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June 13, 2006

U.S. v. _____: F-_____ -04

Ms. AUSA
Assistant United States Attorney
United States Attorney's Office
555 Fourth Street N.W.
Washington, D.C. 20530

Dear Ms. AUSA:

This letter supplements my recent letter requesting all *Brady* material related to the above captioned case. I am writing to ensure that you have taken necessary steps to locate *Brady* material and provide it to the defense as soon as you learn of it. *See* ABA Standards for Criminal Justice, Prosecution Function, § 3-3.11(a)(c) (3d Ed. 1993) DISCLOSURE OF EVIDENCE BY THE PROSECUTOR. If I do not hear otherwise from you, I will presume that you have taken all of the actions listed in this letter.

1. SPEAK TO ALL MEMBERS OF THE “PROSECUTION TEAM.” It is likely that many other people have worked on the case, either in your office or in an investigative capacity. You should speak to anyone who has worked on the case and determine whether they possess any information or have made any promises that constitute *Brady* or *Giglio* material. People you should speak to include:

• **ALL EMPLOYEES OF THE U.S. ATTORNEY’S OFFICE INVOLVED WITH THE CASE.** If any attorney in your office has knowledge of *Brady* or *Giglio* material, that knowledge will be attributed to the entire office. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (“The prosecutor’s office is an entity and as such it is the spokesman for the Government.”)

- **ALL POLICE INVESTIGATORS WHO HANDLED THE CASE.** See *Kyles v. Whitley*, 115 S. Ct. 1555, 1568 (1995) (“[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that ‘procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.’” (citing *Giglio*))

- **ALL FEDERAL AGENTS WHO WORKED ON THE CASE.** If the FBI, ATF, or any other law enforcement agencies participated in the investigation of this case, those agents are part of the prosecution team. See *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (“extensive cooperation between the investigative agencies convinces us that the knowledge of the state team that [witness]’s lawyer was paid from state funds must be imputed to the federal team.”); *United States v. Spagnuolo*, 960 F.2d 990 (11th Cir. 1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) (“[J]oint state-federal drug investigations are quite common, and prosecutors should give some thought to these potential problems of coordination. Being forewarned, they should not simply assume that they have no responsibility for keeping abreast of decisions made by other members of the team.”); *United States v. Safavian* 233 F.R.D. 12, 15 (D.D.C. 2005) (“In the course of their investigation, and in collecting and reviewing evidence, the prosecutors must ensure that any information relevant to this case that comes into the possession, control, or custody of the Justice Department remains available for disclosure.”); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (“There is no question that the AUSA prosecuting a case is responsible for compliance with the dictates of *Brady* and its progeny. This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies.”(citations omitted)).

- **ANY LABORATORIES OR OTHER AGENCIES THAT DID TESTING AS PART OF THE INVESTIGATION.** By talking to the investigating officers and agents, you should be able to determine whether any serology, fingerprint testing, ballistics, or other analysis was requested in the case. If such testing was requested, you should contact the laboratories responsible to determine if their results are exculpatory. See *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985); *Barbee v. Warden, Md. Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964).

2. REVIEW ALL CASE FILES MAINTAINED BY YOUR OFFICE AND ANY LAW ENFORCEMENT AGENCIES TO ENSURE THAT ALL *BRADY* MATERIAL IS DISCLOSED TO THE DEFENSE. Sometimes police officers or law enforcement agents will not provide the prosecution with all of the information collected during their investigation. Nonetheless, you are responsible for reviewing all of the information in their investigative files, and you must make sure that all exculpatory material is turned over to the defense. See, e.g., *Jamison v. Collins*, 291 F.3d 380, 385 (6th Cir. 2002).

3. INVESTIGATE YOUR WITNESSES. Material that impeaches a government witness must be disclosed to the defense, and any impeachment material that you possess or can access easily. There are a few things you must do to guarantee that you meet your *Brady* and *Giglio* obligations:

