IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
v.	Crim. No. 08-231 (EGS)
THEODORE F. STEVENS,	
Defendant.	

SENATOR STEVENS'S MOTION TO DISMISS THE INDICTMENT OR FOR MISTRIAL DUE TO GOVERNMENT'S FAILURE TO COMPLY WITH FEDERAL RULE OF CRIMINAL PROCEDURE 16(a)(1)(E)

During the redirect examination of Bill Allen, the government revealed – for the first time – a check in the amount of $44,339.51 that purports to be evidence of payment for a 1999 Land Rover. *See* GX 1122 (attached as Ex. A). Defense counsel had never seen the document before it was revealed in court, but assumed that they must have missed it in discovery provided by the government. Defense counsel have now learned that this check was never produced in discovery, despite the fact that the government has apparently had it in its possession for months. Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure is clear:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> > (i) the item is material to preparing the defense;
> > (ii) the government intends to use the item in its case-in-chief at trial; or
> > (iii) the item was obtained from or belongs to the defendant.

Pursuant to this Rule, defense counsel asked the government to provide all documents material to preparing the defense on the day after arraignment. *See* Letter from Mr. Cary of August 1, 2008 (attached as Ex. B). The $44,339.51 check introduced during Mr. Allen's testimony was clearly material to preparing the defense. Indeed, it allegedly relates to the first so-called gift in the indictment – the 1999 automobile transaction in which Senator Stevens gave Mr. Allen his 1964 ½ Ford Mustang plus $5,000 in exchange for Allen's 1999 Land Rover. The government's failure to disclose this central piece of evidence until after the cross-examination of its star witness is inexcusable.

The government's failure to disclose this piece of evidence is especially offensive given the government's pattern of failing to abide by orders of this Court, constitutional mandates and the Federal Rules of Criminal Procedure. *See* Mot. to Compel Emergency Relief and Discovery (Dkt. 65) (Sept. 12, 2008); Mot. to Dismiss Indictment or for a Mistrial (Dkt. 103) (Sept. 28, 2008); Emergency Mot. to Dismiss Indictment or for a Mistrial Due to Government's Continuing *Brady* Violations (Dkt. 126) (Oct. 2, 2008); Mot. to Dismiss the Indictment Due to the Government's Intentional and Repeated Misconduct (Dkt. 130) (Oct. 5, 2008). Defendant respectfully requests that the indictment be dismissed. *See United States v. Chapman*, 524 F.3d 1073, 1084 (9th Cir. 2008) (dismissal upheld as an appropriate remedy when government violated its discovery obligations under court's supervisory powers "to implement a remedy for the violation of a recognized statutory or constitutional right"). In the alternative, defendant requests a mistrial. *See United States v. Sawyer*, 831 F. Supp. 755 (D. Neb. 1993) (mistrial imposed as appropriate remedy when government failed to disclose key document prior to trial). At the very least, the government's evidence with respect to the 1999 automobile transaction should be stricken.

The defense assumes that the government will point to *United States v. Marshall*, 132 F.3d 63, 69-70 (D.C. Cir. 1998), for the proposition that, "[o]rdinarily, a continuance is the preferred sanction for a discovery delay" of this variety. The situation facing this Court, however – at this stage of the trial, after the Court has witnessed so many examples of the government failing to live up to its responsibilities – is distinguishable. First, unlike in *Marshall* – where the defendant himself had actual knowledge of the information the government withheld – the defendant here had no independent knowledge of the exact price Mr. Allen paid for the Land Rover, and had no way of knowing other than by the government's compliance with its Rule 16 obligations. *Compare id.* Moreover, the government's failure to produce a highly relevant document that was apparently in its possession all along, *see* Email from Joseph Bottini, October 7, 2008 at 8:38pm (attached as Ex. C), is another clear instance of the government not complying with its duties. Given these facts, it is well within the Court's discretion to impose a more severe sanction than that imposed in *Marshall*. *See United States v. Day*, 524 F.3d 1361, 1372 (D.C. Cir. 2008) ("Trial courts have the discretion to weigh various options in deciding how to address a party's violation of a discovery rule. 'If a sanction is thought necessary [under Rule 16], it is for the court to decide whether to order a continuance, or to prohibit the party from introducing in evidence the material not disclosed, or to make whatever other order it deems just under the circumstances.' Charles Alan Wright, 2 Federal Practice & Procedure: Criminal § 260, at 196-201 (3d ed.2000) (footnotes omitted)."); *Marshall*, 132 F.3d at 70 (finding that imposition of a mild sanction was not an abuse of discretion given the facts presented, but leaving open the possibility that, under a different set of facts, granting a more severe sanction would be well within the court's discretion).

Respectfully submitted,

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