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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO. 96-00407
BYRON C. MITCHELL	:	

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR A NEW TRIAL
ON THE BASIS OF THE GOVERNMENT'S BRADY VIOLATION

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Paul A. Sarmousakis, Assistant United States Attorney, responds to the defendant's motion as follows:

1. Admitted. However, sentencing has been continued until January 3, 2001.

2. Admitted.

3. Denied.

4. Admitted. However, the content and the scope of the Solicitation, along with its eventual existence, were speculative until the Solicitation was issued in March of 2000.

5. Admitted in part and denied in part. It is admitted that Stephen Meagher was present for part of the FRAP meeting on May 18, 1999, however, it is denied that he was a member of the FRAP as NIJ through Richard Rau defined the membership of the FRAP. The remainder of paragraph 5 is denied. The NIJ is an independent entity and the Solicitation, if it had existed at the time of the *Daubert* hearing and the trial, would not have qualified as an admission

under Federal Rule of Evidence 801(d)(2). The fact is that the Solicitation did not exist until March of 2000.

6. Denied, except that it is admitted Edward German's draft as well as the Solicitation issued in March of 2000 are written documents which include that language quoted by the defendant.

7. Admitted in part and denied in part. It is admitted Edward German's draft as well as the Solicitation issued in March of 2000 are written documents which include that language quoted by the defendant and that the Solicitation provides for $500,000 for research. The Solicitation has not yet been funded by Congress. It is denied that Special Agent German or any other member of the FRAP candidly conceded that such testing "has not yet been done." By way of further response, the record of the *Daubert* hearing is a written document which speaks for itself and includes the evidence of testing.

8. Denied as stated. The defendant's characterizations are denied. It is not at all clear that a draft of a solicitation could have been used by the defendant to question Stephen Meagher at trial. Certainly, Meagher's testimony at trial, through direct and cross-examination, addressed his opinions on research.

9. Denied. The record establishes that rather than presenting a "considerable challenge to the government's fingerprint identification" the testimony of the experts presented by the defendant at trial established what the government has always acknowledged, even in its case in chief, namely, that experts can make mistakes. Rather than the jury having to "grapple with the fact that different law enforcement fingerprint examiners had reached differing conclusions about the prints at issue," the fact is that the jury heard the various explanations of those experts as to

why they did not identify the latent prints as Mitchell's in the first instance and heard all but one expert testify to the positive identification of Mitchell. The exception was one expert who identified one of the latent prints as Mitchell's and who testified that one latent did not contain sufficient clarity for **him** to make an identification. The experts testified to various reasons for their failure to make initial identifications which covered the range from making a mistake to having third and perhaps fourth generation copies of the evidence which contained black spots without any ridge detail. The fingerprint identification evidence at trial was overwhelming. Eighty-one (81) experts positively identified one of the latent prints as Mitchell's and eighty (80) experts identified the second latent as Mitchell's.

10. Denied. The defendant suggests that Kim Chester was discredited in the eyes of the jury. In fact, Kim Chester's testimony only enhanced her credibility as to the facts surrounding her participation in the crime. Her trial testimony was corroborated by other evidence at trial, including the fact that she voluntarily told the FBI about the crime shortly after the robbery when she was concerned for the safety of herself and a family member. The cross-examination of Kim Chester about her recent nervous breakdown after her father's death was not linked to any faulty recollection of events which happened years before her breakdown. Indeed, it could not be so linked since her testimony at trial was consistent with what she told the FBI in 1991 and consistent with her testimony at Mitchell's first trial.

11. Denied.

12. Denied since this paragraph represents the defendant's argument.

13. At the time of the *Daubert* hearing and at the time of the trial, the issuance of the NIJ Solicitation was speculative. Evidence will be produced at the hearing on this matter

which will establish the speculative nature of the solicitation and the government's expectations concerning future research.

