UNITED STATES DISTICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	
	:	Crim. No. 24-267 (KMW)
Plaintiff,	:	
vs.	:	
ADRIENNE PONZO, et al.	:	BRADY MOTION
	:	
Defendant.	:	

MOTION TO COMPEL PRODUCTION PURSUANT TO BRADY V. MARYLAND, 373 U.S. 83 (1963)

Defendant Adrienne Ponzo incorporates the Statement of Facts in her Pre Trial Omnibus Motions as if fully stated herein and hereby objects to the overly burdensome way the Government turned over discovery in this matter. Defendant Ponzo, by and through his undersigned counsel, and pursuant to Federal Rule of Criminal Procedure 12(b)(2) and Local Rule of Criminal Procedure 12.1, hereby submits this Memorandum of Law in Support of Motion to Compel Production Pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. Ms. Ponzo respectfully requests that the Court order the Government to comply with its obligations under Brady by immediately conducting a review of: (1) all testimony of witnesses called before the Grand Jury that investigated this matter (the "Grand Jury Transcripts"); (2) all draft or final memoranda and any related rough notes of any interviews conducted by individuals involved in the investigation of this case (collectively, "witness statements"); and (3) such other information, identified infra, that the United States Department of Justice ("USDOJ") has recommended Government prosecutors review to comply with their Brady obligations. Ms. Ponzo further requests that the Court order the Government to certify, in advance of trial, that it conducted the required review and produced all materials required to be produced under Brady to the Defendants.

I. ALTHOUGH THE FEDERAL COURTS HAVE PERMITTED THE PROSECUTION TO UTILIZE AN "OPEN FILE" TO FULFILL ITS BRADY OBLIGATION, THE USE OF AN "OPEN FILE" IS NEITHER NECESSARY NOR SUFFICIENT, COMPELLING THE PROSECUTION TO DO MORE THAN ALLOW SIMPLE ACCESS TO ITS FILES.

The Federal Courts have made clear that an "open file" policy is neither constitutionally required, nor is it automatically sufficient, to satisfy the Prosecution's constitutional obligations:

> While an "open file" policy *may* suffice to discharge the prosecution's Brady obligations in a particular case, it often will not be dispositive of the issue. It is not difficult to envision circumstances where the prosecution possesses, either actually or constructively, Brady information that for some reason is not in the "file," such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing. No one could reasonably argue that under those circumstances, assuming the evidence was exculpatory, the prosecution's Brady obligations would be satisfied by its "open file" policy. To adopt such a holding would permit the prosecution to discharge its obligations under Brady by talismanically invoking the words "open file policy," and thus circumvent the purpose behind Brady.

Smith v. Secretary of New Mexico DOC, 50 F.3d 801, 828 (10th Cir. 1995).

Various Federal Courts have further made clear that providing access to an "open file" is constitutionally insufficient when the file itself is prohibitively large or otherwise inaccessible. The District of Columbia Circuit, for example, maintains that "open-file discovery does not relieve the government of its Brady obligations." United States v. Hsia, 24 F.Supp.2d 14, 29 (D.D.C 1998). The Government may not satisfy its Brady obligations merely "by providing [defendant] with access to 600,000 documents and then claiming that [defendant] should have been able to find the exculpatory information in the haystack." Id.; United States v. Saffarinia, 424 F. Supp. 3d 46, 85 (D.D.C. 2020). The issue, therefore, transcends simple "access," as "the outcomes of these cases seem to turn on what the government does in addition to allowing access to a voluminous open file." United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009).

The use of an "open file," as used in the present case, thereby requires a fact dependent inquiry in order to determine whether the Government has fulfilled its *Brady* obligation. Although non-binding and unreported, the North Carolina Eastern District Court has provided an apt summary of the overarching analysis:

> … there are no clear measures of when a large document production fails to fulfill the Government's *Brady* obligations to disclose exculpatory material in time for its effective use at trial. Decisions appear to be fact-bound and turn on the actions taken by the Government to facilitate the defendant's review of the production,

> such as whether the production is searchable and whether the Government has provided detailed indices, lists of key documents, a list of the evidence the Government expects to present at trial, and any other assistance to the defendant in navigating the production.

