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

UNITED STATES	:	
	:	**Criminal No. F-8237-02**
v.	:	**Honorable Ann O'Regan Keary**
	:	**Trial Date: April 22, 2004**
L.T.	:	

<u>REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT</u>

The government's failure to disclose until the eve of trial critical *Brady* evidence – here, the fact that, soon after the crime and before Mr. T. was arrested, an eyewitness identified someone other than Mr. T. as the perpetrator – is indefensible. The law is clear. The United States Attorney's Office has an obligation (1) to locate *Brady* evidence in the government's files, *Kyles v. Whitley*, 514 U.S. 419, 438-9 (1995); and (2) to turn this *Brady* information over to the defense in a timely fashion. Indeed, the Court of Appeals stated in *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995), that "a prosecutor's timely disclosure obligation with respect to *Brady* material *cannot be overemphasized*, and the practice of delayed production must be disapproved and discouraged . . . . [D]elay may imperil a defendant's right to a fair trial, and a conscientious prosecutor will not countenance it." (internal quotations and citations omitted; emphasis added). Proving its point, in *Ebron v. United States,* 838 A.2d 1140, 1156 n. 13 (D.C. 2003), the Court, not four months ago, once again took the

> opportunity to reemphasize that prosecutors are expected to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of *prompt* disclosure . . . When the government fails to make prompt disclosure, as required, the opportunity for use of the material by the defense may be impaired, and the administration of justice may be impeded by the necessity for a continuance to allow the defense to make use of the material or by the need for reversal of a conviction.

(internal quotations and citations omitted); *accord Leka v. Portuondo,* 257 F.3d 89, 100, 102 (2d Cir. 2001) ("[t]he longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use"; "The opportunity for use under *Brady* is the opportunity for a responsible lawyer to use the information with some degree of calculation and forethought."). In the face of such clear authority, the government's bold effort to argue that it did nothing wrong by failing to turn over *Brady* evidence that has been in its files since December 2002 and that, as a general matter, disclosure of *Brady* evidence mid-trial is "timely" disclosure, Gov't Opp. at ¶ 8, is more than unpersuasive – it demonstrates that the government's understanding of its *Brady* obligations is fundamentally flawed.

Nor does the government have any defense based on the facts. Far from disputing the chronology set forth in Mr. T.'s initial motion, the government concedes in its Opposition its initial failure to "find" this *Brady* evidence -- which had been sitting in a government file for 16 months despite multiple requests by the defense during this time for *Brady* disclosure -- until April 9, 2004. It then provides damning detail about its failure to turn over this *Brady* evidence for another seven days, until less than a week before the rescheduled trial date. It even freely concedes its failure to make any mention of this *Brady* evidence at a hearing before this Court on the morning of April 16, 2004, a hearing that dealt with other *Brady* requests by the defense, because the Assistant in this case had an appointment immediately after the hearing to see if the government could obtain a boilerplate recantation from the *Brady* witness. In so doing, the government admits facts that constitute wholesale violations of its obligations under *Brady*.

In the face of this clear violation of its due process obligation to disclose *Brady* evidence, *see Leka*, 257 F.3d at 98, the government argues that this Court should do nothing. But the mandates of the Constitution, the Supreme Court, and the D.C. Court of Appeals are not so

toothless, and dismissal with prejudice is well warranted. On the facts of this case alone dismissal of the indictment would be justified, but dismissal is additionally appropriate because the problem, unfortunately, is far more extensive than this particular failure to disclose evidence to Mr. T. that might help him negate his guilt.[1] The government's documented pattern and practice of withholding exculpatory evidence, detailed below, demonstrates the United States Attorney's Office (USAO) is systematically failing to disclose acknowledged *Brady* evidence "at such a time 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, 971 (D.C. 1993) (internal quotations and citation omitted). This systemic problem requires a strong response from this Court. Unless and until the judiciary makes it clear that the USAO's disregard for the mandate of *Brady* will not be tolerated, the government will continue to withhold exculpatory evidence with impunity to the detriment of due process and the effective functioning of our adversarial system as a crucible of adversarial testing. *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 . . . . Effective compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system.") (internal quotations and citations omitted).

[1] Indeed, based on eleventh hour disclosures by the government, the *Brady* problems in Mr. T.'s case appear to extend well beyond the government's failure to disclose Mr. Martin's existence and his identification of a third party as the perpetrator. Undersigned counsel discovered last night that the government may have also withheld information about the mental health problems of one of its witnesses, Calvin Howard.