14. The government's Response and the government's Supplemental Response to the Defendant's Motion for a New Trial on the Basis of Newly Discovered Evidence (Docs. 150, 154, and 156) are incorporated by reference herein.

WHEREFORE, for all of the foregoing reasons and for the reasons as stated in the accompanying Memorandum of Law, the government respectfully requests that the defendant's Motion for a New Trial on the Basis of the Government's Brady Violation be denied.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

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PAUL A. SARMOUSAKIS
Assistant United States Attorney

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MEMORANDUM OF LAW IN SUPPORT OF THE
GOVERNMENT'S RESPONSE TO THE
DEFENDANT'S MOTION FOR A NEW TRIAL ON
THE BASIS OF THE GOVERNMENT'S BRADY VIOLATION

This memorandum is in support of the government's request that the defendant's Motion be denied.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violated due process where the evidence is material either to guilt or punishment. A new trial will be granted for a Brady violation only if the defendant can demonstrate both that the prosecution withheld exculpatory evidence, and that the evidence was material, in that the defendant did not receive a fair trial because of its absence. See *Hollman v. Wilson*, 158 F.3d 177 (3d Cir. 1998); *United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997). Impeachment evidence can constitute exculpatory evidence under Brady and its progeny. See *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972). Evidence is not considered material for Brady purposes merely because it "may" have altered the outcome. Rather, evidence is material only where "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. A fair

trial is one deemed worthy of confidence. See *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). The defendant must show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Id*. at 435. So in addition to showing "Brady material" was known and withheld by the government, the defendant must show actual "prejudice." *Strickler v. Greene*, 527 U.S. at 281-82.

I. The Government Did Not Withhold Exculpatory Evidence.

As discussed at length in the government's previous filings, the NIJ Solicitation did not exist at the time of the *Daubert* hearing or the trial in this case. If it had existed it might have been used as impeachment material at the *Daubert* hearing. However, it is the government's position that the Court could properly have excluded the use of the Solicitation at trial.[1]

In addition, the government has no obligation to disclose information that a defendant could obtain from other sources by exercising reasonable diligence. *United States v. Perdomo*, 929 F.2d 967, 970-73 (3d Cir. 1991). Thus, information "is not considered to be suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence." *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984); *United States v. Oliver*, 908 F.2d 260, 262 (8th Cir. 1990). Mitchell must show that he was deprived of information of which he was actually unaware and could not, with reasonable diligence, obtain himself without the government's assistance. See, *United States v. Bey*, 188 F.3d 1, 4, n.2 (1st Cir. 1999) (defendant bears the burden of proving a Brady violation). He has failed to establish that requirement.

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[1]In his motion to strike, the defendant insists that the Solicitation (if it existed at the time of trial) would have been admissible as an admission against the United States. As will be established at the January 3, 2001 hearing, the defendant is wrong. See also, government pleadings in Docs. 150, 154 and 156.

A. <u>The Evidence Was Known Before the *Dauber*t Hearing</u>[2]

The *Daubert* hearing took place in July 1999 . Over a month before the *Daubert* hearing, the defendant's expert, Dr. David A. Stoney, was aware of the potential solicitation. Stoney was part of the NIJ Fingerprint Research Advisory Panel (FRAP) which met on May 18, 1999 in Arlington, Virginia. The purpose of the FRAP meeting was to discuss the issuance of the very solicitation the defendant now claims is newly discovered. Stoney had a copy of the basic wording of the solicitation when he left the May 18, 1999 meeting. In fact, Stoney discussed the solicitation at the *Daubert* hearing with Stephen Meagher and Bruce Budowle, two of the government's experts, during a court recess. Stoney had withdrawn from the FRAP only after decisions on the solicitation were made at the May 18, 19999 meeting and told Meagher and Budowle he withdrew because he wanted to apply for the NIJ grants offered in the solicitation. Prior to the *Daubert* hearing, Stoney also discussed the potential solicitation with an individual who submitted a research proposal for an educational institution in response to the March 2000 Solicitation. Stoney is the principal investigator under that submission. Yet Stoney never told the defendant about the FRAP.

