Beyond Brady

Using Model Rule 3.8(d) for Discovery of Exculpatory Information

National Seminar for Federal Defenders
Seattle, Washington
June 2-4, 2010

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Last year was a difficult one for the Department of Justice. In several high profile cases, involving lawyers in "Main Justice" and in U.S. Attorney's Offices, courts found serious and repeated violations of defendants' constitutional rights under *Brady,* and sanctioned the government and its lawyers.[1] The *Brady* decision is almost fifty years old but its promise of due process through broad disclosure by prosecutors has not been met. To secure discovery of exculpatory and mitigating information, a better tool may be ABA Model Rule of Professional Conduct 3.8(d).

The Problems with *Brady*

The *"Brady rule"* is based on a defendant's right to due process and upon ". . . the special role played by the American prosecutor in the search for truth. . . ." Together, they mandate the ". . . prosecution's broad duty of disclosure . . ."[2] A defense attorney's invocation of *Brady* does not guarantee the defense will receive exculpatory information, or receive it at a time when it can be used most effectively. As the law has developed, the principal flaws in *Brady* are the requirement of "materiality," allowing prosecutors to control the timing of disclosure, and the Supreme Court's use of the term "suppressed evidence."

Brady is applied retrospectively. "[T]here is never a real '*Brady* violation' unless nondisclosure was so serious" that a post-trial review leads judges to conclude that it undermined their confidence in the verdict.[3] This "materiality" prong of *Brady* narrows the "prosecution's broad duty of disclosure." It does not require disclosure of all exculpatory or impeaching information. It allows prosecutors to suppress exculpatory information, betting that in hindsight it will not be "material" to the case.[4] Viewed retrospectively, materiality is something on which prosecutors and

defense lawyers rarely agree, and on which appellate judges often produce "split" opinions.

Second, even when prosecutors recognize that information is "material," *Brady* does not require its immediate production. For tactical reasons, prosecutors may delay disclosure, sometimes to the eve of trial, betting that delay will not "materially" prejudice the defense and will preserve an advantage for the prosecution. The Court of Appeals for the Second Circuit expressly approved that sort of gamesmanship. In a complex prosecution, an experienced trial judge ordered production of "*Brady* material" at the outset of the proceedings. The Court of Appeals granted a government *mandamus* petition, setting aside the order and permitting the government to decide when disclosure was appropriate.[5] The timing problem is worse for a person who pleads guilty. Prosecutors are not required generally to furnish exculpatory information to a defendant for defense use in plea bargaining. As part of a plea agreement, prosecutors may extract *Brady* waivers, at least for "material impeachment evidence . . ."[6]

The third major problem stems from the Supreme Court's use of the phrase "exculpatory or mitigating <u>evidence</u>." It has led some prosecutors to argue that exculpatory information need not be disclosed unless it is admissible evidence. "There is no uniform approach in the federal courts to the treatment of inadmissible evidence as the basis for *Brady* claims."[7]

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<u>Litigating Discovery of Exculpatory Information - an Additional Approach</u>

The limitations on securing *Brady* discovery and the resulting gamesmanship demonstrate the need for another way to pursue exculpatory information for our clients. Prosecutors' woeful misconduct in recent, high profile cases may make judges more receptive to defense requests for exculpatory information and for access to it early in a case. But they remain constrained by the restrictive, retrospective law of *Brady*. We can point them to an additional or alternative legal basis

upon which they can order timely broad disclosure. The argument is made in three steps: (1) prosecutors' ethical duty of disclosure is broader than their duty under the constitutional rule; (2) prosecutors' compliance with the ethics rule is mandatory; and (3) the Jencks Act (or Rule 26.2) does not bar a court from requiring compliance with the ethics rule.

1, The Ethics Rule is Broader than the Constitutional Rule

The U.S. Supreme Court recognized that prosecutors' disclosure duty "may arise more broadly under a prosecutor's ethical or statutory obligations,"[8] than under *Brady*. It cited the ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993) and ABA Model Rule of Professional Conduct 3.8(d) (2008). The key to our argument is Model Rule 3.8(d), which has been adopted in all but a few states.[9] It requires prosecutors to

> make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[10]

Ambiguities in Rule 3.8(d) were resolved in July 2009, when the ABA issued Formal Opinion 09-454.[11] It offers a powerful means to assure fairness in criminal proceedings. There are major differences between Rule 3.8(d) and the *Brady* rule.

- Scope - the ABA Opinion confirms that the ethics rule is separate from and more demanding than the constitutional rule.

- Materiality - the word materiality does not appear in the ethics rule, and the Opinion confirms that it is an intentional omission. Prosecutors' duty is to disclose it all. It is a forward looking rather than a retrospective rule.

- "Evidence" - prosecutors must disclose "evidence or information." Admissibility does not matter under the rule. Prosecutors must disclose information which may lead defense counsel to evidence.

- Timing - prosecutors must disclose information of which they know, "as soon as reasonably practicable," absent a protective order from the court.

- Guilty pleas - prosecutors' disclosure obligation extends to information which may assist the defense in plea negotiations. And the Opinion specifically requires a prosecutor to make disclosure "prior to a guilty plea."

- Waiver - a defendant may not waive prosecutors' obligations. Prosecutors are barred from asking for a waiver.

- Duty to investigate - Rule 3.8(d), as construed in the Opinion, does not require prosecutors to "undertake an investigation in search of exculpatory information." Their disclosure obligation is limited to what they actually know. That limitation is mitigated in two ways. Prosecutors may not be deliberately ignorant of exculpatory information, under the Opinion. Second, Rule 3.8(d) does not modify the constitutional rule which does impose a duty to learn of exculpatory evidence in the government's possession. Although the constitutionally mandated search for information may occur later than the defense would prefer, once the information is obtained, Rule 3.8(d) requires prompt disclosure.

If prosecutors meet their obligation under Rule 3.8(d), the defense will receive more information than it does under *Brady*, and should receive it earlier than it receives *Brady* evidence.

2. Courts Should Require Compliance with Rule 3.8(d)

Most federal courts' local rules require all lawyers to adhere to the state's rules of ethics and professional conduct. The Citizens Protection Act, Title 28 U.S.C. § 530B squarely requires that government lawyers do so.

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

The Department of Justice has recognized that § 530B governs its lawyers' conduct, "[i]n all criminal investigations and prosecutions . . ." Title 28 C.F.R. § 77.3. Therefore, in a "Model Rules State," a federal court has two bases of legal authority[12] to require compliance. If prosecutors fail to discharge their duty, the court has an ethical obligation to take "appropriate action."[13]

3. The Jencks Act Does Not Permit Prosecutors to Delay Production

Under the *Brady* rule, a line of decisions held that if a Jencks Act or Rule 26.2 "statement" contains exculpatory evidence, the government may suppress it until the time when disclosure is due under the act or rule, *i.e.*, after direct examination of the witness.[14] That argument should not succeed under Model Rule 3.8(d).

First, prosecutors can produce "evidence or information" without producing copies of witness "statements" in which it is contained or memorialized. In some districts, the United States Attorney routinely furnishes a letter summarizing *Brady* information rather than provide witness "statements."[15] The Department recommends making discovery that way ". . . when it is not advisable to turn over discoverable information in its original form . . ."[16] Defense requests or motions can avoid the Jencks Act argument by making clear what is and is not sought.

For example, after a lineup, witnesses may be asked to complete a form, indicating whether they selected someone as "the one." The form is a "witness statement." If four out of five witnesses wrote that they did not see "him" on the line, or if they chose a person other than the accused, that information must be disclosed under Rule 3.8(d), "as soon as practicable." If the defense asks for the witnesses' forms, it opens the door to a Jencks Act argument, but if it asks only for the information, there is no legitimate issue. In *United States v. Acosta*, the district court embraced this manner of avoiding a conflict with the Jencks Act.[17]

Second, the Department of Justice successfully and consistently has argued for a narrow definition of "statement" for Rule 26.2 and Jencks Act purposes. The same decisions on which the government relies, when it wishes to withhold an agent's interview notes or an FBI 302 under Rule 26.2, work in favor of the defense in this context. If the item is not a "statement," then Rule 26.2 and the Jencks Act have no relevance to disclosure under Rule 3.8(d).

Third, if the Department of Justice argues that its lawyers are barred from complying with the ethics rule by the Jencks Act, it creates an irreconcilable statutory conflict with Title 28 U.S.C. § 530B. Under general rules of statutory construction, as the latter was more recently enacted, it should prevail. Fourth, at least one court has posited that Rule 26.2 has supplanted the Jencks Act, allowing the court flexibility in ordering pretrial production of witness statements.[18] In short, after release of the ABA Opinion, the scope of prosecutors' duty is clear under Rule 3.8(d). By law, prosecutors are required to comply with state ethics rules.

The Department of Justice's Response to 2009's Scandals

In the aftermath of last year's scandals, Attorney General Holder[19] and Assistant Attorney General Breuer spoke about the Department's failures. Mr. Breuer said, ""The Department of Justice is committed to the very highest ethical standards."[20] Yet, when the Department issued its 2010, guidance on discovery, it made no mention of prosecutors' duty under Rule 3.8(d). It listed Rules 16 and 26.2, the Jencks Act and *Brady* as sources "generally establish[ing]" its "discovery obligations."[21] How can the Department achieve "the very highest ethical standards" when it does not acknowledge that Rule 3.8(d) establishes a duty of disclosure and a broader duty than the sources it listed? Worse, the guidance is inconsistent with Rule 3.8(d) on the critical matter of disclosure timing. The ABA Opinion requires disclosure of exculpatory information "as soon as reasonably practicable." The Department's guidance permits prosecutors' to delay production of exculpatory information.[22]

Although acknowledging that *Brady* practices vary from office to office and even within offices,[23] the guidance does not assure uniform practices within the Department. One way in which that could be accomplished is by moving *Brady* discovery to Rule 16. Judge Emmet Sullivan, who tried the Ted Stevens case, asked the Supreme Court Advisory Committee on Criminal Rules to

consider that. The Department opposed the suggestion,[24] as it did in 2006.

2006 was another year in which the Department promised to address and remedy problems in this area.[25] Recent cases show its efforts were not sufficient.[26] Today, the Department clings to a narrow view of its disclosure obligations, and continues to oppose rules reform. Recent cases may point the way toward needed statutory changes.

- Placing discovery of witness statements within Rule 16 Fed. R. Crim. P., so that they are provided along with other discovery, subject to a protective order as permitted by Rule 16.

- Modifying the definition of "statement" in the Jencks Act and Rule 26.2, to that of Rule 16(a)(1), *i.e.*, "the substance of any relevant oral statement," in the government's possession and any relevant written or recorded statement.

- Adding a subsection to 28 U.S.C. § 530B, mandating reports to the appropriate State Bar disciplinary authority when a finding is made that a lawyer has violated his or her disclosure obligations under the ethics rules.

- Amending the Hyde Amendment, so a person victimized by misconduct under Rule 3.8(d) can be compensated for costs resulting from misconduct.[27]

The defense bar, and particularly the National Association of Criminal Defense Lawyers , led the way to passage of Title 28 U.S.C. §530B and passage of the Hyde Amendment. Recent events show that we need to roll up our sleeves again, in court and in Congress. If the Department of Justice is unwilling or unable to mandate compliance with Rule 3.8(d), and if it is unwilling or unable to assure compliance with the Rule, then our courts or Congress must step in. Now.

ATTACHMENTS

Attachment A – Judge Molloy's Order in *United States v. W.R. Grace, et. al*

Attachment B– Judge Sullivan's Letter, Proposing Amendments to Fed. R. Crim. P.

Attachment C – Judge Wolf's Order in *United States v. Jones*

Attachment D – Judge Wolf's letter to Attorney General Holder

Attachment E – Pleadings and Order in *United States v. Frank Colacurcio, Sr., et. al*

1. Hon. Mark L. Wolf (D. Mass.) wrote a strongly worded order and a letter to the Attorney General. The former may be found on PACER, in D. Mass. CR. NO. 07-10289-MLW and at http://pdfserver.amlaw.com/nlj/USAvJonesMay18order.pdf. His letter may be found on PACER, in D. Mass. Civ. No. 98-11104 and at http://legaltimes.typepad.com/files/2009_04_28_09_07_28.pdf .

Hon. Emmet G. Sullivan appointed a special prosecutor to investigate matters and report to him in the Ted Stevens case. He also proposed changes to Rule 16 to correct some of the problems he observed. His letter may be found on PACER , in 08-CR-00231-EGS, and at http://www.politico.com/static/PPM116_sullivan.html.

In Montana, Hon. Donald W. Molloy entered a sharply worded order in the W.R. Grace prosecution and instructed the jury, " The government has violated its solemn obligation and duty in this case by suppressing or withholding material proof pertinent to the credibility of Robert Locke. . . . You will have to decide what weight to give to Locke's testimony if any but you should be very cautious about making a determination of criminal liability for any defendant based upon his proof." All defendants were acquitted. The order and instruction may be found on PACER, in 05-CR-0007.

In Miami, Hon. Alan S. Gold filed a fifty-page order, finding multiple violations of prosecutors' obligations. As part of the sanctions imposed, he ordered payment of $601,000 in attorneys' fees, and referral of the prosecutors to the Bar. A copy of the order may be found on PACER, in 08-cr-20112-ASG. The government has appealed.

2. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

3. *Id*., at 282; *Kyles v. Whitley*, 514 U.S. 419, 435(1995).

4. "*Brady* does not, however, require the prosecution to disclose all exculpatory and impeachment material; it need disclose only material 'that, if suppressed, would deprive the defendant of a fair trial.'" *United States v. Coppa (In re United States*), 267 F.3d 132, 135 (2d Cir. 2001).

5. " . . . as long as a defendant possesses *Brady* evidence in time for its effective use, the government has not deprived the defendant of due process of law . . . *Id.*, at144 (2d Cir. 2001).

6. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

7. *See e.g., Paradis v. Arave*, 240 F.3d 1169, 1178 (9th Cir. 2001); *Ellsworth v. Warden, New Hampshire State Prison*, 333 F.3d 1, 5 (1st Cir. 2003).

8. Cone v. Bell, 129 S. Ct. 1769, 1783 n.15 (2009).

9. A chart, showing states that are Model Rule States may be found at http://www.abanet.org/cpr/mrpc/alpha_states.html.

10. Available at http://www.abanet.org/cpr/mrpc/rule_3_8.html.

11. Available at http://www.abanet.org/cpr/09-454.pdf

12. *E.g.*, *United States v. Talao*, 222 F.3d 1133, 1139 (9th Cir. 2000), (concluding that state bar ethics rule on contact with a represented party governed pre-indictment conduct of an AUSA, under 28 U.S.C. § 530B); *United States v. Acosta*, 357 F. Supp.2d 1258 (D. Nev. 2005) (rejecting government's contention that the court should not require compliance with Rule 3.8(d) under the court's local rule); *United States v. Olson*, 2006 U.S. App. LEXIS 11762, n.5 (7th Cir. 2006) (citing both local rules and § 530B). *Contra*, *United States v. Weiss*, 2006 U.S. District Lexis 45124 (D Colo 2006) (court "highly doubt[ed]" that state ethics rule "expand a defendant's rights in federal court." It made no reference to its local rule or § 530B.)

13. ABA, Model Code of Judicial Conduct (2007), Rule 2.15(d): "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action." Available at http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf

14. "When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control." *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979); *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004).

15. That was the procedure used by the Department of Justice in the Ted Stevens prosecution, for example.

16. USDOJ, U.S. Attorney's Manual , Criminal Resource Manual §165 (2010): "There may be instances when it is not advisable to turn over discoverable information in its original form . . . If discoverable information is not provided in its original form and is instead provided in a letter to defense counsel . . . prosecutors should take great care to ensure that the full scope of pertinent information is provided to the defendant."

17. *United States v. Acosta*, 357 F. Supp.2d 1228, 1235 (D. Nev. 2005).

18. *Id.*

19. Palazzolo, "Attorney General Promises Judges a New Day at DOJ," *National Law Journal*, May 5, 2009, available at http://www.law.com/jsp/article.jsp?id=1202430445215.

20. As quoted in the *Washington Post*, October 15, 2009, A8.

21. USDOJ, U.S. Attorney's Manual , Criminal Resource Manual §165 (2010): "The discovery obligations of federal prosecutors are generally established by Federal Rules of Criminal Procedure 16 and 26.2, 18 U.S.C. §3500 (the Jencks Act), *Brady v.Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972)."

22. "Exculpatory information . . . must be disclosed to the defendant reasonably promptly after discovery. Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial . . . however, . . . witness security, national security, or other issues may require that

disclosures of impeachment information be made at a time and in a manner consistent with the policy embodied in the Jencks Act." USDOJ, U.S. Attorney's Manual , Criminal Resource Manual §165 (2010), emphasis added. The Model Rule would permit delay only if a protective order was granted. The DOJ guidance permits prosecutors to delay production on their own.

23. *Id.*

24. Palazollo, "Justice Department Opposes Expanded *Brady* Rule," October 15, 2009, available at http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-*Brady*-rule/

25. *Id.*

26. If the Department assessed the effectiveness of its compliance efforts under the same standards applied to a private corporation's, it might not fare well. USAM, §9-28.800.

27. In *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2007), the District Court entered a mid-trial dismissal because of prosecutors' discovery violations. The Court of Appeals upheld dismissal as the appropriate remedy, but denied Hyde Amendment compensation. It reasoned that in obtaining dismissal, the accused was not a "prevailing party" for Hyde Amendment purposes. In an earlier case, United States v. Woodley, 9 F.3d 774, 781-782 (9th Cir. 1993), the District Court imposed sanctions against the United States based on prosecutors Rule 16 and *Brady* violations. To remedy prejudice from the violations, the District Court permitted a witness to be deposed and ordered the government to bear the costs, including defense counsel's fees. The Court of Appeals reversed the sanction, concluding that Rule 16 did not allow monetary sanctions, and that without express language authorizing it, the Court "decline[d] to recognize a waiver of sovereign immunity . . ." It also rejected the District Court's supervisory authority as a basis for monetary sanctions in the case.

Attachment A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA,	)	CR 05-07-M-DWM
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
W. R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO,	)	
	)	
Defendants.	)	
_____	)	

I. Introduction

Pending before the Court are a motion to strike the testimony of government witness Robert Locke and a motion to dismiss the Superseding Indictment due to

prosecutorial misconduct. Locke's testimony has been suspended for one month as the parties and the Court have endeavored to reach an appropriate remedy for the dual problem posed by Locke's untrustworthy testimony and the government's late disclosure of evidence in violation of the Jencks Act, 18 U.S.C. § 3500, and in contravention of the Defendants' constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). The facts surrounding the government's discovery failures are well known to the parties and will not be recited in detail here. It suffices to say that the government failed in its duty to disclose witness statements and other evidence bearing on the witness' credibility in a timely manner. The government suggested at oral argument that it referred to its "mistake, violation, error, misstep or regret" 39 times in its brief in response to the motions to dismiss. Hrg. Tr. at 112-13, Apr. 27, 2009.

These matters have been argued extensively. The Defendants urge the Court to impose the most drastic remedy of dismissal of the Superseding Indictment, arguing that the government's conduct, in this specific instance and in the entirety of the case, has distorted the fact-finding process of the trial beyond repair. Although they at one point stated that they do not wish to see Locke return to the stand under any circumstances, the Defendants have since, with one exception, advised the Court that if the remedy of dismissal is not implemented they would

welcome the opportunity to continue to cross-examine Locke on the narrow issue of his relationship with the prosecution. This would include inquiry into the true number of meetings between Locke and any member of the prosecution team, the extent of Locke's animus toward Grace and Defendant Bettacchi, Locke's interactions with prosecution team members, and the details of Locke's evolution from non-target to unindicted co-conspirator to, ostensibly, unrepresented witness under threat of future prosecution.

Defendant Bettacchi differs from his co-defendants on the question of Locke's return to the witness stand. He argues that the effects of Locke's troublesome testimony are visited disproportionally upon him, and there is merit to his position. If the Superseding Indictment is not dismissed, Defendant Bettacchi has asked that Locke not be permitted to testify further.

In essence, the prosecution's argument is that the virtue of its case sanctifies the means chosen to achieve conviction. This argument cannot prevail in a legal system that is designed to ensure fairness in the proceeding when each side follows the rules. Our confidence in the fairness of our system is rooted in the belief that our process is sound. Useful falsehoods are particularly dangerous in a criminal case, where the cost of wrongful conviction cannot be measured in the impact on the accused alone. Such tainted proof inevitably undermines the process, casting a

dark shadow not only on the concept of fairness, but also on the purpose of the exercise of the coercive power of the state over the individual. No man should go free nor lose his liberty on the strength of false, misleading or incomplete proof.

In one sense the pending motions present distinct legal issues: the reliability of Locke's testimony on one hand, and the government's discovery and constitutional violations on the other. As the arguments on these issues have demonstrated, however, they are intertwined to the point that the discussion of one will eventually require consideration of both. While the motions are discussed separately below, they are addressed collectively in the implementation of the remedy.

II. Robert Locke

Much of Robert Locke's testimony in this case is incredible. He gave an incomplete account of his many meetings with the prosecution, likely creating a misimpression in the minds of the jury that the government did not attempt to correct. He testified to his ignorance as to the identity of Grace's lead corporate counsel, when his own records reveal that he knows exactly who Grace's top lawyer is, and had met with him personally. In response to carefully crafted questioning from government counsel, Locke gave an account of the purposes and motivations behind his "options" memo (Gov. Ex. 239) that was so selective as to

border on prevarication. Locke's account of his rejection of the government's grant of immunity (Def. Ex. 16076) was similarly incomplete, and the government did nothing to correct the record. Finally, Locke's recollection of Defendant Bettacchi's dismissive invocation of "caveat emptor" in response to Locke's reservations over the sale of the screening plant property is highly suspicious; the record does not permit us to know for certain whether Locke presented a convenient remembrance, a crafty embellishment, or an outright lie.

Other behavior and testimony from Locke casts doubt on his credibility. Throughout his testimony, he gave non-responsive answers in which he volunteered information that was prejudicial to the Defendants. He admitted that he had been following the trial proceedings in news accounts and through other media because the trial was important to him. Documents offered by the Defendants, as well as documents produced in response to the Rule 17(c) subpoena issued to Locke, suggest that he has more than once sought to leverage his status as cooperating witness with plaintiffs' attorneys and with the United States in this case to achieve a favorable outcome in his civil suit against Defendants Grace and Bettacchi. He destroyed, on the eve of trial, his personal calendars from recent years, including those that might have revealed meetings relative to his civil suit. He took records and documents from W.R. Grace headquarters that he was not

authorized to keep and has sought to parlay them into leverage by cooperating with plaintiffs' counsel in civil cases.

III. The Government's Discovery and Brady Violations

The government has committed clear and admitted violations of Fed. R. Crim. P. 16, 18 U.S.C. § 3500, and Brady and Giglio. While the prosecution initially resisted any such characterization of its non-disclosure as a violation of any obligation, counsel for the government now concede their error and profess to take full responsibility for it. Locke's e-mail exchanges with Special Agent Marsden, his immunity negotiations with the government, and Marsden's notes as to those negotiations and other matters show Locke's animus toward the Defendants and the extent of his relationship with the prosecution. They are evidence of the bias of the prosecution's star witness, which is clearly a fertile area for cross-examination. The documents should have been disclosed, and the government's failure to timely disclose denied the Defendants the opportunity to conduct thorough and more effective cross-examination.

Since first coming clean with Locke's e-mails but denying their constitutional import, the government has ratcheted up its contrition in increments, apparently hoping to pinpoint the minimum degree of repentance necessary to satisfy the Court. The explanation offered for the non-disclosure is that the

government's discovery obligation is simply too vast to expect complete compliance – as AUSA Cavan put it, the prosecution has "a thousand balls in air." Hrg. Tr. at 244, Apr. 17, 2009. AUSA Racicot stated, "[W]e just dropped the ball. It wasn't that we were trying to hide it." Hrg. Tr. at 124, Apr. 27, 2009. Implicit in this line of argument is the complaint that the Court has overburdened the government by issuing excessively broad discovery orders.

The size of the case, and the resulting disclosure obligation, is a condition of the government's choosing. The constitution and the law do not yield when the government casts a wide net in the charging decision. The government resists the Defendants' effort to tie the most recent discovery violation to the government's earlier transgressions in this area, but the Court is not entirely willing to view the most recent episode in isolation. The government's own argument blaming the scope of its disclosure duties conjures up the failures of the past. The history of this case suggests that the failure to disclose documents related to Locke is merely the latest manifestation of a systemic problem, i.e., that the Department of Justice charged a case larger than the one it prepared to prosecute.

The record reveals that Special Agent Marsden had a completely flawed understanding of the government's disclosure obligations under Brady and Giglio. He filed an affidavit saying that he asked AUSA McLean whether the Locke notes

and e-mails should be produced, and McLean answered in the negative. AUSA Cassidy's affidavit said Special Agent Marsden's misconceptions as to the government's constitutional responsibilities did not come from Cassidy, who instructed case agents properly. Cassidy also stated that Special Agent Marsden had left him with the impression that Locke's communication with Marsden consisted mainly of press articles. AUSA McLean stated that he failed to review Marsden's e-mails because Marsden told McLean the emails were "just press clippings." McLean also states that Marsden's testimony regarding Brady and Giglio was not based on McLean's instruction to Marsden.

The attempt by the United States to rationalize its failure to disclose suggests that the prosecution is not up to the task of meeting its discovery obligations in the case it charged. The government's own attorneys argue that the demands of this sprawling case are so daunting that the Court must permit the occasional non-malicious violation of the Defendants' constitutional rights. In the words of AUSA Cavan, "there is no such thing as a perfect case." Hrg. Tr. at 244, Apr. 17, 2009. The record shows that the government's case agent had an improper understanding of the law. To the extent that the prosecutors have filed affidavits saying they are not responsible for implanting Marsden with that improper understanding, it is of no consequence. It makes no difference whether the agent came to his

misunderstanding through faulty instruction or lack of sufficient instruction; either way, the prosecutors are responsible. Marsden's misunderstanding led him to ignore the importance of Locke's emails, which in turn led prosecutors to fail to review them, resulting in prejudice to the Defendants.

