UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LAVON PARKS a/k/a DUTCH, and JAMES PARKS,,

Defendants.

19-CR-87-LJV
SEALED DECISION AND ORDER

Before the Court are the following motions:

1) the defendants' motion for reconsideration of this Court's prior order, Docket Item 722 at 30, granting the government's motion to admit a January 21, 2018 statement of Rhonda Howard, now deceased, as an excited utterance, *see* Docket Item 478 at 56-60; Docket Item 499 at 166-170; Docket Item 745 at 6-14;
2) the defendants' motion to dismiss Count 2 of the third superseding indictment and suppressing all evidence of the conduct encompassed in Count 2, *see* Docket Item 742; and
3) the defendants' motion to dismiss the third superseding indictment in its entirety, *see* Docket Items 742, 745.

Also pending is this Court's *sua sponte* reconsideration of its prior order admitting the testimony of a government witness, [redacted]. *See* Docket Item 729.

While on the surface it may appear that the pending motions present discrete legal issues, that is not entirely true. The three motions and this Court's *sua sponte* reconsideration of a prior order all relate to allegations that the government has not scrupulously honored its discovery obligations. And this is not the first case in recent memory to call into question the government's discovery practices in this District. *See United States v. Morgan*, 18-CR-108-EAW (indictment dismissed without prejudice due to government's violations of its discovery obligations); *United States v. Padua*, 20-CR-191-LJV (indictment dismissed with prejudice due to prosecutorial misconduct related to sanction imposed for violations of government's discovery obligations); *United States v. Tyshawn Brown*, 19-CR-222-EAW (indictment dismissed on government's motion related to *Brady*/*Giglio* disclosure issues); *United States v. Coleman*, 19-CR-221-RJA (*Brady*/*Giglio* disclosure issues).

Even after prosecutors assured another judge in this District that there was a "commitment by [the United States Attorney's office] leadership to take necessary and appropriate steps, including increased supervision and training, to ensure that such failures are addressed and do not occur in the future," *see United States v. Morgan*, 18-CR-108-EAW, Docket Item 647 at 2, here we are again. This Court acknowledges that the failings here are different from those in *Morgan*, and the disclosures in this case were ongoing while the *Morgan* issue was unfolding. Nevertheless, this Court cannot look the other way and permit such discovery violations—at best serious errors in judgment by the government—to persist when liberty interests are at stake.

The United States Attorney's Office in this District often repeats the mantra that it takes its discovery obligations seriously and understands its ongoing disclosure

requirements. But given the history noted above, in some cases that mantra seems to be little more than empty words. Moreover, the violations here by their very nature require some sanction.

Therefore, the government may not offer the excited utterance of Rhonda Howard into evidence, and [redacted] may not testify at trial. And while Lavon Parks's motion to dismiss Count 2 is denied, the government is precluded from offering any evidence on Count 2 that Lavon Parks was attempting to ship drugs to himself in the Western District of New York.

PROCEDURAL AND FACTUAL BACKGROUND[1]

For years, there has been a steady drumbeat from the defendants, James Parks and Lavon Parks, that the government has been withholding evidence.[2] Now, after extensive litigation, at least some of the defendants' claims have proven true. This

[1] The Court has omitted the early procedural history of this case and will begin with the defendants' motions to suppress physical evidence seized after a 2017 traffic stop in Tennessee.

[2] *See, e.g.*, Docket Item 202 at 14-16 (noting only "some voluntary discovery" provided and requesting disclosure of 20 categories of documents and things); Docket Item 379 at 34 (discussing late *Jencks* disclosure for Agent Spivy); Docket Item 397 at 11-15 (discussing late *Jencks* disclosure for Agent Spivy); Docket Item 408 (text order re-opening suppression hearing due in part to late *Jencks* disclosure for Agent Spivy); Docket Item 582 at 42-47 (motion to dismiss counts 5 and 6 of second superseding indictment for *Brady* violations); Docket Item 640 at 10-13 (arguing that failure to disclose [redacted] cell phone records and Lavon Parks's jail calls precludes effective investigative use); Docket Item 640-1 at 4 (late disclosure of 521 jail calls); Docket Item 742 (motion to dismiss for *Brady* and other disclosure violations); Docket Item 745 (motion to dismiss for *Brady* and other disclosure violations); Docket Item 780 at 40 (noting defense refrain of discovery violations).

