IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS DUE TO ALLEGED MISCONDUCT

The United States of America, by and through its undersigned attorneys, respectfully submits the following opposition to defendant Theodore F. Stevens motion to dismiss.

INTRODUCTION

In their third attack on the government in one week, the defense continues to engage in baseless speculation regarding the government's motives and conduct. Their motion is factually and legally groundless, but that does not deter the defense from choosing this tactic from their playbook. See United States v. Forbes, No. 3:02 CR 00262 (AWT), 2006 WL 680562 (D. Conn. Mar. 16, 2006) (lead attorneys Brendan V. Sullivan, Jr. and Robert M. Cary admonished by the court for a "pattern of unseemly tactics" that included "engag[ing] in a pattern . . . of arguing, premised on speculation, that opposing counsel had engaged in improper conduct." Id. at *1 and *2).

The latest salvo in their effort to derail the trial contains three arguments. First, that the government intentionally procured a new version of events from Bill Allen on September 9, 2008, and then made efforts to conceal that fact from the Court and the defense. This charge

need not detain the Court long because the statement contained in the September 9 letter regarding Bill Allen's understanding of the defendant's interest in receiving an invoice for some of the costs was, in fact, recorded in an FBI Form 302 more than a year earlier, on February 28, 2007. Moreover, that same rendition was included in the July 2007 search warrant affidavit which was given to the defense prior to trial, on August 15, 2008. The government made no effort to conceal the September 9 interview from anyone; indeed, the hearing at which defendant suggests the government attempted to conceal the September 9 interview actually took place after the defense had been provided with an interview report reflecting the September 9 interview.

Second, the defense speculates that the government knowingly withheld a passage in the grand jury transcript for David Anderson that addressed his whereabouts during the Fall of 2000. This, too, is pure and unsupported conjecture. Anderson's absence from the Girdwood work site was no secret, and it was reflected in the news media as well as other documents provided to the defense. Mr. Anderson's grand jury transcript constituted Jencks Act material that the government was required to produce prior to any testimony from Anderson regarding his work, and there is no support for their suggestion that this detail would have been useful in cross-examining any other witness.

And finally, the defense catalogues for the Court a series of minor and cumulative items that they claim should also have been disclosed. In their zeal to make much of these additional items, they suspend common sense, ignore the wide array of related disclosures that were made, and ignore the relevant legal standards regarding materiality. Not one of these items has any practical significance to the case, and they fall far short of the threshold for materiality under the applicable law.

Background

Defendant's motion flows, in large part, from a misdirection regarding what this case is about. This case is about whether defendant paid for the substantial work and financial benefits provided by VECO and Bill Allen, and whether he knowingly and willfully failed to disclose those benefits on his financial disclosure form. It is not about Bill Allen's conjecture about what the defendant might have done if he had been provided with an invoice – there is no dispute that the defendant did not pay for VECO's work and that Bill Allen did not send him an invoice. Indeed, the fact that defendant asked for a bill shows defendant's awareness that he received things of value from VECO and knew he had not paid for them. Obviously, any such requests are fully known to defendant, and he is the best position to know how many times he asked for a bill, just as he is in the best position to know whether he actually paid for any of the VECO costs.

Between August 8, 2008 and September 23, 2008, the government produced to the defense the vast majority of its evidence in this case, including a substantial, early production of Jencks-related material and a significant amount of information arguably discoverable as Brady evidence, including all prior sworn testimony for Bill Allen and Rick Smith, substantial disclosures concerning Rocky Williams and David Anderson, and the grand jury transcripts of Augie Paone and Robert Persons.[1] We also provided two letters concerning various Brady-related issues on August 25, 2008 and September 9, 2008, highlighting several facts that might

[1/] Prior to opening statements, we also provided defendant with the grand jury testimony of John Hess, Doug Alke, and Derrick Awad.

be helpful to the defense. The materials provided to the defense, taken as a whole, provided the defense with ample information regarding the topics about which they now complain.[2]

Applicable Legal Standards

In their haste to throw more allegations at the government,[3] the defense also misconstrues the government's obligations under Brady and Giglio. A few points bear emphasis here.

First, Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972), together require the disclosure by the prosecution of exculpatory and impeachment evidence that is "both favorable to the accused and 'material either to guilt or to punishment.'"

2/ While the defense now focuses exclusively on one paragraph in the September 9, 2008 letter, the Brady letters were intended to supplement the substantial materials that had been and would be provided to the defense; they were never designed to be the exclusive source of such information. As the September 9 letter stated: "the information set forth in this letter and the government's letter dated August 25, 2008, does not contain all potential impeachment material related to certain government witnesses. As you know, the government has produced substantial discovery to defendant which may contain Brady/Giglio material. This discovery also includes the documents voluntarily produced to us by defendant prior to his indictment."

3/ The government does not walk alone on the issue of committing errors due to the accelerated pace of pre-trial discovery, motions practice, and trial preparation. In its second motion to dismiss the indictment, filed on October 2, 2008, defendant attached two of our letters – one dated August 25, 2008, and another dated September 9, 2008. See Dkt. 126 at Exhibits B & C. Although defendant attempted to redact portions of the August 25 letter (Exhibit C), he failed to redact a footnote which indicated that a private citizen (who is a potential government witness) had engaged in criminal conduct, but had not been promised immunity from prosecution for this conduct. Defendant also failed to redact any portion of Exhibit B, including information concerning the criminal conduct associated with this private citizen and all of the information concerning the local investigations of Bill Allen. The impact of defendant's mistake was predictable. A prominent newspaper in Alaska ran a lengthy article on the private citizen, which has had the additional and substantial impact of effecting our on-going criminal investigations.

We recognize that mistakes of this nature may occur given the present pace of the litigation. Unlike defendant, however, we do not run immediately to the courthouse accusing the other side of misconduct when such mistakes arise – even in situations like the present one when, as a result of defendant's error, the government has had its investigations impeded and a third party to this matter has garnered an enormous amount of negative and unwanted attention.