These themes of poor planning and incompetence are common threads throughout the government's spotty compliance with its disclosure obligations dating back to the beginning of the case. However, incompetence is not bad faith. Poor planning is not malice. A systemic flaw is not always flagrant conduct. And the damage, while serious, is not irreparable. The behavior of the prosecution is troubling and at times frustrating, but the record does not support a finding of prosecutorial misconduct.[1] What is clear from the record is that the government's conduct creates a climate in which the Defendants' constitutional rights are at risk, and the Court's role of ensuring the fair administration of justice is complicated.

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[1]The Court and the parties have given extensive consideration to the Ninth Circuit opinion in United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008), in which the court of appeals upheld the district court's dismissal of the indictment after declaring a mistrial due to Brady and Giglio violations. Based on the record in this case, Chapman puts this Court well within its discretion to declare a mistrial and dismiss the Superseding Indictment. There are, however, two critical distinctions between this case and the facts in Chapman. The witnesses at issue in Chapman had left the stand, and could not practically be recalled. Id. at 1079-80. Here the government revealed its breach during the cross-examination of Locke and he remains under subpoena. Unlike the situation in Chapman, continued cross-examination of the relevant witness is a viable remedy.

A more important distinction is the fact that the district court in Chapman found that the government had acted "flagrantly, willfully, and in bad faith." Id. at 1080 n.2. The Court has not made a similar finding in this case. The extreme remedy in Chapman is not warranted here.

IV. Remedy

The parties have put before the Court a range of remedial options. The most drastic is to dismiss the Superseding Indictment, either with or without prejudice. As discussed above, dismissal on the basis of prosecutorial misconduct is not warranted here.

The next option is for the Court to declare a mistrial. The Defendants have shown no interest in a mistrial, as it would allow the government the opportunity to start anew and, in essence, benefit from its failure to fulfill its disclosure obligations by receiving the proverbial second bite at the apple. The Defendants have represented that but for the matters at issue here, they do not wish to forfeit their position except due to dismissal of the charges. It is the Court's understanding that the government also opposes the remedy of a mistrial.

The third possibility is to strike Locke's testimony in its entirety as a remedy for the government's Jencks Act and Brady/Giglio violations. This option has some appeal in light of the prejudice occasioned by the government's non-disclosure and the unreliable nature of Locke's testimony. In the end, however, striking Locke's testimony in its entirety goes too far.

The unavoidable conclusion from listening to Locke's testimony is that he is untrustworthy, and his testimony is very likely fabricated in important respects.

This is a judgment reached through the application of common sense; the witness is simply not credible. But while there is ample evidence of his untrustworthiness, and a strong circumstantial case for perjury, there is no irrefutable objective proof that he has perjured himself. In my view the circumstantial evidence is sufficient, but absent an unmistakable case for perjury, it is not the Court's view on credibility that matters. The issue of Locke's trustworthiness is ultimately for the jury to decide. Intrusion into the jury's consideration of the factual record should occur only as minimally necessary to correct a failure of the process to ensure fairness.

The minimally intrusive solution here is to allow Locke's testimony to stand, subject to the following conditions intended to cure the prejudice to the Defendants resulting from the government's failure to disclose. First, the Defendants may continue cross-examination of Locke on the narrow issues of his relationship and meetings with the government, his animus toward the Defendants, and his status in relation to immunity. Continued cross-examination within these confines will allow the Defendants to utilize the recently disclosed information to conduct a fully informed albeit belated cross-examination to complete the factual record before the jury.

Continued cross-examination is not favored by all Defendants. Defendant Bettacchi, having been uniquely prejudiced by Locke's testimony and the

government's conduct, would understandably prefer that Locke not return to the stand. This conflict among the Defendants appears on the surface to foreclose the remedy of continued cross-examination, but it is not so. There is a cure that both solves the conflict and recognizes that the government's withholding of evidence showing the true extent of Locke's bias and partnership with the prosecution has had heightened consequences for Defendant Bettacchi. Counsel for Defendant Bettacchi was denied an opportunity to fully cross-examine on the number of meetings between Locke and the government, resulting in a less compelling presentation. Had he been fully informed of the genesis of Locke's recollection, Bettacchi's counsel also would likely not have potentially compromised himself as he did by drawing legitimate inferences of recent fabrication relating to Locke's "caveat emptor" testimony. Bettacchi's counsel may well have opened differently had he been fully aware of Locke's attitude toward his client.

The substance of Locke's testimony is especially prejudicial to Bettacchi, as he is the subject of Locke's dubious recollections of discussions on the sale of the former screening plant. Moreover, Locke's e-mails exchanges with Special Agent Marsden make clear that Bettacchi held special status among the targets of Locke's vengeance. The evidence of bias against Bettacchi is far deeper than that against any other Defendant, the significance of which is twofold: first, Bettacchi has

suffered greater prejudice from non-disclosure; and second, Locke's already questionable testimony is even more suspect on matters concerning Bettacchi personally. It is difficult to believe that the Justice Department would sponsor such a biased witness as the linchpin of its conspiracy case. For all of these reasons, the continued cross-examination of Locke will be accompanied by an instruction to the jury that it may not rely upon the testimony of Robert Locke in deciding Defendant Bettacchi's guilt or innocence on any charge.

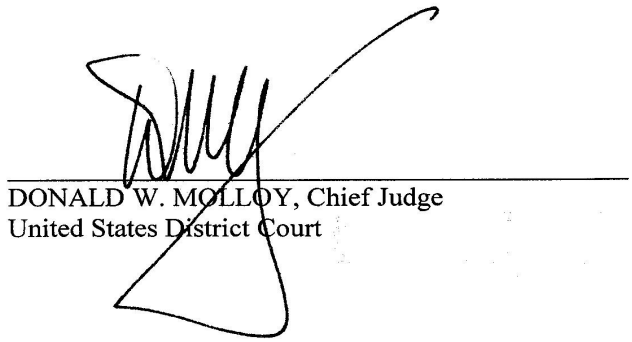
The jury will be further instructed that the government has failed to fully disclose information to the defense as required by the rules and the Constitution, and that Locke is back on the stand so examination can continue after the Defendants have received the information they are entitled to. The jury will be instructed that the striking of Locke's testimony as to Bettacchi should not be read as an endorsement of Locke's testimony as to other Defendants; to the contrary, the jury should view Locke's entire testimony with skepticism.

As part of the remedy, the United States will not be permitted to conduct a redirect examination. The process, when adhered to by all parties, is designed to ensure fairness. When a party fails to fulfill its responsibilities under the process for any reason, it falls to the Court to restore the fairness that the constitution and basic notions of justice require. Here that is achieved by prohibiting re-direct

examination. Locke's testimony will remain in the record, but it will not be bolstered on re-direct examination.

Based on the foregoing, IT IS HEREBY ORDERED that the motion to strike the testimony of Robert Locke (Doc. No. 1021), and the motions to dismiss the Superseding Indictment due to prosecutorial misconduct (Doc. Nos. 1113 and 1117) are GRANTED in part and DENIED in part as set forth above.

Dated this 28th day of April, 2009.



DONALD W. MOLLOY, Chief Judge
United States District Court

Attachment B

United States District Court
for the District of Columbia
Washington, D.C. 20001

Chambers of
Emmet G. Sullivan
United States District Judge

(202) 354-3260

April 28, 2009

VIA FACSIMILE AND FEDEX
The Honorable Richard C. Tallman, Chair
Judicial Conference Advisory Committee
on the Rules of Criminal Procedure
Attn: Rules Committee Support Office
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20054

Dear Judge Tallman:

I write to urge the Advisory Committee on the Rules of Criminal Procedure (the "Rules Committee") to once again propose an amendment to Federal Rule of Criminal Procedure 16 requiring the disclosure of all exculpatory information to the defense. My understanding is that on September 5, 2006, the Rules Committee voted eight to four to forward such an amendment to the Standing Committee on Rules of Practice and Procedure (the "Standing Committee").[1] However, the Department of Justice ("DOJ") strongly opposed the amendment and argued that a modification to the United States Attorneys' Manual – which added, for the first time, a section addressing federal prosecutors' disclosure obligations – would obviate the need for an amendment to the federal rule.

There were compelling reasons for eight of the twelve members of the Rules Committee to support the proposed amendment in September 2006. Those reasons are no less compelling today. Moreover, it has now been nearly three years since the United States Attorneys' Manual was modified to "establish[] guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligations as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case."[2] While I recognize and respect the commitment and hard work demonstrated by federal prosecutors every day in courtrooms throughout the country, it is

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[1] *See* Minutes of September 5, 2006 Special Session at 7, *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf.

[2] *See* United States Attorneys' Manual § 9-5.000, Comment, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

uncontroverted that *Brady* violations nevertheless occur.

Earlier this month, Attorney General Eric H. Holder, Jr., for whom I have the highest regard, took the highly unusual, if not unprecedented, step of moving to set aside the verdict and dismiss the indictment with prejudice in the case of *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.). At a hearing on that motion, the government informed me that during the course of investigating allegations of misconduct, which included several discovery breaches, and preparing to respond to the defendant's post-trial motions, a new team of prosecutors had discovered what the government readily acknowledged were two serious *Brady* violations:

> THE COURT: All right. Let me ask you this, Counsel, and I need a very precise answer to this question. The Government counsel will concede, will it not, that the failure to produce the notes or information from the April 15, 2008 interview with Bill Allen in which he did not recall having a conversation with Bob Persons about sending a bill to the Senator was a *Brady* violation.
>
> MR. O'BRIEN: It was a *Brady* violation. It was impeaching material, and the Court knows that *Giglio* is a subset of *Brady.*
>
> THE COURT: Right.
>
> MR. O'BRIEN: Also, there was – I failed to mention this and I should have. The Court did mention it, but there was also information about the value of the work that was performed.
>
> THE COURT: And that was going to be the second question. Indeed, was that a *Brady* violation as well?
>
> MR. O'BRIEN: I believe that it was. At a minimum, it was favorable evidence to the Defense that should have been turned over pursuant to the instructions that Your Honor previously mentioned.

Motion Hrg. Tr. 13-14 (Apr. 7, 2009). These *Brady* violations – revealed for the first time five months after the verdict was returned – came to light only after an FBI agent filed a complaint alleging prosecutorial and other law enforcement misconduct, a new Attorney General took office, and a new prosecutorial team was appointed to respond to the defendant's post-trial motions. Attorney General Holder's response to these issues has been commendable, and I understand that he has since discussed instituting training for prosecutors regarding their discovery obligations and has publicly reminded prosecutors that their obligations to fairness and justice are paramount to all other concerns.[3] These developments provide further support for such an amendment.

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[3] *See* Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, The Boston Globe, Apr. 9, 2009, at 8 ("'Your job as assistant U.S. attorneys is not to convict people,' said Holder. 'Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do

An amendment to Rule 16 that requires the government to produce all exculpatory information to the defense serves the best interests of the court, the prosecution, the defense, and, ultimately, the public. Such a rule would eliminate the need for the court to enter discovery orders that simply restate the law in this area, reduce discovery disputes, and help ensure the integrity and fairness of criminal proceedings. Moreover, such a rule would also provide clear guidance to the prosecutor and indeed protect prosecutors from inadvertent failures to disclose exculpatory information. Finally, a federal rule of criminal procedure mandating disclosure of such information – whether or not the information is requested by the defense – would ensure that the defense receives in a timely manner all exculpatory information in the government's possession.

The importance of the government's disclosure obligations cannot be overstated. Indeed, as articulated by the U.S. Supreme Court in *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999):

> In *Brady,* this Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. [83, 87 (1963)]. We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, *United States v. Agurs,* 427 U.S. 97 (1976), and that the duty encompasses impeachment evidence as well as exculpatory evidence, *United States v. Bagley*, 473 U.S. 667, 676 (1985). Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682; *see also Kyles v. Whitley,* 514 U.S. 419, 433-434 (1995). Moreover, the rule encompasses evidence "known only to police investigators and not to the prosecutor." *Id.* at 438. In order to comply with *Brady,* therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles,* 514 U.S. at 437.
>
> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

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something other than that is to be ignored. Any policy that is in tension with that is to be questioned and brought to my attention. And I mean that.'" (quoting remarks by Attorney General Holder at a swearing-in ceremony)).

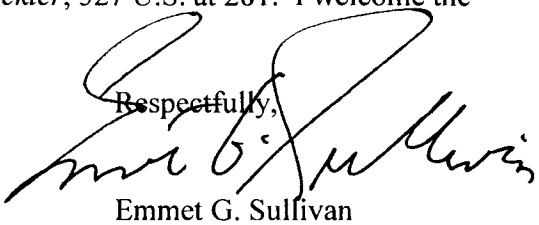
In a decision issued today, the Supreme Court reiterated these principles in equally strong terms. Both the language used by the Supreme Court, and the fact that the Court was faced with yet another case raising important *Brady* issues, strongly countenance in favor of the Rule 16 amendment previously proposed by the Rules Committee:

> Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations. *See Kyles*, 514 U.S. at 437 ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993)"). *See also* ABA Model Rule of Professional Conduct 3.8(d) (2008) ("The prosecutor in a criminal case shall" "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal"). As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure. *See Kyles*, 514 U.S., at 439; *U.S. v. Bagley*, 473 U.S. 667, 711, n. 4 (1985) (STEVENS, J., dissenting); *United States v. Agurs*, 427 U.S. 97, 108 (1976).

Cone v. Bell, No. 07-1114, slip. op. at 21 n.15 (U.S. Apr. 28, 2009).

A federal rule of criminal procedure requiring all exculpatory evidence to be produced to the defense would eliminate the need to rely on a "prudent prosecutor" deciding to "err on the side of transparency," *id.*, and would go a long way towards furthering "the search for the truth in criminal trials" and ensuring that "justice shall be done." *Strickler*, 527 U.S. at 281. I welcome the opportunity to discuss this issue further.

Respectfully,



Emmet G. Sullivan

cc: Members of the Advisory Committee on the Rules of Criminal Procedure (via facsimile)
The Honorable Eric H. Holder, Jr. (via facsimile)
Counsel of record in *United States v. Theodore F. Stevens*, Criminal Action No. 08-231 (EGS) (D.D.C.) (via ECF)

Attachment C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 07-10289-MLW
	)	
DARWIN JONES,	)	
Defendant	)	

MEMORANDUM AND ORDER

WOLF, D.J. May 18, 2009

I. SUMMARY

This is yet another matter that arises out of "misconduct committed by a federal prosecutor who should have known better." United States v. Horn, 29 F.3d 754, 757 (1st Cir. 1994). Defendant Darwin Jones was charged with being a felon in possession of a firearm. If convicted of that charge he would have been subject to a mandatory minimum sentence of ten years in prison.

Jones filed a motion to suppress, alleging that the police did not have the reasonable, articulable suspicion necessary to justify the seizure and search of him that led to the discovery of the firearm at issue. As described in detail in the January 21, 2009 Memorandum and Order:

> [I]n an effort to justify the seizure of Jones, the government argued, and Boston Police Officer Rance Cooley falsely testified, that there was justification to stop Jones because, despite the dark and the distance between them, he identified Jones as he rode his bicycle down Middleton Street in Dorchester, Massachusetts. Cooley testified that his suspicions were raised when Jones pedaled away from him because Cooley knew Jones and Jones had never avoided Cooley before.
>
> However, Cooley had on several earlier occasions told the

> lead prosecutor in this case, Suzanne Sullivan, that he did not recognize Jones on Middleton Street and did not identify the man who had been on the bicycle as Jones until later, when other officers had tackled Jones at another location. Cooley's important inconsistent statements were not disclosed to Jones until the court conducted an in camera review of Sullivan's notes, just before the suppression hearing was complete. Sullivan and her supervisor, James Herbert, acknowledge that Cooley's prior inconsistent statements constituted material exculpatory evidence, and that the failure to disclose them violated the government's constitutional duty under Brady v. Maryland, 373 U.S. 419 (1963), its progeny, and the court's orders.

United States v. Jones, 2009 WL 151587 (D. Mass. Jan. 21, 2009) at *1; see also id. at *2-4.

Cooley's prior inconsistent statements were discovered and disclosed in time for his false testimony to be discredited. Id. at *1, 8. Indeed, the government abandoned reliance on it. Nevertheless, the motion to suppress was denied on other grounds. Id. at *1, 9-16.

The court did, however, immediately consider whether sanctions should be imposed on Ms. Sullivan and/or the government. The court concluded that it was not appropriate to reward Jones, and punish the public, by dismissing the case against him because of the government's misconduct. Id. at *1. Nevertheless, that misconduct is too serious to ignore.

The prosecutorial misconduct in this case arose out of false testimony by a Boston Police officer. Id. at 1, 8 and n.4. False testimony by Boston Police officers and those working with them has both a long and recent history in cases before this court. See

United States v. Rullo, 748 F. Supp. 36, 45 (D. Mass. 1990)(perjury by at least one Boston Police officer defeats operation of the inevitable discovery rule and results in suppression of firearm)[1]; United States v. Jones, 2009 WL 151587 at *9, n.6 (finding that Massachusetts State Troopers William Cameron and Stephen Johnson testified falsely in United States v. Nygell Jones, Cr. No. 07-10339-MLW, and again in the instant case). Moreover, "[t]he egregious failure of the government to disclose plainly material

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[1]In 1990, this court wrote in Rullo that:

> Notwithstanding the importance and urgency of combatting crime generally, or of the "War on Drugs" particularly, improper testimony by law enforcement officers remains unacceptable in the United States district courts. This is one of the first cases to arise from the joint federal, state and local operations of the new Boston Drug Task Force. It is essential that the state and local law enforcement officials now increasingly likely to appear in United States district courts understand that misconduct generally, and fabricating testimony specifically, is not only wrong, but may jeopardize the important cases they have bravely taken personal risks to investigate and wish to prosecute successfully.

748 F. Supp. at 45. This admonition has not proven to be effective.

The court recognizes that the decision whether to prosecute a government witness for his or her false testimony is a matter of prosecutorial discretion. Such misconduct has been prosecuted before. See, e.g., United States v. Collatos 798 F.2d 18 (1st Cir. 1986). In any event, it be should be recognized that inconsistent statements by Cooley on an important point led to Ms. Sullivan's problems in the instant case. Prosecutors should understand that, among other things, they will be acting in their own enlightened self-interest if they make more successful efforts to assure that government witnesses testify candidly and consistently.

exculpatory evidence in this case extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court." Jones, 2009 WL 151587 at *5 and n.2.[2] Therefore, the court ordered United States Attorney Michael Sullivan and Ms. Sullivan to file memoranda and affidavits seeking to show cause why sanctions should not be imposed on the government and/or Ms. Sullivan.

The required submissions were made. The United States Attorney and Ms. Sullivan acknowledged that what they characterized as "mistakes" were made in this case. See United States v. Jones, 2009 WL 1111210 at *1 (D. Mass. Apr. 27, 2009)(citing submissions). They argued, however, that no sanction for Ms. Sullivan's misconduct is necessary or appropriate. Id. They requested a hearing if the court continued to contemplate imposing sanctions. Id.

After considering the submissions by the United States Attorney and Ms. Sullivan, the court "remain[ed] concerned about how and why the repeated errors in this case occurred, and also about the risk that such errors by Ms. Sullivan and other prosecutors will recur." Id. The court informed the United States Attorney and Ms. Sullivan that it was considering a range of

[2]Some of the cases assigned to this court in which the government improperly failed to disclose important information were described in Attachment A to the January 21, 2009 Memorandum and Order, 2009 WL 151587 at *17-18.

possible sanctions, particularly including:

> ordering that Ms. Sullivan reimburse the District Court for at least some of the time spent by defendant's Criminal Justice Act Counsel in dealing with issues caused by her failures to disclose material exculpatory information. In addition, because training involving only prosecutors does not seem to be sufficient, the court is considering ordering Ms. Sullivan to attend a program on the disclosure of exculpatory information involving judges and defense lawyers, as well as prosecutors, which the court would organize.

Id. at *5 (footnote omitted). Therefore, the requested hearing was scheduled.

Counsel for Ms. Sullivan subsequently filed a memorandum and numerous letters on her behalf. After being rescheduled to accommodate Ms. Sullivan's counsel, a hearing was held on May 12, 2009. The now Acting United States Attorney Michael Loucks, Assistant United States Attorneys James Herbert and Dina Chaitowicz, Ms. Sullivan, and her attorney each addressed the court.

For the reasons described in this Memorandum, the court is not appointing counsel to investigate and possibly prosecute Ms. Sullivan for criminal contempt of the order directing her to produce all material exculpatory evidence prior to the commencement of the suppression hearing on October 27, 2008. Cf. In re Special Proceedings, 373 F.3d 37, 41-44 (1st Cir. 2004); United States v. Stevens, Cr. No. 08-231 (EGS) (D.D.C. Apr. 7, 2009) (Order) (Docket No. 372). Such an appointment is not necessary or appropriate because it does not appear that Ms. Sullivan specifically intended

to violate that order or intentionally misrepresented that she had done so. See United States v. Michaud, 928 F.2d 13, 15 (1st Cir. 1991); United States v. Berandelli, 565 F.2d 24, 30 (2d Cir. 1977). However, the court does intend to institute criminal contempt proceedings in future cases if there is good reason to be concerned that discovery orders have been intentionally violated.

As also discussed in this Memorandum, if Ms. Sullivan did not intend to mislead, she has still not adequately explained why on April 15, 2008, she filed a memorandum and affidavit of Cooley asserting that Cooley recognized Jones as the bicyclist on Middleton Street when her notes and testimony demonstrate that he told her on April 7, 2008 that he did not know that the bicyclist was Jones until Jones was tackled by other officers later at another location. See Jones, 2009 WL 151587 at *8. On at least October 6, 2008, and evidently on October 24, 2008 as well, Cooley again told Ms. Sullivan that he did not recognize the bicyclist as Jones on Middleton Street. Yet Ms. Sullivan allowed him to testify repeatedly on October 28, 2009, that he immediately recognized the bicyclist as Jones on Middleton Street. She did not disclose her notes, or the information that they contained, concerning Cooley's important contradictory statements to her. Indeed, as Ms. Sullivan testified on May 12, 2009, she did not even review her notes to determine if they contained exculpatory information that she was required to disclose.

Ms. Sullivan's failure to produce the crucial information contained in her notes reflects a fundamentally flawed understanding of her obligations, or a reckless disregard of them, despite many years of experience as a prosecutor, substantial training by the Department of Justice, and an explanation of her obligations by this court on August 12, 2008. See Jones, 2009 WL 151587 at *3. The persistent recurrence of inadvertent violations of defendants' constitutional right to discovery in the District of Massachusetts persuades this court that it is insufficient to rely on Department of Justice training programs for prosecutors alone to assure that the government's obligation to produce certain information to defendants is understood and properly discharged.

Therefore, this court is arranging to have a program presented on discovery in criminal cases involving judges, defense lawyers, and prosecutors. The program will be organized by United States District Judge Douglas P. Woodlock, assisted by Magistrate Judge Leo Sorokin. As Ms. Sullivan has offered to attend that program, it is not necessary to order her to do so. Her colleagues will be at least invited, and perhaps ordered, to attend as well. In addition, the Attorney General will be asked to designate a representative to participate in the program.

The court is also continuing to consider whether Ms. Sullivan should be ordered to reimburse the District Court for at least some of the time spent by Jones' Criminal Justice Act counsel in dealing

with issues caused by her failure to disclose material exculpatory information.[3] See Horn, 29 F.3d at 766-67; Jones, 2009 WL 1111210 at *2. However, Ms. Sullivan has requested that, if necessary, the court defer for six months deciding whether any sanction is appropriate. Suzanne Sullivan February 10, 2009 Affidavit ("Aff."), ¶6. The court is granting that request.

More specifically, the court will defer deciding whether to take any further action concerning Ms. Sullivan because it is satisfied that she has a previously unblemished record and reputation for being an ethical prosecutor, she has since this issue arose made substantial efforts to educate herself on how to discharge her discovery obligations properly, and she is genuinely contrite. Therefore, although a sanction may prove to be necessary and appropriate to recognize the seriousness of her misconduct and to deter a repetition of it by other prosecutors, there is no immediate need for a sanction to improve Ms. Sullivan's performance.

In addition, recent changes in the leadership of the Department of Justice and the United States Attorney's Office make it appropriate to defer deciding whether sanctions should be

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[3] The affidavit of Jones' counsel John Palmer indicates that he spent at least seven hours dealing with matters relating to the late disclosure of the exculpatory evidence. See John F. Palmer May 4, 2009 Affidavit, ¶2-4. As Criminal Justice Act counsel are compensated at the rate of $110 per hour, the public has been compelled to pay at least approximately $750 in attorney's fees relating to Ms. Sullivan's misconduct.

imposed on the government for the misconduct in this case. On April 14, 2009, Attorney General Eric Holder "announced comprehensive steps to enhance the Justice Department's compliance with rules that require the government to turn over certain types of evidence to the defense in criminal cases." April 14, 2009 Department of Justice Press Release: Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases, available at http://www.usdoj.gov/opa/pr/2009/April/09-opa-338.html. In addition, the new Attorney General recently promised the Chief Judges of the United States District Courts that he would improve the performance of the Department of Justice's Office of Professional Responsibility ("OPR") and make the Department's disciplinary process much more transparent. See Joe Palazzolo, "Holder Promises Judges a New Day at DOJ," The National Law Journal, May 4, 2009, Col. 1. Attorney General Holder has provided promising evidence that his words will be matched by deeds by requesting that the conviction of United States Senator Ted Stevens be vacated and the case against him dismissed because of the government's repeated failure to disclose important exculpatory evidence to Senator Stevens. See Stevens, Cr. No. 08-231 (EGS) (D.D.C. Apr. 1, 2009) (Docket No. 324).