Court will forsake brevity and outline how—at this late stage of the prosecution and after the trial was adjourned on the morning of jury selection—we find ourselves revisiting evidentiary and dispositive rulings, as well as considering a new motion to dismiss the third superseding indictment. What follows is a roughly chronological discussion of the facts and procedural history as necessary to address the three pending motions and the admissibility of [redacted] testimony.

The Charges and the Motions to Suppress Tennessee Evidence

James and Lavon Parks, along with six other defendants, initially were charged in a ten-count indictment filed on May 2, 2019. Docket Item 1. In that indictment, both James and Lavon Parks were charged with conspiring to distribute and to possess with intent to distribute at least five kilograms of cocaine, at least 400 grams of fentanyl, and at least 100 grams of heroin (21 U.S.C. § 846) (Count 1) and with possessing with intent to distribute at least 500 grams of cocaine on November 30, 2017 (21 U.S.C. §§ 841(a)(1) and 841(b)(1)((B) and 18 U.S.C. § 2) (Count 3). *Id*. Lavon Parks also was charged with possessing with intent to distribute at least 500 grams of cocaine on May 26, 2017 (21 U.S.C. §§ 841(a)(1) and 841(b)(1)((B)) (Count 2). *Id*. A superseding indictment was filed on October 24, 2019, adding two more charges against James and Lavon Parks: discharge of a firearm in furtherance of a drug trafficking crime (18 U.S.C. §§ 924(c)(1)(A)(iii) and 2) (Count 9) and discharge of a firearm causing death (18 U.S.C. §§ 924(c)(1)(A)(iii), 924(j)(1) and 2) (Count 10). Docket Item 137. As required by the Due Process Protections Act ("DPPA"), on December 3, 2020, United States Magistrate Judge Jeremiah J. McCarthy read into the record the admonition concerning

the government's obligations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and he issued a DPPA order. *See* Pub. L. 116-182, 134 Stat. 894 and Fed. R. Crim. P. 5(f)(1); Docket Items 325, 326.

In 2019 and 2020, both defendants moved to suppress evidence seized on November 30, 2017, [redacted] Following extensive briefing, an evidentiary hearing before Judge McCarthy, and a re-opened hearing before this Court, this Court granted the motions to suppress. Docket Item 573. [redacted]; the Court therefore suppressed the evidence found [redacted]—cocaine, crack cocaine, and packaging material.[3] *Id.* at 25. While the motions to suppress were pending, a six-count second superseding indictment was filed on April 13, 2022.[4] *See* Docket Item 546.

[3] The government appealed this Court's decision suppressing the evidence seized [redacted], *see* Docket Item 579, but later decided not to pursue that appeal, *see* Docket Item 609.

[4] The second superseding indictment changed Count 3 from possession with intent to distribute at least 500 grams of cocaine to *attempted* possession with intent to distribute at least 500 grams of cocaine; it also changed the date for Count 3 from "on or about November 30, 2017," to "from on or about November 17, 2017, until on or about November 30, 2017." In addition, the second superseding indictment added Count 4, which charged Lavon Parks with possessing a firearm in furtherance of a drug trafficking crime. *Compare* Docket Item 137 *with* Docket Item 546.

Rhonda Howard

The government filed its pretrial memorandum and motions *in limine* in February 2022. Docket Items 478 and 499 (sealed). Among other things, the government moved for an order permitting it "to introduce video footage depicting . . . the sound of six gun shots immediately followed by Rhonda Howard driving by a bystander on the street" and stating:

> Hey, be careful, somebody just got shot around there. I swear to god at that lady house right in the alley. I was at my cousin Larry house. I was in the store, I said, I left my car at his house, right in that house. They dead. Listen, and I just talked to someone who had a gun in they car. Oh my god it was loud --. Oh my god that scared me. She talking about come here and sit next to her on the porch, I said I'm getting the fuck outta here. Be careful!