However, defense counsel used his knowledge of the potential research during the cross-examination of government expert Edward R. German:

> Q. And would you agree with me that there's an insufficient amount of studies that exist addressing the probability of this occurring?

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[2]In its pleadings in response to the defendant's Motion for a New Trial based on Newly Discovered Evidence, the government stated in essence that defense counsel had to know of the May 1999 FRAP meeting and the potential solicitation. After an investigation, the government concedes it was wrong. Defense counsel's knowledge is set out, *infra*.

MR. SARMOUSAKIS: Objection.

THE COURT: Overruled. If you know.

THE WITNESS: No, I would not agree with that, because I believe that in the last 100 years, that examinations have been performed and comparisons have been performed between persons. And looking at fingerprint identifications, that these are not meaningless comparisons. That if you have a study – and you say, okay, we're going to compare the fingerprints and we're going to take a latent fingerprint and we're going to compare it against 50,000 people versus the fact that a crime laboratory has done the same thing last week, that the crime laboratory's comparisons mean nothing and that what you did this week because you said we're now going to do this now as a study, that the other details mean nothing.

It's not that there there's not--that there's not a great amount of information that has been reported and recorded in the last 100 years concerning these comparisons concerning studies, if you want to call them studies.

Q. Have you not, sir, recently called upon more studies – called upon for more studies in the area of whether or not a scientific basis exists for a fingerprint examiner to make an identification?

A. Are you talking about me personally?

Q. Yes, you personally.

A. No, I personally have not recently called for more studies to be done.

Q. You haven't communicated with anyone on that issue?

A. Oh, yes, I have communicated with people about the National Institute of Justice initiative for studying fingerprint validation and fingerprint training, things that are very closely related to what we have done with SWGFAST.

Q. Can you explain, sir, what you men (sic) by fingerprint validation?

> A. Yes. By fingerprint validation, I mean in essence, I think what is the exact question of this hearing, of this Daubert hearing, are fingerprints individualized between two people. Can you take a sufficient quantity and quality of information of ridge details and one impression and individualize that impression and indeed state that it was made by another person to the exclusion of everyone else in the world?
>
> Q. And you've called for more studies in that area. That's all I'm asking.
>
> A. Well, again, you asked me if I personally had. No, I was not. I was asked by the National Institute of Justice to serve on a fingerprint advisory board concerning this topic. And I do serve on that board.

7/8/99 Daubert Hearing Transcript at 46-49.

It is clear and the defendant has conceded that prior to the *Daubert* hearing, defense counsel knew that Edward German had contacted an individual about fingerprint research on behalf of the government. In fact, during cross-examination, German testified he was serving on a NIJ fingerprint advisory board, the initiative of which was fingerprint validation research.

Since the evidence was in fact known by the defense prior to the *Daubert* hearing and trial, the defendant cannot prevail.

B. <u>The Facts Establish That Due Diligence on Mitchell's Part Does not Exist</u>

The defendant has not acted with due diligence or counsel made a tactical decision concerning the fingerprint research issue. Conceding that defense counsel did not know of the possibility of NIJ issuing a solicitation on fingerprint research, counsel had to do no more than follow up Edward R. German's answers on cross-examination. Clearly, the defendant has not used due diligence or even alleged sufficient facts from which the Court may infer due diligence. Indeed, it may be that the decision not to follow-up during German's cross was a tactical decision.