Similarly, the new Acting United States Attorney for the District of Massachusetts, Michael Loucks, has expressed his

determination to improve his office's performance in discharging its duty to disclose material exculpatory evidence. Mr. Loucks' conduct in prior cases indicate that he takes this duty seriously. For example, in United States v. Diaz, this court declared a mistrial in a case alleging that members of the Latin Kings gang distributed drugs because of the government's failure to disclose material exculpatory information concerning a cooperative witness. Cr. No. 05-30042-MLW (D. Mass. September 27, 2006) (Docket No. 125). As First Assistant United States Attorney, Mr. Loucks subsequently caused the case to be dismissed shortly before the scheduled second trial because he realized that the same error had been repeated. Id. (D. Mass. Dec. 19, 2006) (Government's Motion to Dismiss Without Prejudice) (Docket No. 158). Thus, the court has reason to expect that Mr. Loucks, as well as Attorney General Holder, will perform in a way that diminishes the need for sanctions in this case.

Therefore, the court is deferring for at least six months the decision as to whether to impose sanctions on the government and/or Ms. Sullivan for the misconduct in this case. The court is requiring the Department of Justice and Ms. Sullivan to file additional affidavits in November, 2009, addressing whether their performance and progress have obviated the need to impose sanctions in this matter.

II. DISCUSSION

A. Background

It is axiomatic that the government has a constitutional duty to disclose to a defendant material exculpatory evidence. See Brady v. Maryland, 373 U.S. 83 (1963). It has been long and clearly established that exculpatory evidence includes information that is potentially useful in impeaching government witnesses. See Giglio v. United States, 405 U.S. 150, 153-54 (1972).

Nevertheless, in the District of Massachusetts the government has had enduring difficulty in discharging its duty to disclose material exculpatory information to defendants in a timely manner. For example, in 1991, in a case of "astounding negligence," the First Circuit described "the recurring problem of belated government compliance with its duty to provide timely disclosure of exculpatory evidence." United States v. Osorio, 929 F.2d 753, 755 (1st Cir. 1991). The First Circuit had addressed before the "'sloppy practice' in the prosecutor's office with respect to disclosures" and found that in Osorio "[t]he negligence fit[] that pattern of practice." Id. at 760 (quoting United States v. Ingraldi, 793 F.2d 408, 413 (1st Cir. 1986)).[4]

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[4] The pattern of failures to produce discovery addressed in Osorio was not, in that era or now, unique to the District of Massachusetts. For example, in 1984 Judge Reena Raggi of the Southern District of New York wrote that, "Giglio problems recur with disturbing frequency in the cases tried before this court." United States v. Prince, 1994 WL 99231 at *1 (E.D.N.Y. March 10, 1994). More recent examples are discussed below.

Despite the First Circuit's admonitions in Osorio, inadvertent and deliberate violations of the government's duty to disclose material exculpatory information continued to occur. For example, during a 1993 trial before this court it was discovered that Assistant United States Attorney Jeffrey Auerhahn, "repeatedly improperly failed to disclose exculpatory evidence to [defendant Pasquale] Barone. Seven or eight of those discovery violations concerned the failure to disclose exculpatory information relating to [Walter] Jordan's testimony." See Ferrara v. United States, 384 F. Supp.2d 384, 402 (D. Mass. 2005), aff'd 456 F.3d 278 (1st Cir. 2006). In 2003, it was discovered that Mr. Auerhahn had withheld powerful exculpatory information provided by Jordan that directly negated the guilt of Barone and his co-defendant, La Cosa Nostra "Capo" Vincent Ferrara. See Ferrara, 384 F. Supp. 2d at 384, 409; 456 F.3d at 293. As a result, both men were released from prison. See Ferrara v. United States, 372 F. Supp. 2d 108, 133 (D.Mass. 2005), aff'd 456 F.3d at 280-81.

Prosecutorial misconduct concerning discovery in that period was also addressed in United States v. Mannarino, 850 F. Supp. 57 (D. Mass. 1994). In Mannarino, the destruction of a witness' handwritten statement by a police officer was characterized as "present[ing] yet again a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities by the United States Attorney's Office in this

District." Id. at 59.

In 1994, the government's admitted failure to produce required discovery in a timely manner also jeopardized a conviction obtained after a two-month trial in another case before this court. See United States v. Walsh, 75 F.3d 1, 3, 8 (1st Cir. 1996).

Beginning in about 1996, the United States District Court for the District of Massachusetts created a committee of judges, prosecutors, and defense lawyers to develop revised Local Rules for criminal cases. As the report of the judicial members of the committee explained, this effort was initiated in meaningful measure because criminal:

> cases too often get to trial without legally required discovery having been provided. Such problems present judges with challenging issues to be resolved promptly, and threaten both the fairness of the trial and the finality of any conviction. See, e.g., United States v. Walsh, 75 F.3d 1 (1st Cir. 1996); United States v. Osorio, 929 F.2d 753 (1st Cir. 1991); United States v. Devin, 918 F.2d 280 (1st Cir. 1990); United States v. Mannarino, 850 F. Supp. 57 (D. Mass. 1994).

Report of the Judicial members of the Commission Established to Review and Recommend Revisions of the Local Rules of the United States District Court for the District of Massachusetts Concerning Criminal Cases, October 28, 1998, at 8.

In 1998, the new Local Rules were promulgated. They essentially codified the requirements of Brady, Giglio, and their progeny, providing a road map for prosecutors trying to discharge their discovery duties properly. Several of the provisions of the

Local Rules are pertinent to the instant case. Exculpatory information is defined with precision to include "all information that is material and favorable to the accused because it tends to . . . [c]ast doubt on the admissibility of evidence that the government anticipates offering in its case-in-chief, that might be subject to a motion to suppress or exclude, which would, if allowed be appealable pursuant to 18 U.S.C. § 3731." L.R. 116.2(A)(2). The government is required to provide such exculpatory information automatically, without a request, no later than 42 days after arraignment unless a declination procedure is invoked or an ex parte protective order is obtained. See L.R. 116.2(B)(1), 116.6(A) and (B). The Local Rules explicate the fact that the duty to disclose is a continuing duty, and when additional material exculpatory evidence is discovered or developed after an initial disclosure, it must be produced. See L.R. 116.7. The Local Rules also require the preservation of notes so they can be reviewed and produced if they contain material exculpatory information. See L.R. 116.9.

The revised Local Rules for Criminal Cases of the District of Massachusetts have been widely viewed as valuable and, indeed, worthy of emulation. For example, in response to a disturbing number of wrongful convictions resulting in death sentences, in 2002 the Illinois Commission on Capital Punishment recommended that the Illinois Supreme Court "adopt a rule defining 'exculpatory

evidence' in order to provide guidance to counsel in making appropriate disclosures." Report of the Commission on Capital Punishment (hereinafter "Illinois Report"), Ch. 8 at 119, available at http://www.idoc.state.il.us/ccp/index.html. It specifically proposed a modified version of the District of Massachusetts Local Rule, explaining that: "The Massachusetts District Court Rules not only define exculpatory evidence, but impose clearly defined requirements for disclosure. The Commission has revised the Rule to conform more closely to Illinois law." Id. at 120. The proposed revision of the Illinois rules has since been adopted. Compare Illinois Report, Ch. 8 at 120, available at http://www.idoc.state.il.us/ccp/index.html (proposing changes) with Illinois Supreme Court Rule 12(c) (incorporating changes).

Similarly, in 2003, the American College of Trial Lawyers issued a report titled, "Proposed Codification of Disclosure of Favorable Information Under Rules of Criminal Procedure 11 and 16." It wrote that:

> Most local rules that address Brady-Giglio disclosure obligations neither define the nature and/or scope of favorable information, nor require consultation with law enforcement officers, nor provide clear pre-trial or pre-plea deadlines for disclosure. The most notable exception is the District of Massachusetts which in 1998 promulgated the most extensive local criminal discovery rules in the nation. Massachusetts Local Rule 116.2 was enacted in response to federal prosecutors' indifference to pre-trial discovery obligations.

Id. at 11-12 (footnotes omitted) available at http://www.actl.com/content/navigationmenu/publication/allpublica

tions/default.html.

However, the District of Massachusetts revised Local Rules have not proved to be fully effective in preventing the inadvertent errors by prosecutors that have been discovered in some cases.[5] Noteworthy examples of such cases before this court include, but are not limited to, the following.

In United States v. Diabate, 90 F. Supp.2d 140 (D. Mass. 2000), this court declared a mistrial and dismissed the case without prejudice because the government failed to disclose documents very valuable to the defense and improperly allowed officers' notes to be destroyed. The Diabate decision recounts other, then recent failures of the government to disclose information. Id. at 148-50.

In United States v. Castillo, Cr. No. 01-10206-MLW, this court in 2002 declared a mistrial because of the government's failure to disclose important impeaching evidence, and dismissed the case with prejudice after the problem recurred and caused irreparable prejudice to the defendant at his second trial.

In 2002, this court was required to declare a mistrial in United States v. Henderson, Cr. No. 01-10264-MLW, because of the belated disclosure of exculpatory information that the government

[5]No rule will be fully effective in preventing the type of deliberate violations of the duty to provide material exculpatory information to defendants that is described in Ferrara, 384 F. Supp. 2d at 397 n.10, aff'd 456 F.3d at 293.

was required to provide the defendant prior to the hearing on his motion to suppress, which had to be reopened.

In 2002, in United States v. Baskin, Cr. No. 01-10319, this court was again required to reopen a concluded hearing on a motion to suppress because, as the government acknowledged, it had failed to obey an order to provide the defendant with certain material exculpatory information before the hearing.

In 2006, in United States v. Diaz, Cr. No. 05-30042-MLW, this court declared a mistrial in a case alleging that members of the Latin Kings gang distributed drugs because of the government's failure to disclose material impeaching information concerning a cooperative witness. Shortly before the scheduled second trial, the government dismissed the case because it realized it had repeated the error. Id. (D. Mass. Dec. 19, 2006)(Government's Motion to Dismiss Without Prejudice) (Docket No. 158).

The persistent problems discovered by this court may have occurred, at least in part, because the Department of Justice did not properly instruct its prosecutors or adequately educate them to understand the importance of their discovery obligations. For example, Ms. Sullivan became an Assistant United States Attorney in January, 2006, and in March, 2006, attended four days of training in the Department of Justice's National Advocacy Center. See Feb. 10, 2009 Suzanne Sullivan Aff., ¶¶2-3. At that time the voluminous United States Attorneys Manual ("USAM") did not have a section on

a federal prosecutor's duty to disclose material exculpatory information. Section 9-500 of the Manual, "Policy Regarding Disclosure of Exculpatory and Impeachment Information;" was added to the Manual in October, 2006. The addition to the United States Attorneys Manual of a section on a prosecutors' duties under Brady and Giglio was not an unprompted effort by the Department of Justice to address a problem that it perceived and acknowledged. Rather, it was part of an ardent and, to date, successful effort of the Department to defeat a possible amendment to the Federal Rules of Criminal Procedure.

The American College of Trial Lawyers report, supra, prompted the Advisory Committee on Criminal Rules, on which the Department of Justice is represented,[6] to begin in 2003 to consider amending Federal Rule of Criminal Procedure 16 to require the disclosure of exculpatory information. May, 2007 Advisory Committee on Rules of Criminal Procedure Report to Standing Committee at 19, available at http://www.uscourts.gov/rules/reports./CR05-2007.pdf. In 2007, the Advisory Committee recommended amendment of Rule 16 despite the opposition of the Department of Justice. Id. at 18-26. In explaining the need for the proposed amendment, the Chair of the Advisory Committee wrote to the Standing Committee on Rules of Practice and Procedure:

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[6]From 2005 to 2008, Chief Judge Mark L. Wolf was also a member of the Advisory Committee.

> The Committee is [] aware of a significant number of cases in which the courts have found Brady violations, as well as many more cases in which the courts have found that exculpatory material was not disclosed – or was not disclosed in a timely fashion – but nevertheless found no constitutional violation because the failure to provide the evidence did not deprive the defendant of due process. In many cases, the court found that the undisclosed evidence was favorable to the defendant – and material in the sense that term is generally used under Rule 16 – but not material in a narrower constitutional sense. In order to meet this elevated constitutional standard of materiality, the defense must establish a reasonable probability that had disclosure been made the result would have been different, United States v. Bagley, 473 U.S. 667 (1985), or that the trial did not result in a verdict worthy of confidence, Kyles v. Whitley, 514 U.S. 419 (1995). The attached materials include brief descriptions of cases considering Brady issues, as well as an annotation collecting cases.[7]
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> The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs. For that reason, the Advisory Committee places substantial weight on the experience of highly respected practitioners, such as the members of the American College of Trial Lawyers and the practitioner members of the Advisory Committee, who strongly support the need for an amendment to Rule 16. Similarly, the Federal and Community Defenders believe that a rule is needed.

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[7]The materials referenced by the Advisory Committee are appended to this Memorandum and Order as Exhibit A. It is clear that the listed cases do not represent all of those in which Brady violations were discovered in part because in many such cases no decision was published. For example, the Advisory Committee materials cite only one of the five matters involving Brady violations after 2001 in cases assigned to this court which are described earlier in this Memorandum.

Id. at 20 (footnotes omitted).

Therefore, the Advisory Committee recommended an amendment to Rule 16 that would have required the government to disclose to the defendant all exculpatory information, not merely evidence that, when viewed after a conviction, is so important that there is a reasonable probability that had disclosure been made, the result would have been different. Id. at 21 (citing Bagley, 473 U.S. at 682). As the Chair of the Advisory Committee also wrote:

> The proposed amendment reflects the Advisory Committee's conclusions that (1) there is a strong case for codifying the prosecution's duty to disclose exculpatory and impeachment evidence in the Federal Rules, and (2) the disclosure under the rule should be broader in scope than the constitutional obligation imposed by Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. The proposed amendment makes the prosecution's disclosure to the defense of exculpatory and impeachment material a standard part of pretrial discovery in federal prosecutions.
>
> The Committee did not come to the decision to recommend this amendment lightly. The Department of Justice has consistently opposed the idea of amending Rule 16 to encompass exculpatory and impeachment material. The Committee has considered the Department's concerns, and it revised the draft amendment, narrowing it substantially in several respects, in an effort to be responsive to these concerns. During the time the amendment was under consideration . . . the Department also adopted an internal policy intended to address many of the concerns that prompted the consideration of an amendment. The Advisory Committee welcomed the new policy, but ultimately concluded that it did not take the place of a judicially enforceable amendment to the Federal Rules. The proposed rule and the Department's policy are not in conflict. Rather, they would complement one another and focus appropriate attention on the importance of providing exculpatory and impeachment evidence and information to the defense in a timely fashion.

> After the Department's presentation of its new internal policy, the Committee voted 8 to 4 to forward the proposed amendment to the Standing Committee for publication.

Id.. at 18-19.

The Advisory Committee did not deem it sufficient to rely on the recent addition to the United States Attorneys Manual to address the serious problem it discerned in part because:

> [T]he new policy, like the remainder of the USAM, is not judicially enforceable; it "does not create a general right of discovery," "[n]or does it provide defendant with any additional rights and remedies." USAM § 9-5.001(E). See also USAM § 9-5.100 (preface) ("GIGLIO POLICY")(same). The Committee considered deferring consideration of the amendment to give the new policy time to take effect, but felt that it would not be feasible to monitor compliance. As noted above, the defense is generally unaware when the prosecution fails to provide exculpatory or impeachment information. Accordingly, although it welcomed the Department's recognition of the prosecution's constitutional and professional obligations in the United States Attorneys Manual, the Committee concluded that the new policy did not eliminate the need for a rule making disclosure a part of pretrial discovery.

Id. at 21.

However, the Department of Justice's continued opposition to the proposed amendment to Rule 16 persuaded the Standing Committee to reject it. September 2007 Committee on Rules of Practice and Procedure Report to Judicial Conference, available at http://www.uscourts.gov/rules/reports/ST09-2007.pdf. The Standing Committee based its rejection in part on its desire "to obtain information about the experience with the Department of Justice's recent revisions to its U.S. Attorneys' Manual." Id.

As the Advisory Committee recognized, it is not possible to determine the number of cases in which material exculpatory information is not disclosed. Defendants and the court are generally unaware when such information is withheld. However, recent cases strongly indicate that the revision of the United States Attorneys Manual has not solved the problem.

As described earlier, in April, 2009, Attorney General Holder moved to set aside the conviction of Senator Stevens and dismiss the case with prejudice. As the presiding judge in Stevens, Emmet G. Sullivan, subsequently wrote the Advisory Committee in urging it to propose again an amendment of Rule 16 to require the disclosure of all exculpatory information:

> At a hearing on [the] motion [to dismiss], the government informed me that during the course of investigating allegations of misconduct, which included several discovery breaches, and preparing to respond to the defendant's post-trial motions, a new team of prosecutors had discovered what the government readily acknowledged were two serious Brady violations:
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> These Brady violations – revealed for the first time five months after the verdict was returned – came to light only after an FBI agent filed a complaint alleging prosecutorial and other law enforcement misconduct, a new Attorney General took office, and a new prosecutorial team was appointed to respond to the defendant's post-trial motions.

Letter from the Hon. Emmet G. Sullivan, United States District Judge of the United States District Court for the District of Columbia, to the Hon. Richard C. Tallman, Chair, Judicial

Conference Advisory Committee on the Rules of Criminal Procedure (Apr. 28, 2009).[8] The Attorney General's motion was granted and the case against Senator Stevens – who lost his bid to be re-elected after his wrongful conviction – was dismissed. United States v. Stevens, Cr. No. 08-231 (EGS) (D.D.C. Apr. 7, 2009) (Order) (Docket No. 372).

Also in April, 2009, a district judge in the Southern District of Florida sanctioned the government and the prosecutors individually for a wide array of misconduct, including violations of their duty to disclose material exculpatory evidence. See United States v. Shaygan, No. 08-20112-CR (D.D.C. Apr. 9, 2009) (Order on Motion for Sanctions under Hyde Amendment at 9, 19, 23-24, 32-38). The sanctions included an order that the government pay approximately $600,000 of the defendant's legal fees under the

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[8]It is noteworthy that, also in April, 2009, the Supreme Court ordered further review of a case of a Viet Nam veteran who was sentenced to death in 1982 by a state court in Tennessee because the prosecution withheld information that was helpful to the defendant concerning the jury's assessment of the most appropriate punishment for the proven murder. See Cone v. Bell, 129 S.Ct. 1769 (2009). In Cone, the Supreme Court wrote that "[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by Brady, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations." Id. at 1783 n.15 (citing and quoting Kyles v. Whitley, 514 U.S. 419, 437 (1995) and ABA Model Rule of Professional Conduct 3.8(d) (2008); but see id. at 1787 (Roberts, C.J., concurring in the judgement) ("The ABA standards are wholly irrelevant to the disposition of this case, and the majority's passing citation of them should not be taken to suggest otherwise").

Hyde Amendment, 18 U.S.C. § 3006A.[9]

Experience has educated this court to understand that the usual means employed by judges to respond to prosecutorial misconduct are ineffectual. The court can publicly reprimand the prosecutor or the Department of Justice. See Horn, 29 F.3d at 766-67. A prosecutor should value his or her reputation. As Attorney General Robert H. Jackson's told the United States Attorneys in 1940:

> The lawyer in public office . . . must remember that his [or her] most alert and severe, but just, judges will be the members of his [or her] own profession, and that lawyers rest their good opinion of each not merely on results accomplished but on the quality of the performance.

Robert H. Jackson, United States Attorney General, speech to the Second Annual Conference of United States Attorneys: The Federal Prosecutor (April 1, 1940) in In the Name of Justice at 173 (Timothy Lynch ed., 2009).

Recognizing that published criticism of a named prosecutor may

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[9]The Hyde Amendment provides that "the court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) pending on or after the date of the enactment of this Act [Nov. 26, 1997], may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust." 18 U.S.C. §3006A. In the instant case Jones did not prevail on his motion to suppress and, in any event, was represented by "assigned counsel paid for by the public." Thus, the Hyde Amendment does not apply to this matter.

haunt the attorney, this court has at times refrained from memorializing in writing or publishing an oral decision finding prosecutorial misconduct. See, e.g., United States v. Castillo, Cr. No. 01-10206-MLW. In other instances, the court has found it to be most appropriate to publish decisions naming the prosecutor who engaged in misconduct. See, e.g., Ferrara, 372 F.Supp.2d at 132. Neither approach has been sufficient to deter the misconduct that occurred in this and other cases. However, prosecutors should now foresee that they will likely be named in published decisions if this court is convinced that they have engaged in misconduct.

The First Circuit has stated that it may be sufficient to "catch the Justice Department's attention, punish the culprit, and deter future prosecutorial excesses" to "dispatch[] [the prosecutor] to the Justice Department's internal disciplinary office," OPR. Horn, 29 F.3d at 767. This court respectfully disagrees.

In 2003, United States Attorney Michael Sullivan asked this court to defer deciding whether misconduct by Assistant United States Attorney Auerhahn in failing to disclose crucial exculpatory information was intentional so that OPR could investigate. The United States Attorney represented that the results of the OPR investigation would be provided to the court. See Oct. 17, 2008 Michael J. Sullivan Aff. ¶8 (Barone v. United States C.A. No. 98-11104-MLW (Docket No. 89); Ferrara v. United States, C.A. No. 00-

11693-MLW (Docket No. 119)). In reliance on this representation, the court did not in 2003 express its conclusion that Mr. Auerhahn had deliberately withheld the vital exculpatory information at issue. Barone, C.A. No. 98-11104, Oct. 3, 2003 Tr. at 19-20. However, although the Ferrara case was still pending, the Department of Justice did not inform this court or the First Circuit that OPR had finished its investigation by January, 2005. See Ferrara, C.A. No. 00-11693-MLW (D. Mass. July 2, 2007) (Order and Attached Letter to Alberto Gonzales) (Docket No. 243). Nor did the Department report that OPR had found that Mr. Auerhahn had unintentionally failed to discharge his duty to disclose material exculpatory information. Id.

In April, 2005, this court held that Mr. Auerhahn's misconduct was deliberate. See Ferrara, 384 F. Supp. 2d at 397 n.10. In affirming that decision in 2006, the First Circuit characterized the prosecutor's misconduct as "blatant," "reckless," "manipulative," "deliberate," and "outrageous." Ferrara, 456 F.3d at 293.

This court received the results of the OPR investigation from the Department of Justice in May, 2007, in response to a December, 2006 letter to Attorney General Alberto Gonzalez.[10] It then learned

[10]The failure of the Department of Justice to report, as promised, the results of the OPR investigation concerning Mr. Auerhahn appears to be part of a pattern. Since fiscal year 2006, OPR has not published its usual annual report on its activities. See OPR website, http://www.usdoj.gov/opr/reports.htm

that its "sanction" for Mr. Auerhahn's misconduct was what was intended to be a secret written reprimand by United States Attorney Sullivan who, before and after issuing it, publicly praised the prosecutor. See, e.g., Shelly Murphy, "Judge Throws out Mobster's Sentence," The Boston Globe, Apr. 13, 2005, at A1 (quoting United States Attorney Sullivan's statement in defense of Auerhahn that "[h]e's a career prosecutor who's dedicated his career to public service") (internal quotation marks omitted).

In a January 2, 2008 letter to then Attorney General Michael Mukasey, this court wrote:

> [T]he Department's performance in the [Auerhahn] matter raises serious questions about whether judges should continue to rely upon the Department to investigate and sanction misconduct by federal prosecutors. As one who took pride in assisting Attorney General Edward Levi in establishing [the Office of Professional Responsibility] more than thirty years ago, I sadly doubt that it is now capable of serving its intended purpose.

Ferrara, C.A. No. 00-11693-MLW (D. Mass. Jan. 4, 2008) (Order) (Docket No. 257). Attorney General Mukasey did not respond to this letter.

Judge Emmet G. Sullivan's recent decision not to rely on Department of Justice, but instead to appoint of a special counsel to investigate and possibly prosecute high ranking Department of Justice lawyers for contempt in the Stevens case, suggests that this court's 2008 prediction may be proving to be prophetic. In

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(listing reports through fiscal year 2006).

any event, this court does not now find that it would be sufficient to defer to OPR in this matter.

The United States District Court has its own process, established by its Local Rules, for having matters of apparent misconduct determined and, if appropriate, sanctioned by a panel of three district judges. See L.R. 83.6(5). The presumptive prosecutors in such a proceeding are the United States Attorney or Bar Counsel. See L.R. 83.6(9). As the United States Attorney may be subject to sanction, it would not be appropriate to appoint him to pursue this matter. Nor does the court have confidence that the appointment of Bar Counsel would prove to be an efficient and effective way to proceed in this case. See L.R. 83.6(5). In June, 2007, this court referred the matter concerning Mr. Auerhahn to Bar Counsel for prosecution before a panel of three federal judges. Ferrara, C.A. No. 00-11693-MLW (D. Mass. Apr. 28, 2008) (Order) (Docket No. 243). Bar Counsel accepted the appointment and reported that she would take action by October, 2007. However, no action has yet been taken.

There is another recent development that reinforces this court's sense that it is now particularly important that judges find effective means to themselves hold prosecutors and other government officials accountable when misconduct has been demonstrated. For almost 100 years the judicially crafted exclusionary rule has been relied upon as the primary means of

determining government misconduct. See Weeks v. United States, 232 U.S. 383 (1914). For example, the deliberate or reckless withholding of material information from an application for a search warrant will result in the suppression of the evidence obtained in the execution of the warrant. See Franks v. Delaware, 438 U.S. 154, 155 (1978). In January 2009, the Supreme Court decided Herring v. United States, 129 S.Ct. 695 (2009). With Chief Judge John Roberts writing for the five Justices in the majority, the Supreme Court held that "when police mistakes are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements," the exclusionary rule will not operate to suppress the evidence at issue. Id. at 704.