United States v. Bagley, 473 U.S. 667, 674 (1985) (quoting Brady, 373 U.S. at 87). As the Supreme Court has stated, although the term "Brady violation" is sometimes used to refer to any failure to disclose exculpatory evidence, "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, 427 U.S. 97, 109-10 (1976). Instead, "the omitted evidence [must] create[] a reasonable doubt that did not otherwise exist[.]" Agurs, 427 U. S. at 112.

Brady is not an instrument of criminal discovery, but a rule of fairness and minimum prosecutorial obligation. United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978). Thus, "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." Bagley, 473 U.S. at 676. See also United States v. Poindexter, 727 F. Supp. 1470, 1485 (D.D.C. 1989) ("The law is clear that the United States is not required simply to turn all its files over to a defendant."); United States v. Trie, 21 F. Supp.2d 7, 24 (D.D.C. 1998) (same). Importantly, in criminal prosecutions, "the Brady rule, Rule 16, and the Jencks Act exhaust the universe of discovery to which defendant is entitled." United States v. Presser, 844 F.2d 1275, 1286 n.12 (6th Cir. 1988). "Brady does not require a prosecutor to divulge every scintilla of evidence that

might conceivably inure to a defendant's benefit." United States v. Reyes, 270 F.3d 1158, 1166 (7th Cir. 2001).[4]

Second, Brady does not require disclosure of information known or otherwise available to the defendant. Given the purpose of the rule in Brady, it is well-established that the government is under no obligation to produce information or evidence to the defense that is not uniquely within the government's possession. There is no violation if the defendant has actual knowledge of the information, if he should have known it, or if he reasonably ought to have obtained it elsewhere. Here, the defendant is uniquely qualified to know how many times he asked for an invoice, how much he paid, and how much he would have paid if he had received any invoice from VECO. See, e.g., United States v. Zagari, 111 F.3d 307, 320 (2d Cir. 1997) ("Brady cannot be violated if the defendants had actual knowledge of the relevant information or if the documents are part of public records and "defense counsel should know of them and fails to obtain them because of lack of diligence in his own investigation." (citations omitted)); United States v. Whitehead, 176 F.3d 1030, 1036-37 (8th Cir. 1999) ("The government need not disclose evidence that is, inter alia, available through other sources or not in the possession of the

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[4/] We note that Judge Friedman's interpretation of Brady in United States v. Safavian, 233 F.R.D. 12 (D.D.C. 2006), was not addressed on appeal by the D.C. Circuit. In the government's view, Safavian cannot be reconciled with Agurs, Bagley, and Kyles v. Whitley, 514 U.S. 419 (1995), because the reasoning in Safavian parallels and expands upon that of Justice Marshall's dissenting opinion in Bagley. The majority holdings in the Supreme Court make clear that the prosecution has an affirmative duty to produce exculpatory evidence when such evidence is material to either guilt or punishment. Evidence is material, however, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (citing Bagley, 473 U.S. at 682). The District of Columbia Court of Appeals recently compared Safavian to the vast amount of circuit court and Supreme Court jurisprudence on Brady and concluded that Safavian's interpretation was inconsistent and could not be followed. United States v. Boyd, 908 A.2d 39 (D.C. 2006).

prosecutor."); United States v. Prior, 546 F.2d 1254, 1259 (5th Cir. 1977) ("numerous cases have ruled that the government is not obliged under Brady to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself.") (citations omitted); United States v. DiGiovanni, 544 F.2d 642, 645 (2d Cir. 1976) ("The government is not required to make a witness' statement known to a defendant who is on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony he might furnish.").

Third, the Supreme Court and the D.C. Circuit have repeatedly emphasized that a defense claim that the government failed to produce information that is cumulative, irrelevant, or merely "useful" to the defense is insufficient to establish a Brady violation. E.g., United States v. Ruiz, 536 U.S. 622, 630 (2002) ("But the Constitution does not require the prosecutor to share all useful information with the defendant."); Weatherford v. Bursey, 429 U.S. 545, 559 (1997) ("It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably.").

Fourth, the rule that cumulative evidence is not material applies with equal force to impeachment information that is cumulative of information already known to the defendant. United States v. Brodie, 524 F.3d 259, 268-69 (D.C. Cir. 2008) (government's failure to disclose until seven days after trial that the FBI had learned that prosecution witness had been previously involved in a fraudulent loan application on behalf of her niece was not error where this information was cumulative); United States v. Hemphill, 514 F.3d 1350, 1360-61 (D.C. Cir. 2008) (holding that evidence that government witness had been arrested twice for theft was not

material where defense had impeached witness with substantial thefts he committed during instant conspiracy, defendant had pleaded guilty to stealing much more substantial sums than those involved in undisclosed arrests, and defense also impeached witness with more damaging evidence, such as his perjury and other lies); United States v. Oruche, 484 F.3d 590, 599-600 (D.C. Cir. 2007) (failure to disclose grand jury transcript of witness's admission to lying in another case was not Brady violation because witness was "thoroughly impeached" at trial when cross-examined about prior convictions, past incidents of lying, and benefits received in exchange for testimony); United States v. Graham, 83 F.3d 1466, 1474 (D.C. Cir. 1996) (government's failure to disclose deposition of government witness in which he recounted his participation in several drug-related murders and results of polygraph test in which he admitted committing two murders but allegedly gave several deceptive responses when asked about involvement of others did not violate Brady disclosure requirements because witness had already admitted on direct examination to deceptions in other contexts and to participating in three murders; approving district court's conclusion that the witness "had already admitted to the deceptions in other contexts in the course of direct examination, and there is a limit to the number of deceptions which operate for impeachment").

Fifth, courts also have rejected defense arguments that the government withheld information that would have permitted impeachment by prior inconsistent statements when the inconsistencies are minor variances or not likely to lead to an impeachment that would have a material effect on the action. Because information must be material to constitute Brady information, small, insubstantial differences among a witness' statements will not rise to the level of a Constitutional violation. See, e.g., United States v. Andrews, 532 F.3d 900, 906-07 (D.C.

