TIMOTHY A. SCOTT
California Bar No. 215074
SCOTT TRIAL LAWYERS, APC
1350 Columbia Street, Suite 600
San Diego, California 92101
Telephone: (619) 794-0451
Facsimile: (619) 652-9964
email: tas@scotttriallawyers.com

Attorneys for Joseph Govey

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

United States of America, Plaintiff, vs. Joseph Govey, Defendant.	Case No.: 8:17-cr-00103-CJC Response in Opposition to Government's Motion to Continue Trial And Motion to Dismiss for Failure to Disclose Discovery. Trial Date: January 30, 2018

Introduction and Issue Presented.

The government indicted Mr. Govey in August of 2017. It knew then, or it should have known, that impeachment material existed against two of its percipient witnesses. It has continued this case once already, over defense objection. It now seeks to do so again, in order to disclose documents that have been in the DOJ's actual possession since well before the case was indicted. Do the interests of justice support the government's request to delay this trial, again, while Mr. Govey remains in jail without bail?

Statement of Facts

The government presented this case to the grand jury in August of 2017.[1]

It knew then, or should have known, that two of its percipient witnesses were involved in the Orange County jail scandal that *the DOJ itself* was investigating.

It knew, or should have known, that one of its witnesses had invoked his Fifth Amendment rights, in uniform, on the stand in a murder case.[2]

But the government made no effort to gather *Brady* and *Giglio* materials that were in the DOJ's actual possession then. After Mr. Govey was indicted and appointed counsel, the government still did not make any effort to gather or produce this *Brady* or Giglio material to the Federal Defenders Office.

In November of 2017, undersigned counsel was appointed to this case, and requested these specific materials shortly thereafter.[3] The government still did not start the process of gathering the materials.

Instead, the government, by its own admission, did not even *request* the materials until being ordered by this Court in late December, shortly before the January 9th trial date.[4]

---

[1] Docket at 1.

[2] *See e.g.* https://www.ocregister.com/2016/01/05/deputies-take-the-fifth-complicating-yet-another-jail-snitch-case (published January 5, 2016; last visited January 26, 2018).

[3] See Docket at 36 (*Henthorn* motion) and attached exhibits.

[4] *See* Government motion at 3 ("*Immediately following the hearing on December 21*, 2017, and per the Court's directive, the government requested from . . . the Department of Justice ("DOJ") all potentially discoverable material." (emphasis provided).

Now the government would like Mr. Govey to stay in jail, without bail, to have more time to review and disclose *Brady* and *Giglio* material that has been in the DOJ's actual possession since it indicted the case.

The government's motion in unaccompanied by a declaration or other testimony about the "unanticipated difficulties" that it hints at in its brief.[5] It does not explain the "technical obstacles that have impaired the government's ability" to perform its discovery obligations. Instead, it states that "[m]ore than a dozen Assistant United States Attorneys and contract attorneys *are prepared* to assist in that review of the discovery."[6] It is silent as to why this team has not *already* been doing so.

The law cannot, and does not, support the government's position here. In fact, because the government has effectively conceded that it has not complied with its discovery obligations at this late date, Mr. Govey is forced to move to dismiss his case for violation of his rights under *Brady*, *Giglio*, and Rule 16(a)(1)(E).

---

[5] Government Motion at 3.

[6] *Id.*

Discussion

I. The government has not demonstrated due diligence in its handling of this discovery, thus a continuance would be improper.

The government requests this continuance "in the interests of justice." But 18 U.S.C. § 3161(h)(8)(C) provides that "No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, *or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government.*" (emphasis provided).[7]

The government has not demonstrated due diligence. Instead, it admits that it did not even request the DOJ files until after the hearing on December 21, 2017. The government indicted this case in August. It knew who its witnesses were and the legal troubles that plagued them. Present defense counsel has been requesting this information with exacting specificity since his appointment. It is not fair for the government to fail to acquire *Brady* material, hope that the Court will back up its decision, and then demand that the defendant stay in custody awaiting trial when the government proves to be wrong. Even if the government did not subjectively grasp the issues with its case until recently, that cannot be confused with objective due diligence.