Docket Item 478 at 56-60; Docket Item 499 at 166-170. The government argued that the statement is admissible as an excited utterance because Howard is unavailable, *id.*, having died on July 17, 2021, *see* Docket Item 769 at 4. Before the defendants had an opportunity to respond, jury selection was adjourned from March 7, 2022, to August 8, 2022, for reasons not relevant to this decision. *See* Docket Item 519.

When they did respond, the defendants did not dispute that Howard's statement qualified as an excited utterance, but they instead argued that "[e]ven if the Court were to find that Rhonda Howard's statement was not testimonial, the portion of the statement that reads 'I just talked to someone who had a gun in they car' should be excluded under FRE § 403 because it would cause unfair prejudice, confusion of the issues, and mislead the jury [sic]." Docket Item 582 at 53. The defendants later argued, *citing Hemphill v. New York*, 142 S.Ct. 681, 211 L.Ed.2d 534 (2022), that the

admission of Howard's statement would violate the defendants' Sixth Amendment right to confrontation. Docket Item 655 at 3.

As the Court noted during the pretrial conference held on October 5, 2022, the issue concerning Howard's statement became less of an argument about the confrontation clause and excited utterance and more of an argument under Federal Rule of Evidence Rule 403 about the reliability of the statement and the inference the government wanted drawn from it. Docket Item 868 at 20; Docket Item 683 at 4-6. The parties filed supplemental briefs on that issue, Docket Items 694, 695, and this Court heard further oral argument on October 12, 2022, Docket Item 722 at 26-30. At the conclusion of that argument, and after weighing the probative value of the statements against the possible prejudice to the defendants, the Court concluded that the statement was an excited utterance, that it had sufficient indicia of reliability, and that it therefore was admissible. *Id*. at 30.

Testimony of [redacted]

On July 26, 2022, the government filed a supplemental motion *in limine* concerning expected testimony from [redacted], [redacted], [redacted] [redacted] More specifically, the government sought to clarify the limits of such testimony in light of this Court's prior order suppressing the physical evidence. *Id*. After the defendants opposed the motion, Docket Item 640, the Court heard oral argument on September 30, 2022, and invited supplemental briefing

from both sides. Docket Items 678 (transcript), 684. The parties filed their supplemental briefs on October 7, 2022. Docket Items 692, 693

After further argument on October 12, 2022, [redacted], the Court granted the government's motion in part. *Id*. [redacted] could testify about facts unrelated to [redacted]

Subpoenas to Niagara County District Attorney's Office

In September 2022, the defendants moved *ex parte* for the issuance of two subpoenas to the Niagara County District Attorney's Office for the file relating to the homicide at issue in this case as well as files relating to the arrests of two witnesses: [redacted] on May 24, 2017, and [redacted] on July 30, 2018. *See* Docket Item 680-1. On October 4, 2022, the government moved to quash those subpoenas. Docket Item 680. At oral argument of the motion to quash on October 12, 2022, the government advised the Court that the files relating to the arrests of [redacted] and [redacted] had been destroyed[5] but that the file relating to the homicide—one banker's box—would be produced to the Court soon. *See* Docket Item 722 at 40-43.

[5] Because these files were destroyed, the defendants moved for a pretrial hearing to cross-examine [redacted], Niagara Falls police officers, and prosecutors from the Niagara County District Attorney's Office about "any deals or benefits received by [redacted] and [redacted] in state court." Docket Item 769 at 33. In addition, defendants moved for an order directing the Niagara Falls Police Department to disclose its files relating to [redacted]' and [redacted] arrests leading to their cooperation in this case. *Id*.