Cir. 2008) (holding government's alleged failure under Brady to disclose was not material where differences with statements that had been disclosed were insignificant); United States v. Tekle, 329 F.3d 1108, 1115 (9th Cir. 2003) (information related to impeachment of witness' credibility on minor, peripheral point not sufficient to constitute a Brady violation).

Sixth, there is likewise no Brady error when allegedly suppressed information is itself inadmissible and unlikely to lead to admissible evidence or impeachment. Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995) (because polygraph examinations are inadmissible for any purpose under state law, state's failure to disclose examinations of witnesses "could have had no direct effect on the outcome of the trial because respondent could have made no mention of them either during argument or while questioning witnesses"); United States v. Derr, 990 F.2d 1330, 1335-36 (D.C. Cir. 1993) (post arrest statement by third party alleging that, at time of defendant's arrest, three other individuals ran drug distribution operation from apartment where evidence leading to defendant's arrest was discovered not material because statement was hearsay and not admissible under any recognized exception, and declarant would have invoked if called to testify); United States v. Dabney, 498 F.3d 455, 459 (7th Cir. 2007) (rejecting claim that government violated Brady where defendant failed to show that "complaint registers" against police officers contained "admissible impeachment evidence"); Williamson v. Moore, 211 F.3d 1177, 1183 (11th Cir. 2000) ("[F]or prejudice to exist, we must find that the evidence – although itself inadmissible – would have led the defense to some admissible evidence."). Accordingly, speculative statements by witnesses about the defendant's state of mind are themselves inadmissible and would not lead to other admissible evidence or impeachment. Thus, such statements simply are not Brady materials as a matter of law.

Seventh, the timing of the disclosure of information must also be considered in assessing whether the defendant's right to a fair trial has been infringed. Where, as here, the defense has the information it needs in time to make effective use of it at trial, there is no Brady violation. Andrews, 532 F.3d at 907 (no Brady violation where defendant received notes of agent immediately before defense case was to begin and had them in time to make effective use of them); United States v. Dean, 55 F.3d 640, 664-65 (D.C. Cir. 1995) (if defendant receives exculpatory evidence in time to make effective use of it, new trial is not warranted in most cases); United States v. Derr, 990 F.2d 1330, 1335 (D.C. Cir. 1993) (noting that "if defendant receives information at trial, to prevail on Brady claim he must show prejudice from failure to disclose information earlier") (citing United States v. Darwin, 757 F.2d 1193, 1201 (11th Cir. 1985)). The burden is on the defense to make a showing otherwise, and conclusory allegations will not suffice. Andrews, 532 F.3d at 907. Given the stage of these proceedings, with the central government witness yet to conclude his direct examination, the defense cannot demonstrate that it will be unable to use any supposedly suppressed, material information effectively at trial.

Finally, the defense cannot turn a collection of insubstantial claims of withheld evidence or information, none of which is material, into a material violation by mere aggregation. Cf. United States v. Derrick, 163 F.3d 799, 809, 815-34 (4th Cir. 1998) (rejecting district court's dismissal of indictments based claimed "pattern" of government discovery and other errors where none prejudiced the defendants); see also id. at 809 ("A careful parsing of the district court's lengthy opinion reveals that the district court relied for its scores of conclusions as to wrongful withholding of material exculpatory information and other prosecutorial misconduct largely upon

only the defense claims of intentional wrongdoing, rather than upon an independent analysis of the record evidence."). Put differently, the only pattern that is demonstrated by multiple instances of lawful non-disclosure is a pattern of lawful government conduct. Therefore, this Court must critically analyze each instance in which the defendant claims information was suppressed to determine whether any particular non-disclosed item is in fact material under the controlling legal principles described here. As shown below, none are.

ARGUMENT

A. The September 9, 2008 Brady Letter

The lead allegation in defendant's motion can be dispatched quickly because it flows entirely from a misstated fact. Defendant speculates that the government did not like what Bill Allen had said regarding the defendant's willingness to pay an invoice, and therefore reached out to Allen on September 9, 2008, to obtain an entirely new, less-impeachable statement on this topic to put in its Brady letter to defense counsel. See Def. Motion at 2-8. This attack rests entirely on their suggestion that September 9, 2008, was the first occasion on which Bill Allen indicated his belief that defendant would have paid a portion of the costs if Allen had sent him a reduced invoice, although he would not have wanted to pay the entire cost. As defendant styles his attack, on September 9 the government "procur[ed] a new and inconsistent statement from Mr. Allen" on the issue of whether defendant was willing to pay VECO's entire costs, or would only be willing to pay something less than that. Id. at 4 (emphasis omitted).

Their suggestion is wrong, and, as the defense would have known if they had looked into the issue before filing their baseless attacks, the government actually provided the information about Allen's earlier, consistent statement before the trial began. On February 28, 2007 –

nineteen months before the September 9 letter – Allen was interviewed by the FBI to discuss certain aspects of his relationship with defendant. According to the FBI 302 from that interview, Allen told the government: "In relation to the work on the Girdwood residence, Stevens told the source that he needed to pay ***some*** of the source's invoices. . . . [Stevens] said he wanted to pay the source and requested the source provide him with an invoice." Exhibit 1 at 3 (emphasis added). Thus, as early as February 28, 2007, Allen had informed the government that, based on his conversations with defendant, Allen understood that defendant was not interested in paying the full costs of VECO's portion of the remodel, but rather only wanted to pay some of the costs.

On September 9, 2008, the government was concerned that it should be as accurate as possible in its Brady letter, and so reached out to Mr. Allen to confirm Mr. Allen's memory regarding the defendant's willingness to pay some of the costs. Allen was contacted by the FBI, and Allen again stated his understanding that defendant only wanted to pay for some of the costs associated with the remodel. This September 9, 2008, contact was not designed to create a new "memory" by Mr. Allen, but rather to make sure that the government's Brady letter was accurate. And it was accurate.

