPONSIBILITY TO REVIEW AND ASSESS THE SUFFICIENCY OF THE GOVERNMENT’S EFFORTS TO COMPLY WITH ITS *BRADY* OBLIGATIONS IN THIS CASE.

The existence of the government’s obligation to look for *Brady* materials in the files of the prosecution team is clear cut. A prosecutor has a “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Brady*, 373 U.S. 383. The prosecution has a duty to disclose this information to the defense in a timely manner prior to trial so “as to allow the defense to use the favorable material effectively in the *preparation and presentation of its case.*” *Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993) (emphasis added; internal citations and quotations omitted); *Curry*, 658 A.2d at 197-98 (the importance of timely disclosure “cannot be overemphasized . . . [because] delay may imperil a defendant’s right to a fair trial.”) (internal quotations and citations omitted). Finally, the prosecution has a duty to put in place the procedures that ensure that the mandate of *Brady* is fulfilled. *See Giglio v. United States*, 405 U.S. 150, 154 (1972); *see also Kyles*, 514 U.S. at 538 (quoting *Giglio*).

This Court similarly has clear authority to ensure that the prosecution is complying with the unambiguous mandate of *Brady*. Specifically, under Rule 57(b) of the Superior Court Rules of Criminal Procedure and pursuant to its inherent authority to regulate the proceedings before it and to uphold the Constitution, this Court has the

power to review and assess the sufficiency of the government's efforts to comply with its *Brady* obligations as requested in the instant motion.

Courtroom procedures for the most part are dictated by statute and court rules, as well as by constitutional requirements; but, in addition, the trial court has inherent authority, unless otherwise specifically precluded, to control the conduct of the proceedings before it, in order to ensure that . . . all parties are treated fairly, and that justice is done.

Hicks-Bey v. United States, 649 A.2d 569, 575 (D.C. 1994); *see also In Re Jam J.*, 825 A.2d 902, 917 (D.C. 2003) (quoting *Hicks-Bey*). Moreover, as a guardian of the Constitution, *Powell v. Alabama*, 287 U.S. 45, 52 (1932), this Court has a responsibility to ensure the fairness of [DEFENDANT]'s trial, which encompasses a responsibility to ensure that the government has fulfilled its *Brady* obligations to identify, locate and disclose all evidence favorable to the defense in its possession.

1. Rule 57(b) and this Court's inherent power provide this Court with ample authority to grant the requested relief.

Rule 57(b) gives this Court broad power to regulate the proceedings before it and to "cope with the complexities and contingencies inherent in the adversary process." *Jordan v. United States*, 633 A.2d 373, 376 (D.C. 1993) (quoting *Geders v. United States*, 425 U.S. 80, 86-87 (1976)). Specifically, Rule 57(b) provides that "when there is no controlling law," that the trial court "may regulate practice in any manner consistent with applicable law and these Rules." *See also Yeager v. Greene*, 502 A.2d 980, 985 (D.C. 1985) ("The Superior Court Rules of Criminal Procedure expressly give discretion to the trial court to promulgate rules regarding courtroom procedures 'in any lawful manner' where no other rule or statute specifically prohibits such a practice or provides for a

contrary practice to be implemented.”).³ Given that there is no rule or statute prohibiting the oversight of the government’s *Brady* disclosure – to the contrary, such oversight is compelled when the Court is made aware that *Brady* obligations are not being met, *see infra* – this Court may rely on its powers under Rule 57(b) to grant the relief requested in this case.⁴

Apart from Rule 57(b), this Court, of course, has inherent power to both to ensure the “fundamental fairness” of criminal proceedings and to promote “administrative efficiency.” *See United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975); *see also United States v. Edelin*, 134 F. Supp. 2d 45, 48 (D.D.C. 2001) (trial court has inherent judicial power to provide procedures necessary for “just and efficient resolution” of judicial proceedings); *In Re Jam J.*, 825 A.2d at 917 (trial court has inherent authority to “control the conduct of the proceedings before it,” “to ensure that . . . all parties are treated fairly, and [to see] that justice is done”); *Hicks-Bey*, 649 A.2d at 575 (same); *Oesby v. United States*, 398 A.2d 1, 10 (D.C. 1977) (“recogniz[ing] that a trial judge is accorded broad discretion in supervising trial proceedings”).

³ The Court in *Yeager* also observed that the comparable federal rule could be relied upon for guidance in interpreting the scope of the D.C. rule. *See* 502 A.2d at 986 n.12. The Court further explained that the drafters of the federal rule “specifically intended [Rule 57(b)] to give trial courts considerable discretion in implementing procedures relating to the conduct of jury trials.” *Id.* (citing Fed. R. Crim. P. 57 Advisory Committee Note).