The ruling in Herring may prove to be an application or modest extension of Franks and comparable cases such as United States v. Leon, 408 U.S. 897 (1984), which established the good faith exception to the exclusionary rule. However, it has been suggested that Herring foreshadows the elimination of the exclusionary rule altogether. Adam Liptak, "Supreme Court Edging Closer to Repeal of Evidence Ruling," N.Y. Times, January 31, 2009, at A1.[11] If the

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[11]The New York Times article reported, in part, that:

> ''With Alito's replacement of O'Connor,'' said Craig M. Bradley, a law professor at Indiana University, ''suddenly now they have four votes for sure and possibly five for the elimination of the exclusionary rule.''
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> The four certain votes, in the opinion of Professor Bradley and other legal scholars, are Chief Justice

exclusionary rule is eliminated, the need to hold individual prosecutors personally responsible for their misconduct will be magnified.

However, as described earlier, the conventional means for determining whether misconduct has occurred and sanctioning it are not efficient or effective. Neither referral to OPR, other disciplinary bodies, or public criticism has sufficiently deterred prosecutorial misconduct. Therefore, this court intends to address itself any future issues of possible prosecutorial misconduct and sanctions.

The Local Rules of the District of Massachusetts and court orders require that prosecutors, at defined times prior to motions to suppress, trials, and sentencing hearings, provide defendants with all material exculpatory information. In the future, if it appears to this court that such rules and orders may have been wilfully violated, the court is likely to give notice and institute criminal contempt proceedings pursuant to 18 U.S.C. §401 and Federal Rule of Criminal Procedure 42(a). If the interest of

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Roberts, Justice Alito, Justice Antonin Scalia and Justice Clarence Thomas, who is also an alumnus of the Reagan administration.

The fate of the rule seems to turn on the views of Justice Anthony M. Kennedy, who has sent mixed signals on the question. As in so many areas of the law, there are indications that the court's liberal and conservative wings are eagerly courting him. They are also no doubt looking for the case that, with Justice Kennedy's vote, will settle the issue once and for all.

justice so requires, disinterested private counsel will be appointed to investigate and prosecute the matter, as has been done in the Stevens case. See Fed. R. Crim. P. 42(a)(2); In re Special Proceedings, 373 F.3d at 41-44; Stevens, Cr. No. 08-231 (E.G.S.) (D.D.C. Apr. 7, 2009) (Order) (Docket No. 375). If a sentence of more than six months in prison is a possibility, the prosecutor will have a right to a jury trial. See Muniz v. Hoffman, 422 U.S. 454, 476 (1975); United States v. Pina, 844 F.2d 1, 10 (1st Cir. 1988). If the court decides that the maximum possible sentence that it might impose is six months, the matter may, as is customary, be decided by the court. See Muniz, 422 U.S. at 475-76. If it is proven beyond a reasonable doubt that "(1) there was a lawful court order of reasonable specificity, (2) the [prosecutor] violated it and (3) the violation was wilful," the prosecutor will have been proven guilty of criminal contempt. Michaud, 928 F.2d at 15; see also Berandelli, 565 F.2d at 30 ("[T]he crime of criminal contempt requires a specific intent to consciously disregard an order of the court.") (citations and internal quotation marks omitted) (brackets in original). If convicted of criminal contempt, the prosecutor may be incarcerated and/or fined.

In the circumstances of the instant case, the court also has the authority to sanction the prosecutor by ordering her to pay a monetary penalty, including the fees of defendant's Criminal Justice Act counsel that were generated by her misconduct. Such a

sanction could be imposed pursuant to Federal Rule of Criminal Procedure 16(d)(2), as an exercise of the court's inherent supervisory powers, or both.

In the instant case, Ms. Sullivan failed to disclose the material exculpatory information that Cooley had on several occasions made statements to her that contradicted his affidavit and anticipated testimony that he recognized the bicyclist as Jones on Middleton Street. These statements were memorialized in Ms. Sullivan's notes.

As described earlier, Rule 16 does not generally require the disclosure to a defendant of all material exculpatory evidence. That requirement is imposed by the constitution, and is implemented by the Local Rules of the District of Massachusetts and, often, by case-specific orders. Rule 16(a)(1)(E), however, provides that, "[u]pon a defendant's request, the government must permit the defendant to inspect and copy . . . documents . . . or portions of [them], within the government's possession . . . and . . . material to preparing the defense." Local Rule 116.1(A), which implements Rule 16, provides for automatic production of all discoverable material and information in the possession of the government without a motion or request.[12] The duty to supplement an initial

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[12]Local Rule 116.1(A) states:

(1) Automatic Discovery. In all felony cases, unless a defendant waives automatic discovery, all discoverable material and information in the possession, custody, or

disclosure is codified in Local Rule 116.7.

Therefore, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(D), Ms. Sullivan had a duty to disclose to the defendant the portions of her notes of April 7, October 6, 2008, and October 24, 2008, that memorialized Cooley's important inconsistent statements.

Under Rule 16(d)(2)(D), "[i]f a party fails to comply with this rule, the court may . . . enter any [] order that is just under the circumstances." Therefore, if deemed appropriate, the court could impose a monetary sanction on Ms. Sullivan pursuant to Rule 16.

> control of the government and that defendant, the existence of which is known, or by the exercise of due diligence may become known, to the attorneys for those parties, must be disclosed to the opposing party without formal motion practice at the times and under the automatic discovery procedures specified in this Local Rule.

As explained in the report concerning the revised Local Rules:

> The new rules begin with a truly self-executing system of automatic discovery. In all felony cases, unless a defendant promptly waives his right to automatic discovery, within 28 days of arraignment the government must provide the defendant with: all of the discovery provided by Federal Rule of Criminal Procedure 16(a)(1)(A)-(D) . . . . The defendant is obligated to provide comparable reciprocal recovery. See Rule 116.1(D).

Report of the Judicial members of the Commission Established to Review and Recommend Revisions of the Local Rules of the United States District Court for the District of Massachusetts Concerning Criminal Cases, October 28, 1998 at 8-9.

The court also has the authority to impose monetary sanctions on Ms. Sullivan as an exercise of its inherent supervisory powers. "[T]he inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct." Chambers v. Nasco, 501 U.S. 32, 45 (1991); see also Horn, 29 F.3d at 760 ("even though a particular abuse is covered by a specific statute or rule, a court still may invoke its supervisory power to address the abuse if the existing remedial provision is inadequate to the task."). Moreover, if, contrary to this court's conclusion, Ms. Sullivan's failure to disclose her notes memorializing material exculpatory information cannot be sanctioned under Rule 16, it is subject to the exercise of the court's inherent powers, which "exist to fill in the interstices." Chambers, 501 U.S. at 46; see also Horn, 29 F.3d at 760 ("the supervisory power doctrine is interstitial in the sense that it applies only when there is no effective alternative provided by rule, state, or constitutional clause."). There are at least "'three purposes to which the supervisory power may be dedicated: to implement a remedy for a violation of recognized rights, to preserve judicial integrity . . . and as a remedy designed to deter illegal conduct.'" Horn, 29 F.3d at 760. (quoting United States v. Hasting, 461 U.S. 499, 505 (1983). "It has been squarely held that a court's array of supervisory powers includes the power to assess attorneys' fees against other parties or their attorneys in befitting situations." Id. (citing Roadway

Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

In Horn, the First Circuit held that deliberate prosecutorial misconduct that inflicts some enduring prejudice to the defendant would justify the exercise of supervisory powers to order the prosecution to pay the attorneys' fees that misconduct generated. Id. at 758-59, 766. At least ordinarily, supervisory powers may not be relied upon to dismiss a case absent cognizable prejudice to a defendant before the court. See United States v. Santana, 6 F.3d 1, 11 (1st Cir. 1993). However, it remains an open question whether the use of supervisory powers to dismiss an indictment in the absence of prejudice to a defendant would be permissible as an effort to deter future misconduct if the conduct at issue "is plainly improper, indisputably outrageous, and not redressable through the utilization of less drastic disciplinary tools." Id.

In any event, in the instant case there has been inexcusable ignorance, or a reckless disregard, of a constitutional duty, and of the requirements of the Local Rules and a court order relating to that duty. The misconduct extends a long pattern of inadvertent failures to produce material exculpatory information, and cases of intentional misconduct as well. In these circumstances, the supervisory powers are available to permit a narrowly tailored sanction, imposed on the prosecutor personally, to recognize the seriousness of the offense, give integrity to the commands of the constitution and the court's orders, and to deter future

misconduct. A financial sanction on the prosecutor, including requiring the payment of the reasonable attorneys' fees caused by her misconduct, would be one form of an appropriate narrowly-tailored response to the circumstances. Such sanctions have been imposed on government lawyers in civil cases in which money was at stake. See, e.g., Chilcutt v. United States, 4 F.3d 1313, 1319 (5th Cir. 1993) (upholding order that government counsel pay, among other things, for time spent by defense counsel on contempt hearing without being reimbursed); United States v. Sumitomo Marine & Fire Insurance Co., 617 F.2d 1365, 1370-71 (9th Cir. 1991) (upholding imposition of monetary sanction for discovery abuse against government attorney). It would be illogical and injurious to the administration of justice to find that the court does not have comparable authority to sanction serious discovery abuses in criminal cases, in which a person's liberty is at issue.[13]

B. Sanctioning the Government and/or the Prosecutor

[13]At the May 12, 2009 hearing, Acting United States Attorney Loucks stated that the Department of Justice agreed that in the instant case the court has the authority to impose a monetary sanction on the prosecutor personally. Assistant United States Attorney Chaitowitz, however, noted that there is a dearth of case law on the issue and that Horn involved deliberate misconduct that prejudiced the defendant and, therefore, is distinguishable from the instant case. Counsel for Ms. Sullivan concurred with Ms. Chaitowitz. The court recognizes the distinction between the instant case and Horn, but is not persuaded that the distinction is material with regard to the availability of supervisory powers to address the misconduct at issue here.

In this case, it would be permissible to sanction the government for failing to train and supervise Ms. Sullivan adequately, and to sanction her misconduct as well. However, Ms. Sullivan has requested that "this Court defer any decision on any sanction for a period of six months to allow [her] to demonstrate [her] commitment to not repeating these errors." Feb. 10, 2009 Suzanne Sullivan Aff., ¶6. It is appropriate to grant this request.

The court finds that some of the factors required to be considered in fashioning a sentence in a criminal case are relevant in the instant matter. See 18 U.S.C. §3553(a). First among them is the nature and circumstances of the misconduct. See 18 U.S.C. §3553(a)(1).

The misconduct here was serious and repeated. On April 7, 2008, Cooley twice told Ms. Sullivan that he did not immediately know that the man riding the bicycle on Middleton Street was Jones. Oct. 30, 2008 Tr. at 85; Ex. 11 (Sullivan's Apr. 7, 2008 notes). Rather, Cooley said, he first recognized Jones after Jones had been taken to the ground by fellow officers while running between Marden Avenue and Middleton Street sometime later." Oct. 30, 2008 Tr. at 86-88; Ex. 11 (Sullivan's Apr. 7, 2008 notes).

Nevertheless in the April 15, 2008 Government's Opposition to the Motion to Suppress, at 3, Ms. Sullivan wrote that:

> Jones made eye contact with the police and then abruptly turned the bicycle around and began to peddle away faster

> in the opposite direction. Officer Rance Cooley recognized Jones from numerous prior street encounters with him in the same neighborhood over the previous approximately two years. Due to Jones' actions and his flight, this prompted officers to pursue him.

This claim was reiterated on page 11 of her memorandum, where Ms. Sullivan wrote:

> Here, officers can point to the following specific facts justifying their stop of Jones. Jones abruptly turned his bicycle and fled in the opposite direction upon seeing the police approach; in the dozens of encounters Officer Cooley had with Jones in the vicinity of that same neighborhood over the prior approximately two years, Jones had never attempted to flee from the officer.

Sullivan also drafted an affidavit from Cooley to support these contentions. See Jones, 2009 WL 15187 at *3 (citing Cooley Aff. ¶¶9, 19).

Ms. Sullivan asserts that in making these arguments she was not intentionally trying to mislead the court. She has not, however, provided any comprehensible, let alone credible, explanation for why she drafted a memorandum and affidavit that were contradicted by Cooley's then recent, undisclosed statements to her. In any event, if the government's argument that an evidentiary hearing on the motion to suppress was not justified had proved persuasive, the potential violation of Jones' constitutional right to Due Process may never have been discovered.

As explained earlier, the Local Rules required the automatic disclosure of Cooley's material exculpatory statements after they were made in April, 2008. See L.R. 116.2 and 116.7. Ms. Sullivan

evidently gave no thought to her duty to comply with the Local Rules.

On August 12, 2008, the court ordered Ms. Sullivan to produce all material exculpatory information concerning the motion to suppress by October 10, 2008, and reminded her that her duty to do so was continuing. On October 6, 2008, Cooley again told her that he did not recognize Jones as the man on the bicycle when they were on Middleton Street.

On October 10, 2008, Ms. Sullivan sent Jones' counsel a letter providing certain exculpatory evidence, referring to the Local Rules and Giglio. She disclosed three state court decisions finding that Cooley had not testified truthfully at a hearing on a motion to suppress. Letter from Assistant United States Attorney Suzanne Sullivan to John Palmer, Attorney for Darwin Jones, (October 10, 2008) (on file with court). However, she made no reference to his important contradictory statements to her as recently as four days before. Indeed, as she testified on May 12, 2009, Ms. Sullivan did not review her notes for any such information. There is no indication that the failure to review her notes for exculpatory information was a departure from her usual practice. In essence, it appears that despite long experience in the state courts, several years as a federal prosecutor, and training by the Department of Justice, Ms. Sullivan did not understand her discovery obligations.

On October 24, 2008, Cooley again told Ms. Sullivan, among other things, that he did not determine that the bicyclist was Jones until Jones was on the ground between Marden Avenue and Middleton Street. Oct. 30, 2008 Tr. at 99-100; Ex. 11 (Sullivan's notes in trial outline). This was not disclosed to Jones.

At the outset of the suppression hearing on October 27, 2008, in response to a question by the court, Ms. Sullivan stated that she had, by October 10, 2008, produced all material exculpatory information. Oct. 27, 2008 Tr. at 2. This statement was not correct. However, the court finds that it was not knowingly false. Rather, it was a result of a lack of understanding by Ms. Sullivan of her obligations.

On October 28, 2008, the court ordered Ms. Sullivan, who had been joined by her supervisor, Mr. Herbert, to review her notes to determine whether they included any exculpatory information that was required to be disclosed, including any material impeaching information. On October 29, 2008, Sullivan represented that she had reviewed her notes and, in her opinion, there was no information that was required to be disclosed. See Oct. 29, 2008 Tr. at 1-2. She stated that the government had provided the notes to the court for review "out of an abundance of caution." Id. at 5, 9; Oct. 30, 2008 Tr. at 112, 114. After the court mentioned several discrepancies between the notes and Cooley's testimony, the notes were provided to Jones' counsel. On October 30, 2008, Jones'

attorney pointed out the many times reflected in Ms. Sullivan's notes that Cooley had told her that he did not identify the man on the bicycle as Jones on Middleton Street.

Ms. Sullivan, Mr. Herbert, and United States Attorney Sullivan all acknowledge that it was a "mistake" not to disclose to Jones the notes and exculpatory information they contain prior to the suppression hearing. Ms. Sullivan and Mr. Herbert explain that their review of the notes on October 28, 2008 was too quick and cursory, resulting in Ms. Sullivan's erroneous representation on October 29, 2008 that the notes contained no material exculpatory information.[14] The court finds these explanations to be credible, in part because the government provided the notes to it for in camera review. Nevertheless, these errors are inexcusable. The prosecution of a criminal case is not a game to be played casually or thoughtlessly. Many years of a man's life were at stake in the suppression hearing. The court's ability to make a properly informed decision on a matter of profound consequence was threatened. Even when viewed as inadvertent, the misconduct was

[14]At the May 12, 2008 hearing, Mr. Herbert stated that as Ms. Sullivan's supervisor, and as one who too quickly reviewed her notes and agreed that they contained no material exculpatory information, he shares responsibility for the government's failures in this case. He stated, therefore, that any sanction deemed necessary should be imposed on him, either instead of on Ms. Sullivan or in addition to any sanction imposed on Ms. Sullivan. Although the court does not consider Mr. Herbert to be primarily or exclusively responsible in this matter, it will consider his request to sanction him too if it ultimately decides to sanction Ms. Sullivan.

very serious. This militates in favor of imposing appropriate sanctions.

The interest of general deterrence also weighs in favor of sanctioning Ms. Sullivan and the government. As described earlier, there is a dismal history of violations of the government's duty to disclose material exculpatory information in cases before this court. Cases such as Stevens and Shaygan, as well as those in the attachments to this Memorandum, demonstrate that the experience of this court is not unique. The court recognizes that many prosecutors strive earnestly and successfully to meet their discovery obligations. However, the deliberate and inadvertent violations that continue to occur have a powerful impact on individuals entitled to Due Process and a cancerous effect on the administration of justice.

There are, however, factors that favor not imposing a sanction on Ms. Sullivan or the government, at least at this time. The court has considered Ms. Sullivan's history and characteristics as a prosecutor. Her affidavits and testimony, confirmed by the many letters on her behalf, indicate that she is an earnest public servant. She was for many years an Assistant District Attorney in Plymouth County. For several of those years she worked under then District Attorney Michael Sullivan. For the five years before she became a federal prosecutor in 2006, Ms. Sullivan primarily handled child abuse cases. However, she testified that she also worked on

homicide cases. The letters on Ms. Sullivan's behalf from lawyers depict a prosecutor who does not have a "win at any cost" or "ends justifies the means" mentality. Rather, Ms. Sullivan previously enjoyed a reputation as a prosecutor who was industrious and fair. She has never been subject to disciplinary action or, apparently, sanction.

The court is also satisfied that Ms. Sullivan is genuinely contrite. She has taken full responsibility for her misconduct. Since that misconduct was discovered she has made a determined effort to educate herself on her responsibilities through study, and consultation with former federal prosecutors and defense lawyers. She has also offered to attend the educational program that will be presented by the court as a result of this matter. In addition, Ms. Sullivan is now receiving close supervision in the United States Attorneys' office. It is, therefore, unlikely that she will again violate her duty to provide discovery.

The Department of Justice and United States Attorneys Office fully share responsibility for Ms. Sullivan's misconduct. The Department hired a prosecutor who, despite long experience, did not understand her duties under Brady and Giglio, including her duty to review her notes and those of law enforcement agents for material exculpatory information. Ms. Sullivan was given training by the Department and United States Attorney's Office. However, at least with regard to discovery, it was obviously inadequate to serve its

intended purpose. After a stint in the Major Crimes Unit, Ms. Sullivan was promoted to the more elite Organized Crime Unit, where she was apparently virtually unsupervised while its head, Mr. Herbert, spent substantial time in Washington, D.C. on an important special assignment.

It is equally evident that the response of OPR and United States Attorney Sullivan to the egregious misconduct of Mr. Auerhahn described earlier was insufficient to make Ms. Sullivan aware of her obligations and determined not to fail, even inadvertently, to provide defendants with the material exculpatory information necessary to satisfy their right to Due Process. Nor was the publicity concerning this court's criticism of the Department's response to that serious misconduct sufficient to send Ms. Sullivan the necessary message.

However, there is reason for the court to hope that the past will not be prologue, and to give the new leadership of the Department of Justice and the office of the United States Attorney for the District of Massachusetts, as well as Ms. Sullivan, an opportunity to do so.

As explained earlier, Attorney General Holder has recently instituted measures intended to improve the Department's compliance with its discovery obligations in criminal cases. See April 14, 2009 Department of Justice Press Release, supra. These actions reportedly include:

> Providing supplemental training to federal prosecutors throughout the Department on their discovery obligations in criminal cases. Training will begin in the coming weeks. Establishing a working group of senior prosecutors and Department officials from each component to review the discovery practices in criminal cases. The working group, to be headed by the Assistant Attorney General of the Criminal Division and the Chair of the Attorney General's Advisory Committee, will review the need for:
>
> > Improvements to practices and policies related to the government's obligations to provide material to the defense in criminal matters;
> >
> > Additional resources, including staffing and information technology, needed to help prosecutors fulfill their discovery obligations;
> >
> > Additional discovery-related training for other Department prosecutors.

Id. As also described earlier, the Attorney General's request that Senator Stevens' conviction be vacated communicates to this court that he recognizes that the failure to disclose material exculpatory information is both serious misconduct and injures the public interest, either by contributing to a wrongful conviction or allowing a guilty person to escape punishment.

Similarly, Attorney General Holder has initiated action to improve the performance of the Department of Justice's disciplinary process. He has made a pledge to the Chief Judges of the United States District Courts that he will take complaints of prosecutorial misconduct seriously. See Palazzolo, supra. Recognizing that the current process for resolving complaints of

prosecutorial misconduct is unnecessarily slow and secret, he has also promised that OPR will perform in a more timely and open manner. Id. Once again, the Attorney General has taken action consistent with his comments by appointing a new acting head of OPR. Nedra Pickler, "US Attorneys Told to Expect Scrutiny," Associated Press, April 9, 2009.

In its seminal decision concerning the government's duty to disclose material exculpatory information, the Supreme Court wrote in Brady that:

> Society wins when not only the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when an accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."

373 U.S. at 87.[15] In 1940, Attorney General Robert Jackson emphasized this point in an address to the United States Attorneys. He told them, in part, that:

> Nothing better can come out of this meeting of law enforcement officers than a rededication to the spirit of fair play and decency that should animate the federal prosecutor. Your positions are of such independence and importance that while you are being diligent, strict, and vigorous in law enforcement you can also afford to be just. Although the government technically loses its case, it has really won if justice has been done.

Jackson, supra. Attorney General Holder reportedly reemphasized

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[15]The quoted inscription is etched on the ceiling of the entrance to the Attorney General's office.

this point recently, telling new Assistant United States Attorneys:

> Your job as assistant US attorneys is not to convict people. Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. Any policy that is at tension with that is to be questioned and brought to my attention. And I mean that.

Pickler, supra.

It has taken many disturbing experiences over many years to erode this court's trust in the Department of Justice's dedication to the principle that "the United States wins . . . whenever justice is done its citizens in the courts." Brady, 373 U.S. at 87. It will take time for the performance of the Department to restore that faith. However, in the instant matter the court finds that it is most appropriate to defer deciding whether to impose sanctions in order to give Ms. Sullivan, the United States Attorney for the District of Massachusetts, and the Attorney General an opportunity to begin to do so.

III. ORDER

In view of the foregoing, it is hereby ORDERED that:

1. An educational program concerning discovery in criminal cases shall be held in the fall of 2009. United States District Judge Douglas P. Woodlock will lead the planning for the program. He will be assisted by Magistrate Judge Leo Sorokin. The Federal Public Defender and Chair of the Criminal Justice Act Board are

invited to participate in planning the program and/or to propose members of the defense bar to participate in doing so. Acting United States Attorney Michael Loucks shall, by May 20, 2009, inform the court whether he wishes to participate in planning the program and, if not, propose candidates to represent him in doing so. He shall also state whether he intends to require that all Assistant United States Attorneys who handle criminal cases attend the program unless excused by him. When the group which will plan the program is constituted, the court will invite the Attorney General to designate a representative to participate in the program.

2. The United States Attorney and Assistant United States Attorney Suzanne Sullivan shall, by November 20, 2009, update their submissions seeking to show cause why sanctions should not be imposed in this matter. The United States Attorney's submission shall address the progress, if any, that has been made by the Attorney General in his efforts to minimize the risk that federal prosecutors will fail to produce required discovery in criminal cases, and to improve the Department of Justice's process for investigating and disciplining prosecutorial misconduct.

/s/ MARK L. WOLF
UNITED STATES DISTRICT JUDGE

Summaries of Federal Cases Raising *Brady* Issues After 2001

This list (which is not exhaustive) includes both cases where relief granted, and cases where exculpatory or impeaching evidence was not disclosed (or was disclosed belatedly), but no relief was granted.

United States Courts of Appeals

United States v. Oruche, 2007 WL 1296601 (D.C. Cir. 2007). District court's grant of new trial was reversed. Government's failure to disclose information that a prosecution witness had previously lied to police and that she had another possible drug source was not material because the witness was already thoroughly impeached at trial.

United States v. Velarde, 2007 WL 1252482 (10th Cir. 2007). Defendant was entitled to either a hearing on whether the government suppressed the information or discovery on the veracity of the victim's supposed accusations. Evidence of prior false accusations made by the victim may be material, even if not admissible, because discovery could have led to facts that the defense could use to cross-examine the victim about her truthfulness.

Unites States v. Barraza Cazares, 465 F.3d 327 (8th Cir. 2006). Government's failure to disclose co-defendant's statement that he did not previously know the defendant was clearly exculpatory. However, the information had not been not suppressed because it was otherwise available to the defense and was not material because it would not have undermined the government's strong case against the defendant, so the defendant's conviction was affirmed.

United States v. Conley, 415 F.3d 183 (1st Cir. 2005). Brady violation warranting new trial occurred when government withheld FBI memorandum indicating that key witness had expressed uncertainty about his recollection of incident.

United States v. Blanco, 392 F.3d 382 (9th Cir. 2004). Brady violation found where the government failed to disclose highly relevant impeachment information that its confidential informant was given a special visa in return for his cooperation with the DEA. The government must turn over all information related to the confidential informant.

United States v. Sipe, 388 F.3d 471 (5th Cir. 2004). Cumulative effect of government's suppression of evidence regarding its star witness warranted a new trial.

United States v. Rivas, 377 F.3d 195 (2nd Cir. 2004). Defendant's conviction reversed because government withheld a critical piece of evidence – that government's chief witness, not defendant, brought drugs onto ship – that supported the defense theory.

Unites States v. Casas, 356 F.3d 104 (1st Cir. 2004). No prejudice when government delayed

disclosing witnesses' cooperation agreements and a failed drug test, because both were disclosed at trial. Defendant's conviction affirmed.