The defense also suggests that the very first time it learned of this fact – that Bill Allen believed that defendant was not willing to pay the full costs of VECO's work on the remodel – was in the September 9 letter. This, again, is not true. On August 15, 2008, the government produced to defense counsel a CD-R containing copies of two search warrants executed on July 30, 2007, on defendant's Girdwood chalet, along with the detailed affidavit from Special Agent Mary Beth Kepner. Paragraph 85 of those affidavits drew from the February 28, 2007, interview, including the discussion between Mr. Allen and defendant regarding defendant's willingness to

pay for some of the expenses. See Sealed Exhibit 2 at ¶ 85 (emphasis added).[5] Not only did the government not engage in "procuring a new and inconsistent statement from Mr. Allen" on September 9, but defense counsel has known of Mr. Allen's views on this topic since August 15, 2008.[6]

Defendant also suggests that in the same February 28, 2007, interview, we intentionally suppressed the wholly inconsistent statement by Mr. Allen that had VECO sent an invoice from Mr. Hess (which, based on Mr. Hess' testimony, would have been only around $3,000), defendant would have paid it. That statement – that defendant would have been willing to pay an invoice of around $3,000 – is in fact entirely consistent with Mr. Allen's statement during the same debrief that defendant told Mr. Allen that he wanted to pay for "some of the costs." That $3,000 is only a small fraction of what VECO actually put into the house. Although we acknowledge that the government's redacted 302 should have included the statement about the Hess invoice, the failure to do so was inadvertent error, not intentional concealment.

It bears emphasis that these underlying facts – what the defendant said to others regarding invoices and the defendant's willingness to pay an invoice if he had received one – are matters that are peculiarly within the defendant's knowledge, and, as such, they are not a valid ground for a claim under Brady. Zagari, 111 F.3d at 320; Whitehead, 176 F.3d at 1036-37; Prior, 546 F.2d

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5/ Although different in time (May 2001 vs. Summer 2000), Allen's recollections about defendant's desire not to have VECO pay all of the expenses was corroborated by Rocky Williams and described in the same Girdwood search warrant affidavit. See Sealed Exhibit 2 at ¶ 40.

6/ Allen's February 2007 statement is in addition to his statement in his very first debrief with the government, on August 30, 2006, that "TED STEVENS wanted to pay for everything he got."

at 1259; DiGiovanni, 544 F.2d at 645. Likewise, Brady does not apply to evidence that is inadmissible, such one witness's conjecture regarding the defendant's intent if faced with a hypothetical situation that never occurred.

Defendant builds on his factual mistake regarding the creation of the September 9 letter, going on to speculate that the government attempted to conceal its September 9, 2008 interview of the defendant.[7] His argument is as illogical as it is offensive. In making this claim, defendant pulls pieces from the transcript of the hotly contested and lengthy hearing on October 2, 2008, in which the parties addressed the issue of the mistaken redactions from the 302s. The record is absolutely clear, however, that by the time of the hearing on October 2, the government had provided the defense with a copy of the interview report regarding the September 9, 2008 interview. The questions from the Court itself reflect this fact:

> THE COURT: I'm sorry, but this 302, this 1023 or whatever it is, says the contact date was September 9th, 2008. It appears to be an interview with Allen by an FBI agent September 9th of this year.

Obviously the government could not conceal the September 9, 2008 interview from the Court or the defense, because they already had the information. The government's response shows no hint of deception:

> MS. MORRIS: I'm not sure, but I'll double check, Judge, but if I could just explain to you what was provided to them.

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[7] At the outset, of course, defendant ignores the fact that it was the government that discovered its error regarding the redaction of the 302s and brought that information to the attention of the defendant and the Court. The record shows that the government openly acknowledged and rectified its error – it did not attempt to hide anything.

There is no logical or practical reason to suggest that the prosecutor attempted to conceal something that had already been provided to the defense and the Court.

This unambiguous exchange was preceded by a series of exchanges that reflect some confusion on the prosecutor's part about which time frame and which interview the Court and the government were each referring to. In these exchanges, Ms. Morris indicated her mistaken understanding that the content of the September 9, 2008 letter was derived from a handful of earlier 302 reports; yet, when the Court asked specifically about an interview with Allen on September 9, she acknowledged that she was not certain and would need to check. Read fairly and in its entirety, the transcript reflects no intent to deliberately conceal anything from the Court. There are no grounds to ascribe a nefarious motive to the prosecutor's comments, and there is no reason to suggest that Ms. Morris was attempting to conceal something that had already been disclosed.

B. Dave Anderson's Work at Girdwood

From the thousands of pages of additional material produced pursuant to the Court's order, the defense isolates a handful of lines from the transcript of Dave Anderson's otherwise very inculpatory testimony before the grand jury and loudly proclaims that the government "withheld vital exculpatory information and put on false and misleading evidence in this trial." Def. Motion at 9. Nothing could be further from the truth. See generally Sealed Exhibits 3 & 4 (David Anderson grand jury testimony).

First, we note that Ms. Boomershine's testimony and supporting exhibits simply set forth what VECO's internal records reflected were costs charged to a particular cost code. As Ms. Boomershine stated in direct – and as defense counsel established during a lengthy cross-

examination – Ms. Boomershine had no independent knowledge of whether the costs performed were accurate or inaccurate. See 9/26/08 Tr. P.M. at 25 ("Q. Do you happen to know what [Rocky Williams] was doing at the time? A. I don't, I don't."). Ms. Boomershine did not establish that the chalet renovation cost VECO $188,000; rather, she simply established that VECO had a cost code marked "Girdwood" that had $188,000 charged to it. There was thus nothing in Mr. Anderson's grand jury testimony that would provide a proper basis for cross-examination of Ms. Boomershine. At best, she could restate what was already clear: that she had no personal knowledge of who did what work on the project or when. This is precisely the sort of limited and cumulative impeachment information that the courts have brushed aside when faced with Brady challenges.