The Government Concedes Facts That Constitute Wholesale Violations Of Its Obligations Under *Brady* To Identify Exculpatory Evidence And Produce This Evidence To The Defense In A Timely Fashion.

The government freely admits not only those facts set forth in Mr. T.'s initial Motion to Dismiss, but also additional facts that constitute wholesale violations of its obligations under *Brady* to identify exculpatory evidence and produce this evidence to the defense in a timely fashion. The government's cavalier attitude about its missteps and foot-dragging in making timely disclosure in this case demonstrates the depth of the problem. The USAO does not even attempt to demonstrate any diligence over the past 16 months in identifying the *Brady* evidence at issue and producing it to undersigned counsel because it apparently believes that it will have more than fulfilled its *Brady* obligations if only it provides this evidence to the defense before the close of trial.

To begin with, the government does not dispute that the part of the *Brady* information at issue – the notes from an interview with eyewitness Dammien Martin in which Mr. Martin described someone other than Mr. T. as the perpetrator – was in a location that the prosecution might reasonably be expected to search for *Brady* evidence, namely in the Homicide File of Metropolitan Police Department (MPD) detective Chris Kaufman, apparently the lead detective on this case.[2] *See* Motion ¶ 3; Gov't Opp. ¶ 2. Nor does the government dispute that this interview was conducted on December 17, 2002, that is, six days before Mr. T. was arrested. *See* Motion ¶¶ 3-4; Gov't Opp. ¶ 2. The government also does not dispute that in between defense counsel's first *Brady* request on January 10, 2003, and the date on which these notes were

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[2] Detective Kauffman was the affiant on Mr. T.'s arrest warrant and multiple police documents, connected with this case (for example, fingerprint reports and PD698 evidence reports) are directed to Detective Kauffman's attention.

"found," April 9, 2004, defense counsel made multiple separate requests to the government for exculpatory evidence, including specific requests for "any failures to provide the police or the government with information testified to at trial," "any and all prior inconsistent, non-corroborative, or other witness statements which do not reflect the trial testimony," and "any and all witnesses who do not fully corroborate the government's case or who serve to impeach the government's evidence." Motion at 6. The government is conspicuously silent about what efforts, if any, were taken to obtain information responsive to these *Brady* requests during this fourteen-month period. Without further explanation, the government simply states that on April 9, 2004 -- two months after the initially scheduled trial date – the Assistant United States Attorney in this case finally reviewed the MPD file containing this *Brady* evidence and "came across" these notes.

Although the government repeatedly asserts that it turned over Mr. Martin's *Brady* material "as soon as it became known to the prosecutor in the case" Gov't Opp. ¶ 1; *see also id*. ¶ 7 ("Mr. Klein did not hesitate to act on the information as soon as it was discovered"); *id*. ¶ 9 ("the prosecutor disclosed the material . . . as soon as it came to his attention"), this is demonstrably untrue, as reflected by the government's own pleading. The government concedes that it did not turn these notes over to the defense immediately on April 9, 2004, or even the next day. *See* Gov't Opp ¶¶ 2-6. Instead, the government discusses its efforts over the following week to obtain additional *Brady* material – the tape of the interview with Mr. Martin – which apparently was not in the file. *Id.* The government does not explain why its efforts to obtain this additional *Brady* information would in any way impede it from turning over the *Brady* information already in its possession.

The government likewise concedes that once it obtained, on April 14, 2004, a copy of the

tape of Mr. Martin's interview, it did not turn this additional *Brady* material over to the defense immediately, or even the next day. *See* Motion at 4-5; Gov't Opp. ¶¶ 2-6. Indeed, the government admits that, even though it appeared at a hearing before this Court concerning other *Brady* requests by the defense on the morning of April 16, 2004, six days prior to trial, it did not disclose the existence of the tape or the notes to the Court or to defense counsel. *Id.* ¶¶ 3-6.

Finally, the government does not dispute that it made a strategic decision not to disclose the existence of the notes and the tape to the defense until after the Assistant assigned to this case had a chance to speak to Mr. Martin later in the day on April 16, 2004, and had obtained a signed statement from Mr. Martin in which he perfunctorily recanted his detailed account of the crime and description of the shooter given on December 17, 2002.[3] *See* Motion at 4; Notes Attached to Gov't Opp. dated April 16, 2004. To the contrary, the government explicitly acknowledges that the Assistant assigned to this case and his supervisor together "decided" that they would not disclose Mr. Martin's description of the shooter as someone other than Mr. T. until after "the live in-person interview with Mr. Martin." Gov't Opp. ¶ 6. Thus, although the government protests that it did not "withhold" Mr. Martin's *Brady* evidence from the defense, Gov't Opp. at 3, at this late date, only days prior to trial, in fact, it concedes that that is precisely what it did.

