IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS OR FOR A NEW TRIAL

On September 17, 2008, defendant was advised that **"ALLEN recalled that TED STEVENS wanted to pay for everything he got."** See Exhibit A. The Brady claim raised by the defense today – Allen's views on defendant's willingness or state of mind to pay for things he received – was absolutely, unquestionably, and unequivocally disclosed to the defense prior to trial. Yet nowhere in his motion does defendant mention that he possessed this information prior to trial. In fact, defendant filed his motion this afternoon and attached eight exhibits, none of which contained this disclosure.

The United States, in short, has not violated Brady. Defendant stated in Court today that before 11:00 p.m. last night, he was unaware of any information that Bill Allen believed that defendant would have paid a VECO invoice if Allen had sent one to defendant. That representation is simply not correct. Before trial began in this matter, defendant was well aware – through materials produced by the government, and through materials that defendant produced to the government – of these essential facts:

- Most critically, in his very first debrief with the government, on August 30, 2006, Allen stated that **"TED STEVENS wanted to pay for everything he got."**

- Defendant asked Allen for invoices for VECO's work, and asked other VECO employees for invoices for VECO's work, on at least three separate occasions;
- Allen further believed that defendant would have paid a reduced invoice if he had received one;
- Allen acknowledged that defendant had asked him for invoices for VECO's work; and
- Allen thereafter did not provide any invoices to defendant for VECO's work.

* * *

Defendant had all of this material prior to trial. All of this information was "evidence" that he now allegedly claims to have been deprived of all along. All of this information could have been incorporated into defendant's opening statement to this jury. Yet none of it was by defendant's transparent choice, not a result of any government error. That is because this trial is not about what Bill Allen though the defendant might do if the defendant received an invoice – it is undisputed that he never did, and Bill Allen explained in plain terms why he did not send such an invoice. The trial is about what defendant knew about the costs of the benefits provided by VECO; it is not about what he might have done in a hypothetical situation that never occurred, much less is it about what Bill Allen thought the defendant would have done in such a hypothetical situation. No invoice was paid because no invoice was sent. The production of this additional, cumulative statement regarding Bill Allen's speculation, prior to the completion of Mr. Allen's direct examination, does not prejudice the defendant in any way.

Despite defendant's possession of this information, defense counsel chose as their primary defense – as described in his opening statement – that their client, Senator Stevens, was not guilty of the crimes charged because he was "unaware" of the work going on at the Girdwood Residence, and specifically unaware of the costs associated with it. Or, as stated in

the opening, defendant could not report what he did not know. The evidence about which defendant now complains – evidence that defendant knew that VECO had done work and that he owed VECO money – is, in fact, highly inculpatory to defendant and that line of defense.

FACTUAL BACKGROUND

I. The Government's *Brady/Giglio*-Related Disclosures

The United States' production of Brady material to defendant must be considered in light of the information previously provided to defendant by the government as well as the information plainly known to defendant through his own production of documents to the government. Critically important now, given the charges leveled at the government by defendant, is the very first piece of redacted Form 302 information that the government provided to defendant:

> **"ALLEN recalled that TED STEVENS wanted to pay for everything he got." [Aug 30, 2006 - 302].**

That statement is not equivocal like the ones produced last night to the defense. That statement is far broader than statements concerning VECO's renovation at the Girdwood Residence, and what specific belief Mr. Allen may have had concerning defendant's state of mind relating to that project. That statement does not contain any limitations like some of the other statements Mr. Allen has made and that have been disclosed to the defense. Rather, from the very get-go of his cooperation, Allen told the government that "Stevens wanted to pay for everything he got." When defendant suggests that he has been prejudiced in any way by the government's disclosures in this matter, we respectfully disagree. The key information raised by the defense today – Allen's views on defendant's willingness to pay for things he received was

unquestionably disclosed to the defense before trial. Moreover, that statement was merely the tip of an iceberg of evidence provided to defendant to the very same effect.

The government's Brady productions, in particular its information relating to Mr. Allen, continued. The government provided two summary disclosure letters to defendant dated August 25, 2008, and September 9, 2008. Those letters are attached to defendant's motion at Exhibits B & C and were previously provided to the Court by the government. The information contained in those letters, as well as in the subsequently-produced redacted Form 302s, reveal the following:

- Allen stated that he knew defendant took out a loan to pay a contractor in connection with the renovations.
- On at least two occasions, Allen was asked by defendant to send him an invoice for the work VECO did.
- Allen never sent an invoice to defendant despite those requests.
- Allen believed that defendant would not have paid an invoice that reflected the actual costs, but that defendant would have paid a reduced invoice.
- Allen thought VECO's costs were too high.
- Allen, himself, did not want to send defendant an invoice because he simply did not want defendant to have to pay for the work VECO did.
- Allen once gave defendant a king size bed that the defendant did not request, which the defendant acknowledged thereafter.
- Allen knew that the defendant was careful about reimbursing and paying for certain things, such as restaurant meals and charter airline flights.
- Defendant told Allen that he considered the permanently-affixed Viking grill to be Allen's property, not defendant's.
- It was Allen's decision not to produce an invoice, in part because Allen did not know how to produce one.