Second, contrary to defendant's attacks, the defendant was provided with substantial evidence with which to query Ms. Boomershine – or any other relevant witness – with information to establish both Anderson's time on the site and efficiency when there. In Augie Paone's grand jury testimony – a full, unredacted copy of which was provided to defendant before trial – Paone noted on three separate occasions that Anderson did not step in for Rocky Williams until December 2000. Armed with that information alone – that Anderson's role in the project, from Paone's perspective, began in December – defendant had ample information from which to cross-examine or to build leads. Similarly, the government produced multiple pieces of evidence in discovery that set forth firsthand accounts of Anderson being intoxicated on the job. See Exhibit 5 (Bob Persons 00000180 ("I don't think Rocky and Dave did much. Dave was drunk every time I saw him and Augie says both of them are alcoholics.")); Exhibit 6 (Bob Persons 00000424 ("The only thing I saw that seemed peculiar was that guy Dave Anderson sitting in his

truck and I think he was drinking whiskey almost all the time he was there."). Yet defendant asked few, if any, VECO workers to date about whether Dave Anderson was a productive, active member of the work site.

Third, the government has, from opening statements, represented the VECO cost accounting as a spreadsheet with likely substantial variance. This point was also disclosed in the government's September 9 Brady letter concerning Mr. Allen's subjective belief that VECO's costs were too high, and was further elicited in great detail today during cross-examination of Mr. Allen. This is partly because of anomalies concerning, for instance, Mr. Anderson departing for seven weeks, and partly because of the vast amounts of uncharged VECO labor and materials that were done at the chalet but not reflected on the Girdwood cost code. Trial testimony to date established that the following workers' time was not reflected on the Girdwood cost code:

(1) John Hess

(2) Doug Alke

(3) Derrick Awad

(4) Roy Dettmer

(5) Cecil Dale

(6) Edgar Hernandez

(7) John Fugate

(8) Jack Billings

(9) Daniel Johnston

And as defense counsel is now aware, the Girdwood cost code also does not reflect labor charges for the following workers' involvement in the project:

(10) Rocky Williams prior to August 2000

(11) Dave Anderson prior to September 25, 2000

(12) Clint Murdock

(13) John David

(14) Dave Anderson after spring 2001, continuing through winter 2002

Each of those VECO employees logged hours at the defendant's home remodel, yet none of their time is included in the spreadsheet.

Contrast those absent hours, from a materiality perspective, with the hours about which defense counsel now complains. Contrary to Anderson's estimations, documents available to defense counsel establish that the period of Anderson's absence is no greater than October 13 to December 8. See GX 1023 (October 13, 2000 email from Persons to defendant, noting that "[B]ill is a champ for keeping [R]ocky and [D]ave on the job" at the chalet); Exhibits 7 & 8 (VECO_00000130 and VECO_00001178 (numerous invoices with Dave Anderson's signature relating to renovation supplies dated December 8, 2000)).

This distinction is important for purposes of materiality. Anderson's first time entry appearing on the spreadsheet is from September 25, 2000 through October 29, 2000, and reflects a total salary amount of $9,859.09. Accordingly, if Anderson was at the site from September 25, 2000 through October 13, 2000, the prorated amount of Anderson's inappropriately-accrued salary is roughly $5,352. On the other end of the time frame, defendant is aware of additional evidence suggesting that Anderson was back at the site in some capacity by December 8, 2000. This results in an approximate prorated amount for December 2000 of roughly $6,800. Adding in Anderson's November 2000 billings of $4,614, it takes the total amount of Anderson's lost

wages to just greater than $16,000. Where the government's standard of proof is "greater than $260," and the government has proven significant additional costs not captured in the spreadsheet, the loss of $16,000 is absolutely immaterial to the issues in this trial.

In this regard, we further defendant had the spreadsheet and the backup documentation and never once asked Dettmer about his time. This is understandable, given that any questions along those lines would have highlighted that little of Dettmer's time was captured by the spreadsheet. For these reasons, in its opening, the government presaged the lack of precision in the cost report and indicated that the range of VECO's costs could be anywhere from $120,000 to $240,000. The subtraction of a portion of Anderson's time during the Fall of 2000 from the spreadsheet would not undermine the government's limited and qualified use of that exhibit.

In arguing that the government deliberately concealed Mr. Anderson's absence from the site in the Fall of 2007, defendant ignores the fact that there were other sources for that information as well. Put simply, Anderson's trip to Oregon was no secret. In fact, a widely circulated newspaper article quoted Anderson as saying that he was away from the project because he went to Oregon to attend to a family matter. Exhibit 9 at 5.

Finally, defendant goes one step further, to suggest that the government actually attempted to hide Dave Anderson from the reach of their subpoenas. This accusation is patently false as well. The defense asked whether the government would accept service of a subpoena for Mr. Anderson, and the government responded that it had no authority to do so. While the news media has apparently had no trouble locating Mr. Anderson, the defense then asked that the government provide them with Mr. Anderson's address. See Exhibits 9 & 10. Again, the government simply indicated that it had no authority to share such information regarding a

private citizen. Ultimately, when Mr. Anderson was in Washington, D.C. for trial preparation, the government offered to facilitate service of the defendant's trial subpoena. There was nothing deceptive or inappropriate in the government's conduct.

At the end of the day, Mr. Anderson remains under subpoena by the defendant, and the defense remains free to call Mr. Anderson as a witness in its own case, in the event that the government chooses not to call him. Accordingly, there can be no prejudice stemming from the facts concerning Mr. Anderson's limited absence from the Girdwood site in 2000.

C. Miscellaneous Items From The FBI 302s

In his final, catchall argument, defendant collects a handful of minor and cumulative items that do not approach the threshold of materiality required for disclosure under Brady or Giglio. We discuss each of these items below.

1. Roy Dettmer – 7/31/08 FBI Form 302

Defendant claims the government violated Brady because it failed to disclose that Roy Dettmer, an independent electrician hired by VECO to work on the Girdwood residence, told the FBI that on one occasion he was installing light fixtures in the garage when Catherine Stevens inquired about the cost of the fixtures. Defendant maintains that this statement demonstrates that Catherine Stevens intended to pay the bill. See Def. Motion at 14.