The Law Concerning the Government's Obligations to Locate and Promptly Produce *Brady* Evidence In Its Files Is Clear, And the Government's Assertion That It Can Comply With *Brady* Simply By Disclosing Exculpatory Evidence Sometime Before The Close Of Trial Is Fundamentally Flawed.

The government apparently believes that it can wait sixteen months to review its files and ignore multiple *Brady* requests, and nonetheless fully satisfy its *Brady* obligations so long as it

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[3] The government cannot now credibly claim that this decision was anything other than strategic. It is not the case, for example, that the government was unaware of how to contact Mr. Martin.

discloses exculpatory evidence some time before the close of trial. This evisceration of *Brady* has no purchase in the law.

The government would like to start the disclosure clock – not in December 2002 when it obtained this evidence, and not in January 2003 when the defense made its first *Brady* request – but on April 9, 2004, when it first "came across" the notes from Mr. Martin's interview in which he described someone other than Mr. T. as the perpetrator in the lead detective's file. But the law is clear that the government may not defend against a failure to disclose *Brady* evidence by asserting that it did not know about the information in its possession because it had not looked for it. The prosecution "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*, 514 U.S. at 437, and has a "duty to search accessible files to find requested exculpatory material," *Hollman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998); *see also In re Sealed Case*, 185 F.3d 887 (D.C. Cir. 1999) (prosecutor had duty to look at police files to find *Brady* material). Furthermore, if the prosecution does not conduct an adequate search for *Brady* information in government files, the knowledge of this information will be imputed to the prosecution. *See Mastracchio v. Vose*, 274 F.3d 590 (1st Cir. 2001); *In re Sealed Case*, 185 F.3d 887.[4] Here, "[t]here is no doubt that the prosecutor had [the notes and the tape of Mr. Martin's interview] from the beginning of the case . . . And it is clear that this information was favorable to the defense. So there is really no question but that the government suppressed information that it was required to turn over," in

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Mr. Martin was easily locatable in the custody of the Bureau of Prisons. *See* Gov't Opp. ¶ 3.

[4] Were the law otherwise, the prosecution would have perverse incentives to engage in gamesmanship. *United States v. Auten*, 632 F. 2d 478 (5th Cir. 1980) ("If disclosure were excused in instances where the prosecution has not sought out information readily available to it, we would be inviting and placing a premium on conduct unworthy of representatives of the United States government.")

violation of its obligations under *Brady*. *Leka*, 257 F.3d at 100.

Even if the government could somehow excuse its fourteen-month failure to disclose the *Brady* evidence at issue in this case (which it makes no attempt to do), the government cannot prevail on its argument that there is no *Brady* violation in this case because it did eventually disclose the existence of Mr. Martin's *Brady* evidence six days prior to trial and because Mr. Martin is now "available as a witness for trial." Gov't Opp. ¶8. As a preliminary matter, this argument glosses over the fact that even after it "found" two critical pieces of *Brady* evidence, the government deliberately "decided" to withhold this information from the defense until after the government interviewed Mr. Martin – an interview in which Mr. Martin conveniently recanted Gov't Opp. ¶ 6. By intentionally withholding Mr. Martin's exculpatory evidence to gain tactical advantage, the government directly abrogated its obligations under *Brady* and under the ethical rules to disclose *Brady* evidence "promptly," especially when the defense had explicitly requested such evidence. *Ebron*, 838 A.2d at 1156 n.13; Rule 3.8 of the District of Columbia Rules of Professional Conduct ("The 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 . . . .") (emphasis added).

Although never explicitly articulated in its Opposition, the prosecution apparently believes that this withholding was acceptable, and that its obligation to disclose *Brady* evidence in its possession is somehow tolled during any time in which the government tries to undercut or mitigate this evidence. *See* Gov't Opp. ¶¶ 3-6. The government provides no support for this "tolling" argument, because none exists. The government may certainly try to mitigate the effect of this *Brady* evidence, but it must do so on its own time, and it may not hide the identity of a

Brady witness from the defense to gain tactical advantage. Moreover, as detailed below, the government was required to make timely disclosure of *Brady* evidence, which, in this case, should have been well before April 9, 2004, much less April 16, 2004; thus, on these facts, the government did not have the luxury of withholding this *Brady* evidence another week after failing to "find" it for fourteen months.