United States v. Contech Engineered Sols. LLC, No. 5:20-CR-481-FL-2, 2021 U.S. Dist. LEXIS 35069, at *11 (E.D.N.C. Feb. 18, 2021). On a "more fundamental" level, however, the Federal Courts have noted "that 'the prosecutor's role transcends that of an adversary: he [or she] is the representative not of an ordinary party to a controversy, but of a sovereignty.... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" Hsia, 24 F.Supp.2d at 30 (quoting United States v. Bagley, 473 U.S. 667, 675 n. 6 (1985)); Berger v. United States, 295 U.S. 78, 88 (1935).

A. Mass "Document Dumps" Whereby the Information Provided Is Irrelevant or Superfluous Have Always Been Deemed Insufficient to Satisfy the Government's Brady Obligation.

When a criminal defendant alleges that the Government has engaged in an impermissible "document dump," the volume of the information provided alone is not dispositive. The Federal jurisprudence centers upon the functionality of the production, rather than volume alone, as will be analyzed in greater detail below. Nonetheless, our Federal Courts have consistently indicated that bad faith in connection with that discovery production will result in a finding that the Prosecution has not fulfilled its *Brady* obligation. To illustrate, the Third Circuit has ruled that the Government may not hide exculpatory material by "mislead[ing] the defense into believing the evidence will not be favorable to the defendant." United States v. Pelullo, 399 F.3d 197, 213 (3d Cir. 2005). In addition, courts within our Circuit have indicated that a Prosecutor abdicates his duty when "a significant portion of the materials turned over as discovery bear no relevance" to the charges against the Defendant. United States v. McGill, No. 12-112-01, slip op. at 29 (E.D. Pa. Jan. 5, 2016).

Courts within the Fifth Circuit and the Sixth Circuit, in turn, have been "quick to point out that the prosecution's mere production of an open file consisting of millions of pages does not necessarily always meet its *Brady* obligations." United States v. Gross, 424 F. Supp. 3d 800, 804 (C.D. Cal. 2019). Both have similarly dictated the circumstances where a voluminous file will be deemed an impermissible "document dump:"

> We do not hold that the use of a voluminous open file can never violate Brady. For instance, evidence that the government "padded" an open file with pointless or superfluous information to frustrate a defendant's review of the file might raise serious Brady issues. **Creating a voluminous file that is unduly onerous to access might raise similar concerns**. And it should go without saying that the government may not hide Brady material of which it is actually aware in a huge open file in the hope that the defendant will never find it.

Skilling, 554 F.3d at 577 (emphasis added); United States v. Warshak, 631 F.3d 266, 297-98 (6th Cir. 2010)(Government failed to meet its obligations under *Brady* if it "larded its production with entirely irrelevant documents;" "made access to the documents unduly onerous;" or "deliberately concealed any exculpatory evidence in the information it turned over to the defense.")

In the present case, the Government's production equates to an impermissible "document dump" as it is currently nothing more than a "voluminous file that is unduly onerous to access" using terminology employed by Skilling and Warshak. To assist with the analysis and preparation of the data, Defendant Ponzo has retained Cornerstone Discovery ("Cornerstone"), who has authored a report indicating that the access has been "unduly onerous" based on the multiple formats employed:

> Upon initial review, we found that data from multiple devices was generated in different formats. We needed to spend time to examine this more to account for any duplication. On top of this we received standard files, along with a Relativity export in single page tiff format that also needed to be quality checked, processed and loaded to our review platform for easy review.
>
> Cornerstone Discovery received data from multiple devices in various formats …
>
> In addition to the duplication in different formats, we found that there was a large zip file split into 95 parts totaling 2.08 TB. The problem with how this was provided is that the splits of the zip were dispersed across several folders. This caused errors when trying to analyze the contents of the split zip. The 95 parts were saved in different locations on the provided drives. When provided this way the split zip did not open properly. The 2.08 TB of data had to be copied locally into one folder for the split zip to open properly. This added additional time to copy, and quality check the contents.

(See Cornerstone Report, attached as Exhibit "A" pp 1-2).

Cornerstone's initial review further reveals that the production is also laden with "pointless or superfluous information" again using terminology employed by Skilling and Warshak, as the production contains unnecessary duplicates:

> Cornerstone Discovery also received over 3.41 TB of encrypted archive files, that our team examined and determined to be duplicates of provided data in zip format. Our team needed to take time to confirm that this was duplicative to avoid increasing the amount of time needed to review this data.
>
> In total Cornerstone received just over 10 terabytes of data. After spending over a month of processing, deduplication, quality checking data, and loading data for a timely review, we have a review platform with under 3 TB. The data that was sent needed sufficient time to properly handle and get ready for review. The data had duplication, without any documentation listing the reasoning for this duplication, causing an increase in time needed to locate any specific document or category of documents.

(Exhibit A, p. 2). Although Cornerstone has focused upon the time and effort necessary in light of the duplication, the fact that the Government produced such a large volume of duplicates shows that the Government produced unnecessary documents to make the Defendant's analysis more difficult, which is the precise opposite of what is required to fulfill the Prosecution's Brady obligations.

In light of this voluminous production, and its attendant difficulties in both analysis of the data for actual use by the Defendants and the need to identify and eliminate duplicative materials, this Court's ultimate determination in terms of a remedy should depend on what additional assistance the Government provided in order to make the data meaningfully accessible. Unfortunately, the answer is none.

B. Federal Jurisprudence Has Focused Upon the Manner Within Which the Prosecution has Made the Open File Accessible and Meaningfully Discoverable of Potentially Exculpatory Material.

As indicated, supra, one of the leading cases that permits the Prosecution to meet its burden by using an open-file policy states that the sufficiency of the production depends upon "what the government does in addition to allowing access to a voluminous open file." United States v. Skilling, 554 F.3d 529, 577 (5th Cir. 2009). The Fifth Circuit focused upon "the additional steps the government took beyond merely providing [an] open file," including the fact that 1) the open file was electronic and searchable; 2) the government produced a set of "hot documents" that it thought were important to its case or were potentially relevant to the defense; 3) the government provided indices to these and other documents and 4) the government also provided defendant with access to various databases concerning prior relevant litigation. Id at 577

The crux of the analysis centers upon whether the Prosecution merely provided the Defendants with simple access (which is insufficient) or whether it provided additional safeguards or information. The Government may "not comply with the requirement of *Brady* by merely including all known Brady material within the four million plus pages of discovery." Compliance depends upon the "additional steps taken by the Government" to make the production usable and meaningfully accessible. United States v. Blankenship, No. 5:14-cr-00244, at *16

(S.D. W. Va. June 12, 2015); United States v. Contech Engineered Sols. LLC, No. 5:20-CR-481-FL-2 at *5-6 (E.D.N.C. Feb. 18, 2021)("Other courts have found that in large document production cases, the Government's manner of production was sufficient to fulfill its Brady obligations when the Government took certain steps to assist the defendant in navigating the large file.")

Courts within the Third Circuit have echoed the notion that the Government may use an open file to satisfy its Brady obligation, provided that the production provides the defendants with *meaningful access* to the discovery. In United States v. McGill, No. 12-112-01 (E.D. Pa. Jan. 5, 2016), for example, the Court found dispositive the fact that "although the discovery materials are voluminous, the Government has provided several tools to the defense to assist with the review of these materials." These "tools" included providing 1) the discovery "in a form that could easily be loaded into and searched through an electronic database;" 2) "a discovery log, the Title III log, and a list of the consensual recordings;" and 3) access to the "case agents … to assist during the defense's review." United States v. McGill, No. 12-112-01, slip op at *28

After setting forth the holdings in Skilling and Hsia, the Pennsylvania Western District Court similarly found crucial the fact that "the Government took pains to organize its electronic discovery into distinct folders, in a format that allows the discovery to be downloaded and electronically searched." United States

v. Hertel & Brown Physical & Aquatic Therapy, No. 1:21-cr-39, 2024 U.S. Dist. LEXIS 98239, at *50 (W.D. Pa. June 3, 2024). The District of New Jersey also found no obligation on the part of the "Government to identify the Brady material within the already produced materials," where it (1) "organized the productions in individual, separate folders and with an index that identified the specific source of the particular records;" (2) identified records using the Bates-stamp system; (3) "provided the defense with records in the same format in which the Government received them from third parties;" and (4) "provided, whenever possible, electronic records in a searchable format, such as PDFs, or in files that are loadable into a discovery platform." United States v. Ellis, No. 2:19-cr-693-BRM-1, 2020 U.S. Dist. LEXIS 122287, at *4 (D.N.J. July 13, 2020)

In other words, the characteristics of the "open file", and whether the defendants actually (not theoretically) enjoy meaningful access to same world of information as the Prosecution, inform the analysis. In the present case, the Cornerstone report evidences that the Government sought to frustrate the Defendants' access and failed to take any of the steps identified in the cases above:

> If there are additional documents that can point to why specific devices were produced, and the data from those devices that are of key importance, that could help with the review as well. As it stands, the data provided no assistance to the end user. Indices would be useful or guides to what was seen as relevant when the data was produced.

(Exhibit A, p. 2). The absence of any assistance by the Government to navigate the duplicative and inaccessible document production compels a specific remedy – the Government should now specifically identify any Brady material.

C. In the Absence of these Additional Steps and Safeguards, the Court Should Compel the Government to Identify the Brady Items.

In the wake of Skilling, certain Federal Courts have deemed it "appropriate to require the government to identify the *Brady* material in the discovery that has been produced." United States v. Saffarinia, 424 F. Supp. 3d 46, 85 (D.D.C. 2020) (quoting United States v. Cutting, No. 14-CR-00139-SI-1, 2017 U.S. Dist. LEXIS 5006, 2017 WL 132403, at *9 (N.D. Cal. Jan. 12, 2017)); Hsia, 24 F. Supp. 2d at 30. The need to compel the Government to identify documents is specifically acute where the Government's production proves unworkable or unmanageable, as "the 'duty to disclose [exculpatory evidence] may be unfulfilled by disclosing too much; at some point, 'disclosure,' in order to be meaningful, requires 'identification' as well.'" Cutting, No. 14-cr-00139-SI-1, 2017 U.S. Dist. LEXIS 5006, at *24 (quoting United States v. Salyer, 271 F.R.D. 148, 155 (E.D. Cal. 2010)). Specifically, when "the government's production has not only been voluminous, but its electronic production has been marred by technical problems that seriously impede defendants' ability to search the ESI," the Court should deem "it appropriate to order the government to identify by Bates number the Brady/Giglio material in the discovery that has been produced." Id. slip op at *29.

The Court in United States v. Blankenship, No. 5:14-cr-00244 (S.D. W. Va. June 12, 2015) in turn "reject[ed] … the government's argument that merely providing a 'searchable, indexed, digital database of documents' to the defendant was sufficient under Brady." United States v. Saffarinia, 424 F. Supp. 3d 46, 87 (D.D.C. 2020)(quoting Blankenship, slip op. at *4). Once again, meaningful, effective access to the Government's information is the touchstone of the analysis. The Court should order "that **the United States should specifically designate any known Brady material** as such and disclose the same to defense counsel," when the Government merely provides voluminous documents without more. Blankenship, No. 5:14-cr-00244 slip op. at *15-16

The Courts that have required the Government to specifically identify *Brady* material acknowledge Skilling's "general rule" that "the government is under no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence." Nonetheless, based on the quality of that production, the constitutional nature of the Government's obligation, and the Defendants' relative dearth of resources when compared to the Government, the Skilling holding "does not preclude the [Court] as a matter of case management (and fairness) in ordering identification [of Brady material] to be done." Saffarinia, 424 F. Supp. at 85 n.15. The Supreme Court itself "has placed the initial Brady/Giglio duty on the government, and the [court] is not free to assign it to [the defendant]," compelling the "prosecution in the first instance to affirmatively look for and disclose Brady/Giglio." Id. at 88.

In the present case, based on the quality of the production as analyzed by Cornerstone, the constitutional nature of the Government's obligation, and the Defendants' relative dearth of resources when compared to the Government, the Court should compel the Government to specifically identify any Brady material in the document production. Although our Courts do not compel the Government to do so as a matter of course, the nature of the production compels such a remedy, especially in light of the fact that the Third Circuit has specifically rejected any due diligence requirement on the part of the Defendant.

II. IN LIGHT OF THE THIRD CIRCUIT'S REJECTION OF ANY DUE DILIGENCE REQUIREMENT, THE GOVERNMENT MAY NOT MEET ITS BRADY OBLIGATION THROUGH A MASS PRODUCTION OF DOCUMENTS THAT PRECLUDES MEANINGFUL ACCESS.

Prior to the Third Circuit decision in Dennis, the Third Circuit repeatedly "made clear that Brady does not compel the government to furnish a defendant with information he already has or, with any reasonable diligence, he can obtain himself." United States v. Pelullo, 399 F.3d 197, 213 (3d Cir. 2005); United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984); United States v. Kubini, 19 F. Supp. 3d 579, 627 (W.D. Pa. 2014). Pursuant to this logic, the Third Circuit maintained that "*Brady* and its progeny permit the government to make information within its control available for inspection by the defense, and impose no additional duty on the prosecution team members to ferret out any potentially defense-favorable information from materials that are so disclosed." Pelullo, 399 F.3d at 212; United States v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991); United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984).

That line of cases came to end in 2016 with the Third Circuit's decision in Dennis v. Sec'y, Pa. Dep't of Corr., 834 F.3d 263, 290 (3d Cir. 2016), when the Court made clear that "the United States Supreme Court has never recognized an affirmative due diligence duty of defense counsel as part of *Brady*, let alone an exception to the mandate of *Brady* as this would clearly be." Such a requirement "upon defense counsel would erode the prosecutor's obligation under, and the basis for, *Brady* itself." Id. Although the Court acknowledged conflicting decisions in the past, the Third Circuit saw the "need to clarify our position: the concept of 'due diligence' plays no role in the *Brady* analysis." Dennis, 834 F.3d at 291.

Subsequent decisions from the Third Circuit Court of Appeals confirmed that "*Dennis* corrected a major misstep in this Circuit's case law, one that was central to the nature of *Brady* claims and the relative expectations that the law places on prosecutors and defendants with respect to exculpatory information in the government's possession." Bracey v. Superintendent Rockview SCI, 986 F.3d 274, 289 (3d Cir. 2021). As the Court clarified:

> Our en banc opinion in *Dennis* thus decisively rejected the line of cases embracing a due diligence obligation and returned us to first principles

> as to both the factual predicate of a *Brady* claim and the reasonable expectations of a defendant in the *Brady* context. Whereas we had previously suggested that the factual trigger for a *Brady* violation was the prosecution's failure to disclose material exculpatory evidence not otherwise accessible to the defendant, *Dennis* embraced an "absolute" prosecutorial duty to disclose "not depend[ent] on" the defense's efforts. 834 F.3d at 290. And whereas we had previously suggested that a defendant bore an independent obligation to seek out *Brady* material, *Dennis* held that the defense may "rely on the prosecutor's duty to turn over exculpatory evidence," with any inquiry into the defendant's ability to discover that evidence being "beside the point." *Id.* at 291. Thus, while it had the effect of bringing our case law back in line with clearly established Supreme Court precedent, id., *Dennis* reflected a significant change in our own jurisprudence ...

Id. at 289-90. Dennis thereby "overruled" existing case law such as Pelullo, Perdomo, Starusko and Grant v. Lockett, 709 F.3d 224, 230-31 (3d Cir. 2013), insofar as a due diligence requirement is concerned. Id. at 290 n.14 ("… it's why an en banc was required to overturn those precedents and bring us in line with Supreme Court precedent…")

Imposing a general obligation of due diligence upon the Defendants improperly "places the burden of discovering exculpatory information on the defendant and releases the prosecutor from the duty of disclosure." See United States v. Tavera, 719 F.3d 705, 711 (6th Cir. 2013)(citing Banks v. Dretke, 540 U.S. 668 (2004)). As the Supreme Court has stated, "Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed Brady material when the prosecution represents that all such material has been disclosed." Banks, 540 U.S. at 695. Any rule that permits a prosecutor to abdicate his duty under the guise that the defendant is able to locate information "is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696; Amado v. Gonzalez, 758 F.3d 1119, 1136 (9th Cir. 2014)("The Court of Appeal's requirement of due diligence would flip that obligation, and ..is contrary to federal law as clearly established by the Supreme Court … .").