This information is neither exculpatory nor substantial impeachment material. The cost of the light fixtures were included on the invoices for Christensen Builder. These invoices were then sent to the Stevenses. The government, during initial discovery in this case, produced all of the invoices from Christensen Builders and all of the backup paperwork. Defendant, in turn, provided to the government copies of certain of these invoices. The invoices reflect that the costs

associated with certain electrical materials, such as the light fixtures, were charged to the Stevenses. See Exhibit 11. No one is disputing in this case that defendant paid the bills from Christensen Builders that were sent to the Stevenses in Washington, D.C. It is also undisputed that the Stevenses paid the costs associated with the light fixtures, since those costs are captured in the invoices they received. The hearsay statement attributed to Dettmer is therefore not exculpatory in any way. At best, it is neutral information which, of course, need not be produced pursuant to Brady.[8]

2. Bill Allen – 8/30/06 FBI Form 302

Defendant erroneously argues that the government should have disclosed a portion of Allen's August 30, 2006, interview with the FBI that attributes to Allen a statement that he thought the 2005 Jeep Grand Cherokee trade for the 1999 Land Rover and $13,000 cash was legitimate and did not result in a financial benefit to defendant.

The government unequivocally disclosed this specific information to defendant during pre-trial discovery. Paragraph 126 of the Girdwood search warrant affidavit indicates that Allen told defendant he thought the 1999 Land Rover was worth $20,000. See Sealed Exhibit 2.

8/ In this circuit as elsewhere, the government is not required to disclose neutral or inculpatory evidence. United States v. Poindexter, 727 F. Supp. 1470, 1485 (D.D.C. 1989) (government is "not required to provide to the defendant evidence that is not exculpatory but is merely not inculpatory and might therefore form the groundwork for some argument in favor of the defense"); United States v. Bryan, 868 F.2d 1032, 1037 (9th Cir.) (evidence is not automatically exculpatory because it is not inculpatory), cert. denied, 493 U.S. 858 (1989); United States v. Comosona, 848 F.2d 1110, 1115 (10th Cir. 1988) (government does not have to produce any statements which do not "expressly" contain exculpatory material); United States v. Agurs, 427 U.S. 97, 110-11 (1975) (government is under "no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor" and has no obligation to search its files for "possibly" exculpatory information).

Paragraph 128 of that same document states that Allen told the same thing to Lily Stevens. Id.[9] The Jeep Grand Cherokee was purchased from the dealership for $33,712 (see GX 237), thus implying that Allen believed the vehicle trade was fair. There can be no doubt that defendant is aware of the contents of the search warrant affidavit. See Exhibit 12 (redacted 9/19/08 letter from defense counsel acknowledging their receipt of the Girdwood search warrant affidavit and the fact that it contains exculpatory Brady evidence).

Not only was this information fully disclosed, had it not been, the nondisclosure would fail to rise to the level of Brady evidence. Courts have routinely rejected defense arguments that the government withheld information that would have permitted impeachment by prior inconsistent statements when the inconsistencies are minor variances or not likely to lead to an impeachment that would have a material effect on the action. Because information must be material to constitute Brady information, small, insubstantial differences among a witness' statements will not rise to the level of a Constitutional violation. E.g., United States v. Andrews, 532 F.3d 900, 906-07 (D.C. Cir. 2008) (holding government's alleged failure under Brady to disclose was not material where differences with statements that had been disclosed were insignificant); United States v. Trie, 21 F. Supp.2d 7, 26 (D.D.C. 1998) ("To the extent that [defendant] seeks all potentially inconsistent witness statements from all of the government's witnesses, he is not entitled to those under Brady."); see also id. ("The government's Brady obligation extends only to material impeachment evidence, and potentially inconsistent witness statements from minor or incidental government witnesses therefore do not fall within the Brady

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9/ The government's Rule 404(b) notice reflects that, based on other information, defendant received a substantial benefit, including the cost to ship the Jeep from Anchorage, Alaska to Seattle, Washington.

obligation."); United States v. Tarantino, 846 F.2d 1384, 1416 (D.C. Cir. 1988); United States v. Tekle, 329 F.3d 1108, 1115 (9th Cir. 2003) (information related to impeachment of witness' credibility on minor, peripheral point not sufficient to constitute a Brady violation).

3. John Hess – 2/9/07 FBI Form 302

Defendant further complains that the government should have disclosed as Brady evidence that portion of the Form 302 for Hess in which Hess is attributed as saying that "his (Persons) job was to make Stevens happy since he (Stevens) does not have a lot of time." Def. Motion at 14 (quoting 2/9/07 Form 302).

Defendant argues that this supposedly-devastating information "directly supports the defense theme that Senator Stevens did not know the details of the renovations that were happening 3,300 miles away from Washington, D.C. Yet the defense did not have this information with which to cross-examine Mr. Hess." Def. Motion at 14-15. Defendant's argument is nonsense for several reasons.

First, defendant received Hess' grand jury testimony prior to opening statements, and that grand jury testimony is entirely consistent with the interview statement attributed to Hess that was supposedly suppressed by the government. See Sealed Exhibit 13 at 53-54; 61-62.

Second, even if defendant had not been given Hess' grand jury transcript before the start of trial, defendant is well aware of the role that Bob Persons played with respect to the project – as evidenced by defendant's opening statement and the fact that defendant (and, presumably, defense counsel) have talked to Persons on several occasions concerning both the investigation and the Girdwood renovations. Indeed, during opening statements, defendant provided the jury

with a geography lesson on the location of Alaska in comparison to Washington, D.C. Counsel then added:

> this is a renovation by a married couple that lives 3,300 miles from the renovation. They live here with us . . . but this renovation is not in the house you're living in, it's in the house you stop by and see every day, it is 3,300 miles away. That is their technical residence. . . .
>
> * * *
>
> They are lucky to spend twenty days a year at that residence. . . . Alaska is so enormous we in the District fo Columbia have a hard time [fathoming] the size and the distance of it. It's so enormous that even when Defendant is in the state of Alaska for business he often stay in hotels hundreds of miles away no where near his home, the site of the renovation.
>
> * * *
>
> He's (Bob Persons) in a position to check on their (Stevenses) home over the years and did so many times, and when the renovation project started they relied upon Bob in order to help them out and get it started.