⁴ Rule 16 cannot be construed as any impediment to an exercise of this Court’s inherent authority in this case. Even with respect to judicial oversight of discovery, Rule 16 is not a “general limitation on the trial court’s broad discretion as to evidentiary questions at trial.” *United States v. Nobles*, 422 U.S. 225, 236 (1975). In any event, disclosure mandated by *Brady* is not a rule of discovery and is not addressed by Rule 16. *See Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (“*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation . . . [that] is necessary to ensure the effective administration of the criminal justice system”) (internal quotations and citation omitted); *see also Boone v. United States*, 769 A.2d 811, 821 (D.C. 2001) (rejecting argument that *Brady* disclosure can be regulated by *Jencks* Act).

In this instance, both justifications for the exercise of inherent authority – ensuring fairness and promoting efficiency – are implicated; indeed, “the latter help[s] to effectuate the former.” *Holmes*, 343 A.2d at 277. By ordering the government to file a report detailing its efforts to comply with its obligations under *Brady*, the Court can reinforce up front the government’s duty to learn of and disclose all information favorable to the defense. Once the government files its report, any confusion about the nature of the government’s *Brady* obligations or the scope of its search for *Brady* information can be addressed on a complete record well before trial. *Cf. Boyd v. United States*, 586 A.2d 670, 675 (D.C. 1991) (ascertaining validity of waiver of right to testify pre-trial allows “trial judge [to] address concerns at a time when problems can be rectified before the community’s resources are expended on a trial”); *Monroe v. United States*, 398 A.2d 811, 818 (D.C. 1978) (inquiry into adequacy of assistance pre-trial gives the trial court the “opportunity to take steps to eliminate any deficiencies in the representation of counsel before the resources have been invested in a full-blown trial”). This will substantially lessen the possibility that additional *Brady* information will come to light during or after trial, thus disrupting trial proceedings and raising complicated questions about how to quantify the prejudice to the defense and what the appropriate sanction should be. Furthermore, because the government’s efforts to comply with its duties under *Brady* should be fully documented in its report to the Court, it will also lessen the need, if [DEFENDANT] is convicted, for post-conviction proceedings to try to reconstruct the *Brady* record and to determine long after the fact (1) who in the government knew of certain *Brady* information, (2) when and how they acquired this knowledge, (3) why this information was withheld, and (4) how timely disclosure of this

information could have affected the trial. And, of course, this prophylactic and efficient oversight of *Brady* disclosures only promotes [DEFENDANT’S] right to Due Process.

The requirement that the government report to the Court or proffer information justifying its actions at a hearing is hardly a novel procedure,⁵ but even if the imposition of a reporting requirement were in some way innovative, it would still be within this Court’s power. The exercise of a trial court’s inherent authority to mandate “innovative trial procedures . . . [is] acceptable as long as the[se procedures] are administered carefully and meet the requirements of due process.” *Hicks-Bay*, 649 A.2d at 575 (internal quotation and citation omitted). The proposed report is not contrary to Due Process; it is in furtherance of it. It simply allows the Court to verify the government’s compliance with its “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles*, 514 U.S. at 437.

⁵ A number of courts around the country already require the prosecution to file some sort of written report or certificate of *Brady* compliance prior to trial. *See, e.g.*, D. Haw. Local Crim. R.16(a); Colo. Crim. P. 16 (V)(d); ALM Crim. P. Rule 14 (a)(3), N.M. Dist. Ct. R. Crim. P. 5-501(D). In this jurisdiction, trial courts regularly exercise their inherent authority to demand information from litigants. Indeed, the Supreme Court and the D.C. Court of Appeals have repeatedly endorsed such an exercise of power particularly where, as here, no privilege militating against disclosure can conceivably exist. *See, e.g.*, *Nobles*, 422 U.S. at 231 (“Decisions of this Court repeatedly have recognized the federal judiciary’s inherent power to require the prosecution to produce” discovery); *Holmes*, 343 A.2d at 276-77 (trial court has inherent authority to order prosecution to disclose names of witnesses not otherwise required by rules of criminal procedure); *cf. United States v. Jones*, 438 A.2d 444, 446 (D.C. 1981) (rejecting trial court’s inherent power to order pre-trial disclosure in context of resolving a severance motion and distinguishing from power to order disclosure “to aid the defendant in the preparation and presentation of his defense,” a situation that has “constitutional dimensions”); *Bowman v. United States*, 412 A.2d 10, 12 (D.C. 1980) (trial court’s authority to compel discovery in criminal cases, stemming from, among other things, the Supreme Court’s decision in *Brady*, did not encompass power to order defense counsel to disclose his theory of the case pre-trial).