The Third Circuit's current jurisprudence makes clear that the Supreme Court "placed the burden of obtaining favorable evidence squarely on the prosecution's shoulders." Dennis, 834 F.3d at 290 (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995)). The Supreme Court of the United States has specifically held that an "individual prosecutor has a duty to learn of any favorable evidence" and that the Government has an affirmative duty to "assist the defense in making its case." Bagley, 473 U.S. at 675, n. 6; Kyle, 514 U.S. at 437.

In fact, scores of Federal Courts have interpreted Supreme Court precedent as standing for the proposition that the Prosecutor's duty includes an obligation to affirmatively search for Brady material and include it within the "open file":

> … the prosecution has the duty to affirmatively scour those records of the agencies considered the "government" for purposes of the criminal case in order to determine and acquire those materials which would be considered Brady exculpatory and Giglio impeaching. Kyles v. Whitley, 514 U.S. 419, 437 (1995); United States v. Price, 566 F.3d 900, 908–909 (9th Cir. 2009). Indeed, the most recent Department of Justice guidelines, fashioned after some embarrassing non-disclosures in other cases, command an actual review of the materials acquired during investigation of a criminal case for the purpose of disclosing Brady/Giglio materials. See Memorandum for Department

> Prosecutors, dated January 4, 2010, Section B, e.g., items, 1 ("The prosecutor can personally review the file or documents or may choose to request production of ... materials from the case agent"), ("[g]enerally, all evidence and information gathered during the investigation should be reviewed, including anything obtained during searches or via subpoenas, etc."). Tellingly, nowhere in the memorandum does it even suggest that in lieu of affirmatively looking for Brady/Giglio the prosecutor may determine not to look at all and simply disclose the entire discovery file. The prosecutor's argument that his duty to affirmatively search for Brady/Giglio information is performed by not searching is oxymoronic in nature.

United States v. Salyer, 2010 WL 3036444, slip op. at 3 (E.D. Cal. 2010). The affirmative duty to search all of the material to which the Prosecutor has access derives from the fact that "[t] he prosecution's affirmative obligation under Brady may often go beyond divulging what is in 'the file.'" Smith, 50 F.3d at 828.

The constitutional mandate of due process and "notions of fundamental fairness" thereby lie at the heart of "Brady and its progeny" which "embody a practical recognition of the imbalances inherent in our adversarial system of criminal justice." Id. at 823. Because of "the constitutional nature of the Government's *Brady* obligation," the Government is the party required to designate the exculpatory material. The Government's superior knowledge of both "the nature of the charges and … the evidence and witnesses it intends to produce to prove those charges," places it "in a far better position than the Defendant to know what evidence might be exculpatory and/or impeachment material under *Brady*." Blankenship, No. 5:14-cr-00244, 2015 U.S. Dist. LEXIS 76287, slip op at *16-17;

see also United States v. Briggs, No. 10CR184S, 2011 U.S. Dist. LEXIS 101415, at *24 (W.D.N.Y. Sep. 8, 2011)("…, as between the Government and defense, the Government is in the better position to organize this mass of information and re-present it in a manner that is searchable by the defense.")

The Supreme Court's rejection of the due diligence requirement is thereby predicated upon the fact that "the prosecution has the advantage of a large staff of investigators, prosecutors and grand jurors, as well as new technology such as wiretaps of cell phones." Tavera, 719 F.3d at 712. The "superior prosecutorial investigatory apparatus" requires that the Government "assist the defendant who normally lacks this assistance." Id. The fact that "the Government's hand is stacked with cards the defense lacks" creates a need "[t]o compensate for these imbalances ... in the interest of promoting and enhancing the search for truth." Smith, 50 F.3d at 823.