9/24/08 Tr. 59-60, 62; id. at 63 (the Stevenses relied upon Allen to find workers and to make suggested changes to the project. Allen also took on the role of reviewing the bills since the Stevenses were not in Girdwood to ensure that the Stevenses were getting a reasonable product for the money they were paying). Defense counsel then advised the jury that defendant was in Girdwood only six days in 2000 and 19 days in 2001. 9/24/08 Tr. at 63.

Defendant's own opening statement makes clear that defendant knew Persons' role with the project given the fact that the Stevenses were in Washington, D.C. during a portion of the Girdwood renovations. Defendant, moreover, had Bob Persons' grand jury testimony detailing Persons' role with the project, and had produced and received during discovery a large number of

inculpatory e-mails wherein Persons provided frequent updates to defendant while defendant was in Washington, D.C.

Finally, the fact that defendant "does not have a lot of time" is not a contested issue in this trial, and Mr. Persons' acknowledgment of that simple fact is of no significance whatsoever.

4. Dick Ladd – 9/19/06 FBI Form 302

Defendant complains that a Washington, D.C. lobbyist, Dick Ladd, who is also in charge of defendant's own "Northern Lights" political action committee, told the government during a September 19, 2006, interview that he "was not tasked by Senator Stevens to help him find Walter a job but merely made the comment in passing." Def. Motion at 15 (quoting 9/19/06 FBI Form 302). Defendant suggests that this information is inconsistent with the government's Rule 404(b) notice (filed on Aug. 14, 2008), which alleges that defendant asked Ladd to ask Allen to find employment in Phoenix for defendant's son, Walter Stevens.

Defendant is hair splitting at best concerning a statement that Ladd made during his interview with the FBI that is inculpatory, not exculpatory. The statement attributed to Ladd is a "watered down" version of a prior, recorded statement of Ladd which, of course, speaks for itself. Defendant's argument regarding this comment in a 302 report regarding a Rule 404(b) matter stretches Brady and Giglio to the breaking point. The government, for this reason and others, was under no obligation to produce this portion of the Form 302 pursuant to Brady or Giglio.

A mere week after defendant's arraignment, the government disclosed a March 5, 2006, electronic recording of a telephone conversation between Allen and Ladd concerning the job for Walter Stevens. In the conversation, Ladd told Allen that, in a recent lunch meeting with

defendant, defendant asked Ladd whether Bill Allen could provide Walter with a job in the Phoenix area:

> Hey, ah, I saw the senator at lunch and, and he asked if I could talk with you, I'm not sure why he mentioned it, but he asked me to, I think find out if you had any business contacts in Phoenix. With respect to his son, Walter, who is down there who is, finds himself without a job at this point and because of, you know . . . So, ah, I did not know, do you (UI) that's what he was interested in and I thought I'd pass that along to you cause you're gonna see him next week –
>
> Thanks a lot. Sorry to bother you but if it hadn't been for him (UI) he didn't mention it first and mention you by name I would have let it go for awhile but . . .

GX 656 (emphasis added). Allen and Ladd then discussed that the job should be in Phoenix, and discussed other possible individuals who might also be able to help with the job.

In the summer of 2006, Allen directed VECO to provide a position for Walter Stevens at one of VECO's operations in Alaska. Walter Stevens accepted the position with VECO. In addition to receiving the recording between Allen and Ladd, defendant received the underlying documents for this issue and numerous other recordings on this topic. See Exhibit 14 & 15 (VECO documents concerning Walter Stevens).[10]

[10/] Defendant and his family members were well aware that Allen directed VECO to provide a position for Walter Stevens in mid-2006. For instance, a July 13, 2006 internal VECO e-mail states that Walter was a "political hire" and that Walter had been "saddled all his life with being a member of his family" and that VECO employees were asked to "downplay his family connections." See Exhibit 14 at 3.

Defendant also received several other electronic recordings discussing the fact that Walter had been hired by VECO: (1) a May 30, 2006, telephone conversation between Allen and Walter in which the two discussed work for Walter on the North Slope; (2) a June 23, 2006, conversation between Allen and his assistant, Linda Croft, in which Allen told Croft to provide Walter with a hotel and car while he was in Anchorage; (3) a June 23, 2006, conversation between Allen and Walter Stevens in which Walter thanked Allen for paying for the hotel bill

If defendant truly believes that the statement attributed to Dick Ladd during his interview on March 5, 2006, is inconsistent with his actual, recorded statement, then defendant is more than free to call Ladd as a witness during his case-in-chief to get Ladd to impeach himself concerning his own past recorded statement.

5. Chris von Imhof – 5/31/07 FBI Form 302

During a May 31, 2007, interview with the FBI, Chris von Imhof, a friend and neighbor of defendant, is attributed as stating that, in May 2007, defendant asked von Imhof "if he knew a company that could fix a problem he was having with a gutter on his house and the heat tape system. [Defendant] was adamant that he wanted to make sure that whoever did the work provided him a bill so he could pay for the repairs."

Again, this statement is inculpatory, not exculpatory. The conversation between von Imhof and defendant allegedly occurred in late May 2007, which was well after it was publicly revealed that Bill Allen was under criminal investigation; a few weeks after Bill Allen and Rick Smith had publicly plead guilty; a few weeks after the government had indicted several other state legislators for taking bribes from Allen and Smith; a few weeks after defendant had been notified that he was under investigation and the investigation related to his involvement with Allen; and after counsel for the defendant had spoken with the Department of Justice regarding the investigation.