As the Court of Appeals has stated repeatedly, the touchstone for *Brady* disclosure is that exculpatory evidence be disclosed "at such a time 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, 971 (D.C. 1993); *see also Curry*, 658 A.2d at 197*; Ebron,* 838 A.2d at 1156 n. 13. There are no set times for such production; each case must be considered on its own facts. But considerations of judicial economy and efficient trial management support the idea that delivery of exculpatory evidence should occur at the earliest feasible opportunity. *United States v. Starsuko*, 729 F.2d 256, 264 (3d Cir. 1984). Moreover, courts have recognized that, as a general matter, such *Brady* evidence should be disclosed well before trial because that is the only way to ensure that the defense will be able to use such evidence effectively. *See Leka*, 257 F.3d at 100 ("the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use"); *Ebron*, 838 A.2d at 1156 n.3 ("When the government fails to make prompt disclosure, as required, the opportunity for use of the material by the defense may be impaired, and the administration of justice may be impeded").

In this case, disclosure six days prior to Mr. T.'s trial for first degree murder of the existence of an eyewitness who placed multiple other witnesses at the scene and gave a description of the shooter that does not match Mr. T., is simply too late in the day to ensure that Mr. T.'s trial will be a legitimate "search for the truth." Mr. Martin's lengthy interview with

police on December 17, 2002, which is memorialized on two cassette tapes,[5] contains a treasure trove of leads. The defense's investigative efforts documented in its *ex parte* motion for a subpoena submitted to the Court on April 21, 2004, is just the tip of the iceberg. Obviously, counsel must talk to the more than half a dozen other eyewitnesses to the crime identified by Mr. Martin in his December 17, 2002, interview. Jamming this work into six days – the six days immediately prior to trial – virtually ensures that counsel will not be able to do everything counsel would have done to provide effective assistance of counsel had this information been timely disclosed. *See Leka*, 257 F.3d at 101 (when "disclosure is first made on the eve of trial . . . . [t]he defense may be unable to use it to divert resources from other initiatives and obligations that are or may seem more pressing . . . . Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray."). Finally, even if six days were enough time to follow up on all the leads and process all the new information generated from this belated disclosure, the nature of this investigation is qualitatively different than it would have been had this *Brady* evidence been timely disclosed. All of this investigative work would surely have been much easier and more fruitful closer in time to the crime, when memories were fresh and witnesses were presumably more easily located.

The cases the government cites, Gov't Opp. ¶ 8, in no way undermine the conclusion that the government's disclosure of critical *Brady* evidence six days prior to trial has been made too late to ensure that Mr. T.'s due process rights are guaranteed at such a proceeding, and in no way stand for any general proposition that *Brady* disclosure is timely so long as it is made before the conclusion of trial. First, *Johnson v. United States*, 544 A.2d 270 (D.C. 1988), and *Frezzell v.*

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[5] Counsel has not yet been able to generate a complete transcript of this interview, but will provide a copy to the court upon its completion.

United States, 380 A.2d 1382 (D.C. 1977), the two cases on which the government primarily relies, pre-date the Court of Appeals successive reminders in *Edelen*, *Curry*, and *Ebron*, cases which the government entirely ignores, that the government must disclose *Brady* evidence "promptly." As the Court made clear in those cases, "prompt" disclosure means within enough time to give defense counsel an opportunity to make full use of this evidence. *Id.* Second, *Frezzell* and *Mercer v. United States*, 724 A.2d 1176 (D.C. 1999), both appear to be less about timing than materiality. Indeed, in *Frezzell*, the Court chided the government on the belated disclosure, and noted that "[i]t would have been better practice for the defense to have been apprised earlier of the fact that there was a witness with potentially exculpatory evidence, so that counsel could have attempted to locate" that witness. 380 A.2d at 1385. Third, none of these cases present facts akin to those presented in this case – namely, the government's acknowledged failure to search its files for *Brady* evidence for fourteen months despite multiple *Brady* requests coupled with the government's willful withholding of *Brady* evidence after it was "discovered" in its own files.

In sum, the government's conduct in this case cannot be squared with its obligations under *Brady* to disclose exculpatory evidence to the defense promptly and to ensure that a trial is a search for the truth.