About a week later, the Court received the documents and CDs responsive to the subpoena for the homicide file, and the Court gave the defendants access to those materials the next day. Docket Item 742 at 17. As detailed in the defendants' later-filed motions, Docket Items 742, 745, after reviewing the homicide file, the defendants learned of the failure to disclose, among other things, prior recorded interviews of Rhonda Howard.[6]

Count 2 and Former DEA Special Agent Joseph Bongiovanni

Count 2 of the indictment, the superseding indictment, and the second superseding indictment all charged Lavon Parks with possessing with intent to distribute and distributing at least 500 grams of cocaine on or about May 26, 2017, in the Western District of New York. Docket Items 1, 137 and 546. Although not apparent from the face of the indictments, the conduct charged in Count 2 relates to Lavon Parks's allegedly mailing cocaine from Puerto Rico to the Western District of New York on May 26, 2017. *See* Docket Items 1, 137, 546.

On October 3, 2022, Lavon Parks moved to dismiss Count 2 of the second superseding indictment for improper venue. Docket Item 676. The government opposed the motion, Docket Item 682; perhaps recognizing a venue issue with Count 2 as charged, however, the government also advised that it would present a third superseding indictment to the grand jury modifying Count 2 to charge Lavon Parks with

[6] According to the defendants, a review of the Niagara County District Attorney's Turner homicide file revealed that evidence disclosed by the government on October 11, 2022—10 days before jury selection—also was included in the homicide file. Docket Item 745 at 4. That may suggest that the government had prior access to that file or at least to parts of it.

attempting to possess with intent to distribute, and *attempting* to distribute, at least 500 grams of cocaine in the Western District of New York.[7] Docket Item 868 at 6.

Lavon Parks then moved to dismiss Count 2 of the forthcoming third superseding indictment, arguing that the third superseding indictment did not cure the venue problem. *See* Docket Items 676, 696. *Id*. In response, the government argued that venue was proper in the Western District of New York because Lavon Parks "undertook substantial acts prior to traveling to Puerto Rico which contributed towards his goal of sending his cocaine back to himself in Niagara Falls for distribution." Docket Item 710 at 7.

The shipment from Puerto Rico charged in Count 2 had been intercepted by law enforcement, and a controlled delivery of sham cocaine had been attempted in the Western District of New York. Docket Item 696 at 2, n.1. But because DEA Special Agent Joseph Bongiovanni was involved in that sham delivery, the government decided not to offer proof at trial about the controlled delivery.[8] Docket Items 696, 763. More specifically, in its pretrial filings, the government explained that "[a]s a prophylactic measure, the government excised evidence involving Bongiovanni from its case-in-chief"; the government also noted that because "[t]he defendants' charged conduct is so attenuated from Bongiovanni, and the government's proof of their guilt obtained from

[7] As anticipated, Count 2 of the third superseding indictment charges Lavon Parks with attempting to possess at least 500 grams of cocaine with the intent to distribute that substance. *See* Docket Item 712.

[8] Daniel Wilson, now deceased, signed for the package and told law enforcement that the intended recipient of the package and the person who hired him to sign for the package was Devante Gregory. Docket Item 742 at 6. The DEA reports relating to the attempted controlled delivery and the interview of Wilson were written by Bongiovanni.

other sources is so strong, [ ] the government does not need to include any evidence Bongiovanni touched to prove its case." Docket Item 763 at 13-14. Presumably, the government did and said all that because Bongiovanni had been indicted in the Western District of New York in an unrelated case. *See United States v. Joseph Bongiovanni*, 19-CR-227-LJV.

So the government tried to cabin anything involving Bongiovanni and to keep it out of its case. But in his motion to dismiss the indictment, Lavon Parks made the following observation about a possible *Brady* violation involving documents connected to Bongiovanni:

> If the Government did offer proof at trial that agents attempted a controlled delivery, the evidence would be that a white male (now deceased) signed for the package, told the delivery person to set the package on the porch[,] and then walked away. Upon information and belief, Agent [Joseph] Bongiovanni or other DEA agents surveilled that person and subsequently questioned him about whether the package was intended for Lavon Parks. The Government has not provided the defense with DEA-6 reports on the basis that it did not intend to call any of the DEA agents as witnesses. Presumably, if the person who signed for the package had implicated Lavon Parks, the Government would try to introduce that fact. On the other hand, if the person implicated someone other than Lavon Parks, that would be *Brady* material and would have been turned over.