2. *This Court's role as a guardian of the Constitution provides further foundation to grant this motion.*

Rule 57(b) and this Court's inherent powers are mechanisms for this Court to fulfill its constitutionally mandated function "to see that . . . [the defendant is] denied no necessary incident of a fair trial." *Powell*, 287 U.S. at 52. At stake here are [DEFENDANT]'s rights to Due Process and the effective assistance of counsel. It is well-established that a trial court has the power to authorize an inquiry in order to ensure that a defendant's Fifth and Sixth Amendment rights are not being violated.

The incomplete disclosure of *Brady* information prior to trial in [DEFENDANT]'s case threatens both his right to Due Process and his right to the effective assistance of counsel. "[D]elay[ed disclosure of *Brady* information] may imperil a defendant's right to a fair trial." *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995) (internal quotations and citations omitted); *see also United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985) (prosecutor has a duty "to assist the defense in making its case" "to ensure that a miscarriage of justice does not occur"). One of the reasons suppression or delayed disclosure of *Brady* information may imperil a defendant's Due Process rights is because it may thwart a defense attorney's ability to provide the effective assistance of counsel guaranteed by the Sixth Amendment.⁶ *See Monroe*, 389

⁶ The Sixth Amendment guarantee to the effective assistance of counsel encompasses instances both where trial counsel of her own accord fails to perform her duties as a zealous advocate, *see, e.g., Strickland v. Washington*, 466 U.S. 668 (1984), and where counsel is prevented from doing so because of external impediments. *See, e.g., Powell v. Alabama*, 287 U.S. 45 (1932) (designation of counsel on eve of trial precluding counsel's adequate preparation for trial amounted to denial of effective assistance of counsel); *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978) (defense counsel forced to represent three defendants impeded from providing effective assistance to any one; "joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing"); *see also Geders v. United States*, 425 U.S. 80 (1976) (court order

A.2d at 816 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (Sixth Amendment guarantee of counsel is “fundamental and essential for a fair trial, and so, to due process of law”). Simply stated, the failure to timely disclose *Brady* information not only generally undermines the trial objective to search for the truth, *Kyles*, 514 U.S. at 439-440, but also specifically, “tends to prevent” defense counsel from adequately preparing for trial.⁷ *Holloway*, 435 U.S. at 489-90; *see also Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993) (*Brady* disclosure must be made “at such a time as to allow the defense to use the favorable material effectively in the *preparation and presentation* of its case”) (internal citation and quotation omitted; emphasis added); *Cf. Powell*, 287 U.S. at 71 (Due Process is violated when counsel is assigned “at such a time, or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case”).

This threat to [DEFENDANT]’s Fifth and Sixth Amendment rights further justifies this Court’s intervention and heightened oversight. In a myriad of instances, the threat to a defendant’s Due Process rights justifies inquiry by a trial court. *See, e.g., Pate v. Robinson*, 383 U.S. 375 (1966) (Due Process requires trial court to inquire if there is concern about defendant’s competency); *Boyd v. United States*, 586 A.2d 670, 675 (D.C.

preventing counsel from conferring with client during overnight recess violated Sixth Amendment); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (court procedure requiring defendant to be first witness compromised Sixth Amendment rights); *Ferguson v. Georgia*, 365 U.S. 570, 593-96 (1961) (court procedure prohibiting direct examination of defendant compromised Sixth Amendment rights).

⁷ “[T]he most able and competent lawyer in the world can not render effective assistance in the defense of h[er] client if h[er] lack of preparation for trial results in h[er] failure to learn of readily available facts which might have afforded h[er] client a legitimate justiciable defense.” *McQueen v. Swenson*, 498 F.2d 207, 217 (8th Cir. 1974). The same must be true when counsel is impeded in such preparation because the government fails to turn over all the *Brady* information to which the defendant is constitutionally entitled.

1991) (Due Process requires trial court to inquire to ensure defendant's decision not to exercise right to testify is made knowingly, intelligently and voluntarily); *In re F.G.*, 576 A.2d 724 (D.C. 1990) (Due Process requires that trial court hold pre-trial hearing to determine admissibility of inherently suggestive show-up identifications). It is unquestionably proper for a trial court to conduct an inquiry pre-trial into the adequacy of the government's disclosure pursuant to *Brady* to preserve a defendant's Due Process rights. *See, e.g., United States v. Carter*, 2004 WL 825846 at 2-3 (E.D. Wisc. 2004); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199-1201 (C.D. Cal. 1999).