United States v. Martinez, 78 F.App'x 679 (10th Cir. 2003). Defendant's conviction was affirmed. Court concluded he was not prejudiced by the delay in discovering evidence uncovered by the defense on cross examination, because, considering the totality of the evidence, the impeachment value was slight.

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003). Suppression of evidence favorable to the defendant was not material when the government failed to disclose statements made by a non-testifying confidential informant. Because the verdict was supported by compelling evidence, there was not a reasonable probability of a different result. Defendant's conviction affirmed.

United States v. Winston, 55 F.App'x 289 (6th Cir. 2003). Defendant's conviction was affirmed, because the government's failure to disclose that a prosecution witness had earlier fabricated letters of good character to the court was not material. When considered in conjunction with the rest of the evidence, this witness's testimony was incidental.

Unites States v. Gil, 297 F.3d 93 (2d Cir. 2002). Government's belated disclosure of exculpatory and impeachment evidence on the eve of trial violated Brady. Evidence was material and prejudicial when the evidence would have shown that a meeting could have occurred which would have born directly on the central issue of the defendant's authorization. The district court's denial of defendant's motion for a new trial was reversed.

United States District Courts

United States v. Safavian, 233 F.R.D. 12 (D. D.C. 2005). Because the definition of "materiality" discussed in Strickler and other appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. Before trial the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed--with the benefit of hindsight--as affecting the outcome of the trial.

Ferrara v. United States, 372 F. Supp. 2d 108 (D. Mass. 2005). Defendant resentenced because prosecution withheld evidence that its only direct source of information on murder charge had twice stated that defendant did not order the murder; disclosure of this information would have led defendant not to plea bargain murder charge.

United States v. Koubriti, 336 F. Supp. 2d 676 (E.D. Mich. 2004). Conviction for providing material support to terrorists reversed after government informed court that *Brady* and *Giglio* materials had not been disclosed.

St. Germain v. United States, 2004 WL 1171403 (S.D.N.Y. 2004). Defendant was granted a new trial for a Brady violation when the government delayed in producing grand jury testimony that could have been used to impeach the government's key witness. The evidence was turned over immediately before trial and not identified as Brady material.

United States v. Washington, 294 F.Supp.2d 246 (D. Conn. 2003). Late disclosure of evidence prejudiced the defendant and warranted a new trial when the government waited until trial began to disclose that its key witness had previously been convicted for making a false police report.

United States v. Diabate, 90 F.Supp.2d 140, 148-49 (D.Mass. 2000). Case dismissed because of delayed Brady disclosures.

Excerpts from Summaries of Successful Cases Under *Brady v. Maryland*, Through July 2001, A Publication of the Habeas Assistance and Training Project

UNITED STATES COURTS OF APPEALS

United States v. Gerard, 491 F.2d 1300 (9th Cir. 1974). Convictions reversed where defendants were deprived of all evidence of promise of leniency by prosecutor, and prosecutor failed to disclose that witness was in other trouble, thereby giving him even greater incentive to lie.

United States v. Pope, 529 F.2d .112 (9th Cir. 1976). Conviction reversed where prosecution failed to disclose plea bargain with key witness in exchange for testimony and compounded the violation by arguing to the jury that the witness had no reason to lie.

United States v. Auten, 632 F.2d 213 (5th Cir. 1980). Prosecutor's lack of knowledge of witness's criminal record was no excuse for Brady violation.

United States v. Beasley, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). Conviction reversed due to failure of government to timely produce statement of key prosecution witness where not only was the witness critical to the conviction, but defense and prosecution argued his credibility at length, and the statement at issue differed from witness' trial testimony in many significant ways.

United States v. Herberman, 583 F.2d 222 (5th Cir. 1978). Testimony presented to grand jury contradicting testimony of government witnesses was Brady material subject to disclosure to the defense.

United States v. Fairman, 769 F.2d 386 (7th Cir. 1985). Prosecutor's ignorance of existence of, ballistic's worksheet indicating gun defendant was accused of firing was inoperable does not excuse failure to disclose.

United States v. Severdija, 790 F.2d 1556 (11th Cir. 1986). Written statement defendant made to coast guard boarding party should have been disclosed under Brady, and failure to disclose warranted new trial. The statement tended to negate the defendant's intent, which was the critical issue before the jury.

United States v. Strifler, **851 F.2d 1197 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989).** Information in government witness' probation file was relevant to witness' credibility and should have been released as Brady material. Criminal record of witness could not be made unavailable by being part of probation file. District court's failure to release these materials required reversal.

United States v. Weintraub, **871 F.2d 1257 (5th Cir. 1989).** Impeachment evidence which was withheld would have allowed defendant to challenge evidence presented as to amount of narcotics sold, was material to sentencing and required remand for new sentencing hearing.

United States v. Tincher, **907 F.2d 600 (6th Cir. 1989).** "Deliberate misrepresentation" where prosecutor withheld grand jury testimony of cop, after defense requested any Jencks Act or Brady material and prosecutor responded that none existed. Convictions reversed.

United States v. Wayne, **903 F.2d 1188 (8th Cir. 1990).** Government's failure to disclose Brady material required new trial where drug transaction records would have aided cross-exam of key witness.

United States v. Tincher, **907 F.2d 600 (6th Cir. 1990).** Prosecutor's response to Jencks Act and Brady request was deliberate misrepresentation in light of knowledge of testimony of government agent before grand jury. Reversal was required since misconduct precluded review of the agent's testimony by the district court.

United States v. Spagnoulo., **960 F.2d 990 (11th Cir. 1992).** New trial ordered on basis of Brady violation where prosecution failed to disclose results of a pre-trial psychiatric evaluation of defendant which would have fundamentally altered strategy and raised serious competency issue.

United States v. Minsky, **963 F.2d 870 (6th Cir. 1992).** Government improperly refused to disclose statements of-witness that he did not make at trial. Disclosure could have resulted in loss of credibility with jury based on false statements to FBI.

United States v. Gregory, **983 F. 2d 1069 (6th Cir. 1992) (unpublished).** Habeas petitioner, in fourth petition, claimed that state suppressed crucial evidence that its only eyewitness had originally identified a third party, and that third party had been arrested. Petitioner demonstrated "good cause" because state failed to disclose the info despite repeated requests. [Case remanded for resentencing.]

United States v. Kojayan, **8 F.3d 1315 (9th Cir. 1992).** Where government failed to disclose agreement with potential witness and later request for missing witness instruction was denied because counsel was unaware of the agreement, Brady required disclosure.

United States v. Brumel-Alvarez, **991 F.2d 1452 (9th Cir. 1993).** Brady violation where government failed to disclose memo indicating that informant lied to DEA, had undue influence over DEA agents, and thwarted investigation of evidence crucial to his credibility.

United States v. Kelly, 35 F.3d 929 (4th Cir. 1994). Kidnapping conviction reversed where government failed to furnish an affidavit in support of an application for a warrant to search key witness's; house just before trial, and failed to disclose a letter written by same witness which would have seriously undermined her credibility.

United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994). District court did not abuse discretion in ordering new trial where, in violation of Brady, government failed to disclose evidence tending to identify former codefendant as drug courier; conviction was based largely on testimony of codefendants and defendant had strong alibi evidence.

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995). Failure of prosecutor to correct representations he made to the jury which were damaging to defendant's duress defense, despite having learned of their falsehood during the course ofthe trial, was Brady violation and required granting of new trial motion.

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995). Trial court did not abuse discretion by granting new trial based on government's failure to reveal to defense either drug use and dealing by prisoner witnesses during trial or "continuous stream of unlawful" favors prosecution gave those witnesses.

United States v. O'Connor, 64 F.3d 355 (8th Cir. 1995), cert. denied, 116 S.Ct. 1581 (1996). Brady violation occurring when government failed to inform defendant of threats by one government witness against another and attempts to influence second government witness' testimony was reversible error with respect to convictions on those substantive drug counts and conspiracy counts where testimony of those government witnesses provided only evidence; evidence of threats, combined with undisclosed statements from interview reports, could have caused jury to disbelieve government witnesses.

United States v. David, 70 F.3d 1280 (9th Cir. 1995) **(unpublished).** New trial ordered where defendant had been convicted of operating a continuing criminal enterprise solely on the strength of testimony of two prisoners serving life sentences in the Philippines. Subsequent to the conviction, these two prisoners were released, and defendant discovered previously undisclosed evidence of a deal between the government and the two prisoners.

United States v. Lloyd, 71 F.3d 408 (D.C.Cir. 1995). Defendant who was convicted of aiding and abetting in preparation of false federal income tax returns was entitled to new trial where prosecution: (1) withheld, without wrongdoing, tax return of defendant's client for year which defendant did not prepare returns; and (2) failed to disclose prior tax returns for four of defendant's clients. The *first* item would probably have changed the result of the trial, and the second group of items were exculpatory material evidence.

United States v. Smith, 77 F.3d 511 (D.C.Cir. 1996). Dismissal of state court charges against prosecution witness, as part of plea agreement in federal court, was material and should have been disclosed under due process clause, even though prosecutor disclosed other dismissed charges and other impeachment evidence was thus available, and whether or not witness was intentionally

concealing agreement. Armed with full disclosure, defense could have pursued devastating cross-exam, challenging witness' assertion that he was testifying only to "get a fresh start" and suggesting that witness might have concealed other favors from government.

United States v. Cuffie, **80 F.3d 514 (D.C. Cir. 1996).** Undisclosed evidence that prosecution witness, who testified that defendant paid him to keep drugs in his apartment, had previously lied under oath in proceeding involving same conspiracy was material where witness was impeached on basis that he was a cocaine addict and snitch, but not on basis of perjury, and where his testimony provided only connection between defendant and drugs found in witness' apartment.

United States v. Steinberg, **99 F.3d 1486 (9th Cir. 1996).** New trial ordered where prosecution failed to disclose information indicating that its key witness, an informant, was involved in two different illegal transactions around the time he was working as a CI, and that the informant owed the defendant money, thus giving him incentive to send the defendant to prison. Although the prosecutor did not know about the exculpatory information until months after the trial, nondisclosure to the defense of this material evidence required a new trial.

United States v. Pelullo, **105 F.3d 117 (3rd Cir. 1997),** Denial of § 2255 motion reversed where government failed to disclose surveillance tapes and raw notes of FBI and IRS agents. The notes contained information supporting defendant's version of events and impeaching the testimony of the government agents, who provided the key testimony at defendant's trial for wire fraud and other charges.

United States v. Fisher, **106 F.3d 622 (5th Cir. 1997).** New trial ordered where government failed to disclose FBI report directly contradicting testimony of a key government witness on bank fraud charge. Because the witness' credibility was crucial to the government's case, there was a reasonable probability that the result would have been different if the report had been disclosed.

United States v. Frost, **125 F.3d 346 (6th Cir. 1997).** Reversal required where government represented to defense that the substance of a witness' testimony would be adverse to the defendant, but in fact the testimony would have been exculpatory.

United States v. Vozzella, **124 F.3d 389 (2nd Cir. 1997).** Conviction for conspiring to extend extortionate loans reversed where prosecution presented false evidence and elicited misleading testimony concerning that evidence which was vital to prove a conspiracy.

United States v. Service Deli, Inc., **151 F.3d 938, 943-944 (9th Cir. 1998).** The court reversed the defendant government contractor's conviction for filing a false statement with the United States Defense Commissary Agency because the government failed to disclose notes taken by one of its attorneys during an interview with the state's most important witness. The notes contained "three key pieces of information" useful in impeaching the witness: (1) the witness' story had changed; (2) the change may have been brought on by the threat of imprisonment; and (3) that the witness explained his inconsistent stories by claiming that he had suffered "a stroke which affected his memory." This information was material, the court explained, because "the government's entire case rested on [the] testimony" of the witness who was the subject of the undisclosed notes, and that witness' credibility

"essentially was the only issue that mattered." Finally, the court rejected the government's contention that the undisclosed impeachment evidence was merely cumulative because the defendant had gone into the same areas on cross examination of the witness. The court explained: "It makes little sense to argue that because [defendant] tried to impeach [the witness] and failed, any further impeachment evidence would be useless. It is more likely that [defendant] may have failed to impeach [the witness] because the most damning impeachment evidence in fact was withheld by the government."

United States v. Mejia-Mesa, **153 F.3d 925, 929 (9th Cir. 1998).** The court reversed the district court's denial of §2255 relief and remanded for an evidentiary hearing to determine whether petitioner had procedurally defaulted his claim "that the government withheld, suppressed or destroyed a page or *pages* from the deck log of ... the vessel carrying the cocaine [which formed the basis of one of petitioner's convictions]," and if so, whether he could show cause and prejudice sufficient to overcome the default.

United States v. Scheer, 168 F.3d 445 (11th Cir. 1999). The court granted relief in this bank fraud case on the ground that the government violated Brady by failing to disclose that the lead prosecutor in the case had made a statement to a key prosecution witness, who *was* himself on probation as a result of a conviction arising out of the same set of facts, "that reasonably could be construed as an implicit -if not explicit -- threat regarding the nature of [the witness'] upcoming testimony . . .." 168 F.3d at 452. In granting relief, the court made clear that, to succeed, the appellant was not required to prove that the witness actually changed his testimony as a result of the prosecutor's threat, nor was he required to establish that, had evidence of the threat been disclosed, the remaining untainted evidence would have been insufficient to support his conviction.

Schledwitz v. United States, **169 F.2d 1003 (6th Cir. 1999).** The government violated Brady by failing to disclose that its key witness, who was portrayed as a neutral and disinterested expert during petitioner's fraud prosecution, had for years actually been actively involved in investigating petitioner and interviewing witnesses against him.

United States District Courts

United States v. Turner, 490 F.Supp. 583 (E.D.Mich. 1979), aff'd, 633 F.2d 219 (6th Cir. 1980), cert. denied, 450 U.S. 912 (1981). New trial granted where DEA agent, who had entered into a leniency agreement with the defense counsel for a prosecution witness, not only failed to correct the witness' testimony disclaiming any such arrangement but took the stand and buttressed the witness' false testimony through an affirmative material misrepresentation that no agreement existed, and such conduct was an affront to the court's dignity and honor and to the nation.

United States v. Tariq, **521 F.Supp. 773 (D.Md. 1981).** Government violates defendant's Fifth Amendment right to due process and Sixth Amendment right to compulsory process when it acts unilaterally in a manner which interferes with defendant's ability to discover, to prepare, or to offer exculpatory or relevant evidence, by deporting a witness who is an illegal alien, if the Government

knows or has reason to know that the witness' testimony could conceivably benefit defendant and if deportation occurs before defense counsel has had notice and a reasonable opportunity to interview and/or depose the illegal alien.

United States v. Stifel, **594 F.Supp. 1525 (N.D.Ohio 1984).** Conviction for willfully and knowingly mailing infernal machine with intent to kill another vacated where prosecution failed to disclose evidence/ implicating another suspect, statement by defendant's girlfriend attesting to his innocence in contradiction to her trial testimony, and results of investigation tending to show that defendant did not buy the switch used in the bomb.

United States v. Burnside, **824 F.Supp. 1215 (N.D. Ill. 1993).** Brady requires disclosure of impeachment information of which government personnel, but not prosecutors personally, are aware. Knowledge of warden and others at facility housing witnesses could be imputed to prosecution.

United States v. Ramming, **915 F.Supp. 854 (S.D.Tex. 1996).** Motion to Dismiss for, inter alia, prosecutorial misconduct granted where, in multi-count bank fraud indictment, government failed to disclose, despite court order to the contrary, numerous items of evidence tending to support defendants' claims of innocence and refute government's theory of the case.

United States v. French, **943 F.Supp. 480 (E.D.Pa.1996).** New trial ordered where government's undisclosed file on informant indicated that his motivation for cooperating was monetary, yet prosecution elicited testimony from him at trial that he did not cooperate for the money, but rather because he felt that he was "doing something real good for the world."

United States v. Taylor, **956 F.Supp. 622 (D.S.C. 1997).** Federal extortion and conspiracy indictments against state legislators dismissed due to government's repeated and flagrant misconduct including failure to disclose exculpatory and impeachment evidence bearing on credibility of government's cooperating witness, who was allowed to assume an unusual amount of control over the sting operation resulting in the defendants' indictments, and undermining reliability of government's case as a whole.

United States v. Patrick, **985 F.Supp. 543 (E.D.Pa. 1997).** Motion for a new trial granted when government failed to disclose evidence which would have impeached one of its main witnesses. This evidence could not have been obtained by the defendant through the exercise of due diligence as the government never identified the information that was contained in the withheld documents. Thus, the defendant could not have known of the essential facts that would have permitted him to make use of the evidence.

United States v. Colima-Monge, **978 F.Supp. 941 (1997),** Defendant's due process rights would be violated if the INS withheld information concerning the co-defendant which may be relevant to defendant's motion to dismiss. Motion for protective order denied.

United States v. Dollar, **25 F.Supp. 2d 1320, 1332 (N.D.Ala. 1998).** The district court dismissed charges of conspiracy and concealing the identity of firearms purchasers as a result of the government's repeated, egregious violations of its disclosure obligations under Brady. These

violations centered on nondisclosure of materially inconsistent pre-trial statements of several of the government's key witnesses. The court explained that, "[f]rom the outset of this case, defense counsel have been unrelenting in their effort to obtain Brady materials. The United States' general response has been to disclose as little as possible, and as late as possible--even to the point of a post-trial Brady disclosure. * * * [A]fter having assured the court that it had produced all Brady materials, the United States continued to withhold materials which clearly and directly contradicted the direct testimony of several of its most important witnesses."

United States v. Locke, 1999 WL 558130 (N.D. Ill. July 27, 1999). The government violated Brady in connection with defendant's federal trial for conspiracy to import heroin by suppressing a statement made by a co-defendant at his change-of-plea hearing, in which the co-defendant indicated that neither he nor defendant had knowledge that their travel abroad with another co-defendant was for the purpose of importing heroin. Noting the weakness of the government's case against defendant at trial, the court found this statement material and granted defendant's motion for new trial. In reaching this conclusion, the court rejected the government's contention that it did not "suppress" the statement since defendant's attorney was free to have attended the co-defendant's change-of-plea hearing, at which he would have heard the statement first hand. The court reasoned that a defendant's counsel had not failed to act with reasonable diligence in not attending the hearing, since such hearings do not ordinarily produce exculpatory evidence for co-defendants.

United States v. McLaughlin, 89 F.Supp.2d 617 (E.D.Pa. 2000). The court granted defendant's motion for a new trial in this federal tax evasion case, finding that the government's nondisclosure of a witness' grand jury testimony contradicting the trial testimony of defendant's accountant on the critical point of whether the accountant had knowledge of defendant's bank account, and nondisclosure of documents supporting defendant's claim that certain income was legitimately entitled to tax deferred status, violated Brady.

United States v. Peterson, 116 F.Supp.2d 366 (N.D.N.Y. 2000). The district court granted a new trial in this federal prosecution, finding that the prosecution violated the Jencks Act by inadvertently suppressing investigators' notes which, if disclosed, would have revealed discrepancies with the government's trial testimony relating to petitioner's statement. These discrepancies created a significant possibility that the jury would have had a reasonable doubt as to defendant's guilt.

United States v. Lin, 143 F.Supp.2d 783 (E.D.Ky. 2001). The district court dismissed the indictment in this federal prosecution for employing illegal aliens after finding that the government deported witnesses prior to disclosing statements taken from those witnesses indicating that the witnesses would have been favorable to the defense. After acknowledging that "it is impossible for the defendants to make an avowal as to the deported aliens' testimony because they were denied any opportunity to interview them before the government rendered them unavailable," the court noted that the witnesses' statements indicate they would have testified favorably on the key question whether defendants knew they were employing illegal aliens, and recognized that the deported witnesses were "perhaps the only witnesses who may have information the defense could use to impeach the material witnesses' testimony." Based on its findings concerning the government's misconduct and the prejudice suffered by the defense, the court concluded that "the only appropriate remedy is the dismissal of the [71 count] indictment."

Attachment D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PASQUALE BARONE	)	
	)	
v.	)	Civ. No. 98-11104-MLW
	)	
UNITED STATES OF AMERICA	)	
VINCENT FERRARA	)	
	)	
v.	)	Civ. No. 00-11693-MLW
	)	
UNITED STATES OF AMERICA	)	

ORDER

WOLF, D.J. April 28, 2009

Attached is an April 23, 2009 letter from the court to Attorney General Eric H. Holder. The attachments to the letter may be obtained from the court files in these cases.

UNITED STATES DISTRICT JUDGE

United States District Court

Boston, Massachusetts 02210

MARK L. WOLF
CHIEF JUDGE

April 23, 2009

BY FEDERAL EXPRESS

The Honorable Eric H. Holder
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, N.W., Room 4400
Washington, D.C. 20530

Attention: Annie Bradley

Dear Attorney General Holder:

Thank you for your remarks on April 21, 2009, to the Chief Judges of the United States District Courts. We appreciate your determination to assure that Department of Justice attorneys perform their duties honorably and ably, and to take seriously any failure to do so. I am writing in response to your request that we communicate with you directly if we encounter the type of problem you wish to address.

Enclosed is my January 2, 2008 letter, with attachments, to Attorney General Michael Mukasey. As you will see, it describes the disciplinary proceedings I initiated in 2007 against an Assistant United States Attorney because of the Department of Justice's inadequate response to his misconduct in failing to disclose material exculpatory information that the Court of Appeals for the First Circuit characterized as "blatant," "feckless," "manipulative," "deliberate," and "outrageous." Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006). That misconduct required me to order the release from prison of a Capo and an Associate of the Patriarca Family of La Cosa Nostra. See Ferrara v. United States, 384 F. Supp. 2d 384 (D. Mass. 2005).

As explained in my attached December 8, 2006 letter to Attorney General Alberto Gonzales, the misconduct that resulted in the release of the defendants was part of a long pattern of similar misconduct by the same prosecutor. As explained in my attached June 29, 2007 letter to Attorney General Gonzales, my January 2, 2008 letter to Attorney General Mukasey, and my attached January 2,

2008 letter to Associate Deputy Attorney General David Margolis, the "sanction" for the extreme and intentional misconduct found by me and by the First Circuit was a secret, written reprimand by the United States Attorney for the District of Massachusetts who, before and after issuing it, publicly praised the prosecutor.

In my letter to Attorney General Mukasey I wrote that:

> the Department's performance in the [referenced] matter raises serious questions about whether judges should continue to rely upon the Department to investigate and sanction misconduct by federal prosecutors. As one who took pride in assisting Attorney General Edward Levi in establishing [the Office of Professional Responsibility] more than thirty years ago, I sadly doubt that it is now capable of serving its intended purpose.

Judge Emmet G. Sullivan's recent appointment of a special counsel to investigate and possibly prosecute high ranking Department of Justice lawyers for contempt in the Stevens case confirms that other judges share my concern.

As the Stevens case also indicates, prosecutorial misconduct is neither a rare nor merely historical problem. As I recently wrote in the enclosed decision in United States v. Jones, "[t]he egregious failure of the government to disclose [in 2008] plainly material exculpatory evidence in [Jones] extends a dismal history of intentional and inadvertent violations of the government's duties to disclose in cases assigned to this court." 2009 WL 151587 at *5 (D. Mass. Jan. 21, 2009). Nine noteworthy examples of such misconduct were cited. Id. at *17-18.

In my letter to Attorney General Mukasey I also described the repeated failures of the Department of Justice to be candid and consistent with courts in matters arising from my 1999 decision finding extraordinary misconduct by members of the Federal Bureau of Investigation ("FBI") concerning its informant James "Whitey" Bulger. See United States v. Salemme, 91 F. Supp. 2d 141 (D. Mass. 1999). For example, as described in detail in that letter, in the federal prosecution of FBI agent John Connolly the Department of Justice asserted that Connolly had told Bulger of individuals providing information against Bulger who were then, foreseeably, murdered. Connolly has been convicted of doing just that in a state court case in Florida that was prosecuted in part by a cross-designated Assistant United States Attorney. In both criminal cases, the government presented the immunized testimony of Bulger's associate Kevin Weeks. Weeks received a federal sentence of only six years for committing five murders based on the Department of

Justice's representation that Weeks had been completely truthful and provided substantial assistance. Nevertheless, in a series of cases brought by the survivors of Bulger's victims, attorneys from the Civil Division of the Department of Justice have unsuccessfully argued that Connolly did not leak the lethal information to Bulger and have attempted to discredit Weeks' testimony on this issue.

My late colleague Judge Reginald Lindsay publicly urged the Department of Justice to settle the cases arising out of the FBI's misconduct concerning its informants. It has not done so. As a result, damages of more than $100,000,000 have been awarded against the United States in two cases and the remaining six are scheduled to be tried before the end of this summer. As the attached articles indicate, the government's approach to the remaining wrongful death cases has recently provoked renewed public criticism of the Department of Justice. See Kevin Cullen, Family Needs an Advocate, Boston Globe, Mar. 23, 2009, at B1 ("[T]he Department of Justice tried to blame the victim. A pair of lawyers with nice suits and no scruples flew up from Washington and tried to sully Michael Donahue in the grave."); Kevin Cullen, Where is the Justice?, Boston Globe, Apr. 13, 2009, at B1 (noting "[t]he vindictative, unconscionable approach the government is taking with the Donahues"); Peter Gelzinis, Heroic Ruling Stands, But Jury's Still Out On Feds, Boston Herald, Apr. 15, 2009, at 10 (Judge Lindsay having died after finding the government liable but before awarding damages, "the government lawyers wanted to start everything from scratch." Tommy Donahue "prepared himself to be betrayed by the government he loves.").

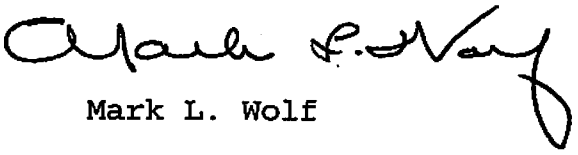
Attorney General Gonzales told me that he would look into these matters when I first raised them with him in June, 2006. I did not hear further from him. I concluded my January, 2008 letter to Attorney General Mukasey by stating that:

> I expect that you have returned to the Department because, like so many former federal prosecutors, you retain a reverence for its mission. Therefore, I felt that I should bring these matters to your personal attention in the hope that, with your leadership, the recent past will not be prologue, and the Department will soon again discharge its duties in a manner that commands the trust of federal judges and the people of the United States.

However, I did not receive a response from Attorney General Mukasey either. Nevertheless, encouraged by the intentions and aspirations you expressed to the Chief Judges, and by your actions as Attorney General, I am sending this message to you with renewed hope.

With best wishes,

Sincerely yours,



Mark L. Wolf

Attachment E

Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. FRANK FRANCIS COLACURCIO SR., FRANK FRANCIS COLACURCIO JR., LEROY RICHARD CHRISTIANSEN, DAVID CARL EBERT, STEVEN MICHAEL FUESTON, JOHN GILBERT CONTE, D.C.E. INC., MM MR RM CORPORATION, and LLC EVERETT I, Defendants.	No. CR 09-0209 RAJ DEFENDANTS' MOTION TO COMPEL PRODUCTION OF FAVORABLE INFORMATION NOTE ON MOTION CALENDAR: February 5, 2010 **ORAL ARGUMENT REQUESTED**

Pursuant to Local Criminal Rule 12, defendants Frank Francis Colacurcio, Sr., Frank Francis Colacurcio Jr., Leroy Richard Christiansen, David Carl Ebert and Steven Michael Fueston ("Defendants") move the Court for an order directing the government to promptly produce information currently in its possession that is favorable to the defense, as required by Washington Rule of Professional Conduct 3.8(d). To counsels' knowledge, this is the first motion in this district to seek discovery based on RPC 3.8(d), and this motion addresses an unusual factual situation and very recent developments in the law.

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I. INTRODUCTION

This fall, in the wake of the trial of Senator Ted Stevens in which it was discovered the government had failed to disclose exculpatory evidence (resulting in its voluntary dismissal of the case), Assistant Attorney General Lanny A. Breuer reassured a group of federal judges in Seattle that "[t]he Department of Justice is committed to the very highest ethical standards." Carrie Johnson, *Justice Department Looks to Avoid Another Stevens Fiasco*, Wash. Post, Oct. 15, 2009. The notoriety of the Ted Stevens trial and its unusual outcome due to discovery abuse has brought the issue of the government's ethical and constitutional discovery obligations to the fore. What the government must produce, and when, has been the subject of countless commentaries and CLEs in the last year, and Attorney General Holder himself has responded to these concerns by instituting training for prosecutors regarding their discovery obligations and has publicly reminded prosecutors that their obligations to fairness and justice are paramount. *See* Nedra Pickler, *US Attorneys Told to Expect Scrutiny; Senator's Case Leaves Taint, Holder Says*, The Boston Globe, Apr. 9, 2009, at 8 ("'Your job as assistant U.S. attorneys is not to convict people,' Holder said. 'Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing.'").

Coincidentally or not, the issue of prosecutors' ethical obligations as to discovery has been prominent elsewhere in the past year too. In July 2009, the American Bar Association's Standing Committee on Legal Ethics and Professional Responsibility issued a new formal opinion, Formal Op. 09-454 (2009) ("Opinion") discussing the scope of a prosecutor's ethical duties. This new opinion concludes that a prosecutor's ethical duty under Model Rule of Professional Conduct 3.8 is broader in scope than the constitutional requirements under *Brady v. Maryland*. The key difference is that Rule 3.8(d) "requires the disclosure of evidence *or information favorable* to the defense *without regard to the anticipated impact of the evidence or information on the trial's outcome.*" Opinion at 1

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(emphasis added). In contrast, the constitutional standard is that the prosecutor need only turn over "*material evidence.*" The Opinion notes that prosecutors are under an ethical duty to make the favorable information available "as soon as reasonably practicable" after discovery of it unless excused by a protective order. Also, in 2009, the Supreme Court, in *Cone v. Bell*, 129 S. Ct. 1769, 1782 n.15 (2009), observed that the constitutional rule of *Brady* is not the only source of a prosecutor's duty to disclose, and that a prosecutor's ethical duties to disclose favorable evidence are more demanding.

Against this backdrop and the renewed emphasis on prosecutors' ethical obligations to produce favorable information, the government's position in this case regarding discovery is noteworthy. During discovery conferences and in related correspondence, the prosecutors have informed defense counsel that they have exculpatory information or evidence, some of which is contained in the agent notes, witness interview memoranda or grand jury transcripts of more than 300 witnesses. However, prosecutors are unwilling to disclose the favorable information now and will not disclose it until November 15, 2010, the date it is due to produce Jencks Act and Rule 26.2 material. This is contrary to the government's obligations under Rule 3.8(d). The government broadly asserts that the exculpatory information is "Jencks Act" material (presumably because some of the information simply came from witnesses), which it is not required to disclose except as set forth in the Act.

The government's use of the Jencks Act as a shield is improper and a red herring. The issue on this motion is not application of the Jencks Act, but rather the enforcement of prosecutors' ethical duties to produce evidence favorable to an accused as soon as reasonably possible after obtaining such information. Indeed, defense counsel do not by this motion even ask for Jencks material—defense counsel do not seek grand jury transcripts, or FBI 302 memoranda, or other "substantially verbatim" statements of witnesses. These are the only kinds of statements or information the Jencks Act covers.

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See 18 U.S.C. § 3500(e). Rather, the defense requests production of exculpatory *information* provided by these and other persons, in whatever form is appropriate to satisfy the government's obligations. For example, a letter or other communication from prosecutors summarizing the nature of the exculpatory information the government possesses, along with the identity of those who provided the information, would satisfy the prosecutors' ethical obligations without implicating the Jencks Act. The government is required to produce this information; the Jencks Act is irrelevant to its obligations in this regard. The Court should direct the government to disclose all information favorable to the defense, including from witnesses it has interviewed.

II. BACKGROUND

On June 23, 2009, the grand jury returned a 15-count indictment against Defendants charging them with four crimes: conspiracy to commit RICO (Count 1); conspiracy to use interstate facilities in aid of racketeering – prostitution (Count 2); conspiracy to engage in money laundering (Count 3); and mail fraud (Counts 4–15). The indictment charges that defendants managed and operated four adult entertainment establishments and related companies in a manner that promoted prostitution, laundered the proceeds of the prostitution, and underpaid admission taxes owed to the City of Seattle. (*See* Indict. ¶ 22.)

In discovery conferences following arraignment, defense counsel requested that the government provide all exculpatory information, and to "identify witnesses, including entertainers and customers, who provided information tending to show that they do not believe that management promoted, encouraged or permitted prostitution." *See* Ex. A (Aug. 17, 2009 letter from defense counsel).[1] The government declined to provide information outside of what it perceived to be its Rule 16 obligations, and specifically declined to identify witnesses with exculpatory information "at this time." *See* Ex. B at 2–3 (Aug. 18, 2009 letter from government to defense counsel). Defense counsel followed this request with an October

[1] All exhibits are attached to the Declaration of Angelo J. Calfo submitted in support of this motion.

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23, 2009 letter renewing their request for favorable information (*see* Ex. C), and citing the prosecutors' ethical obligations. Defense counsel requested, among other things, (1) *information* in whatever form (not just substantially verbatim witness statements) known to the government that is relevant to showing that any defendant did not permit, facilitate or promote prostitution; (2) information known to the government that is relevant to showing that any defendant did not participate in underreporting customer counts at Rick's to evade the Seattle admissions tax; and (3) the names and contact information for persons who are known to the government and who have advised police or federal authorities or others of any information favorable to the defense (as outlined above or otherwise). Ex. C at 1. In response, the government said it had produced "all known *Brady* information, except for that contained in Jencks Act witness statements" and that it would give "careful consideration" to the issue of producing other favorable information. *See* Ex. D.

On November 13, 2009, all defense counsel met with the prosecutors and asked when they would respond further to defense counsel's request for favorable information. Defense counsel were told that a response would follow within 30 days. *See* Calfo Decl. ¶ 2. The government has provided no further response.

III. ARGUMENT

A. RPC 3.8(d) Requires Timely Production of Favorable Information.

ABA Model Rule of Professional Conduct 3.8, which has been adopted in Washington state (*see* Washington RPC 3.8(d)) and is entitled "Special Responsibilities of a Prosecutor," provides: "The prosecutor in a criminal case shall . . . (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." RPC 3.8(d) does not simply codify the constitutional due process obligation to produce favorable information, or any similar obligation established by statute, procedural rule, or court order. Instead, the ethical duty arising from RPC 3.8(d) is a separate, stand-alone obligation that requires a

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"prosecutor who knows of evidence and information favorable to the defense to disclose it *as soon as reasonably practicable* so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation." *See* ABA Formal Op. 09-454, at 1 (July 8, 2009)) (attached as Ex. E and referred to here as the "Opinion") (emphasis added).[2] The prosecutors in this case are subject to the disclosure obligations set forth in Washington RPC 3.8. *See* 28 U.S.C. § 530B(a) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State"); *see also* 28 C.F.R. § 77.3 ("In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules."); Local GR 2(e) (stating that all attorneys shall comply with the Washington RPCs).[3]

Until recently, there was no clear guidance on what constituted "timely" production. As explained in the Opinion, Rule 3.8 requires that exculpatory information be furnished "as soon as reasonably practicable" after the prosecution learns of the information. The Opinion is clear that a prosecutor should not sit on favorable information until it is strategically convenient to furnish it to the defense. "Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence

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[2] Indeed, ethical rules are separately enforceable obligations, not merely suggestions to be followed. For instance, in addition to RPC 3.8, there are other ethical rules that specifically apply to prosecutors, such as the duty not to communicate directly with a represented defendant (RPC 4.2). This ethical rule has been the subject of various enforcement measures. *See, e.g.*, *United States v. Ortega*, 203 F.3d 675, 680-81 (9th Cir. 2000) (deploring, on ethical grounds, the fact that the government, via INS agents, routinely questions represented clients after indictment outside the presence and without the consent of counsel); *United States v. Lopez*, 4 F.3d 1455, 1458-63 (9th Cir. 1993) (holding that federal prosecutor violated state-law ethical duties by meeting with indicted defendant without consent or presence of defendant's lawyer); *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988) (same).

[3] Local General Rule 2(e) also notes that in construing the local and federal rules and RPC's, the Court may consider, among other things, the Ethics Opinions issued by the American Bar Association pursuant to the ABA model rules.

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or information, *once known to the prosecutor*, *must* be disclosed under Rule 3.8(d) *as soon as reasonably practicable*." Opinion at 6 (emphasis added); *see also ABA Standards for Criminal Justice, Prosecution and Defense Function*, Standard 3-3.11(a) (ABA 3d ed. 1993), *available at* http://www.abanet.org/crimjust/standards/pfunc_toc.html (calling for disclosure of exculpatory information "at the earliest feasible opportunity"). Thus, timing the production of favorable evidence for strategic purposes violates the ethical rule. The Opinion suggests a prosecutor who believes there is a legitimate basis for withholding evidence in his or her possession, but which is favorable to an accused, should obtain a protective order. Opinion at 6; *see also United States v. Acosta*, 357 F. Supp. 2d 1228, 1236 (D. Nev. 2005) (stating that if a witness statement contains favorable evidence, then the government may either voluntarily produce it (as it usually does), or seek a protective order to guard against disclosure that would implicate Jencks Act concerns).

The Opinion further concludes that a prosecutor's ethical duty "is not limited to admissible 'evidence,'" but also "requires disclosure of favorable 'information,'" which "may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations." Opinion at 5. Nor is there a "de minimis" exception for when the prosecutor "believes that the information has only a minimal tendency to negate the defendant's guilt." *Id.* All favorable information, regardless of its value in the eyes of the prosecutor, must be disclosed. *Id.*

In addition, the Opinion describes as "inaccurate" the proposition that RPC 3.8(d) "requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure." *Id.* at 1. A prosecutor's *constitutional* obligation to disclose exculpatory information "extends only to favorable information that is 'material,' *i.e.*, evidence and information likely to lead to an acquittal." *Id.* at 2. After reviewing the background and history of Rule 3.8, the Opinion notes that "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information

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favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome." *Id.* at 4. In other words, the "rule requires prosecutors to steer clear of the constitutional line, erring on the side of caution." *Id.*; *see also id.* at 3 n.12 ("[A] disparity exists between the prosecutor's disclosure duty as a matter of law and the prosecutor's duty as a matter of ethics.") (quoting Olavi Maru, Annotated Code of Professional Responsibility 330 (American Bar Found., 1979)); *ABA Standards for Criminal Justice*, Standard 3-3.11(a) ("A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged . . . .").

The prosecutors in this case have not addressed their ethical obligations and instead have spoken only in terms of the constitutional requirement for disclosure. But the government cannot argue that it meets its ethical obligations simply by observing *Brady*. The Supreme Court has recognized that prosecutors are subject to Rule 3.8's ethical obligation, which is broader than any constitutionally based obligations, particularly insofar as the ethical obligation is not limited by *Brady*'s after-the-fact outcome-determinative "materiality" test for whether certain evidence should be disclosed. *See Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations"); Opinion at 4 n.16 ("The professional ethical duty is considerably broader than the constitutional duty announced in *Brady v. Maryland* . . . and its progeny.") (quoting 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 34-6 (3d 2001 & Supp. 2009)).

Why is the *Brady* rule different? For one thing, *Brady* is applied retrospectively. There is no *Brady* violation unless (a) there was exculpatory evidence, (b) it was not

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disclosed, and (c) it was of such demonstrable moment that the outcome of the trial might well have been different if the evidence was disclosed or disclosed at an earlier time. *See generally Kyles v. Whitley*, 514 U.S. 419 (1995); *Acosta*, 357 F. Supp. 2d at 1232 ("*Brady* and its progeny arise in a post-trial context" and concern "whether the failure to disclose favorable material evidence in violation of defendant's due process rights justifies a new trial"). In other words, *Brady* essentially asks, "Given the prosecutor's failure to disclose, has the accused demonstrated a violation of his constitutional right to due process?" In contrast, the ethics rule is forward-looking. It creates an ethical duty and a discovery obligation at the earliest stages of a prosecution.

The Opinion makes the distinction between *Brady* and the ethical obligations clear: "[A] court's determination in post-trial proceedings that evidence withheld by the prosecution was not material is not equivalent to a determination that evidence or information did not have to be disclosed under Rule 3.8(d)." *See* Opinion at 4 n.20; *see also Mastracchio v. Vose*, No. CA 98–372T, 2000 WL 303307, at *13 (D.R.I. 2000), *aff'd*, 274 F.3d 590 (1st Cir. 2001) (stating that the prosecution's failure to disclose nonmaterial information about witness did not violate defendant's due process rights but came "exceedingly close to violating [Rule 3.8]" and ABA Standard 3–3.11(a)). Thus, while the case law interpreting a prosecutor's *Brady* obligations may limit a prosecutor's liability in various ways—for example, depending on whether the information is produced sufficiently in advance of trial to be "useful"—the ethical duties are separate and distinct and, under Rule 3.8(d), require disclosure as soon as reasonably practicable absent a protective order.

The Justice Department is aware that its ethical obligation to provide favorable information to the defense is broader than constitutional or statutory discovery standards. Only about two weeks ago, on January 4, 2010, Deputy Attorney General David Ogden issued a memorandum to prosecutors entitled, "Guidance for Prosecutors Regarding Criminal Discovery" (attached as Exhibit F). The memorandum encourages prosecutors "to

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provide discovery broader and more comprehensive than the discovery obligations," since doing so "promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases." Ex. F at 9. As for timing of the disclosure, the memorandum states that "[e]xculpatory information, regardless of whether the information is memorialized, *must be disclosed* to the defendant *reasonably promptly* after discovery." *Id.* at 10 (emphasis added). Even if the pertinent favorable information "is not provided in its original form and is instead provided in a letter to defense counsel," prosecutors should make sure "the full scope of pertinent information is provided." *Id.* Nowhere in Mr. Ogden's memorandum are prosecutors given the option of *not* providing favorable information because it presently exists in a form—such as a grand jury transcript— that is not discoverable under Rule 16 or the Jencks Act.

B. Compliance with Rule 3.8 is Critical in this Case.

It is, of course, important in every case that a prosecutor fulfill his or her ethical obligation to disclose favorable information to the defense. In a complex case such as this, it is perhaps even more important because the consequences of delayed disclosure have the potential to cause greater harm. The government currently possesses favorable information it received through its investigation, including through its interviews of more than *300 witnesses*. The government is withholding this information, and it apparently plans to continue to hold this information – where it will do the defense no good whatsoever – until eight weeks before trial.

Regardless of the prosecutors' motives or intent in withholding this favorable information, the effect is clear: withholding this information will undercut efforts of the defense to make use of it. If prosecutors are permitted to delay disclosure, defense counsel will be forced to review and analyze voluminous information in the eight weeks before trial, including identifying and locating the witnesses who provided the information, and following leads developed once the favorable information is learned. The prejudicial effect

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is not just that all of this work will have to be done at the same time as the countless other pretrial activities that must be accomplished just weeks before trial. Many of the witnesses in this case lead transient lives and will be difficult to locate after a substantial period of time has passed. *And*, defendants will be inevitably prejudiced by missed opportunities—leads to pursue, for instance—that could have been identified and pursued but for the government's late disclosure of exculpatory information.

In sum, a prosecutor has an overriding obligation "to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence." Rule 3.8 cmt.1. The Opinion reflects this goal by noting that the "timely disclosure of evidence and information that tends to negate the guilt of the accused or mitigate the offense promotes the public interest in the fair and reliable resolution of criminal prosecutions" and "promotes the proper functioning of the adversarial process." Opinion at 3-4. And the Opinion notes that these purposes are best served by enforcing RPC 3.8's demanding standard: "Because the defense can use favorable evidence and information most fully and effectively the sooner it is received, such evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) as soon as reasonably practical." *Id.*

The harmful effect of the prosecutors' decision in this case to delay disclosure of favorable evidence cuts at the heart of Rule 3.8. The rule is aimed at avoiding delay and prejudice to the defense. To meet these goals in this case, prosecutors should be required to comply with Rule 3.8 and provide the defense with favorable information now.

IV. CONCLUSION

Pursuant to RPC 3.8, the defense requests an order compelling the production of (1) the identity of witnesses whom the government has contacted and from whom it has obtained information, but whom the government will not call at trial; (2) information provided by persons contacted by the government that tends to show the defendants did not

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permit, promote or encourage prostitution as alleged in the charging document in this case; and (3) information known to the government that is relevant to showing that any defendant did not participate in underreporting customer counts at Rick's to evade the Seattle admissions tax. The government has no legitimate reason to withhold this information. Indeed, to the contrary, it has an ethical obligation to produce it now.

Respectfully submitted this 28th day of January, 2010.

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The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. FRANK F. COLACURCIO SR., et. al, Defendants.	NO. CR09-209RAJ GOVERNMENT'S RESPONSE TO DEFENDANTS' MOTION TO COMPEL PRODUCTION OF FAVORABLE INFORMATION

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Todd Greenberg and Tessa M. Gorman, Assistant United States Attorneys for said District, hereby files this Response to Defendants' Motion to Compel Production of Favorable Information (Doc. 157).

In drafting this response pleading, the undersigned Assistant United States Attorneys have coordinated with officials at the highest levels within the United States Attorney's Office for the Western District of Washington, and at appropriate levels within the U.S. Department of Justice in Washington, D.C.

I. INTRODUCTION

The Motion to Compel seeks an Order from the Court directing the government to "promptly produce" all favorable *Brady* information in the government's possession. As a preliminary matter, the government notes that the actual issue before the Court is a much narrower one than is suggested by the defendants' motion. There is no issue presented here regarding the *scope* of the government's disclosure obligations, because the government does

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not dispute that the information sought by the motion should and will be produced. Rather, the issue concerns the *timing* of the government's disclosure. More specifically, at issue is the timing of disclosure of only a *subset* of *Brady* information – that which is contained in Jencks Act witness statements. The government already has produced all other known exculpatory information in its possession.

Thus, the Court is faced with the following relatively narrow question: When is the government required to produce favorable *Brady* information that is contained in Jencks Act witness statements? The Ninth Circuit has plainly answered this question, holding that the Jencks Act governs the timing of production of *Brady* information contained within witness statements. Consistent with this case law, and with this Court's Case Scheduling Order, the government intends to produce all *Brady* information contained in witness statements on November 15, 2010, the Court's deadline for the production of Jencks Act and *Giglio* impeachment materials. Neither the recently issued Department of Justice "Guidance for Prosecutors Regarding Criminal Discovery," the United States Attorney's Manual, nor Washington Rule of Professional Conduct 3.8(d) compels a different result, because each of these sources are intended to be interpreted and applied in a manner consistent with the Jencks Act and the Ninth Circuit's controlling case law. Thus, the Motion should be denied.

II. BACKGROUND

Although the Jencks Act, 18 U.S.C. § 3500, requires the government to produce the statements of its witness only after their direct examination, in this case the government has recognized the logistical burdens that strict adherence to the Jencks Act would place upon the defense and the Court. In light of these concerns, and at the Court's urging, the government has agreed to produce Jencks Act materials eight weeks prior to trial, and the Court has so ordered. *See* Doc. 123 at 2; Doc. 156 at page 4.

The Jencks materials will constitute a small sliver of the total discovery materials in this case. To date, the government has produced more than 121,000 pages of discovery. The Jencks Act materials are contained in approximately four large binders plus the grand jury transcripts and exhibits. The vast majority of the witnesses in this case are the defendants'

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current and/or former employees (club dancers and managers, or office employees), or customers at the strip clubs. Although most of the witnesses interviewed by the government have provided incriminating information, the government acknowledges that some of the witnesses have provided information favorable to the defense. An understanding of the general nature of this favorable information is important to the disposition of the defendants' motion because, as argued below, the information is not of the type that will require extensive defense pre-trial investigation to use it effectively at trial. Rather, this information consists of things such as: (a) a blanket denial by a witness that he or she ever saw or engaged in prostitution at the strip clubs; (b) a witness' statement that a particular defendant made a self-serving exculpatory comment, for example, that prostitution was forbidden in the clubs; (c) a witness' statement that she did not typically see one or more of the defendants at the Talents West office; or (d) a witness' description of disciplinary action taken by a defendant in response to acts of prostitution at the clubs.

III. LEGAL AUTHORITIES

The Jencks Act requires the government to produce statements of its witness only after their direct examination, and a district court may not compel an earlier production of witness statements. *See, e.g. United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995). The courts have recognized that the strict timing provisions of the Jencks Act are justified by the need to protect the government's witnesses from harassment, intimidation, and tampering. *See United States v. Mills,* 641 F.2d 785, 790 (9th Cir. 1981) ("Protection of [government witnesses'] statements is necessary to protect the witnesses from threats, bribery, and perjury.") (citations omitted).[1] As a result, the courts have strictly enforced the provisions of the Jencks Act.

The *Brady* line of cases requires only that information favorable to the defense must be produced "in sufficient time to permit [the] defendant to make effective use of that material."

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[1] *See also United States v. Walk*, 533 F.2d 417, 419-20 (9th Cir. 1975) ("This protection of government files is necessary to protect government witnesses from threats, bribery and perjury. The mere fact that the witness' statement in this case contains oral 'statements' attributable to the defendant in no way diminishes the recognized governmental interest in protecting the identity of the witness, and the context of the statement, until the time of trial."); *Ogden v. United States*, 303 F.2d 734 (9th Cir. 1962).

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La Mere v. Risley, 827 F.2d 622, 625 (9th Cir. 1987). The Ninth Circuit has recognized that in many cases, "*Brady* does not necessarily require that the prosecution turn over exculpatory material before trial." *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988).[2]

There are times when the Jencks Act and the *Brady* doctrines overlap. This case presents one such instance, because the Motion to Compel seeks the production of *Brady* information contained within Jencks Act witness statements. The issue of whether the Jencks Act or the *Brady* line of cases governs the timing of production when information is both Jencks Act and *Brady* material "has caused a split in the federal circuits." *United States v. Beckford*, 962 F.Supp. 780, 789, 791 (reviewing cases).

In the Ninth Circuit, however, the issue is well settled. The Ninth Circuit has plainly held that with respect to *Brady* materials that are contained in Jencks Act witnesses statements, the timing of production under the Jencks Act trumps *Brady*. *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th Cir. 2004) ("When the defense seeks evidence which qualifies as both Jencks Act and *Brad*y material, the Jencks Act standards control."); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) ("*Brady* does not overcome the strictures of the Jencks Act. When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.").

This issue recently arose in the case of *United States v. Cerna*, 633 F.Supp. 2d 1053 (N.D. Cal. 2009), a 31-defendant RICO case pending in San Francisco, California. In ruling on a defense motion to compel production of various types of *Brady* information, including some contained within Jencks Act statements, the district court summarized the state of the law in the Ninth Circuit as follows:

> A threshold legal question is the extent to which district courts have authority, under their supervisory and case management powers, to order prosecutors to make *Brady* disclosures *prior* to trial. With respect to *Brady* materials that also happen to be Jencks Act statements, *i.e.*, "statements" with the meaning of 18 U.S.C. § 3500(e), the Ninth Circuit has plainly held that the Jencks Act trumps

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[2] *See also United States v. Manning*, 56 F.3d 1188, 1199 (9th Cir. 1995) (no prejudice resulting from government's production of letter to defense after trial commenced); *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (*Brady* materials need not be disclosed prior to trial if the defense can make meaningful use of the information upon disclosure).

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> *Brady*. *United States v. Alvarez*, 358 F.3d 1194, 1211 (9th cir. 2004); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979). In light of these holdings, the government would be within its rights in withholding Jencks Act statements until after the witness testifies on direct – and this would be so even if the Jencks Act statements contain *Brady* information. District courts in this circuit have no authority to override strict observance of the Jencks Act. . . . For immediate purposes, therefore, the concern [raised by the defense motion] reduces to *Brady* material falling outside the Jencks Act, *i.e.*, "non-Jencks *Brady* information."