Dismissal with Prejudice is the Proper Remedy for the Government's Misconduct

The government asks this Court to turn a blind eye to its *Brady* violations, but "[w]hen the prosecutor receives a specific and relevant [*Brady*] request, the failure to make any response is seldom, if ever, excusable." *United States v. Agurs* 427 U.S. 97, 106 (1976). On the facts of this case alone, dismissal of the indictment is justified, both to preserve Mr. T.'s due process rights and as a sanction for the government's failure to disclose evidence that should have been

disclosed months ago in response to defense counsel's repeated requests for exculpatory evidence. *See, e.g., United States v. Dollar*, 25 F. Supp.2d 1320 (N.D. Ala. 1998) (dismissal with prejudice warranted for *Brady* violations); *State v. Harris*, 713 N.E. 2d 528 (Ohio App. 1998) (same).

First, dismissal is necessary to preserve Mr. T.'s rights. The government suggests that there is no harm to Mr. T. because it has now disclosed Mr. Martin's *Brady* evidence, and the government may well suggest that the defense simply request a continuance if it needs extra time to prepare for trial. This argument misses the point. Irremediable damage has already been done because Mr. T. has been denied access to critical *Brady* evidence at a time when he could have made the best use of it – months ago, when counsel had the time and resources to fully investigate this case, and when the evidence was fresh and memories of witnesses were not dulled by the passage of time. This opportunity has been irretrievably lost. Likewise, it is simply not fair to require Mr. T. to make the Hobson's choice between his right to a speedy trial and his right to a fair trial. Mr. T. has been incarcerated for the past sixteen months. It was the government's obligation during that time to "promptly" turn over requested *Brady* material. It is not fair to Mr. T. to force him to seek a continuance and remain in jail in an effort to compensate for the government's failure to honor its *Brady* obligations.

Equally important, dismissal is required to send a message to the United States Attorney's Office that the complete disregard for *Brady* obligations demonstrated in this case will not be tolerated. Unquestionably, the details of the government's failure to disclose critical *Brady* evidence in this case are especially egregious. The government initially sat on its hands for fourteen months, refusing to search for *Brady* evidence in a location where it could reasonably be expected to look -- the lead detective's own file -- despite multiple requests by the

defense for this evidence. Then, after it "came across" this evidence by accident, it failed to disclose this evidence immediately. Instead, it strategically continued to withhold this evidence so that it could get to the *Brady* witness first and attempt to obtain a recantation. Clearly, the government "press[ed] the boundaries of propriety with the apparent hope that the issue [would] be held harmless error." *Atkinson v. State*, 778 A.2d 1058, 1061 (Del. 2001). Unless this Court dismisses the indictment in this case, the government will not be deterred from engaging in such gamesmanship in future cases.

Dismissal Is Additionally Warranted Because Of The Government's Pattern And Practice Of Failing To Disclose *Brady* Evidence To The Defense.

Dismissal of the indictment in this case is additionally well-deserved because the government's misconduct in this case is not an isolated instance. To the contrary, the United States Attorney's Office has an abysmal track record with respect to delayed disclosure (if not complete withholding) of acknowledged *Brady* evidence. This Court is unquestionably authorized to exercise its supervisory power to "enforc[e] or vindicat[e] legally compelled standards of prosecutorial conduct." *United States v. Williams*, 504 U.S. 36, 46-47 (1992); *see also United States v. Ming He*, 94 F.3d 782, 789 (2d Cir. 2001) ("Judges have an obligation to exercise supervision over the administration of criminal justice . . . a responsibility that implies the duty of establishing and maintaining civilized standards of procedure and evidence) (internal quotations and citations omitted). Dismissal of Mr. T.'s indictment as an exercise of this Court's supervisory power will thus serve as an important reminder to the entire United States Attorney's Office that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The USAO is in dire need of such a reminder. *See United States v. Serubo*, 604 F.2d 807, 817-18 (3d Cir. 1979) (dismissal appropriate

as an exercise of the court's supervisory power where "the type of misconduct challenged has become entrenched and flagrant"); *United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976) (same).

Counsel stands ready to proffer evidence to the Court at a hearing on this motion to demonstrate prevalence of the problem of non-disclosure of *Brady* evidence by the USAO. Alternatively, this Court can take judicial notice of cases in which the government has failed to disclose *Brady* information in a timely manner. Counsel has attached a chart of recent *Brady* timing abuses by the government; these are only a sampling of cases known to PDS. *See* Attached. This chart documents a disturbing pattern of eleventh hour (or even later) disclosure of exculpatory evidence that evinces the same pattern seen in this case: (1) the prosecution delays disclosure to gain tactical advantage over the defense; (2) by the time disclosure is made, complete investigation of the case by the defense is impossible; and (3) the government's delayed disclosure imposes a Hobson's choice on the defendant – he is forced either to ask for continuance to do whatever incomplete investigation is possible at the late stage at which disclosure has been made, or to go to trial immediately while material exculpatory facts remain uninvestigated.