Moreover, when a defendant's right to the effective assistance of counsel may be in jeopardy, the *Monroe-Farrell* doctrine specifically requires a trial court to conduct an inquiry into the threat. *Monroe*, 389 A.2d 811; *Farrell v. United States*, 391 A.2d 755 (D.C. 1978); *see also Fields v. United States*, 466 A.2d 822, 826 (D.C. 1983) (In *Monroe*, the Court of Appeals "mandat[ed] a regularized, on-the-record inquiry into the validity of pretrial ineffective assistance claims, . . . which was designed to offer an alternative to the judiciary's more traditional post-conviction exercise of control over the quality of defense advocacy."). As the Court of Appeals explained in *Monroe*, 389 A.2d at 816, "[b]ecause the assistance of counsel is 'requisite to the very existence of a fair trial,' *Argersinger v. Hamlin*, 407 U.S. [25] at 31 [1972], the right to such assistance 'invokes, of itself, the protection of a trial court' *Johnson v. Zerbst*, . . . 304 U.S. [458] at 465 [1938]." No different than any other inquiry under the aegis of the *Monroe-Farrell* doctrine, the Court in this case has the power (1) to "ascertain the concrete steps taken by counsel" – albeit in this instance the prosecutor – "in the preparation of the case" and specifically in the identification, location and disclosure of *Brady* information, and (2) to

“evaluate the[] sufficiency [of these steps] under the circumstances.” *Monroe*, 389 A.2d at 819.

3. ***Requiring the Prosecution to File a Report Detailing Its Efforts to Comply with its Brady obligations should not be unduly burdensome if the government is complying with the mandate of Brady.***

The obligation to file a *Brady* compliance report should not place an undue burden on prosecution in this case. *Cf. Taylor v. Illinois* 484 U.S. 400, 416 (1988) (“burden of . . . [disclosure] in advance of trial adds little to the[] routine demands of trial preparation”). The prosecution already has an obligation under *Brady* to disclose all information in the government’s possession that is favorable to [DEFENDANT] and material to his guilt or innocence, *Kyles*, 514 U.S. at 437-38; *Brady*, 373 U.S. at 87; and the prosecution already has an obligation to make this disclosure in a timely manner prior to trial. *See Curry*, 658 A.2d at 197-98; *Edelen*, 627 A.2d at 970. Moreover, the USAO already has an obligation to put in place the procedures that ensure that the mandate of *Brady* is fulfilled. *See Giglio*, 405 U.S. at 154; *see also Kyles*, 514 U.S. at 538 (quoting *Giglio*). Finally, the prosecution already has an obligation to “resolve doubtful questions in favor of disclosure.” *Kyles*, 514 U.S. at 439 (internal quotation and citation omitted); *see also Ebron v. United States*, 838 A.2d 1140, 1156 n. 13 (D.C. 2003) (same).

So long as that the government is already complying with the mandate of *Brady*, the requested report should not add to the government’s substantive obligations in this case. To the extent that the government is not in compliance, the extra burden of an additional filing should be the least of its worries. *See Brady*, 373 U.S. at 87 (a prosecutor who withholds *Brady* evidence becomes “the architect of a proceeding that does not comport with the standards of justice”); Rule 3.8 of the District of Columbia

Rules of Professional Conduct (“[t]he prosecutor in a criminal case shall not . . . [i]ntentionally fail to disclose to the defense upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense”); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) (prosecutors are “the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”)

WHEREFORE, for the foregoing reasons and any others that appear to the Court, [DEFENDANT], through undersigned counsel, respectfully requests that this Honorable Court grant this motion.

Dated: _____

Respectfully submitted,

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division - Felony Branch**

UNITED STATES	:	
	:	Criminal No. _____
v.	:	Honorable _____
	:	Trial Date: _____
[DEFENDANT]	:	

ORDER

This Court having considered the Defendant’s Motion for a Report on the Government’s Efforts to Comply With Its Obligations Under *Brady v. Maryland*, 373 U.S. 383 (1963), it is this ___ day of October, 2004, hereby

ORDERED, that the government shall file thirty days prior to trial (**INSERT DATE**) a report that catalogues and certifies:

- (1) the measures the government has taken to identify and/or locate *Brady* information;
- (2) the information was identified as *Brady* as a result of this search;
- (3) the date that this information was located or identified as *Brady*; and
- (4) the date that this *Brady* information was disclosed to the defense.

ORDERED that, to the extent that the government has considered certain information to be *Brady* but ultimately determined that this information could be lawfully withheld, the government shall file at the same time a separate report, *ex parte*, both identifying the withheld information, and explaining the justification for nondisclosure.

The Honorable _____

Copies to: