NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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November 5, 2020

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Re: Commonwealth of Virginia v. Kelvin Omar Gonzalez
FE-2020-326

Dear Counsel,

This matter came on for argument on the Defendant's Motion to Quash Indictment on October 23, 2020. At the conclusion of the arguments, the Court took the matter under advisement. In the interim, counsel submitted certain letters and accompanying materials, which the Court also considered in addition to the prehearing memoranda. The Court is now ready to rule.

OPINION LETTER

BACKGROUND

Mr. Gonzalez is charged with one count of First-Degree Murder pursuant to Va. Code §18.2-32 and one count of Felonious Use of a Firearm pursuant to Va. Code §18.2-53.1. Trial by jury is set for January 5, 2021.

The Commonwealth provided initial discovery to Mr. Gonzalez on January 13, 2020 and January 14, 2020. This included information on a knife found at the scene, which the Commonwealth had not analyzed for DNA or fingerprints. On August 18, 2020, the Commonwealth provided 99 pages of supplemental discovery to Mr. Gonzalez. Pages 96-97 of the supplemental discovery contained a brief report by the Detective (Hereafter referred to as Detective JV). For the very first time, the Accused learned of two things:

1. The report includes a witness statement from (name redacted by the Court) ("The Witness"), who heard Mr. Gonzalez say to the decedent "Don't get close, I have a gun;" and
2. The Witness observed the decedent with a knife in his hand.

Other than a telephone number, no other information was collected from The Witness. No residential, business or email address or emergency contact was requested. Nothing. This was the *first and last time* Detective JV saw or even attempted to speak with The Witness.

Upon receipt, Mr. Gonzalez, through counsel, requested The Witness's contact information. The Commonwealth, at that time, refused to provide this information.

On October 23, 2020, the Court heard Mr. Gonzalez's Motion to Quash the Indictment based on (1) the police report by Detective JV provided by the Commonwealth to the defense on August 18, 2020; and (2) the knife found on the scene.

SYNOPSIS OF ARGUMENTS

I. Defendant's Motion to Quash

Defendant argues that the Commonwealth's inexcusable nine-month delay in providing him with The Witness's statements constitutes a *Brady* violation. As a result, Mr. Gonzalez has been deprived of due process and the right to a fair trial, and the delay has irreparably damaged his right to call for evidence in his favor in violation of Art. 1 § 9 of the Virginia Constitution and the Sixth Amendment to the U.S. Constitution.

Defendant next argues that the Commonwealth's failure to test the utility knife found within a few feet from decedent's body violates *Brady*. The knife has not been sent for DNA/fingerprint analysis, and it is unlikely that such analysis can be obtained prior to trial. Further, even if the analysis comes back, Defendant will have little to no opportunity to effectively obtain an independent review of any DNA analysis before trial. "The constitutional right to receive exculpatory evidence is not fulfilled, and a prosecutor's duty is not satisfied, simply by disclosure; timely disclosure is required." *Moreno v. Commonwealth*, 10 Va. App. 408, 417 (1990).

II. The Commonwealth's Opposition to the Motion to Quash

The Commonwealth argues that there was no *Brady* violation, nor was Mr. Gonzalez deprived of due process or the right to a fair trial. *Brady* is not violated when exculpatory evidence is made "available to a defendant during trial" if the defendant has "sufficient time to make use of it at trial." *Read v. Virginia State Bar*, 233 Va. 560, 564-65 (1987). Because the statements were available months before the jury trial set for January 5, 2021, Defendant has sufficient time to make use of the evidence at the trial.

The Commonwealth next argues that failing to analyze the knife does not violate *Brady*. The Commonwealth is entitled to send whatever items of evidence deemed relevant to the case to the state laboratory for scientific analysis. Defendant has known about the knife and has had ten months to request the knife be tested for DNA and fingerprints. The Commonwealth argues that the appropriate remedy, should the knife testing results not be done by the January trial date, is a continuance at his request.

III. Defendant's Response to the Commonwealth's Opposition

Defendant argues that all three prongs of *Workman* have been established to prove a *Brady* violation. *Workman v. Commonwealth*, 272 Va. 633, 645 (2006). First, the statements were exculpatory. Second, the exculpatory information provided to Detective JV was withheld from the defense for approximately nine months. Third, the clearly exculpatory information confirms that the decedent was armed with a knife and warned by Mr. Gonzalez to stay away from him; important factors establishing self-defense.

ACTIONS TAKEN BY THE COMMONWEALTH SINCE THE OCTOBER 23, 2020 HEARING

A few hours after the October 23, 2020 hearing, the Commonwealth provided Defense Counsel with The Witness's date of birth and phone number. Additionally, the Commonwealth sent the knife for DNA and fingerprint analysis. Defense Counsel has been unable to locate The Witness, even with the additional information provided by the Commonwealth. Moreover, the Commonwealth and the Police Department have attempted to locate The Witness, without success. He appears to be in the wind.

BRADY- The Ideal

Brady v. Maryland, insofar the state's obligation to disclose information favorable to the accused is precedent. But it is so much more than that. This is true because other than a review in law school, most lawyers have not actually read the case. That is because *Brady* simply ***is***.

It is about fairness. It is about transparency. It is about accepting the notion that the state, with its enormous power, polices itself righteously when it is required to disclose favorable evidence to an accused person, who would otherwise have no knowledge of this information.

Brady is not just a case and not just an idea. It is an ideal. After all, the due process clause of the fourteenth amendment, which forms the basis for *Brady's* rationale, is concerned with the orderly and fair treatment of a person who is accused of a crime. It is the antithesis of arbitrariness, standardless procedures and deliberate ignorance, or worse, indifference. Once we exhaust all the fancy language and the lofty ideals, adherence to *Brady*, its progeny and the ideal of due process, we must understand, and agree, that to be a civilized society governed by the rule of law, sham trials that pretend to justice make us less than who we should be as a people.

ANALYSIS

The question presented to the Court is what Mr. Gonzalez's pre-trial remedy is when the Commonwealth has violated *Brady* by untimely disclosing exculpatory evidence.

***BRADY - The* Standard**

Under *Brady* and its progeny, "the suppression by the prosecution of evidence favorable to an accused," whether requested or not, "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

United States v. Agurs, 427 U.S. 97, 107 (1976). This includes both impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 U.S. 667, 676 (1985).

Such evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Additionally, to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 433–434 (1995). If the accused does not receive such evidence, or if the accused learns of the evidence at a point in the proceedings when he cannot effectively use it, his due process rights as enunciated in *Brady* are violated. *Bowman v. Commonwealth*, 248 Va. 130, 133.

A violation of *Brady* occurs when (1) the evidence not disclosed is favorable to the accused, either because it is exculpatory or because it may be used for impeachment; (2) the evidence was withheld by the Commonwealth either willfully or inadvertently; and (3) the accused was prejudiced. *Workman v. Commonwealth*, 272 Va. 633, 645 (2006) (citing *Strickler v. Greene*, 527 U.S. 263, 281-83 (1999).

I. The Witness's Statement

Detective JV was dispatched to INOVA Fairfax Hospital in reference to a shot person on November 28, 2019. Detective JV's Supplement, *submitted on July 8, 2020*, states he spoke to a witness who "stated as he crossed the street, he saw the victim had a knife. He heard the other guy say, 'Don't get close I have a gun (revolver).' The victim had a work knife. The Witness said he does not know either of the subjects but has seen them around…" The Commonwealth provided Defense Counsel a redacted copy of this supplemental information, on *August 18, 2020*.

Since August, Defense Counsel, the Commonwealth, and the Police Department have attempted to locate the witness, without success. The late disclosure of The Witness's statement constitutes a *Brady* violation under *Workman's* three prongs:

First, the Commonwealth conceded in her argument that The Witness's statement is exculpatory.

Second, under *Kyles*, the Commonwealth had a duty to learn of any exculpatory evidence known to Detective JV, and such evidence has been withheld from Defense Counsel since November 2019.

Finally, the failure to earlier disclose prejudiced Mr. Gonzalez because it came so late that the information disclosed cannot be effectively used at trial given that The Witness's current whereabouts are unknown.

II. The Knife

The Commonwealth turned over discovery to the Accused in January 2020, which included a reference to the knife found at the scene of the incident. In a letter dated February 5, 2020, the Commonwealth informed Defense Counsel that if he wanted to examine the knife, to contact the office and a time would be arranged. Defense Counsel examined the knife in the Commonwealth's Office in the March 2020 timeframe.

After the Supplemental Discovery sent to Defense Counsel on August 18, 2020, where, for the first time, it was learned that a witness saw the decedent holding the knife, Defense Counsel requested a copy of the knife analysis. The Commonwealth informed Defense Counsel that no such analysis had been requested or performed.

Based on the Supplemental Discovery, an eyewitness, The Witness, saw the decedent with a knife approaching the accused. The knife became obviously exculpatory to Defense Counsel only after Detective JV's statement came to light. It was the Commonwealth's responsibly under *Brady* to have the knife analyzed for DNA and fingerprints. Since the October 23, 2020 hearing, the Commonwealth has submitted the knife for DNA and fingerprint analysis. However, given the delay of laboratory analysis, it is unlikely that Mr. Gonzalez will have enough time to review the analysis and plan a proper trial strategy based on what the analysis might provide. The Accused remains incarcerated.

BRADY –The *standard validates the ideal*

Looking at this case through this prism leaves the Court figuratively scratching its head. Here, an experienced investigating detective, on the day of the shooting, November 28, 2019, interviewed a disinterested witness to a homicide who described the shooting in such a manner as to implicate self-defense. That is exculpatory.

It is indisputable that law enforcement never followed up with The Witness in any fashion. This was conceded in oral argument. The position of the Commonwealth appears to be that The Witness's statement was inconsistent with other, more favorable, evidence and therefore no follow up was necessary.

The Commonwealth, charged with constructively knowing this information, did not disclose this to Defense Counsel until August 20, 2020, mere days before the preliminary hearing in the Juvenile and Domestic Relations District Court and 5 months before the trial date in Circuit Court. Further, this witness puts a knife in the decedent's hand and tells the detective that the defendant warned the decedent that he had a gun and that he should not come closer. Months and months and months go by without the defense being aware of this information. As well, the knife, found near the decedent, was never sent to the laboratory to be analyzed. This information was on page 97 of a 99-page supplement provided to Defense Counsel after the Commonwealth checked Ileads, a record management system, for police report supplements.

The Commonwealth, has another witness who is expected to testify that:

- The decedent did not have a knife;
- The decedent was not acting aggressively; and
- The defendant shot the decedent once from a distance and then fired a second round up close.

Therefore, the Commonwealth neither pursued The Witness for more information nor did it submit the knife for analysis to see if there was forensic evidence linking the knife to the decedent until the end of October 2020. This is because The Witness, who was disclosed on August 20, 2020, had a very different story.

Worse, knowing this information was vital to the accused, the Commonwealth merely transmitted this supplementary package to Defense Counsel and did not even provide to counsel any type of direction as to this information.

The supplement, for reasons still not explained, was filed by Detective JV on July 8, 2020. The disclosure to Defense Counsel was, amazingly, not for another 31 days. Again, this is what the detective noted in the supplement, in pertinent part:

> *Witness:*
>
> *(*Name redacted by the Court*)*
>
> *I spoke to a witness (*name redacted by the Court*). He stated he was crossing Dinwiddie Street along with one more person. He stated as he crossed he saw the victim had a knife. He heard the other guy say "Don't get close I have a gun (revolver). The victim had a work knife. The guy took out a gun and shot him. (*Name redacted by the Court*)*

> *said he does not know either of the subjects but has seen them around. The guy with the gun ran and the victim fell.*

Clearly, the detective did not just suddenly remember this encounter. This was written down sometime in November of 2019. Why it mysteriously appeared in the form of a supplement in August of 2020 has, to this day, never been explained.

When Defense Counsel followed up with the Commonwealth on August 31, 2020, about the supplemental response, the Commonwealth, responded in part on September 9, 2020 that she

> "… reached out to the detective to ensure we have his notes, and any notes we receive will be provided to you promptly. The Commonwealth is not obligated to provide contact information for a witness."

This means from the time the Commonwealth received the supplement to September 9, 2020, the Commonwealth *did nothing by way of follow up* even though this information should have appeared to the government, on its face, to be a critical omission of constitutional proportions based upon prior disclosures.

The Commonwealth buried its head in the sand. This witness was bad for their case. They will never call this witness. Therefore, the detective did not advise the Commonwealth of his existence and never bothered to follow up with this witness once the trauma of witnessing a homicide subsided to some extent. Figuring it would simply provide a name and nothing more, 10 months later, the Commonwealth unapologetically maintains they have done their duty.

This attitude reminds the Court of a scene from the movie "Liar Liar" where the judge and counsel have the following interchange:

> *Fletcher: Your honor, I object!*
> *Judge: Why?*
> *Fletcher: Because it's devastating to my case!*
> *Judge: Overruled.*
> *Fletcher: Good call!*

That fictional exchange is funny. The reality of this case is not. Understanding that the witness interviewed in November, 2019 and then disclosed in August of 2020 could be devastating to its case, the Commonwealth shrugs its shoulders and essentially takes the position, both in its written submission as well as oral argument: "He got it when the Commonwealth's office found about it, there is no problem here. There is nothing to see. Move along."

Here is the problem: we do not abide sham trials. We do not wink and nod at fairness and justice. At least we should not do these things. If just outcomes are the correct outcomes, whatever the result, it must be through a process that views prosecutorial obligations as hallowed rather than an inconvenient but necessary duty.

Article I, Section 11 of the Virginia Constitution reads, in part:

> That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.

If the trial itself is to be conducted in a sacred manner, should not divulging, *in a meaningful way*, the information which could form the basis of an absolute defense be a sacred duty by extension? The answer to that question must be yes. To disagree with this is tantamount to a sad devaluation of a fundamental principle that is inexorably tied to the soul of our system.

And we are not soulless. We as a community and society take the presumption of innocence seriously. We understand that justice is not just about winning. We understand that transparency and daylight create fairness where surprise and indifferent disclosure ensures a system that is defined by mediocrity.

So, when a person, as here, is charged with taking a life, and there is available evidence to demonstrate a potential justifiable defense, the government should be happy to provide evidence that supports the principle that a prosecution is not merely about winning, but is the practical quintessence of justice. But here, anyway, it appears to be just about "getting the W."

This would be a good point to set out and then discuss Rule 3:8 and the obligations it imposes upon prosecutors. But this case presents an issue which is, candidly, transcendent. Because it is not about doing something, it is about *how* one does something. The Commonwealth, if one accepts the nature and extent of its obligation, should have been enthusiastic about Detective JV's disclosure. The detective should have immediately noted its importance and reported it directly to the prosecutor with appropriate follow-up, rather than including the information in a few lines within a supplemental report, months after the encounter. The information was treated like the weather. Or the color of a car. Or the time of day. Self-defense is not innocuous and should not be treated as such. But it was.

A FAIR TRIAL REMEDY FOR *BRADY* VIOLATIONS

Quashing the indictment is an inappropriate remedy. Typically, *Brady* violations result in the accused being entitled to a new trial, not a blanket acquittal. *See Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995). Pursuant to Va. R. Sup. Ct. 3A:11(h), "If at any time during the pendency of the case it is brought to the attention of the court that a party has failed to comply with this Rule… the court may grant such other relief authorized by Virginia law as it may in its discretion deem appropriate." The Court finds that a jury instruction describing the Commonwealth's disclosure duty and its breach of that duty is the appropriate remedy in this case.

Virginia Courts have rarely addressed adverse inference instructions in criminal cases. The Supreme Court of Virginia has held "[a] defendant is not entitled to an adverse inference instruction due to the loss of evidence that only potentially has exculpatory value, when the loss is without fault by the prosecution. *Prieto v. Commonwealth*, 278 Va. 366, 396 (2009). There, the Commonwealth lost the evidence obtained by the police prior to the identification of a suspect. The court noted that evidence is *potentially* exculpatory, not *apparently* exculpatory, until a comparison can be made with an identified suspect. *Id.* (emphasis added) Therefore, if "the potentially exculpatory evidence is lost prior to the determination of a suspect, unless there is bad faith on the part of the Commonwealth, there is no due process violation." *Id.*

Instructively, the New York Supreme Court (a trial level court) gave an adverse inference jury instruction following the government's *Brady* violation. In *People v Jackson,* 168 Misc.2d 182, 191 (1995), the police interviewed an eyewitness who saw the defendant standing outside the apartment when shots were fired. *Id.* at 184. The government did not disclose the eyewitness's exculpatory statements to the defense for three years, and the eyewitness was unable to recall any of the critical details of his earlier statements by the time of trial.[1]

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[1] In *Jackson*, the court held:

> The People violated *Brady* when they failed to turn over statements made by a "circumstantial" witness to three homicides on the ground that the prosecutor questioned the witness's credibility. The prosecution should not decide the "usefulness" of evidence; rather the trier of fact decides credibility of witnesses. The prosecutor's belief, even if held in good faith, does not overcome the *Brady* violation.

As well, California Penal Code § 1054.5(b) states: "Upon a showing that a party has not complied with [discovery] … the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure." California also adopted a jury instruction for failure to disclose evidence within a timely fashion. *See People v. Mora and Rangel*, 5 Cal.5th 442 (2018). In that case, discovery reports were turned over by the prosecutor in untimely fashion. There, the trial court gave a modified version of CALJIC No. 2.28[2] which explained the rules of discovery and noted that the police department failed to timely disclose reports containing witness statements and a fingerprint testing report. *Id.* at 470.

Here, the Commonwealth did not disclose The Witness's exculpatory statements to the accused for nine months. Unlike in *Prieto*, Mr. Gonzalez has been in custody and awaiting trial since November 2019, *the same time* the Commonwealth knew of the witness's statement about the decedent holding a knife and the defendant issuing a verbal warning to the decedent. The Commonwealth has failed to fulfill its constitutional duty to disclose exculpatory evidence to the accused. The untimely disclosure has permanently prejudiced Mr. Gonzalez, given that The Witness, a key eyewitness, is missing.

Whether to give or deny jury instructions "rest[s] in the sound discretion of the trial court." *Cooper v. Commonwealth*, 277 Va. 377, 381 (2009) (citing *Daniels v. Commonwealth*, 275 Va. 460, 466 (2008) and *Stockton v. Commonwealth*, 227 Va. 124, 145 (1984)). In this case, the appropriate remedy is to give an adverse inference instruction concerning The Witness and the statements he made to Detective JV.

Elizabeth Napier Dewar, in a Yale Law journal note, *Note*: *A Fair Trial Remedy For Brady Violations*, 115 Yale L.J. 1450 (2006) suggests a remedy similar to what is available to civil litigants under Federal Rule of Civil Procedure 37(c)(1)(b)[3]. In the note the author states in pertinent part:

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[2] As pertains to the state's obligations, California's jury instruction is as follows:

> If you find that the [concealment] [and] [or] [delayed disclosure] was by the prosecution, and relates to a fact of importance rather than something trivial, and does not relate to subject matter already established by other credible evidence, you may consider that [concealment] [and] [or] [delayed disclosure] in determining the [[believability] [or] [weight] to be given to that particular evidence[.]

[3] (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.

I propose that when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on Brady law and allowing the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt.

I call this a "fair trial remedy," because instead of curing the Brady violation through reversal on appeal, the remedy corrects the trial itself. In contributing to a jury's decision to acquit, the remedy would provide more immediate relief than a postconviction reversal. Yet, because the remedy would not free or even grant a new trial to defendants of whose guilt the government has sufficient evidence, the remedy would not run afoul of those who decry the social costs of other "punishments" for prosecutors, such as overturning convictions or dismissing charges.

The remedy would be structurally similar to the "missing evidence" and "missing witness" doctrines. Each side in a criminal case has long been allowed to argue that the failure of a party to produce a witness or evidence when that party might be naturally expected to do so creates an inference that the missing testimony or evidence would have been unfavorable to that party. This adverse inference may then, with the court's permission, be argued in closing and addressed by a jury instruction. The prerequisites are a showing that the testimony would have "elucidated the transaction"--i.e., that it would not simply have been cumulative--and that the evidence or witness was "peculiarly" available to the nonproducing party.

The corresponding Brady remedy would require defendants to establish that favorable evidence in the government's possession had been suppressed, and that the suppression had significantly hampered the defense's investigation and preparation for trial. The defense would also have to show that the suppressed evidence was not merely cumulative of other favorable evidence in the defense's possession, and the defense did not have access to the suppressed evidence and could not reasonably have been expected to find the evidence through other channels.

The remedy would exist primarily for the benefit of defendants when the government's tardiness or failure to disclose favorable evidence permanently prejudiced the defense. Permanent prejudice might consist of the disintegration of tangible evidence or the death or disappearance of a witness or alternative suspect. In such cases, neither granting a continuance for further investigation nor the fact that the defendant may be able to make some use of the belatedly disclosed evidence is a sufficient remedy.

The proposed remedy would delegate to juries a task currently assigned to appellate courts. Before the hindsight-burdened reassessment on appeal, the jury would consider the possible prejudice to the defense resulting from the Brady violation in light of the evidence presented at trial. The jury would know that the government had illegally hindered the

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(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
(B) may inform the jury of the party's failure.

> defense and would be exhorted by defense counsel to acquit the defendant in part on the basis of the suppression, because the suppressed evidence itself raised a reasonable doubt about the defendant's guilt; because the government's failure to disclose the evidence evinced the weakness of its case; or because, if the defendant had known of the evidence earlier, the defendant would have found proof of innocence or at least further evidence to undermine the government's case. The jury might accept one of these arguments, or the jury's generally enhanced scrutiny of the government's case might uncover a reasonable doubt the jury would not otherwise have noticed."

Another way to look at the same issue is set forth in a trial brief filed by defendant in *United States v. Parnel*, 2014 WL 5106530 (M.D.Ga.) (Trial Motion, Memorandum and Affidavit), United States District Court, M.D. Georgia. In that case, as here, defense counsel sought dismissal of an indictment because of discovery abuses. Alternately, counsel sought relief by way of a curative jury instruction, along the lines set out in the above referenced Yale Law Journal Note[4]:

> It is well-established that "[d]ue process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *See also* U.S. Attorney's Manual, at §9.5-001.D.
>
> Due process also requires that exculpatory evidence must be disclosed reasonably promptly after it is discovered and impeachment information must be disclosed at a reasonable time before trial. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993) ("due process requires only that disclosure of exculpatory material be made in sufficient time to permit the defendant to make effective use of that material at trial"); U.S. Attorney Manual, § 9.5-001(D)(1)-(2).
>
> More fundamentally, "*society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.*" *Brady*, 373 U.S. at 87. The administration of justice largely falls into the hands of the United States' Attorneys and the Courts, and it comes as no surprise that former Deputy Attorney General David Ogden recently pointed to Justice

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[4] This is a "post Stevens" federal case, referring to the prosecution of Senator Ted Stevens of Alaska where it was found that two Justice Department prosecutors intentionally hid evidence in the case. A report was ultimately issued which found that the government team concealed documents that would have helped the late Stevens, a longtime Republican senator from Alaska, defend himself against false-statements charges in 2008. Stevens lost his Senate seat as the scandal played out, and he died in a plane crash two years later.

> Sutherland's observations in *Berger v. United States*, 295 U.S. 78, 88 (1935) that *"[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."* In any prosecution where evidence, if made available, would tend to exculpate the defendant and it is withheld or not produced in a timely manner, due process is violated whether or not the prosecution's acts are "the result of guile." *Brady*, 373 U.S. at 88. (emphasis added)
>
> A (third) remedy potentially available to the Court is to instruct the jury that the government's discovery misconduct occurred and permit the jury to consider that the government's failure to disclose key evidence can, alone, raise a reasonable doubt as to the defendants' guilt. *See First Mariner Bank v. Resolution Law Group*, 2013 U.S. Dist LEXIS 153299, 2013 WL 5797381 (D. Md. Oct. 24, 2013); *Network Computing Services Corp. v. Cisco Systems, Inc.*, 223 F.R.D. 392, 400-401 (D.S.C. Aug. 3, 2004); Elizabeth NapierDewar, *Note: A Fair Trial Remedy For* Brady *Violations*, 115 Yale L.J. 1450 (2006). Though outright dismissal by the Court is the only meaningful method for curing the due process violations in this case and ensuring that they do not again occur, exclusion of documents and witnesses as described herein, and a jury instruction regarding the government's conduct do provide some measure of relief.

While the Court declines to quash the indictment, it will inform the jury, once it is seated, in a manner consistent with this analysis.

CONCLUSION

For the foregoing reasons, the Court finds the Commonwealth violated *Brady* when it untimely and inadequately disclosed The Witness's statements to the accused and neglected to submit the knife for DNA and fingerprint analysis as a result of The Witness's statement. In so finding, the Court holds that at the conclusion of the trial, the jury will be instructed as follows:

> *During the pre-trial phase of this case, the Commonwealth was obligated to timely disclose to the Accused information favorable to him. The Commonwealth knew in November of 2019 of the existence of a witness who told a detective he saw the decedent with a knife and further heard the defendant say "don't come any closer I have a gun." This witness did not know either the decedent or the Accused. The police did not, in any fashion, follow up with this witness after the day of the incident. As well, the police did not request the witnesses' residential or business address, email address or emergency contact.*
>
> *It was not until August 18, 2020 that the Accused learned of this information from the government. It was included in a few lines of text on page 97 of a 99-page set of documents. It was not until October 23, 2020 that the government provided a telephone number and a date of birth for this witness. The telephone number was disconnected. This person cannot now be located, despite the Defendant's and the Commonwealth's*

efforts to do so. Further, a knife, which was recovered near the decedent's body was not sent for a forensic analysis until October 23, 2020.

The jury should infer that this testimony, had it been disclosed to the Accused in a timely fashion, would have been favorable to his claim of self-defense which could lead to the acquittal of the Defendant and the dismissal of this indictment.

Should the Accused wish for the Court to instruct the jury as set out above, prior to opening statements, the accused must advise the Court and the Commonwealth of this election, by Praecipe, 10 days prior to trial. The jury will also be furnished with this statement as part of the packet of jury instructions.

As well, should the Defendant so elect, he will be granted a self-defense instruction at his request. This is without prejudice to seeking a self-defense instruction based on the evidence taken, in its totality.

An appropriate Order will be entered.

Very truly yours,

[redacted]

Thomas P. Mann
Circuit Court Judge

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	:	
v.	:	Case No. FE-2020-326
KELVIN OMAR GONZALEZ	:	
_____	:	

ORDER

The court, for the reasons stated in the letter opinion attached hereto, issues the following order on the Defendant's Motion to Quash Indictment:

1. At the Defendant's election, the following adverse inference instruction will be given to the jury once constituted and then again in writing at the conclusion of the evidence;

> *During the pre-trial phase of this case, the Commonwealth was obligated to timely disclose to the Accused information favorable to him. The Commonwealth knew in November of 2019 of the existence of a witness who told a detective he saw the decedent with a knife and further heard the defendant say "don't come any closer I have a gun." This witness did not know either the decedent or the Accused. The police did not, in any fashion, follow up with this witness after the day of the incident. As well, the police did not request the witnesses' residential or business address, email address or emergency contact.*
>
> *It was not until August 18, 2020 that the Accused learned of this information from the government. It was included in a few lines of text on page 97 of a 99 page set of documents. It was not until October 23, 2020 that the government provided a telephone number and a date of birth for this witness. The telephone number was disconnected. This person cannot now be located, despite the Defendant's and the Commonwealth's efforts to do so. Further, a knife, which*

was recovered near the decedent's body was not sent for a forensic analysis until October 23, 2020.

The jury should infer that this testimony, had it been disclosed to the Accused in a timely fashion, would have been favorable to his claim of self-defense which could lead to the acquittal of the Defendant and the dismissal of this indictment.

2. Should the accused wish for the Court to instruct the jury as set out above, prior to opening statements, the Accused must advise the Court and the Commonwealth of this election, by Praecipe, 10 days prior to trial. The jury will also be furnished with this statement as part of the packet of jury instructions.
3. As well, should the Defendant so elect, he will be granted a self-defense instruction at his request. This is without prejudice to seeking a self-defense instruction based on the evidence taken, in its totality.

THIS CAUSE CONTINUES.

ENTERED THIS 5th DAY OF November 2020

Judge Thomas P. Mann

ENDORSEMENTS WAIVED PER RULE 1:13