Cerna, 633 F. Supp. 2d at 1055-56.[3]

IV. ARGUMENT

A. Under the Controlling Ninth Circuit Precedent, and this Court's Prior Orders, the Government Need Not Produce *Brady* Information Contained Within Jencks Act Statements at the Present Time.

On its face, the motion seeks the production of information contained in Jencks Act materials. *See* Motion at 3 (requesting information found in "agents notes, witness interview memoranda or grand jury transcripts"). Thus, the above referenced case law is dispositive of the defendant's Motion to Compel. However, the defendants attempt to side-step the controlling Ninth Circuit law by claiming not to be seeking Jencks Act materials, suggesting that a letter from the government summarizing each witness' favorable information and *identifying* each witnesses by name could be produced "without implicating the Jencks Act." Motion at 3, 4.

But this argument must fail because requiring the government to produce the letter suggested by the defendants would, in this case, be tantamount to forcing the government to identify a majority of its witnesses as well as the substance of some of their statements, contrary to the protections afforded witnesses by the Jencks Act. There are very few witnesses in this case (or any case for that matter) whose statements do not include *some* information that, under the broadest interpretation of *Brady*, could be considered favorable to the defense. Even witnesses who, for the most part, have extremely incriminating information to provide may state a fact or two that one or more of the defendants may find helpful. As a result, the

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[3] *See also United States v. Tubbs*, 2007 WL 2712980 (W.D.WA. 2007) (unpublished) (Judge Burgess' Order denying defendant's motion to compel, quoting *United States v. Alvarez* for the proposition that, "When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.").

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letter envisioned by the defense would end up serving as a virtual government witness list – the very thing the Jencks Act was intended to avoid. The defense approach also would be contrary to this Court's Case Scheduling Order, which requires the production of Jencks materials and the government's witness list on November 15, 2010.[4]

B. Delayed Production of Witness Statements is Necessary in this Case to Avoid Potential Witness Tampering, Witness Intimidation, and Obstruction of Justice.

Although the protective purposes behind the Jencks Act are important in every case, the government invokes them with special force in this particular matter. This case presents circumstances giving rise to a serious and reasonable concern about the potential for obstruction of justice, witness tampering, and witness harassment. The government has previously outlined this evidence. *See* Exhibit A (Omnibus Response to Defendants' Motions to Amend Conditions of Release (Doc. 69)). Based on this evidence, four of the six individual defendants in this case have been found by either this Court (Christiansen) or Magistrate Judge James P. Donohue (Colacurcio Sr., Colacurcio Jr., and Conte) to present a substantial concern of obstruction of justice and/or witness tampering.[5] This prosecution is the very type of case envisioned by Congress when it designed the Jencks Act as a means of protecting the government's case from efforts to obstruct justice, and the government's witnesses from harassment, intimidation, and tampering.

C. The Production of Witness Statements Eight Weeks Before Trial Will Afford the Defense Ample Time to Make Effective Use of the Favorable Information.

Considering the circumstances of this case, and the nature of the favorable information at issue here, production of the Jencks Act statements, and the favorable information contained

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[4] Moreover, the Ninth Circuit's holdings in *Alvarez* and *Jones* created a bright-line rule dictating that the timing of the Jencks Act controls the production of *Brady* information contained in witness statements. Although they certainly must have considered the issue, especially in light of the existing circuit split, the Ninth Circuit allowed for no exceptions to this rule, which is exactly what the letter requested by the defense would amount to.

[5] The government recently filed a motion to amend the bond conditions for Ebert and Fueston, on the basis of recent evidence that they continue to operate the Talents West clubs in a manner which permits prostitution. Their blatant violation of this Court's orders in that regard raises substantial concerns as to whether they will further violate the conditions of release by having inappropriate contacts with witnesses in the future.

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therein, eight weeks prior to trial will afford the defense ample time to make effective use of the information. As stated above, that is all *Brady* requires. As previously emphasized, the majority of the witnesses in this case are the defendants' current or former employees. As noted in prior filings before this Court, the defendants possess electronic databases relating to each of the dancers and managers, including personal information such as dates of birth and addresses. Thus, the defendants have the means to identify, and have ready access to, the potential pool of witnesses in this matter. *See United States v. Shaffer*, 789 F.2d 682, 690 (9th Cir. 1986) ("[Defendant] cannot claim a *Brady* violation if he was aware of the essential facts enabling him to take advantage of any exculpatory evidence."). Indeed, defense counsel have previously represented to this Court that they already have interviewed "numerous witnesses." Exhibit B at 6:2 - 6:5. It is clear, then, that the defendants' ability to prepare for trial will not be unduly prejudiced by the government's production eight weeks before trial.[6]

Moreover, the nature of the favorable information at issue here – the information contained in the witness statements as outlined generally above in section II – will not require extensive pre-trial investigation in order to put it to effective use at trial. Once the government produces the Jencks Act materials, all that will be required is for the defense to locate and interview the pertinent witnesses. The defense team, which consists of 14 attorneys of record plus an unknown number of paralegals and investigators, should be able to accomplish this within the eight weeks allotted under the Court's Case Scheduling Order.

D. The Production of Witness Statements Eight Weeks Before Trial is Consistent With the Department of Justice's Recent Guidance Regarding Discovery.

On January 4, 2010, the Department of Justice issued an internal memorandum entitled, "Guidance for Prosecutors Regarding Criminal Discovery." *See* Exhibit F to Motion to Compel ("Guidance Memorandum"). The defendants' attempt to use the Guidance Memorandum as a sword against the government should be rejected by this Court.

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[6] Although the defendants may be aware of the potential pool of witnesses, providing them with the information sought by the Motion would significantly increase the potential for tampering and obstruction of justice, because it would identify those witnesses who have provided favorable information for the defendants, and, by omission, it would tend to identify those who did the opposite. The latter witnesses are the ones most likely to be tampered with.

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As a preliminary matter, the preface of the Guidance Memorandum expressly states that "[i]t provides prospective guidance only and is not intended to have the force of law or to create or confer any rights, privileges, or benefits." *Id.* at 1. This is consistent with federal case law holding that internal government guidance or policy memoranda do not confer rights on individual defendants in criminal cases. *See United States v. Caceres*, 440 U.S. 741, 754-56 (1979); *United States v. Tatoyan*, 474 F.3d 1174, 1178 (9th Cir. 2007). Similarly, the Guidance Memorandum states that it "is subject to legal precedent, court orders, and local rules." Exhibit F to Motion to Compel at 1. Therefore, the memorandum is not intended to undermine the Jencks Act, or to supplant or supersede controlling Ninth Circuit case law.

Moreover, the defendants misinterpret the substance of the Guidance Memorandum as it pertains to the timing of production of *Brady* materials. The Guidance Memorandum specifically encourages prosecutors to consider the protective policies embodied in the Jencks Act in determining the timing of production of *Brady* and other information. In this regard, the memorandum advises that although "[e]xculpatory information . . . must be disclosed to the defendant reasonably promptly after discovery," *Id.* at 10, in determining what is reasonable in a given case, the prosecutor "should always consider any appropriate countervailing concerns in the particular case" which may warrant a reasonable delay in the timing of production. *Id.* at 9. For example, the Guidance Memorandum states that it is appropriate for prosecutors to consider "protecting victims and witnesses from harassment and intimidation; protecting the privacy interests of witnesses; . . . protecting the trial from efforts at obstruction; . . . and other strategic considerations that enhance the likelihood of achieving a just result in a particular case." *Id.* Thus, the Guidance Memorandum affords prosecutors the flexibility to consider these sorts of "countervailing concerns," and when appropriate, disclosure is subject to being controlled, including postponed, as long as disclosure is made in time for the defendant to make effective use of *Brady* information.[7] As discussed above,

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[7] Likewise, Section 9-5.001 of the United States Attorney's Manual ("USAM") acknowledges that in determining the timing of production of exculpatory and impeachment information, "other interests, such as witness security and national security, are also critically

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the facts of this case implicate many of these "countervailing concerns" regarding the potential for obstruction of justice and witness tampering.

E. The Government's Disclosure Eight Weeks Prior to Trial Comports with the Ethical Obligations Imposed on Prosecutors Under RPC 3.8(d).

1. Timeliness Under RPC 3.8(d) Must be Determined in Accordance with Governing Law, Procedure, and Court Orders.

The ethical conduct of attorneys practicing before this Court is governed by Local General Rule 2(e)(2), which requires attorneys to comply with the Washington Rules of Professional Conduct. This Court has "broad discretion in interpreting and applying [the] local rules." *Avocent Redmond Corp. v. Rose Electronics*, 491 F.Supp.2d 1000, 1003 (W.D. Wash. 2007) (*quoting Miranda v. S. Pac. Transp. Co.*, 710 F.2d 516, 521 (9th Cir. 1983)).

At issue here is Washington RPC 3.8(d), which provides: "The prosecutor in a criminal case shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."[8] The defendants contend that RPC 3.8(d) requires the government to produce information favorable to the defense that is contained in Jencks Act materials "as soon as reasonably possible after obtaining such information" (Motion at 3, 6), a timing requirement that would be contrary to the disclosure obligations imposed under governing federal law, procedural requirements, and the Court's Scheduling Order. The defense interpretation of the Rule must fail, because it is well settled that a federal court, in interpreting and applying the Rules of Professional Conduct, may consider ethics opinions and state cases, but they "should be relied upon only to the extent that they are compatible with federal law and policy." *Grievance Comm. for the S. Dist. of New York v. Simels*, 48 F.3d 640, 645 (2d Cir. 1995) (declining to

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important, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted. . ." *See* Exhibit C at 1.

[8] We see no need for the government to seek a protective order under the Rule at this time, because a protective order is necessary only where the Rule requires a disclosure, or the timing of a disclosure, that in the government's view would be prejudicial. Here, under the government's interpretation of the Rule, disclosure consistent with the Court's Scheduling Order meets the Rule's timeliness requirement.

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follow a local ethics opinion's interpretation of a New York ethics rule, after concluding the interpretation was contrary to federal law and policy).[9] Consistent with this case law, the Preamble to the Washington RPC acknowledges that the Rules must be interpreted consistently with the laws and procedures that govern criminal prosecutions. *See* Paragraph 15 ("[t]he Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."). This line of authority makes clear that RPC 3.8(d) must be interpreted in a manner that is consistent with the controlling Ninth Circuit precedent that bars a court from requiring the production of Jencks Act material in advance of the timing specified by that statute, even where that material contains *Brady* information. *See Alvarez*, 358 F.3d at 1211; *Jones*, 612 F.2d at 455; *Cerna*, 633 F. Supp. 2d at 1055-56. This Court should reject any interpretation of RPC 3.8(d) that would require the government to make disclosures on a schedule that is prohibited by federal law.

The cases cited by the defendants do not support their premise that that Rules like RPC 3.8(d) should be interpreted as stand-alone obligations requiring the immediate disclosure of favorable information in the possession of the government, without regard to governing law. Rather, the majority of those cases involve issues pertaining to the *scope* of the government's disclosure obligations, and not to the issues of *timing* such as are presented here. *See, e.g. Kyles v. Whitley*, 514 U.S. 419 (1995); *Mastracchio v. Vose*, 2000 WL 303307 (D. R.I. 2000), *aff'd* 274 F.3d 590 (1st Cir. 2001); *Cone v. Bell*, 127 S.Ct. 1769 (2009).[10]

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[9] *See also Cord v. Smith*, 338 F.2d 516, 524 (9th Cir. 1964) (declining to apply state's interpretation of California ethics rule after finding it inconsistent with duties of attorneys in federal court); *In re Congoleum Corp.*, 426 F.3d 675, 691 (3d Cir. 2005) (in the context of "the complexities of [a federal] bankruptcy proceeding," interpreting New Jersey ethics rule and its ABA counterpart); *United States v. Plumley*, 207 F.3d 1086, 1095 (8th Cir. 2000) (the interpretation of state disciplinary rules as they apply to federal criminal practice "should be and is a matter of federal law'")

[10] We are aware of only one case, *In re Attorney C*, 47 P.3d 1167, 1170-71 (Colo. 2002), which interprets a Rule like RPC 3.8(d) as requiring a particular timing for disclosures that is distinct from the timing of disclosures required under the *Brady* line of cases. However, the reasoning of *Attorney C* is not applicable here because, among other reasons, it was decided by a state (not federal) court, and thus the Jencks Act question presented here was not at issue.

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Given the absence of federal case law supporting the defendants' contention that RPC 3.8(d) should be interpreted as a stand-alone provision requiring the government to disclose information "as soon as reasonably practical," the defendants rely almost entirely on ABA Opinion 09-454. However, it bears noting that Opinion 09-454 expressly acknowledges that it "is based on the [ABA] Model Rules of Professional Conduct," and that "laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling." See ABA Opinion at 6, fn 2. Thus, the opinion itself recognizes that the views expressed therein must give way, to the extent that they are contrary to governing law or to other authority interpreting a Rule in a different way. Here, the views of the ABA Opinion should be rejected by this Court because, among other reasons, the Opinion is contrary to controlling federal case law and to the Jencks Act.

The Opinion is woefully lacking in concrete support for the novel position expressed therein – it cites no relevant authority for the proposition that the Rule requires a prosecutor to automatically disclose favorable information "as soon as reasonably practicable," without regard to other governing considerations. Instead, the Opinion focuses almost entirely on the benefits to be gained by defendants from receiving information at the earliest possible time. But, as discussed above, by enacting the Jencks Act prescribing the timing of the government's disclosures of witness statements, Congress determined that such timing serves the vital government interest of protecting the safety of witnesses and victims.[11]

2. The Defendants' Interpretation of Rule 3.8(d) Is Contrary to the Text of the Rule.

The fact that RPC 3.8(d) requires "*timely*" disclosure, rather than "*prompt*" disclosure, illustrates that the express language of the Rule itself does not require the immediate disclosure urged by the defendants. Although neither the Rule nor the relevant Comments further explain what is meant by the term "timely," a careful analysis of the RPC makes clear that when the

[11] Because no issue has been raised relating to the *scope* (as opposed to *timing*) of the disclosure obligation under RPC 3.8(d), this Court need not address the separate issue of whether RPC 3.8(d) is subject to a materiality standard. Suffice it to say that the government disagrees, in significant respects, with the views expressed in the ABA Opinion concerning the materiality standard.

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Rules intend to require that an action be accomplished "as soon as reasonably possible," the Rules use the term "promptly." Numerous RPCs use the word "promptly" to convey that an action should be carried out without delay.[12] On the other hand, when the Rules use the term "timely," the context does not convey that the action in question must be accomplished immediately or at once, but rather conveys that timeliness is to be determined by reference to the overall context, as well as the facts and circumstances.[13] The Rules use the terms "timely" and "promptly" consistent with their common meanings. *See The Oxford English Dictionary*, 2nd Ed. (1989) (defining "timely" as "occurring, done, or made at an appropriate or suitable time," and "promptly" as "quick, without delay").[14] Therefore, the term "timely," as used in RPC 3.8(d), should not be interpreted to mean that the disclosures it requires are to be made immediately or "as soon as reasonably possible," but rather should be read to require that disclosure be made at an appropriate or suitable time, a determination that necessarily must be made by reference to criteria outside the Rule itself, such as by reference to the Court's

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[12] The term "promptly" occurs in RPCs 1.0(b), 1.4, 1.5, 1.7, 1.1; 1.12, 1.15, 1.16, 1.18, 3.3, and 4.4. In all of these Rules, the context indicates that the use of the term "promptly" is intended to convey that the timing of a required disclosure, notice, or communication should be accomplished "without delay."

[13] The term "timely" occurs in RPCs 1.0(k), 1.11.(b)(2), 1.12(c)(2), 1.13(c), 1.13(h)(2), and 1.18(d). In each instance, the use of the term "timely" conveys that the action in question should occur at the appropriate time or after the appropriate interval, with appropriateness necessarily determined, at least in part, by fact-driven considerations external to the Rule.

[14] Both terms occur in two Rules, RPCs 1.11 and 1.12, with each term used consistently with its dictionary definition. RPCs 1.11(b)(1) and 1.12(c)(1) require that a disqualified lawyer be "timely" screened from participation in a prohibited matter, conveying, consistent with the definition of screening in RPC 1.0(h), that screening must be accomplished at a time when it will be effective, while RPCs 1.11(b)(2) and 1.12(c)(2) require written notice of a lawyer's disqualification to be made "promptly," conveying that notice should be given without delay.

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Scheduling Order and the Jencks Act, which govern the timing of the government's disclosure obligations of Jencks Act materials in the instant case.

DATED this 4th day of March, 2010.

Respectfully submitted,

JENNY A. DURKAN
United States Attorney

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Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. FRANK FRANCIS COLACURCIO SR., FRANK FRANCIS COLACURCIO JR., LEROY RICHARD CHRISTIANSEN, DAVID CARL EBERT, STEVEN MICHAEL FUESTON, JOHN GILBERT CONTE, D.C.E. INC., MM MR RM CORPORATION, and LLC EVERETT I, Defendants.	No. CR09-0209 RAJ DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF FAVORABLE INFORMATION NOTE ON MOTION CALENDAR: March 10, 2010

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I. INTRODUCTION

After months of "careful consideration," and in consultation with the "highest levels" of the U.S. Attorney's Office, the government falls back on familiar, well-worn ground, trumpeting the Jencks-trumps-*Brady* rule (a red herring), and disclaims a present obligation to produce the favorable information to an accused, even as it acknowledges it exists. The government exaggerates concerns of witness tampering both to make its position seem justified and to give the Court pause about calamities that might result from enforcing the ethical rule. The government all but ignores its duties under RPC 3.8(d), which it appears to regard as having all the force of a law review article, not a binding rule of ethics.

This is all misdirection. Government attorneys have received information favorable to the defense, including information that defendants forbid prostitution and disciplined those who were involved in acts of prostitution, among other things. Govt. Resp. at 3. This exculpatory information cuts at the heart of the government's prosecution theory. The government is obligated to provide this favorable information now and doing so does not implicate the Jencks Act. If the government believes that producing this information poses a threat to witnesses, it must, as RPC 3.8(d) expressly contemplates, move for a protective order and offer proof to justify withholding the information. Its other arguments—that the favorable information is not particularly meaningful or that the defense will have enough time to make use of it under the existing schedule—merit little response. RPC 3.8 does not confer on the prosecutor the right to determine how useful or complex the favorable evidence is or to decide for defense counsel how much time is enough to make "adequate" use of it.

II. DISCUSSION

A. RPC 3.8 Cannot Simply Be Dismissed as a Suggestion or as "Unpersuasive."

The government's approach to its obligations under RPC 3.8(d) can only be described as dismissive—the ethical rule is treated as a nice suggestion (if overly favorable to defendants) but is not regarded as a serious obligation. For instance, the government persists

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in arguing that the constitutional rule announced in *Brady* is the only relevant yardstick. *See* Resp. 7 (arguing that production of favorable information before trial "is all that *Brady* requires"). The government cites several *Brady* cases, standing for the proposition that the government need only produce favorable information "in sufficient time to permit [the] defendant to make effective use of that material." Resp. at 3-4 (quoting *La Mere v. Risley*, 827 F.2d 622, 625 (9th Cir. 1987)).

This position simply is not defensible. There is little question but that a prosecutor's obligations under RPC 3.8(d) are broader than under the constitutional rule. *See* ABA Opinion at 1 (Rule 3.8(d) "requires the disclosure of evidence *or information favorable* to the defense *without regard to the anticipated impact of the evidence or information on the trial's outcome*.") (emphasis added). The Opinion describes as "inaccurate" that RPC 3.8(d) "requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure." *Id*. If the government does not want to take the word of the formal ethics opinion, which it derides as "unpersuasive" and "woefully lacking in concrete support," Resp. at 11, a higher authority—the Supreme Court—has weighed in on this issue. *See Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) ("Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.") (citing ABA Model Rule of Professional Conduct 3.8(d) (2008)).[1] Moreover, as the Opinion recognizes, the ABA Standards for Criminal Justice also state that prosecutors' ethical duties of disclosure "go[] beyond the corollary duty upon prosecutors imposed by constitutional law." *Id.*; ABA Standards for Criminal Justice 3-3.11(a) ("A prosecutor shall not intentionally fail to make

[1] Local General Rule 2(e) states that, in construing the RPCs, the "Ethics Opinions" related to the Model Rules of Professional Conduct of the ABA are to be considered.

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timely disclosure to the defense, at the earliest feasible opportunity, of all evidence which tends to negate the guilty of the accused or mitigate the offense charged . . . .”).

The government jumps through rhetorical hoops to explain away the ABA Committee’s interpretation of its own rule as to the “timeliness” of production. The government dithers over the meaning of “promptly” versus “timely,” concluding, finally, that “timely” means “at the appropriate time.” Resp. at 12 n.13. Under RPC 3.8(d), *now* is the appropriate time. The government has long had this favorable information, is in a position to produce it now, and can do so without implicating the Jencks Act. There are no legitimate countervailing considerations, at least none that have yet to be found persuasive. More importantly, it is not for the prosecutor to decide when he or she feels it is appropriate to furnish favorable information; it must be furnished “as soon as it is reasonably practicable to do so.” Opinion at 6. The government excuses its non-production by noting that the defense should have sufficient resources to make use of the evidence closer to trial. The issue is not just whether the defense will have time to review the four-volumes-and-growing worth of witness materials (not to mention grand jury transcripts) in time for trial. It is about whether the witnesses can be located and interviewed and whether leads can be developed and the information can otherwise be put to use. Fortunately, RPC 3.8 does not confer on the government the discretion to decide for the defense when it is appropriate for the information to be furnished, nor does it justify delayed production based on the government’s beliefs concerning the defense’s resources.

B. The Defense Request Does not Implicate the Jencks Act.

Because it is advantageous to do so, the government focuses the Court’s attention primarily on Jencks and *Brady*. But the defense does not seek “substantially verbatim” statements of witnesses now. The government can (and has an obligation to) furnish the defense favorable information, in whatever form it chooses. It need not produce a transcript, or a report of interview.

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The January 4, 2010 DOJ memorandum entitled, "Guidance for Prosecutors Regarding Criminal Discovery" states that "[e]xculpatory information . . . *must be disclosed* to the defendant *reasonably promptly* after discovery" and that, even if the favorable information "is not provided in its original form and is instead provided in a letter to defense counsel," prosecutors should make sure "the full scope of pertinent information is provided." Calfo Decl. Ex. F at 10. The government has in other cases provided exculpatory information in a summarized form without disclosing verbatim witness statements. For example, in the recent prosecution of Ted Stevens, the government provided defense counsel with a letter and redacted FBI 302 memorandum summarizing witness statements. *See* Dkt. No. 130-6 in Case No. 1:08-cr-00231-EGS (attached hereto as Ex. A). So, too, must the prosecutors in this case (at a minimum) set out the favorable information of which they are aware in a letter to defense counsel (or by some other means), if such information is otherwise contained in materials they choose not to produce.

C. The Government Is Making Two Highly Questionable Representations to the Court in Withholding the Favorable Information.

The government's argument that the Jencks Act justifies withholding favorable information rests on two highly questionable factual representations. First, the government is representing to the Court that the favorable information it currently possesses is possessed *only* in the form of Jencks material, and, therefore, under its view, is not required to be produced until after the witness who provided the information has testified. But the Jencks Act does not protect the identity of witnesses nor does it cover all witness materials, but only statements adopted by the witness or those that are "substantially verbatim" and "recorded contemporaneously." 18 U.S.C. § 3500(e). Thus, the government must represent that there is *no* exculpatory information contained within FBI 302 or other law enforcement memoranda that does not qualify as a "substantially verbatim" statement of a witness. *Cf. United States v. Alvarez*, 86 F.3d 901 (9th Cir. 1996) (holding that, although an agent's rough notes do not qualify as Jencks statements, they must be disclosed if they contain material and exculpatory

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information); *United States v. Thomas*, 12 F.3d 1350, 1364 (5th Cir. 1994) ("An agent's interview notes . . . are not 'statements' of the witnesses interviewed [under the Jencks Act] unless the witnesses 'signed, read, or heard the entire document read.'"). Even with the government's "Jencks trumps all" argument, only some materials are protected from disclosure. The government should be required to disclose whether exculpatory information is contained in FBI 302 or other law enforcement memoranda, including rough notes of agents, that do not qualify as a "substantially verbatim" statement of a witness.

Second, for the government to claim that all 300 statements are protected by the Jencks Act, it must be able to represent that it intends to call 300 witnesses at trial. If the government cannot make that representation at the hearing, then the witness statements of those persons whom it is not calling cannot be categorized as Jencks material, and exculpatory material contained within those statements cannot be withheld under any theory.

D. Witness Tampering Is a False Concern.

The government appears to believe that the Jencks Act protects the identity of witnesses. It does not, and courts have the authority to order the government to identify witnesses for the defense. *See United States v. W.R. Grace*, 526 F.3d 499, 509-10 (9th Cir. 2008) (en banc) (holding that a district court has the authority to order the government to produce a witness list so that the defense may prepare for trial). In any event, the government's concern about having to identify witnesses makes no sense because, as the government itself points out, "the majority of the witnesses in this case are the defendants' current or former employees." Resp. at 7. Thus, witnesses' identities are not going to be compromised by furnishing favorable information—a fact the government all but recognizes. *See id*. ("[T]he defendants have the means to identify, and have ready access to, the potential pool of witnesses in this matter.").

Moreover, the government has not been able to establish, by proof rather than bare assertion, witness tampering in this case. Indeed, at the bond hearings, the Court stated that

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between the time of the search warrant and the bond hearings (a period of 13 months) "there has been no evidence of obstruction, tampering with witnesses, interference or any ongoing obstructionist activity," nor any evidence at all that "any dancer, witness, or manager has expressed a single shred of fear or any evidence of concern about witness tampering, and that would specifically include the prospective witnesses, including dancers, managers, or any prospective clients or employees." Aug. 21, 2009 Hearing Tr. at 60–61 (excerpts attached as Ex. B). In light of the fact that the defense seeks only *favorable* information supplied by witnesses, the government's position is even more strained. *Cf. United States v. Acosta*, 357 F. Supp. 2d 1228, 1235-36 (D. Nev. 2005) ("[T]the prosecution calls witnesses to offer inculpatory evidence. If a witness' testimony includes exculpatory or impeachment evidence, then that witness' usefulness to the prosecution is limited. Subsection (a) [of the Jencks Act] was intended to protect against the danger of improper witness influence. This danger is substantially lessened when witness testimony includes exculpatory evidence[.]").