The few cases that the government cites do not support any argument to the contrary. The first, *United States v. Lewis*, 611 F.3d 1172 (9th Cir. 2010) involved

---

[7] *See e.g. United States v. Dog Taking Gun*, 7 F. Supp. 2d 1118, 1121-22 (D. Mont. 1998) ("Here the FBI, acting on behalf of the United States, had all the pertinent evidence in its possession, custody and control for over a year. . . .The lack of diligence by the FBI in processing evidence, and the congested workload of the FBI lab do not constitute a factual basis to exclude time from the Speedy Trial computation 'in the interests of justice.'").

a case that was before the Ninth Circuit for the *third time* after being reversed—twice for Speedy Trial violations. And the exclusion that was finally upheld stemmed from the fact that there were co-defendants. The *co-defendant* requested a continuance because of voluminous discovery, and the defendant was dragged along under the Speedy Trial Act. Nothing in *Lewis* suggests that the government can ignore discovery requests, hope for the best, and then keep the defendant in custody without bail after its legal arguments are rejected.

United States v. Dota, 33 F.3d 1179, 1183-84 (9th Cir. 1994) also addressed delay caused by co-defendants. The Court did provide an "alternative basis for our decision"—otherwise known as dicta—in musing that "preparation of the factual record here was unusually complicated and required additional time," but it again concluded that "the district court properly considered the needs of codefendants' counsel." *Id.* at 1183. That case simply does not help the government either.

Finally, citing *United States v. Hernandez-Meza*¸720 F.3d 760 (9th Cir. 2013), the government argues that a continuance "may lead to the defense abandoning its proffered defense at trial." Motion at 7. While that assertion is laughable, it is not funny. The government has to know that the defense will not abandon its proffered defense at trial. And ironically enough, *Hernandez-Mesa* was also a reversal for a Speedy Trial violation. Moreover, it held that the government committed a discovery violation by failing to turn over documents: "A defendant needn't spell out his theory of the case in order to obtain discovery," the Court held, "[n]or is the government entitled to know in advance specifically what the defense is going to be." *Id.* at 768. "The relevant subsection of Rule 16 is written in categorical terms: Upon defendant's request, the government must disclose any documents or other objects within its possession, custody or control that are 'material to preparing the defense.'" The Court of Appeals reassigned the case to a different judge on remand. *Id.*

Ultimately, the government has not cited a case standing for the proposition that a continuance is proper when the government has not yet turned over *Brady* that is in the *DOJ*'s actual possession—and that has been since the case's inception. It has not demonstrated due diligence, even after obtaining the discovery on January 13th. While the government states that a team "is prepared" to review discovery, it does not say that it has started doing so. Instead, the government has spent valuable time providing 7th Circuit authority on evidentiary issues that have already been decided,[8] and fighting to admit brass knuckles at trial.[9]

For all these reasons, the motion to continue should be denied.

II. The government's admitted failure to comply with its discovery obligations should result in dismissal of these charges.

As the government's puts it, it is "requesting a continuance in the interest of justice *so that the government can fully comply with its discovery obligations and provide to the defense all discovery to which it is entitled.*" Government motion at 7. That is a plain admission that the government has not yet complied with its discovery obligations, nor given Mr. Govey the discovery to which he is entitled. At this late date, the case should be dismissed for failure to comply with discovery obligations.

Brady teaches that the failure to turn over exculpatory evidence is a matter of due process: "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to

---

[8] *See e.g.* Docket at 70 (re-arguing 404(b) issues, citing only out-of-Circuit authority).