In those letters, the government produced other information that did not even directly relate to the defendant, such as:

- Catherine Stevens contacted an accountant and inquired as to the best way to pay for the improvements to the Girdwood Residence, and that thereafter the Stevenses took out a $100,000 loan to pay for them.
- Information that the roof design in the renovation caused the need for the heat tape.
- Information that Dave Anderson and Rocky Williams had alcohol problems, and that Dave Anderson was once fired from a job because of drinking and poor performance.
- Information that the defendant paid his friend Bob Penney more than $10,000 for materials that Penney purchased for the renovation to the Girdwood Residence.
- Information that another VECO executive, Peter Leathard, told the government that he believed that defendant in fact reimbursed VECO for all of the work that VECO did for defendant.
- Multiple other statements concerning witnesses other than the defendant or Allen.

Finally, and not in connection with the Court's Order concerning redacted Form 302s, the government further provided the entire grand jury transcripts of Augie Paone and Robert Persons. These transcripts contained detailed information (which, due to the constraints of Fed. R. Crim. P. 6(e), the government is willing to provide the Court for in camera review) about the renovation at the Girdwood Residence, much of which arguably constituted Brady material.

Finally, the government, pursuant to the Court's Order today, will be providing defendant with all unredacted Form 302s for the investigation of defendant.

ARGUMENT

There can be no dispute that no prejudice has occurred with respect to Mr. Allen's testimony because cross-examination has not yet started. Nonetheless, we anticipate that

defendant will now claim that, armed with the cumulative material that was provided to him last night, defendant would have adopted a different strategy in opening statement. Our response to this point cannot be presented strongly enough: it was primarily from defendant's own productions of materials that the government obtained its evidence of defendant's continued, in-depth involvement in the renovation of the Girdwood Residence. First, defendant produced to the government two different pieces of fall 2002 correspondence between defendant and Allen. In each of those letters, defendant specifically and unequivocally asked for a "bill" from Allen for the work done at the Girdwood Residence.

Second, defendant produced to the government more than 40 separate pieces of emails and other correspondence – most from Bob Persons to defendant, some from defendant to Persons and others – in which defendant was specifically notified about VECO's work at the residence. These e-mails, which the Court reviewed in connection with the government's prior motion in limine on that topic, repeatedly and specifically reference the work that "Rocky," "Bill," and "Dave" are doing at the defendant's house. They speak in detailed and sometimes glowing terms about the grand renovations that those VECO employees were performing.

Third, defendant produced to the government an internal memorandum from Stevens' office, dated October 31, 2000, concerning the payment of work for the renovations being done. The substance of the memo expressed defendant's instruction to his assistant that he be notified if Catherine Stevens used the "chalet account" to pay for anything other than home renovation work. The assistant, in response, provided defendant with a photostatic printout of all of the account's checks up through the end of October 2000. Many of the checks were written to Christensen; none were written to VECO. Although defendant was aware via more than 20

emails, sent to him prior to that point, that VECO was doing work at his house, and although defendant by that point had already thanked Bill Allen twice for the work VECO was doing, the "chalet account" had no checks to VECO written from it.

At the time of opening statements, defendant had in his possession information that "ALLEN believed that TED STEVENS wanted to pay for everything he got." Given that information, defendant absolutely could have opened with a theory of the case that "Ted Stevens wanted to pay for everything he got, and Bill Allen knew that." Yet they elected not to do so, opting instead for another defense: that defendant had no intent to violate the law because Bill Allen defrauded him by not sending him invoices:

> "The man they selected for a friend to review the bills, to make sure that they were getting – not getting abused 3,300 miles away, was the guy that decided not to send the bill, their friend or supposed friend." Tr. 9/25/08 a.m. at 69.
>
> "[T]his was an act by Bill Allen to keep information from the Stevens. He'll tell you that he send a bill. . . . And why? Well, I guess you'll hear from him he thought the costs were too high." Id. at 70.
>
> "There's no evidence that if Catherine had been sent a bill, a proper bill, that it would not have been paid. The evidence is they paid every other bill that was sent." Id.
>
> "You cannot report what you don't know. You can't fill out a form and say what's been kept from you by the deviousness of Bill Allen who decides to make Augie Paone eat the bill and then doesn't send any bill for services that others may have performed." Id. at 74 (emphasis added).