The Third Circuit has similarly noted, "The emphasis in the United States Supreme Court's Brady jurisprudence on fairness in criminal trials reflects Brady's concern with the government's unquestionable advantage in criminal proceedings, which the Court has explicitly recognized." Dennis, 834 F.3d at 290. The distinct "prosecutorial advantage" compels that the Court focus squarely upon "disclosure by the prosecutor, not diligence by defense." Id. Although the Supreme Court did not intend for Brady to entirely displace the adversary system, our Circuit has interpreted Supreme Court precedent as signaling "approval of the shift in the traditional adversarial system *Brady* imposes." Dennis, 834 F.3d at 263. Current Third Circuit jurisprudence under Dennis adopts the underlying logic of those cases that rely upon the Government's superior resource advantage to require the Government to do more than simply provide access to a voluminous file.

Dennis has changed this Circuit's jurisprudence with regard to a defendant's due diligence and the obligations, duties and rights mandated by our Constitution, placing it back in line with existing Supreme Court precedent. It is high time this Circuit place itself back in line with both Supreme Court precedent, and the bulk of the Federal Circuits, in refusing to countenance voluminous document productions, that are ineffective and unusable, like the production in the present case. Because the Third Circuit has made clear that the there is no due diligence requirement, the quality of the production in the present case requires that the Government, with its vastly greater resources, identify any Brady materials.

III. THIS COURT SHOULD ORDER THE GOVERNMENT TO OBTAIN AND REVIEW THE PERSONNEL FILES OF EACH LAW ENFORCEMENT WITNESS FOR IMPEACHMENT MATERIAL.

Defendant Ponzo anticipates that law enforcement officers will testify at evidentiary hearings and/or trial. The Government should be required to obtain and to review the personnel and other files regarding each law enforcement witness, and immediately to produce to counsel for Defendant Ponzo any documents and information contained in such files that is impeaching to the witness' credibility. See United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972). Defendant Ponzo's Sixth Amendment rights to confrontation and compulsory process also mandate access to those type materials contained in law enforcement officer's personnel files. See Commonwealth v. Mejia-Arias, 734 A.2d 870, 874-876 (Pa. Super. 1999).

Because the personnel and internal affairs files are not something to which the defense has access, and are exclusively in the control of law enforcement agencies, the burden of obtaining such files and providing them for the Court's in camera review should fall to the government. Overall, government review of personnel and internal affairs files regarding law enforcement witnesses should include but not be limited to the following:

1. reference to perjurious conduct or false testimony;
2. reference to verbal falsification to superiors or supervising personnel;
3. references to falsehoods on job applications or promotion applications;
4. reference to any other dishonesty by such law enforcement officer, including but not limited to improper claims for: overtime, time off, sick time, vacation time;
5. references to falsification of reports;
6. any other references to conduct or words involving dishonesty; and
7. references to any conduct that could be construed to be criminal activity by a law enforcement officer, whether or not it is a crimen falsi.

The review of personnel files should not be limited to just the federal government files, but also to other governmental agencies for which any government witnesses worked. Pre-trial disclosure to the defense of impeachment information is critical to safeguard Defendant Ponzo's Due Process rights. Early pre-trial disclosure is necessary to enable the defense to conduct effective pre-trial investigation, to assess and to pursue appropriate defenses, and fully to test the validity, admissibility and credibility of the government's evidence and witnesses.

Conclusion

Although the Government is not required to identify Brady materials in every criminal prosecution, the quality of the production in this case, the difficulty in obtaining meaningful access, and the considerations underlying Dennis compel such a remedy. The absence of any assistance in terms of navigating the document production makes clear that the Government may not rely upon "access" to its open file to fulfill its Brady obligation.

For the foregoing reasons and those set forth in Ms. Ponzo's Motion to Compel Production Pursuant to Brady , Ms. Ponzo respectfully requests that his motion be granted, and that the Court compel the prompt identification and production by the Government of any and all material favorable to his defense, as required by Brady v. Maryland, 373 U.S. 83 (1963), and its progeny.

Respectfully Submitted,

/s/ Troy Archie
Troy A. Archie, Esquire
Counsel for Adrienne Ponzo

Dated: December 2, 2024

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the within Motion to Compel Pursuant to Brady v. Maryland, 373 U.S. 83 (1963) was served upon the following persons electronically via ECF:

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All Defense Counsel

Dated: December 2, 2024

/s/ Troy A. Archie

Troy A. Archie, Esquire