[9] With considerable understatement, this Court described the latter argument as "disappointing."

guilt or punishment, irrespective of the good faith or bad faith of the prosecution." *Id. See also Hein v. Sullivan*, 601 F.3d 897, 906 (9th Cir. 2010) (quoting *Silva v. Brown*, 416 F.3d 980, 985 (9th Cir. 2005)). The prosecutor's duty to disclose *Brady* material exists whether or not the information is requested by the defense. *See Paradis v. Arave*, 240 F.3d 1169, 1176 (9th Cir. 2001) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). When evidence is exculpatory, *Brady* trumps even the work-product privilege. *See Goldberg v. United States*, 425 U.S. 94, 108 (1976) (holding statements discoverable even though they constituted work product of government attorneys). There are three essential components to a claim of a Brady violation: (1) the evidence was favorable to the accused; (2) it was suppressed by the prosecutor; and (3) it was material. *See, e.g., Hein v. Sullivan*, 601 F.3d 897, 906 (9th Cir. 2010); *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007) (en banc).

As to the first prong, "*Brady* encompasses impeachment evidence, and evidence that would impeach a central prosecution witness is indisputably favorable to the accused." *United States v. Price*, 566 F.3d 900, 907 (9th Cir. 2009) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)). *See, e.g., United States v. Blanco*, 392 F.3d 382, 387 (9th Cir. 2004) ("*Brady/Giglio* information includes material … that bears on the credibility of a significant witness in the case."). The DOJ evidence here implicates the credibility of witnesses Larson and Beeman.

As to the second prong, "suppression," a *Brady* violation occurs whenever "favorable evidence known to police or the prosecution is not disclosed, either willfully *or inadvertently*." *United States v. Lopez*, 577 F.3d 1053, 1059 (9th Cir. 2009) (emphasis provided). Indeed, "[t]he term 'suppression' does not describe merely overt or purposeful acts on the part of the prosecutor; sins of omission are equally within Brady's scope." *Price*, 566 F.3d at 907. In short, the terms *suppression*, *withholding*, and *failure to disclose* all "have the same meaning for Brady purposes." *Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir. 2002).

Importantly, a prosecutor need not have actual knowledge of the suppressed evidence for a *Brady* violation to occur. Legally, there is no distinction between information known to the prosecutor, his or her office, and law-enforcement agencies. The law imputes knowledge to the prosecutor in each case. *See Kyles v. Whitley*, 514 U.S. 419, 438 (1995). *See also Giglio*, 405 U.S. at 154. As the *en banc* Court put it in *Carriger v. Stewart*, 132 F.3d 463, 479–80 (9th Cir. 1997) "actual awareness (or lack thereof) of exculpatory evidence in the government's hands … is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf." Thus it is no defense that a different DOJ division possessed this material. It has been in the government's actual possession for years.

The third prong for a *Brady* violation is materiality. Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). *See also Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). *See also Browning v. Baker*, 875 F.3d 444, 464 (9th Cir. 2017).

The Court may find this "reasonable probability" even where the remaining evidence would have been sufficient to convict the defendant. *Strickler*, 527 U.S. at 290. Moreover, a "reasonable probability" may exist even without a finding that the outcome would more likely than not have been different. *See Kyles v. Whitley*, 514 U.S. at 434. Instead, "[a] 'reasonable probability' of a different result [exists] when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' " *Id.* (quoting *Bagley*, 473 U.S. at 678). *See also United States v. Sedaghaty*, 728 F.3d 885, 900 (9th Cir. 2013) ("In evaluating materiality, we focus on whether the withholding of the evidence undermines our trust in the

fairness of the trial and the resulting verdict."). For the reasons set forth above, and at hearings throughout this case, this evidence is material to the defense.

The government makes much of the discovery that it is reviewing. But Mr. Govey is entitled to have this information—and to have it with enough time to make it meaningfully useful at trial. That has not yet occurred.

This case should be dismissed given the government's admissions that it has not yet complied with its discovery obligations.

Conclusion

Mr. Govey respectfully requests that the motion to continue to denied, and this case dismissed instead.

Dated: January 26, 2018

s/ Timothy A. Scott

TIMOTHY A. SCOTT
Attorneys for Mr. Govey