Docket Item 696 at 2, n.1.

At oral argument on the motion to dismiss Count 2 on October 12, 2022, Docket Item 722, this Court inquired about Lavon Parks's observation with respect to possible *Brady* material; notwithstanding the government's insistence that all *Brady* material had been disclosed, the Court directed the government to re-examine its file. *Id*. at 66. Two days later, the government submitted an *ex parte* request, asking this Court to review *in*

camera the investigative reports regarding the failed controlled delivery connected with Count 2 to determine whether any material was discoverable under *Brady*. Docket Item 861. In that *ex parte* application, the government "confirm[ed that] no *Brady* material exists within these materials," but "[i]n an abundance of caution, . . . provid[ed] these reports to the Court for the Court's *in camera* inspection." Docket Item 861 at 2-3.

On October 21, 2022, after reviewing the investigative reports and while the defendants and a venire of one hundred twenty-nine were waiting for jury selection to begin, the Court met *ex parte* with government attorneys about the reports withheld from disclosure.[9] Docket Item 737. In fact, the Court met with the government attorneys twice that day—once while the venire was waiting and once later in the afternoon. *Id.*

During the first *ex parte* conversation with the prosecutors, the Court expressed its concern about several documents in the package of investigative reports. *Id*. More specifically, the Court was concerned about reports describing a photo array shown to Daniel Wilson, the person who retrieved the drugs sent from Puerto Rico, and Wilson's possible identification of someone other than Lavon Parks as the person who hired him to pick up the package. Because those reports were authored by former DEA SA Bongiovanni, and because the government planned to exclude Bongiovanni from the

[9] The files submitted for *ex parte* review related to Count 2 of the third superseding indictment charging Lavon Parks with attempted possession of at least 500 grams of cocaine allegedly shipped by him from Puerto Rico. Count 2 of the second superseding indictment charged Lavon Parks with the possession of that same 500 grams of cocaine allegedly shipped from Puerto Rico. Also included in the files were investigative reports relating to the arrest of [redacted] in [redacted].

case, the government apparently had not focused on examining them for *Brady* material.[10] Docket Item 766 at 65-66.

The Court also was concerned about investigative reports relating to [redacted] interest in cooperating with law enforcement [redacted]. [redacted]. During the oral argument [redacted], the government had represented that the link between [redacted] willingness to testify and the illegal search [redacted] was attenuated because [redacted] did not cooperate with the government until eighteen months after [redacted] *Id*. The Bongiovanni reports submitted to the Court *in camera*, however, revealed that [redacted] was "extremely motivated to cooperate with the DEA" just four days after [redacted]. And after reading those reports, this Court stated that their late disclosure

> alarms me because [the reports] . . . change[] the analysis [about] whether [redacted] can testify or not. . . . After I read the government's papers [on the motion to permit [redacted] to testify], I thought two things. I thought, number 1, there's a long gap between the arrest and when he decides to cooperate with the government, and then obviously the trial.

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[10] The government's theory with respect to Count 2 was that Lavon Parks was mailing drugs from Puerto Rico to himself in the Western District of New York. *See* Docket Item 710 at 7. As evidence supporting that theory, the government originally told this Court that when Wilson said that he was contacted by "D" in connection with picking up the drugs in Western New York, he meant "Dutch," a nickname for Lavon Parks. Docket Item 737 at 17. But the government was mistaken: As it turns out, and as the government advised the Court later that same day, D meant [redacted], not Dutch. *Id*. at 38-39. This Court has no doubt that the government's mistake was unintentional and inadvertent—perhaps resulting from the government's decision to excise Bongiovanni from this case and its assumption that documents involving or related to Bongiovanni were therefore unimportant. Nevertheless, the identification of someone other than Lavon Parks was *Brady* material. *See id*. at 39.

> So, huge gaps there. And then number 2, I thought that there were independent - - two independent witnesses who say [redacted]. [ ] Now - - at oral argument I found out that, well, really the two witnesses didn't just say [redacted], they were shown photos of [redacted] that the government wouldn't have shown them had it not been for the illegal search. And number 2, . . . what I thought was a sizable gap in time is not a sizable gap in time at all. In fact, . . . a fair reading of this is that the cooperation began four days after. He says, call my lawyer, and I'll - - and I'll spill my guts.

Docket Item 737 at 18-19. This Court therefore was inclined to order that all the investigative reports be turned over to the defense. *Id*. at 20. But the Court agreed to give the government some time to further research the issue, and jury selection was generally adjourned. *Id*. at 35.

Later that day, the government requested another *ex parte* meeting. *Id*. at 38. During that second *ex parte* meeting, the government admitted that it had been mistaken about at least one matter discussed with the Court earlier, *see* note 10 *supra*, and said that it intended to disclose the complete package of investigative reports to the defense. *Id*. That disclosure was made later that same day. *See* Docket Item 742 at 6.

Following the disclosure of the investigative reports on October 21, 2022, the Court issued a text order on October 24, 2022, sharing its concerns about its earlier decision to permit [redacted] to testify at trial. [redacted]. For that reason, the Court advised the parties that it would revisit its analysis and decision as it relates to two issues: 1) the timing of [redacted] desire to cooperate with federal authorities [redacted]; and 2) whether the government would have inevitably learned about [redacted] involvement without the illegal [redacted] search. *Id*. On October 25, 2022, the government submitted a memorandum of law in response to this

Court's text order, Docket Item 736, and on November 2, 2022, the defendants replied, Docket Item 741.

In the meantime, on October 24, 2022, the defendants moved to dismiss the third superseding indictment in its entirety, citing violations of *Brady* and other government disclosure obligations. Docket Item 742. The defendants then filed a supplemental memorandum of law in further support of their motion to dismiss. Docket Item 745. In their initial motion, the defendants sought alternative forms of relief as well, including asking this Court to reconsider its prior ruling that Rhonda Howard's excited utterance is admissible in the government's case-in-chief; to reconsider its prior ruling permitting [redacted] to testify at trial; and to dismiss only Count 2 of the third superseding indictment. Docket Item 742. Extensive filings on the motion to dismiss as well as on other discovery and evidentiary issues by both parties followed over the next several months, Docket Items 763, 769, 775, 788, 800, 816, 819, 821, 825, 832, 833, 838, 841. This Court heard oral argument on October 25, 2022, November 3, 2022, December 2, 2022, and February 13, 2023.

DISCUSSION

Rhonda Howard

In the supplemental memorandum in support of their motion to dismiss the third superseding indictment, the defendants listed several specific items included in the box received from Niagara County District Attorney's Office that they say should have been, but were not, disclosed by the government. *See* Docket Item 745. With respect to the issue of Rhonda Howard's excited utterance, the defendants say that Howard's grand

jury testimony, as well as two recorded interviews conducted on March 1 and 2, 2018, by the Niagara Falls Police Department, should have been disclosed. Docket Item 745 at 5.[11] More specifically, the defendants argue that Howard's recorded interviews included *Brady* material and that the government's failure to disclose them when the defendants could have used them—that is, before Howard died—warrants the preclusion of her excited utterance at trial. Docket Item 745 at 5-11. This Court agrees.

To say that this Court is troubled by what appears to be the government's disregard of its disclosure obligations—the Howard interviews being just one example—is an understatement. There is little doubt that included in Howard's interviews by the police were statements favorable to the defense—or at least capable of being used by defense counsel to exculpate their clients. And the government's insistence to the contrary simply underscores their narrow view of *Brady*—and the evidence here—through their own prosecutorial eyes.