That is the theory that the defendant selected. Aware of evidence that Bill Allen believed that "Ted Stevens wanted to pay for everything he got," and aware of multiple instances in which defendant requested invoices from Bill Allen, defendant elected a different strategy.

I. There Has Been No Violation Of *Brady*

A. The Government's Obligations Under *Brady*

The government has advised the Court that it is aware of its obligations with respect to exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150, 108 (1972), and United States v. Bagley, 473 U.S. 667, 676 (1985), and has produced and will continue to produce to defendant all such information properly falling within the scope of Brady and its progeny.

Notwithstanding the fact that defendants are not entitled to use Brady as a discovery device to gain general access to the prosecution's files or to conduct a fishing expedition to probe the strength of the government's case before trial, we have provided defendant with an enormous amount of Brady/Giglio material – indeed, material far beyond our constitutional obligations. Bagley, 473 U.S. at 676 ("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"); 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) ("the government is not required to 'deliver [its] 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'") (quoting Bagley, 473 U.S. at 675).[1]

[1/] As the Court knows, 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). See also Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987); Arizona v. Youngblood, 488 U.S. 51, 55 (1988) (no general right to discovery in a criminal case); Weatherford v. Bursey, 429 U.S. 545, 559 (1977); United States v. Agurs, 472

The Court has previously instructed the parties to consider United States v. Safavian, 233 F.R.D. 12 (D.D.C. 2005), for guidance on interpreting the Brady doctrine. The government has taken this decision into account when producing its Brady-related material.[2] In this circuit as elsewhere, the government is not required to disclose neutral or inculpatory evidence. Poindexter, 727 F. Supp. at 1485 (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); Agurs, 472 U.S. at 110-11 (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); North American Rockwell Corp. v. N.L.R.B., 389 F.2d 866, 873 (10th Cir. 1968) ("Brady did not declare that a prosecutor must on demand comb his file for bits and pieces of evidence which conceivably could be favorable to the defense").

B. Defendant Is Not Entitled To A Dismissal Or A New Trial

U.S. 97, 106, 109 (1976); Moore v. Illinois, 408 U.S. 786, 795 (1972).

[2/] The rule under Brady is not a discovery rule, but rather a rule of fairness and minimum prosecutorial obligation. United States v. Beasley, 576 F.2d 626, 630 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979). The purpose of the Brady rule is not to provide a defendant with a complete disclosure of all evidence in the government's file which might conceivably assist him in the preparation of his defense, but, rather, to assure that he will not be denied access to exculpatory evidence known to the government but unknown to him. Bagley, 473 U.S. at 675; United States v. Ruggiero, 472 F.2d 599, 604 (2nd Cir.), cert. denied 412 U.S. 939 (1973).

Defendant's motion fails to establish that any Brady violation has occurred. To find a Brady violation, the Court must determine that (1) the evidence was suppressed by the government; (2) the suppressed evidence was favorable to the accused; and (3) prejudice must have occurred. United States v. Brodie, 524 F.3d 259 (D.C. Cir. 2008) ("There are three components of a true Brady violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.") (quoting Strickler, 527 U.S. at 281-82); see also In re Sealed Case No. 99-3096 (Brady Obligations), 185 F.3d 887, 892 (D.C. Cir. 1999). In order for prejudice to have occurred, the suppressed evidence must be material to the defense. See Kyles v. Whitley, 514 U.S. 419, 432-38 (1995). Materiality is established only if there is a reasonable probability that the evidence would have changed the outcome of the proceeding. In re Sealed Case, 185 F.3d at 892.

C. The Claimed *Brady* Material At Issue Is Cumulative And Was Already Known To Defendant

As set forth above, the evidence claimed to be a Brady violation is cumulative, redundant, and already known to defendant. The Supreme Court and the D.C. Circuit have both 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."). See also Brodie, 524 F.3d at 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. Derrick, 163 F.3d 799 (4th Cir. 1998).

The government is also not required to provide information that already is known to the defendant and its failure to do so cannot be deemed prejudicial. See 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.") (internal citation omitted); 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).

As the Court explained at length in United States v. Agurs, 427 U.S. 97 (1975):

> The Court of Appeals erred in assuming "that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. . . . If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice . . . . Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much . . . . 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.