Two cases listed in the chart rival this case in their shock value, and demonstrate the depth of the government's disregard for its obligations under *Brady*. In *United States v. Andrew Cooper*, Superior Court No. F-08478-97, Court of Appeals No. 99-CF-1532, the government, consistent with its view that it has complied with the mandate of *Brady* if it discloses exculpatory evidence prior to the close of trial, disclosed mid-trial that one of the complainants and the previously unidentified witness who had failed to select the defendant from a photo array were one and the same person. The government then tried to explain away this damning fact by suggesting that the complainant's failure to make an identification was reasonable because he

had been shown a very old photograph of the defendant. Only after trial, during appellate briefing, did the government disclose that the complainant had been shown two photo arrays -- one with an old photograph of the defendant, the other with a recent photograph -- and had failed to identify the defendant on both occasions. The government also did not disclose until halfway through the appeal that the non-identifying witness/complainant actually knew Mr. Cooper – despite a specific inquiry by *this* Court on *this* subject during the trial. All of these issues, including the government's recently disclosed violation of *Napue v. Illinois,* 360 U.S. 264 (1959), are currently being litigated before the Court of Appeals.

The government's failure to disclose *Brady* evidence in its prosecution of Cleveland Bryan, *see United States v. Cleveland Bryan*, Superior Court No. F-04302-03, Court of Appeals No. 03-CO-819, was equally egregious. The government in that case sought Mr. Bryan's detention prior to trial based on a statement by an unidentified "Witness 1." The government failed to disclose prior to the detention hearing, however, that "Witness 1" was a purported accomplice to the charged shooting. This fact was elicited on cross-examination of the testifying police officer at the hearing, at which point the government argued that the accomplice's hearsay statement was nonetheless reliable because this statement was against the accomplice's penal interest. *See Bryan v. United States*, 831 A.2d 383 (D.C. 2003) (*Bryan I*). The government failed to disclose, however, that the accomplice had no fear of prosecution because his statement occurred as part of the standard debriefing and plea process. This fact was finally disclosed by the government after appeal and after the Court of Appeals issued a decision upholding the use of the accomplice's statement. Because the government's untimely disclosure had caused the Court of Appeals to issue an erroneous opinion, the Court of Appeals vacated this opinion and originally condemned the trial prosecutor's actions as "deplorable," although it eventually

deleted the word "deplorable" from its opinion at the government's request. *See Bryan v. United States*, 836 A.2d 581, 583 (D.C. 2003) (*Bryan II*). Judge Glickman's concurrence describes the government's misconduct in detail. *Id.* at 583-87. All charges against Mr. Bryan were eventually dismissed.

The government unquestionably has an obligation to cure the recurring problem of untimely disclosure of exculpatory evidence. As the Supreme Court has made clear, each prosecutor's office has an obligation to put systems in place to ensure that all *Brady* information is turned over to the defense. *See Kyles*, 514 U.S. at 438; *Giglio v. United States*, 405 U.S. 150 (1972). To that end, the Supreme Court suggested that large prosecutor's offices establish "procedures and regulations . . . [to] insure communication of all relevant information on each case to every lawyer who deals with it." *Giglio*, 405 U.S. at 154; *see also Kyles*, 514 U.S. at 538 (quoting *Giglio*). It is unlikely, however, that this United States Attorney's Office will act to put in place such procedures and regulations (or to re-enforce them if they are already in existence), without a signal from the judiciary that business as usual – i.e., the regular belated disclosure of *Brady* evidence – will no longer be tolerated.

WHEREFORE, for the foregoing reasons and any others that appear to the Court, Mr. T., through undersigned counsel, respectfully requests that this Honorable Court dismiss the indictment in this case with prejudice.

Dated: April 21, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply Memorandum of Points and Authorities in Support of Defendant's Motion To Dismiss The Indictment was served by hand (and by telecopier at (202) 307-2022) on Assistant United States Attorney Douglas Klein, United States Attorney's Office, 555 Fourth Street, Washington, D.C., on this 21st day of April, 2004.

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Santha Sonenberg