- **EXAMINE THE PERSONNEL FILES OF ALL INVESTIGATING AGENTS WHO MAY TESTIFY AT TRIAL.** If there is impeachment evidence regarding any officers involved with the investigation of the case, especially those who may testify at hearings or at trial, it must be disclosed to the defense. *See, e.g., Nuckols v. Gibson*, 233 F.3d 1261 (10th Cir. 2000); *United States v. Muse*, 708 F.2d 513 10th Cir. 1983); *United States v. Brooks*, 966 F.2d 1500 (D.C. Cir. 1992). Thus, you should search the personnel files of all officers involved with the case for such evidence.
- **EXAMINE THE PERSONNEL FILES OF ALL PROSECUTION WITNESSES WHO WORK FOR THE GOVERNMENT.** If any prosecution witnesses work for other branches of the government, you should search their personnel files for impeachment evidence, as with the files of law enforcement officers. *See, e.g., United States v. Deutsch*, 475 F.2d 55 (5th Cir. 1973), overruled on other grounds by *United States v. Henry*, 749 F.2d 203 (5th Cir. 1984) (holding that contents of postal worker's personnel file, if they could be used for impeachment, would constitute *Brady* material)
- **SEARCH ALL CRIMINAL RECORD DATABASES TO WHICH YOU HAVE ACCESS FOR CRIMINAL RECORDS OF POTENTIAL PROSECUTION WITNESSES.** I presume that you have checked both local and national databases for any criminal convictions of government witnesses. *See United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) (holding that failure to search a local criminal database for informant's criminal convictions is *Brady* violation); *United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (holding that failure to run FBI or NCIC checks on a prosecution witness constitutes a *Brady* violation).
- **ASK THE FBI, DRUG ENFORCEMENT AGENCY, AND METROPOLITAN POLICE DEPARTMENT IF THEY HAVE FILES ON ANY OF YOUR WITNESSES.** Even if you are unaware of deals that your witnesses have made with law enforcement agencies, such deals are *Brady* material and must be disclosed to the defense. *See, e.g., In re Sealed Case No. 99-3096 (Brady Obligations)*, 185 F.3d 887, 896 (D.C. Cir. 1999) (“[P]rosecutors in this circuit are responsible for disclosing *Brady* information contained in MPD files The same is true for files of the FBI and DEA. . . .”) I presume that you have spoken with all of these agencies to ensure that they have not made any deals with or payments to any of your witnesses.
- [If applicable] **EXAMINE THE PRE-SENTENCE REPORTS AND PROBATION FILES OF ALL WITNESSES.**
 - o Exculpatory information in a witness's probation file, including the witness's criminal record or personal information that could be used for

impeachment, should be released to the defense. *See, e.g., United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988).

o Pre-sentence reports (PSRs) of any government witnesses should be provided to the trial court for *in camera* examination to determine whether they contain *Brady* or *Giglio* material. *See, e.g., United States v. Jackson*, 978 F.2d 903, 909 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2429 (1993).

o Speak to pretrial services to ensure that incarcerated witnesses have not engaged in misconduct while awaiting trial. *See, e.g., United States v. Combs*, 267 F.3d 1167, 1174-75 (10th Cir. 2001); *United States v. Burnside*, 824 F. Supp. 1215, 1258 (N.D. Ill. 1993).

• **IF ANY GOVERNMENT WITNESSES ARE BEING HANDLED BY WITNESS PROTECTION OFFICERS, SPEAK TO THOSE OFFICERS.** If the conditions of government witnesses' confinement are different from those of average prisoners because of their cooperation with the government, or if payments have been made to government witnesses in exchange for their cooperation, those conditions and/or payments must be disclosed to the defense. You should talk to the witness protection officers to determine if they know of any such payments or conditions. *See, e.g., Mastracchio v. Vose*, 274 F.3d 590, 599-600 (1st Cir. 2001).

• **IF ANY GOVERNMENT WITNESSES HAVE BEEN INCARCERATED, EXAMINE THEIR DEPARTMENT OF CORRECTIONS AND/OR BUREAU OF PRISONS FILES.** *See, e.g., Carriger v. Stewart*, 132 F.3d 463, 479-80 (9th Cir. 1997) (*en banc*) (“The state had an obligation, before putting [a career burglar and six-time felon] on the stand, to obtain and review [his] corrections file, and to treat its contents in accordance with the requirements of *Brady* and *Giglio*.”)

4. [if applicable] **SPEAK WITH THE VICTIM ADVOCATE INVOLVED WITH THE CASE.** *Commonwealth v. Liang*, 434 Mass. 131, 747 N.E.2d 112 (2001)

5. [if applicable] **IF ANOTHER GOVERNMENT AGENCY INVESTIGATED THE ALLEGED OFFENSE, EXAMINE THE FILES FROM THAT INVESTIGATION OR HAVE THE COURT EXAMINE THEM.** *See Pennsylvania v. Ritchie*, 480 U.S. 39, 57-60. (holding that defendant was entitled to have court conduct *in camera* examination of Child and Youth Services (CYS) file investigating defendant's alleged rape of his daughter to determine if it contained *Brady* material).

This letter serves as my understanding of the United States Attorney's Office obligations under *Brady* to search for exculpatory information. If your understanding of your *Brady*-search obligations diverges from the parameters of this letter, please let me know so that I can determine whether litigation of this issue is necessary. If I do not hear from you, I will assume that your understanding of your obligations under *Brady* to search for exculpatory information conforms to the duties set forth in this letter. Consequently, if it is later revealed that *Brady* material was not timely disclosed, a court

may draw the conclusion that the United States Attorney's Office has acted in reckless disregard of its *Brady* obligations, if not demonstrated actual bad faith.

Thank you for your time and attention to this matter.

Sincerely,

ATTORNEY