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and providing the car; (4) a July 13, 2006, conversation between Allen and Rick Smith in which they discussed that Walter was being harassed for being defendant's son and getting a VECO job; and (5) an August 26, 2006, conversation between Ben Stevens and his brother, Ted Stevens, Jr., in which they discussed that defendant had talked to Allen about getting Walter a job with VECO.

Finally, defendant also suggests that the government's decision not to redact other portions of this Form 302 shows that the government suppressed Brady evidence. As noted above, the government's September 9, 2008, letter included a statement attributed to von Imhof. Consistent with the Court's Order, the government redacted the Form 302 in a manner that reflected the statement in our letter. In any event, the statement at issue here did not have to be produced in the first place because it is not Brady or Giglio evidence.

D. Even Were the Court to Find Any Violation, The Appropriate Remedy Would Be Neither Mistrial Nor Dismissal

At the end of the day, the defendant can demonstrate no prejudice from any of his claimed errors, and thus, his claim of error warrants no remedy. As a result of this Court's prior order, the defendant now has in his possession unredacted copies of all relevant FBI Form 302s and grand jury testimony. In addition, he has the extensive material previously provided by the government, as well as all of the records to which he has access himself. The defendant has received from the government vastly more information than he is entitled to under Brady, Rule 16, and the Jencks Act. Accordingly, even in the unlikely event that this Court identifies some item of undisclosed information that would be both favorable to the accused and so material to the issues of this case that the proceedings were undermined, there is no need for any further remedial action because this Court's orders have already remedied any potential prejudice.

Further, neither dismissal nor a mistrial are appropriate remedies of any perceived prejudice. First, there is simply no legal ground for dismissal. The District of Columbia Circuit has indicated that mistrial, rather than dismissal, is the most serious sanction available. United States v. Evans, 888 F.2d 891, 897 n.5 (D.C. Cir. 1989) ("Our research indicates . . . that where a

Brady violation requires a remedy, relief is afforded by mistrial rather than dismissal.") (citation omitted); accord United States v. Davis, 578 F.2d 277, 280 (10th Cir. 1978) ("a violation of due process under Brady does not entitle a defendant to an acquittal, but only to a new trial in which the convicted defendant has access to the wrongfully withheld evidence").[11]

11/ Those few courts that have held that dismissal may be available as a remedy for a Brady violation have restricted it to only the most egregious and pervasive circumstances, nothing remotely like the sort of things claimed by the defendant here. The Third Circuit held – while finding the sanction not to be appropriate in the case before it – that "[w]hile retrial is normally the most severe sanction available for a Brady violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper." Virgin Islands v. Fahie, 419 F.3d 249, 255 (3d Cir. 2005). In reaching this conclusion, the Third Circuit found it instructive to look to the Supreme Court's decision in United States v. Morrison, 449 U.S. 361 (1981). In Morrison, the Supreme Court assumed a Sixth Amendment violation where federal agents met with and conversed with a represented defendant, in the absence of her counsel, in order to seek her cooperation. Id. at 362. Although the Court found the agents' conduct egregious, dismissal was "plainly inappropriate" because there was no prejudice. Id. at 365. The Supreme Court concluded that Sixth Amendment deprivations, like other constitutional deprivations, are "subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." Id. at 364 (emphasis added). Reviewing other cases of the denial of the constitutional right to counsel, the Supreme Court observed that none had resulted in the dismissal of the indictment; rather, the convictions were reversed and new trials ordered. Id. at 365.

The Third Circuit also looked to other Supreme Court cases that showed that willful misconduct, in addition to prejudice, was important when considering the appropriate remedy for a constitutional violation. 419 F.3d at 254. In United States v. Marion, for example, the Supreme Court reversed the dismissal of an indictment for violation of the defendants' constitutional right to a speedy trial where no actual prejudice had been shown and there was "no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." 404 U.S. 307, 325 (1971). In the Third Circuit case, a firearms case, the prosecutor failed to disclose an ATF Report showing that the weapon at issue was traced to someone out of state and had not been reported stolen. Fahie, 419 F.3d at 251. The record indicated that the prosecutor had overlooked the significance of the report, rather than engaged in any calculated conduct to deprive the defendant of his due process rights. Id. at 255-56. Moreover, although the defendant argued that the failure to disclose the ATF Report was part of a pattern of discovery abuse or recklessness on the part of the prosecutor, there was no evidence of such abuse. Id. at 256. Thus, the Third Circuit held that dismissal with prejudice was an improper sanction. Id. at 257.

At this stage of the proceedings, mistrial is also entirely unwarranted. As described in detail above, none of the claimed discovery errors cited by defendant are viable, and certainly did not cause defendant prejudice. Nonetheless, even were this Court to identify some harm to the defendant arising from the government's failure to disclose any item of material information, that prejudice can readily be cured simply by permitting the defense to use the information as the trial continues. The burden is on the defendant to make a persuasive showing that their trial tactics would in fact have been altered. Andrews, 532 F.3d at 906-07. His conclusory assertion that any item of information would have lead him to give a different opening statement or conduct his trial defense and differently is not credible. The motion makes no prima facie showing, because it cannot. Mr. Allen, the central government witness, remained on the stand on cross-examination with a defense team that was well armed for cross, and all government witnesses who have testified to date are readily subject to recall and further examination in the unlikely event any such relief were necessary.

In this case, as discussed above, the defendant has not established that he was prejudiced at all, much less that he was prejudiced so irreparably that a new trial would be required to alleviate the prejudice. Nor has the defendant established any government impropriety whatsoever, much less the willful misconduct he claims without any support. Because there is no prejudice to the defendant requiring the order of a new trial in this case, and because there is no evidence of any willful misconduct, the defendant is not entitled to dismissal or new trial, and this Court should deny defendant's motion.

CONCLUSION

For the foregoing reasons, the government respectfully requests that defendant's motion to dismiss the indictment or for a mistrial be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October, 2008, I caused a copy of the foregoing "GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS" to be delivered by electronic mail to the following:

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