III. CONCLUSION

For these reasons, defendants request an order compelling the government to adhere to its obligations under RPC 3.8(d) and produce all favorable information currently known to it and within its possession.

Respectfully submitted this 10th day of March, 2010.

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THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA, Plaintiff, v. FRANK F. COLACURCIO, SR., *et al.* Defendants.	No. CR 09-209 RAJ SUBMISSION OF SUPPLEMENTAL AUTHORITY

Frank Colacurcio, Sr. submits supplemental authorities on two points raised in defendants' joint motion to regarding exculpatory information and RPC 3.8(d). (Clerk's Docket 157.)

I. *Erickson v. Newmar Corp.,* 87 F.3d 298 (9th Cir. 1996)

We bring this case to the Court's attention because it addressed an ethics issue in a Model Rules state and demonstrated the Ninth Circuit of Appeal's reliance on an ABA Formal Opinion, as a basis for its ruling. The plaintiff in the matter sought relief as a result of defense counsel's breach of the Nevada Rules of Professional Conduct. Nevada had adopted the ABA Model Rules, 87 F.3d., at 302, but there was "a scarcity of case law on

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the issue" presented. *Id.* The Court relied upon ABA Formal Ethics Opinion 93-378, "applying [its] reasoning" (and that of an Oregon Bar Association opinion) to conclude that defense counsel violated Nevada ethical rules. *Id.* The Court went on, in unusually harsh language, to conclude that the trial court "abdicated its duty" to address the ethics issue presented and "abused its discretion by failing to address" it. *Id.,* at 303.

As there, the issue we present is one on which there is limited case law. As there, we believe that the Court should rely upon and require compliance with the ABA Formal Opinion. Although that is the only Ninth Circuit decision expressly relying on ABA Formal Ethics Opinion that we located, numerous other decisions of that Court have relied on the ABA Criminal Justice Standards in construing ethical obligations of counsel. *Smith v. Mahoney*, 2010 U.S. App. LEXIS 4704, 14-16 (9th Cir. Mar. 5, 2010) (defense counsel's efforts found deficient, based on the American Bar Association, Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.); *Pinholster v. Ayers*, 2009 U.S. App. LEXIS 26850, 46-48 (9th Cir. 2009) (same); *United States v. De Gross*, 1992 U.S. App. LEXIS 5645 (9th Cir. 1992) ("The American Bar Association rules of professional ethics state that "the basic duty [criminal] defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA Standards for Criminal Justice, Standard 4-1.2(b)."; *United States v. Leonti*, 326 F.3d 1111, 1120-1121 (9th Cir. 2003) (claim of ineffective assistance of counsel rejected because counsel adhered to the ABA Standards.); Levine v. United States Dist. Court for Cent. Dist., 1985 U.S. App. LEXIS 21572, 27-29 (9th Cir. 1985) (permissible scope of public statements by counsel resolved, on part by reliance on the ABA Model Rules of Professional Conduct and the Criminal Justice Standards.)

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The Washington Supreme Court too has relied on ABA Standards in deciding ethics issues that have come before it, *e.g.*, *In re Disciplinary Proceeding Against Boelter*, 139 Wn.2d 81, 99 (1999). "T]he ultimate responsibility and authority for determining the nature of attorney discipline rests with this court." [Citation omitted.] In meeting that responsibility, we are guided by the AMERICAN BAR ASS'N CTR. FOR PROFESSIONAL RESPONSIBILITY'S STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986)."

Under the Washington RPC, "Some of the Rules are imperatives, cast in terms of 'shall' or 'shall not." (Preamble to RPC, at ¶14.) Rule 3.8(d) is an imperative. Compliance is mandatory. Lawyers for the Department of Justice are bound to comply with it.

> At this point a brief historical reference appears in order. During the early part of the decade of the 1990's, intense discussions were had between state judicial authorities and the Department of Justice over a position taken by the DOJ in a written communication popularly referred to as the "Thornburgh Memorandum." In essence, that memorandum created serious problems by excusing federal attorneys from compliance with state ethics rules. The conflict that developed was dissipated when the Congress adopted what is now 28 U.S.C. § 530B, and made state ethics rules applicable to government attorneys. [Footnote omitted.]

United States v. Talao, 222 F.3d 1133, 1139-1140 (9th Cir. 2000).

II. *United States v. Gonzalez-Melendez*, 594 F.3d 28, 35 - 36 (1st Cir. 2010)

Defendants' reply memorandum (Clerk's Docket 192), addressed the government's assertion that the Jencks Act trumps the ethical rule. The *Gonzalez-Melendez* opinion appeared in West's advance sheets after that memorandum was filed. There, the defendant asserted that he was denied access to an FBI interview report of a witness' "statement," in violation of the Jencks Act. The matter was remanded to the district court, or a hearing. At the hearing, the district court heard testimony from the FBI agent who interviewed the witness and wrote the report (an FD-302 report form).

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"Morales testified that he did not record or transcribe" the witness' 'oral statement.'" In preparing the report he "relied" on notes he took during the interview. "Morales further clarified that [the witness] neither signed nor adopted either the 302 or the notes." Based on his testimony, the district court found "that the 302 was not a 'substantially verbatim recital of an oral statement made by a witness,' . . ." The Court of Appeals sustained that finding, even after the FBI agent said his report "contained 99% of what [the witness] told him." The Court of Appeals also concluded that the defendant failed to prove that the statement was adopted or approved by the witness, "[a]lthough Morales testified that he 'repeated some of the points of the interview'" to the witness.

The decision illustrates that the party invoking the Jencks Act has the burden of proving that an interview memo, or notes of an interview, are "statements" as defined by the Jencks Act. That point was addressed by the Court of Appeals in its earlier opinion remanding the case for a hearing.

> Because the Jencks Act contains several definitions of "statement," the district court was obliged (and on remand, is obliged) independently to determine whether the Form 302 meets any of the Jencks Act's definitions of "statement."
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> * * *
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> Thus, consistent with Supreme Court and circuit precedent, we remand this case to the district court for the limited purpose of revisiting its Jencks Act ruling in light of the proper legal standards. The district court should independently satisfy itself whether or not the Form 302 reflecting an FBI interview with Evans was discoverable under the Jencks Act. In that endeavor, we note that it would be difficult to complete the task without reviewing the document itself and that it likely would be helpful to hear from not only Mr. Evans, but also the agent(s) who interviewed him and the agent who prepared the Form. *See Campbell*, 373 U.S. at 490-91.

United States v. Gonzalez-Melendez, 570 F.3d 1, 4 (1st Cir. 2009).

Gonzalez-Melendez is consistent with law in the Ninth Circuit. *United States v. Pisello*, 877 F.2d 762, 768 (9th Cir. 1989) (whether notes taken by FBI agents are Jencks

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Act "statements" "remains a question of fact . . ." *Gonzalez-Melendez* relied on the Supreme Court's decision in *Goldberg v. United States*, 425 U.S. 94, 108-109 (1976). At issue there were notes taken by a federal prosecutor in a witness interview. There too, the Court remanded the matter for a fact gearing on whether the materials at issue were "statements" as defined by the Jencks Act.

Although the government here broadly asserts that it may delay production of exculpatory information, on its claim that it is contained in Jencks statements, it has not offered any proof of the assertion. It bears the burden and it has not done so. It has made it impossible for the Court to determine independently whether memos or reports or notes of an interview are "statements" of a "witness" as defined in the Jencks Act or Rule 26.2, Fed R. Crim. P. Its claim must be rejected for that reason.

Dated: March 21, 2010.

Respectfully submitted:

/s/ Irwin H. Schwartz

_____

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Attorney for Frank Colacurcio, Sr.

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. FRANK FRANCIS COLACURCIO SR., et al., Defendants.	CASE NO. CR09-209RAJ ORDER

I. INTRODUCTION

This matter comes before the court on Defendants' motion to compel the production of information favorable to them. Dkt. # 157. The court has heard oral argument on the motion, and has considered the parties' briefs and supporting material. For the reasons stated below, the court DENIES the motion.

II. BACKGROUND

There are five individual Defendants in this RICO action, all of whom have some role in the operation of four topless dancing clubs in the Seattle area. Defendants are alleged to have permitted, facilitated or encouraged dancers at the clubs to engage in prostitution, to have laundered the proceeds of prostitution, and to have evaded payment of a Seattle tax on admissions to the clubs. No one disputes that the Government has produced a mountain of evidence to Defendants; but no one disputes that the Government has not produced statements of as many as 300 potential witnesses for the prosecution.

This motion explores the Government's duty to disclose evidence and information favorable to the Defendants. No one disputes that the Government has such a duty. The Constitution imposes that duty, as the Supreme Court has held in *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and their progeny. The *Brady* line of cases establishes only a floor – the minimum extent of a prosecutor's obligation to disclose favorable information. *Cone v. Bell*, 129 S.Ct. 1769, 1783 n.15 (2009) (noting that while *Brady* "only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations"). The Federal Rules of Criminal Procedure, statutes, and binding ethical rules in some instances impose disclosure obligations that exceed the Constitutional minimum. This motion highlights potential tension between a binding ethical rule, federal rules and statutes, and a court's case management orders. It does not concern the scope of the prosecution's duty of disclosure, but rather *when* the Government must fulfill its duty to disclose favorable information.

In August 2009, the Government was obligated to produce all discovery mandated by Rule 16(a) of the Federal Rules of Criminal Procedure, with the exception of Rule 16(a)(1)(G) expert witness discovery. The scope of disclosure under Rule 16(a) and its analogue in this District's local rules is broad. Fed. R. Crim. P. 16(a)(1)(A)-(F); Local Rules W.D. Wash. CrR 16(a)(1)(A)-(L). Rule 16 expressly does not require, however, that the Government produce witness statements subject to the Jencks Act, 18 U.S.C. § 3500. Fed. R. Crim. P. 16(a)(2) ("Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500."); Local Rules W.D. Wash. CrR 16(a)(1)(L) ("The attorney for the government is not required, however, to produce any statements of witnesses which fall within the purview of [the Jencks Act] until such time as required under those provisions.").

The Jencks Act, enacted in 1957, permits the Government to withhold the statement of a "Government witness or prospective Government witness," regardless of

its contents, until the Government completes direct examination of the witness at trial. 18 U.S.C. § 3500(a). To fall within the Jencks Act, a "statement" must be made by the witness herself or transcribed in "substantially verbatim" fashion from the witness's oral statement. 18 U.S.C. § 3500(e). Although the Jencks Act was enacted in part "to protect government witnesses from threats, bribery and perjury," it applies regardless of whether there is any realistic danger of interference with witnesses. *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975); *United States v. Bobadilla-Lopez*, 954 F.2d 519, 521 (9th Cir. 1992) ("[T]he legislative history expresses a much greater concern with limiting the application of [court] decision[s] so that [they] would not hamper the workings of law enforcement by forcing wholesale disclosure of government materials and files."). The parties' debate about whether witness tampering is a realistic concern in this case is thus irrelevant. The Jencks Act applies regardless.

In this case, the Government has promised to provide Jencks Act materials by November 15, 2010 – eight weeks before trial begins on January 10, 2011. Dkt. # 122. That promise is now memorialized in the court's December 2, 2009 case scheduling order. Dkt. # 156.

The Government asserts that it has now produced all discovery (except expert witness discovery) governed by Rule 16(a), including all *Brady* material, except to the extent that such material is contained within Jencks Act statements.

Defendants contend that the Government's production of discovery is inadequate, relying neither on Rule 16(a), the Jencks Act, nor *Brady*, but rather on Washington's Rules of Professional Conduct ("RPCs"). RPC 3.8(d) provides as follows:

> [The prosecutor in a criminal case shall] make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Washington RPCs apply to the Assistant United States Attorneys prosecuting this action via The Citizens Protection Act of 1998:

> An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as others attorneys in the State.

28 U.S.C. § 530B(a). In Defendants' view, RPC 3.8(d) compels the Government to produce any undisclosed favorable information *now*, not eight weeks before trial. To the extent that the information is contained in Jencks Act statements, they urge the court to order disclosure of the information without necessarily requiring production of the statements themselves.

III. ANALYSIS

The court begins its analysis by clarifying what undisclosed evidence and information is at issue. The Government assures the Defendants and the court that it has already divulged all favorable information not embodied in Jencks Act statements. Defendants offer no particular reason to doubt this assertion. They complain that the Government has hundreds of witness statements, and that it cannot possibly intend to call each of those witnesses at trial. The Government admitted as much at oral argument, but explained that it has not yet decided which witnesses it will call. The Jencks Act expressly applies to a "prospective Government witness." 18 U.S.C. § 3500(a). In a different case, the court might have to decide whether a prosecutor could withhold statements from any *potential* government witnesses until it has finally determined whether that witness will testify at trial – a determination that might not come until the close of the prosecution's case at trial.[1] This is not such a case, because the Government has agreed to disclose its witness list and all Jencks Act statements eight weeks before

[1] The court has authority to order the prosecution to produce a final witness list in advance of trial. *United States v. W.R. Grace*, 526 F.3d 499, 513 (9th Cir. 2008). It thus presumably has power to prevent the Government from withholding evidence by designating an overbroad universe of potential Government witnesses.

trial, an agreement memorialized in the court's scheduling order. On the same date, the Government must disclose any information not previously disclosed from a non-witness that falls within the broad scope of Rule 16(a) and its analogue in the local rules. *See* Fed. R. Crim. P. 16(c)(1) (imposing continuing duty to disclose). The Government is thus withholding, until eight weeks before trial, all statements of potential witnesses and any "favorable information" contained therein.

It is important to acknowledge that the term "favorable information" is likely far too flattering in these circumstances. Witnesses who have information truly favorable to the defense are not Government witnesses or even potential Government witnesses. Prosecutors will not call a witness whose testimony is "favorable" to the defense in the ordinary sense of the word, nor could a prosecutor ethically delay the production of truly favorable information by designating a witness with information truly favorable to the defense as a potential witness for the prosecution. Any witness statement that the Government is withholding thus contains "favorable" information only in the sense that while portions of it may tend to negate one or more Defendants' guilt, the statement overall tends to prove one or more Defendants' guilt. Defendants must necessarily rely on the Government's judgment and good faith in this regard, but that is always so in discovery in criminal cases.[2] Defendants' reliance on *United States v. Gonzalez-Melendez*, 570 F.3d 1 (1st Cir. 2009), as establishing the Government's obligation to prove that it is withholding information consistent with the Jencks Act is misplaced. *Gonzalez-Melendez* held that a trial court must conduct an independent investigation into the prosecution's assertion that a document summarizing the witness's testimony is *not* a Jencks Act statement. 570 F.3d at 3. The trial court's duty arose when, after a witness

[2] Particularly in a multi-defendant prosecution like this one, the decision to withhold witness statements or information disclosed therein can be ethically complex. Imagine, for example, that a dancer witness in this case testified before the grand jury that "Defendant A encouraged me to engage in sex acts with customers, but Defendant B told me that I should never do that." The statement tends to negate the guilt of one Defendant while tending to prove the guilt of another. A prosecutor who justifies the decision to withhold such information based solely on the Jencks Act does so at her own peril.

finished direct examination, prosecutors asserted that an FBI agent's summary of an early witness interview was not a Jencks Act statement. *Id*. Nothing in *Gonzalez-Melendez* suggests that a trial court must conduct an independent investigation whenever a prosecutor makes a pretrial assertion that evidence is a Jencks Act statement. That obligation would require the court to review the Government's purported Jencks Act statements in advance of trial in every case in which a defendant requests it. Defendants cite no case, and the court is not aware of one, in which a prosecutor has been compelled before trial to produce discovery she contends is protected by the Jencks Act so that the court can test her contention.

The question this motion presents is whether the Government can delay disclosure of witness statements and any favorable information contained therein until eight weeks before trial. The answer the Government urges is that because the Jencks Act permits it to withhold the statements until each witness finishes direct examination, an agreement to produce the statements eight weeks before trial must is not merely lawful, it is generous.

Defendants urge a different conclusion for several reasons. They contend that RPC 3.8(d), via the Citizens Protection Act, implicitly overrules the Jencks Act to the extent they conflict. In the alternative, they contend that the Jencks Act does not permit the Government to withhold favorable *information* found within witness statements, even if it permits the withholding of the statements themselves. The court now turns to each argument.

A. RPC 3.8(d) Does Not Override the Jencks Act.

As to the first contention, The Citizens Protection Act and RPC 3.8(d) do not impliedly repeal the Jencks Act. There is much reason to doubt that Congress considered every provision of every state ethical rule when it enacted the Citizens Protection Act, and thus much reason to doubt that RPC 3.8(d) trumps the Jencks Act. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not

submerged by a later enacted statute covering a more generalized spectrum") (internal citation omitted). The Citizens Protection Act does not mention the Jencks Act. It repeals the Jencks Act by implication (whether in whole or in part) only if it "expressly contradict[s] the original act" or lacks "any meaning at all" without a construction that conflicts with the Jencks Act. *Id.* Even if the court could conclude that Congress intended to supplant every federal law in conflict with any state's attorney ethics rules, the court sees no conflict between RPC 3.8(d) and the Jencks Act. The ethical rule requires "timely" disclosure of favorable evidence and information. The Jencks Act decrees that for the statement of a government witness, production is timely so long as it comes after the witness finishes direct examination. These provisions are not in conflict.[3]

Defendants' assertion of conflict arises not from RPC 3.8(d) or from any binding authority interpreting it, but rather from a recent opinion from the American Bar Association's Standing Committee on Ethics and Professional Responsibility. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009) (viewed on Apr. 1, 2010 at http://www.abanet.org/cpr/09-454.pdf) (hereinafter "ABA Opinion"). The ABA Opinion interpreted the ABA's Model Rule of Professional Conduct 3.8(d), which is materially identical to Washington's RPC 3.8(d). The Opinion declares that favorable "evidence or information, once known to the prosecutor, must be disclosed under Rule 3.8(d) *as soon as reasonably practical*." ABA Opinion at 6 (emphasis added).

The court finds that the ABA Opinion's interpretation of "timely" in Model Rule 3.8(d) does not govern the interpretation of RPC 3.8(d). The ABA Opinion makes this explicit, acknowledging that the "laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling." ABA Opinion at 1 n.1. The ABA Opinion nowhere cites the Jencks Act. The court implies no

[3] The court emphasizes that the only ethical obligations it addresses in this order are those arising from RPC 3.8(d). Nothing in this order should be taken to suggest that a prosecutor could, for example, withhold information that exonerates a Defendant merely because that information is embodied in a Jencks Act statement.

view on whether the ABA Opinion expresses the better vision of a prosecutor's duty of disclosure. In this court, federal law governs, and under federal law, it is Washington RPC 3.8(d) that applies, not Model Rule of Professional Conduct 3.8(d). To the court's knowledge, no other court has considered the meaning of "timely" in RPC 3.8(d). Where binding authority is silent as to a particular ethics issue, courts can consider ABA Opinions as persuasive authority. *See, e.g.*, *Erickson v. Newmar Corp.*, 87 F.3d 298, 302 (9th Cir. 1996) (noting "lack of case law" and citing ABA Comm. on Ethics & Prof. Responsibility, Formal Op. 93-378 (1983)). In this case, however, binding authority strongly suggests that the Jencks Act's dictates as to timely disclosure of witness statements control. In the Ninth Circuit, the Jencks Act overrides even the constitutional requirements of *Brady*. *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1979) ("When the defense seeks evidence which qualifies as both Jencks Act and *Brady* material, the Jencks Act standards control.").[4] If the Jencks Act controls even in the face of a constitutional mandate to produce materially exculpatory information to the accused soon enough to permit it to be used effectively at trial, then it controls in the face of RPC 3.8(d) to the extent that it requires earlier production of all information that tends to exculpate, regardless of its materiality.

B. In General, the Government Need Not Disclose Favorable Information Extracted from Witness Statements.

Defendants argue that the Jencks Act is not necessarily at issue. They suggest that the Government can simply provide them favorable information contained within Jencks Act witness statements without disclosing the statements themselves. The court finds this proposal intriguing but unworkable. Neither Defendants nor the Government are likely

[4] Defendants disagree with *Jones*, and with the notion that a statute can override constitutional obligations. They are not alone in this view. *See, e.g.*, *United States v. Acosta*, 357 F. Supp. 2d 1228, 1235 (D. Nev. 2005) (following *Jones* "[r]egardless of the wisdom behind suppressing the constitutional rights of defendants with a rule of evidence and procedure"). Although Defendants have preserved the right to challenge *Jones* on appeal, they acknowledge that this court must adhere to *Jones*.

to be satisfied with the disclosure of information extracted from witness statements. In general, it will be difficult at best to extract "information" from a witness statement without revealing the witness's identity or at least giving substantial clues as to the witness's identity. Extracting information from witness statements thus raises substantial risk of effectively subverting the Jencks Act. On the other hand, should the Government succeed at extracting favorable information, Defendants are likely to find the information useless. The extent to which information from a witness is "favorable" depends in no small part on who the witness is. There are perhaps some nuggets of information that are easily severed from a witness statement without compromising Jencks Act concerns. To the extent the Government is already aware of them, it may be obligated to disclose them. The court does not interpret RPC 3.8(d) to require the Government to search for such information in advance of its Jencks Act disclosure deadline.[5]

Rather than tread into the minefield of decoupling information from Jencks Act witness statements, the court rules that in this case, the court's order to produce all Jencks Act material eight weeks before trial is sufficient to allow Defendants timely access to favorable information. The Government agreed in September 2009 to produce Jencks Act statements eight weeks before trial. Dkt. # 122. When the parties later proposed case management schedules, Defendants objected to this date, contending that "for purposes of allowing for adequate trial preparation, and for trial management purposes, government witness information should be produced earlier."[6] Dkt. # 151, Ex. 1. The

[5] Again, the court emphasizes that it applies only RPC 3.8(d) in this order. At a minimum, the Government cannot withhold information embodied in multiple sources merely because one of those sources is a Jencks Act statement. Moreover, as the court has already noted, other ethical obligations may require the disclosure of some information regardless of whether it comes from a Jencks Act statement. *See supra* n.3.

[6] It bears noting that the court set the current trial date in September 2009. The Government was prepared to try this case this summer. Defendants sought a date in 2011, primarily because their counsel had various scheduling conflicts. Had they chosen to try the case when the Government was ready to do so, the deadline for Jencks Act disclosures would have been much earlier. Indeed, it might have passed already. Defendants thus bear substantial responsibility for the lengthy gap between Rule 16(a) disclosures in this case and Jencks Act disclosures.

court adopted the Government's proposed date in its case management order. Defendants thus argue that the Government's planned production is not "timely" within the meaning of RPC 3.8(d) even though a court order authorizes production at that time. The court disagrees. The court finds that disclosure eight weeks in advance of trial suffices to ameliorate any tension between RPC 3.8(d) and the Jencks Act in this case. *See United States v. Acosta*, 357 F. Supp. 2d 1228, 1234-1236 (D. Nev. 2005) (balancing state law duty to disclose against Jencks Act concerns). If the Government complies with the court's order, then its production will be "timely" within the meaning of RPC 3.8(d). The court doubts that in enacting the Citizens Protection Act, Congress intended to eliminate, *sub silentio*, a trial court's ability to manage discovery. Whatever "timely" means in RPC 3.8(d), a prosecutor's production will generally be timely if it complies with a court order. *But see supra* n.3.

Before concluding, the court notes that Defendants at oral argument contended that even if RPC 3.8(d) does not require production of favorable information "as soon as reasonably practical," as stated in the ABA Opinion, it requires production in conjunction with plea discussions. This view too finds support in the ABA Opinion. ABA Opinion at 6 ("Because the defendant's decision [to plead guilty] may be strongly influenced by defense counsel's evaluation of the strength of the prosecution's case, timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding."). The extent of the Government's disclosure obligation in connection with plea bargaining is an open question. *See, e.g.*, *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995) (joining three circuits in holding that "a defendant can argue that his guilty plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material"); *but see United States v. Ruiz*, 536 U.S. 622, 629 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."); *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003) ("[W]e have a question not

directly addressed by *Ruiz*: whether a criminal defendant's guilty plea can ever be 'voluntary' when the government possesses evidence that would exonerate the defendant of any criminal wrongdoing but fails to disclose such evidence during plea negotiations or before the entry of the plea."); *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) ("To date, the Supreme Court has not addressed the question of whether the *Brady* right to exculpatory information, in contrast to impeachment information, might be extended to the guilty plea context."). Defendants have scarcely addressed the question, and the court will not resolve it today. For purposes of this order, the court observes that Defendants are under no obligation to plead guilty or to entertain plea discussions, much less to do so without full disclosure of information in the Government's possession.

IV. CONCLUSION

In resolving this motion, the court holds only that the Government in this case can satisfy its duty under RPC 3.8(d) to disclose information favorable to the Defendants even while withholding Jencks Act statements and information contained therein until eight weeks before trial. The motion before the court does not require it to decide the effect of ethical obligations beyond those specified in RPC 3.8(d) on the Government's decision to withhold some information in this case.[7]

For the reasons stated above, the court DENIES Defendants' motion to compel. Dkt. # 157.

DATED this 9th day of April, 2010.

The Honorable Richard A. Jones
United States District Judge

[7] Defendants cite a recent Department of Justice memorandum, reports of statements of senior Department of Justice officials, and reports of statements of Attorney General Eric Holder as supporting a broader view of prosecutor's discovery obligations. Whether the Government in this case has adhered to the standards expressed in those statements is for the Department of Justice to decide, not this court.