Finally, where a prosecutor has no actual knowledge or cause to know of the existence of Brady material in a file unrelated to the case under prosecution, a defendant, in order to trigger an examination of such unrelated files, must make a specific request for that information. *Joseph*, 996 F.2d at 40-41 (emphasis added). Constructive knowledge cases require only that the government turn over information that it should have known was in existence. The Court should takes a restrictive view of constructive knowledge: "[c]onstructive knowledge can only be found where the defense has made a specific request for the information." *United States v. Veksler*, 62 F.3d 544, 549 (3d Cir. 1995) (holding that where defense did not make a specific request for information, the court would not find constructive knowledge), *cert. denied*, 511 U.S. 1075 (1996). No specific request was made here. In addition, at the time of the *Daubert* hearing and at the time of the trial, the issuance of the NIJ Solicitation was speculative. Evidence will be produced at the hearing on this matter which will establish the speculative nature of the solicitation and the government's expectations concerning future research.

II. The Defendant Received a Fair Trial

When a Brady claim is the basis of the motion for a new trial, the defendant must affirmatively demonstrate that he was deprived of specific impeachment evidence that was "material" to his defense. Evidence is "material" only if there is a reasonable probability that, had it been disclosed, the result of the proceeding would have been different.[3] *Kyles v. Whitley*, 514

[3]The defendant's pleadings have been used by several other defendants across the country to challenge fingerprint evidence. All of those motions to exclude fingerprint evidence or expert opinions have been denied. In at least four of the eight cases, the NIJ Solicitation was known to and used by the defendant.

Additionally, in a recent Eastern District of Pennsylvania robbery case, the NIJ Solicitation was used by the defendant while cross-examining the government's latent print expert. The evidence in that case was almost exclusively fingerprint and document examination expert

U.S. 419, 434-35 (1995); *Buehl v. Vaughn*, 166 F.3d 163, 181 (3d Cir. 1999). This standard is not met by the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 109-10 (1976). Rather, the item must pertain to a "crucial fact," *United States v. Pelullo*, 14 F.3d 881, 887 (3d Cir. 1994), or "go to the heart of the defendant's guilt or innocence" in light of the "totality of the circumstances," and its absence must "impair the fairness of defendant's trial." *United States v. Hill*, 976 F.2d 132, 134-35 (3d Cir. 1992). The undisclosed information must first be "Brady material" before the Court must determine whether a "Brady violation" has occurred. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Smith v. Holtz*, 210 F.3d 186, 196-97 (3d Cir. 2000). Here it is neither.

The evidence at issue here did not go to the heart of the defendant's guilt or innocence. At most, it provided additional impeachment of the government's expert, who was extensively and thoroughly cross-examined by the defense.

CONCLUSION

The defendant cannot meet the requirements necessary for this Court to grant a new trial on the basis of an alleged Brady violation.

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opinions. Unlike the *Mitchell* case, there were no corroborating witnesses to the unlawful planning and execution of the robberies. Like the *Mitchell* case, there were witnesses to the robberies but no eye-witness identification of the defendant. The evidence consisted of latent prints on demand notes used in two of the robberies and writings on one of the two demand notes that were similar to the writings on the demand notes for three other robberies (no fingerprint identification). The jury returned guilty verdicts on all counts. Attached hereto are the Report and Recommendation of Chief United States Magistrate Snow in the case of *United States v. Hilerdieu Alteme, et al.*, Case No. 99-8131-CR-Ferguson, Southern District of Florida, and the Entry on Defendant's Motion to Exclude... of Judge Hamilton in *United States v. Wade Havvard*, Cause No. IP 00-43-CR-01 H/F, Southern District of Indiana, rejecting fingerprint challenges.

WHEREFORE, for all of the foregoing reasons, the government respectfully requests that the defendant's motion be denied.

Respectfully submitted,

MICHAEL R. STILES
United States Attorney

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PAUL A. SARMOUSAKIS
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Government's Response to the Defendant's Motion for a New Trial on the Basis of Newly Discovered Evidence has been served via hand pick up upon the following counsel on the date set forth below:

Leigh M. Skipper, Esquire
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/s/ Paul A. Sarmousakis
PAUL A. SARMOUSAKIS
Assistant United States Attorney

DATE: 11/15/00