Id. at 108-10; see also Moore v. Illinois, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case"); Zeigler v. Callahan, 659 F.2d 254, 266 (1st Cir. 1981) (cumulative evidence not material where defense had opportunity to impeach witness by other means).

Here, defendant suggests that the material disclosed was not cumulative because it was somehow different than what the government previously produced. Defendant is incorrect.

For the reasons detailed in the factual statement, above, the information defendant frames as the basis for a claim Brady violation was not suppressed – it is both cumulative information and information specifically known by defendant. See Brodie, 524 F.3d at 268-69 (D.C. Cir. 2008); Oruche, 484 F.3d at 599-600 (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. Maloney, 71 F.3d 645, 653 (7th Cir. 1995) (impeachment evidence that lawyer witness instructed client to lie was cumulative because witness admitted to taking statements from other clients with 269 full knowledge of falsity); United States v. Kozinski, 16 F.3d 795, 818 (7th Cir. 1994) (evidence that witness participated in two additional drug sales was cumulative where witness admitted to being drug dealer); United States v. Marashi, 913 F.2d 724, 732-33 (9th Cir.1990) (witness's false statement was cumulative where her trial testimony was contradicted by another prior statement).

D. No Prejudice Has Occurred, And Any Perceived Harm Has Been Cured

The proper remedy for a claimed Brady violation at this stage of the proceedings would not be dismissal of the indictment or the declaration of a mistrial. Bill Allen is still on direct examination. Defendant has received all formal memoranda concerning interviews of Allen. Allen has ample time and opportunity to cross-examine him at length on the issue of

Defendant was not prejudiced because he had the critical information about Allen's subjective beliefs about whether defendant would pay a bill from Allen or VECO before trial began. When this trial began, defendant was fully aware from the government's disclosures that "Allen recalled that Ted Stevens wanted to pay for everything he got" and the government's further disclosure that Allen believed defendant would have paid a reduced invoice. Defendant is not prejudiced by the government's failure to disclose a statement to the effect that Bill Allen believed if Rocky Williams or Dave Anderson had sent defendant an invoice, defendant would have paid the invoice. Defendant's insistence that this statement is in direct opposition to Allen's statement that he believed defendant would not have paid a bill for all of the costs incurred by VECO at the chalet because those costs would have been too much is assuming too much on defendant's part. Defendant fails to note the government's further disclosure in the same letter that "Allen stated that defendant probably would have paid a reduced invoice if he had received one from Allen or VECO. Allen did not want to give defendant a bill partly because he felt that VECO's costs were higher than they needed to be and partly because he simply did not want defendant to have to pay." Accordingly, defendant's claim that he would have dramatically altered his opening statement is simply not reasonable. Defendant would have the Court believe that he would have focused his opening statement on a single statement by Allen that is subject

to elaboration and explanation – elaboration and explanation already provided to defendant by the government.

Defendant is further not prejudiced because Allen remains on the stand and will be subject to cross examination. Defendant is free to ask Allen all about his prior statements and defendant has this information prior to Allen's cross examination. Allen's statement that he believed defendant would have paid an invoice from Williams or Anderson is not a point that requires any further investigation, or that is capable of further investigation. Allen either believes the statement or not and will qualify the statement or not. It does not change any essential element of this case and, most critically, has no relation to what defendant believed with regard to the renovations and whether he owed any money to Allen and/or VECO for the renovations. At the end of the day, the issue of whether Allen believed defendant would pay for an invoice or not is immaterial. The issue at trial is whether the defendant knew that he had received these benefits and therefore knowingly or willfully failed to report them.

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,

WILLIAM M. WELCH II
Chief, Public Integrity Section

/s/ Brenda K. Morris
BRENDA K. MORRIS
Principal Deputy Chief

NICHOLAS A. MARSH
EDWARD P. SULLIVAN
Trial Attorneys

JOSEPH W. BOTTINI
JAMES A. GOEKE
Assistant United States Attorneys
for the District of Alaska

Criminal Division, Public Integrity Section
U.S. Department of Justice
1400 New York Ave. NW, 12th Floor
Washington, D.C. 20530
Tel: 202-514-1412
Fax: 202-514-3003

CERTIFICATE OF SERVICE

I hereby certify that on this 2d day of October, 2008, I caused a copy of the foregoing "GOVERNMENT'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR FOR A NEW TRIAL" to be delivered by electronic mail to the following:

Brendan V. Sullivan, Jr., Esq.
Robert M. Cary, Esq.
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

/s/
Brenda K. Morris.