James Parks is charged with aiding and abetting discharge of a firearm in furtherance of a drug trafficking crime (Count 4) and causing death (Count 5). Docket Item 712. The government's theory is that James Parks served as a lookout—protecting the shooter, his son Lavon. Docket Item 722 at 29. But in the interviews, Rhonda Howard told investigators that shortly after the shooting she saw James Parks's truck in his driveway, supporting the defense theory that James Parks was at home and not, as the government asserts, acting as a lookout or otherwise aiding and abetting the shooter. *See* Docket Item 745 at 6. And while the government may be correct that it

[11] The defendants also refer to another recorded interview of Howard conducted on January 25, 2018. Docket Item 745-1 at 5.

has answers to these arguments, Docket Item 763 at 17, that does not change the fact that some of what Howard said may well be favorable to James Parks's defense.

The defendants also note Howard's statements about the presence of someone named "Mike" at or near the time of the shooting, and they say that supports their alternative perpetrator theory of the shooting. *Id*. at 7-10. Again, the government says that it has answers to that theory and Howard's statement. For example, the government says that after watching a video of the events at issue, it determined that Howard's statement about a person named "Mike" in James Parks's vehicle is simply "inaccurate[;] it's not true." *See* Docket Item 780 at 17. "In fact," the government says simply, "there is no Mike," and the video proves just that. *Id*. at 18. But that does not change Howard's statement that there indeed was a "Mike," Docket Item 745 at 7-10, something that the defense says is consistent with their theory of the case, Docket Item 582 at 37-39.

Indeed, the fact that *a government witness* said something that the government says is demonstrably false is *Brady* material by its very nature. Under *Brady*, the government must disclose "evidence favorable to an accused … where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Material that is "favorable to the accused" includes not only evidence that tends to exculpate a defendant, but also information that impeaches the credibility of the government's witnesses. *United States v. Bagley*, 473 U.S. 667-676-77 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). So at least until Howard passed away, her statements about "Mike" were *Brady* material one way or another.

The government contends that "[t]he existence of a potential third person in James Parks'[s] truck is immaterial" because "[t]he government has repeatedly stated that James Parks was not with the shooter when the shooting occurred." Docket Item 763 at 18. But that assessment of what might be material looks at the case only through the prosecutor's eyes. From the defense perspective, another person in the car with someone who is alleged to have aided and abetted the shooting might well be material—and exculpatory because it supports the argument that someone other than Lavon Parks shot the decedent. The government also says that Howard "imitated James shaking his head *yes* when she asked if it was his son" who was the shooter, and that "[t]his is *inculpatory*." *Id*. (emphasis in original). But according to the defense, Howard shook her head "no" on at least one occasion when asked about James Parks's answer. *See* Docket Item 745 at 9. And her statement that James Parks "was like [somewhat shaking head no] ***but*** he had a look on his face like it was to me," *id.* (emphasis added; other emphasis omitted), suggests that Howard indeed shook her head "no" when asked what James Parks said. Regardless, there certainly was enough material favorable to the defense in Howard's various interviews and testimony for the government to have turned that material over early in the process.

The government makes several other unpersuasive arguments with respect to its decision to not disclose Rhonda Howard's recorded interviews. For example, the government maintains that it was not in possession of the recorded interviews before Howard's death and therefore could not have disclosed them then. Docket Item 763 at 17. And after Howard died and the government learned about the interviews, the government says, it concluded that because Howard no longer could testify, those

interviews did not constitute *Jencks* material and disclosure was not required. *Id*. But the government is incorrect on both counts.

First, as the government conceded at oral argument, the investigation began "as a Niagara Falls Police Department investigation in conjunction with the Niagara County District Attorney's Office." *See* Docket Item 780 at 11. Indeed, the government noted that a Niagara Falls police detective "is on the prosecution team," *id.,* and the interviews at issue were in the police file which the government had, *id*. at 10. So even if, as the government now insists, "[t]he Niagara Falls District Attorney's Office is not on the prosecution team," *id*. at 11, the government still had those interviews early on and was required to disclose them to the defense. And even if that were not true, good lawyering would include getting the files of all the prior investigators. So unless a prosecution's sticking its head in the sand—perhaps for strategic reasons—should be countenanced, it was incumbent for the government to look for *Brady* material in the files of both the Niagara Falls Police Department and the Niagara County District Attorney's office—that is, the investigators and attorneys who shared information with them.[12]

[12] There is no dispute that the homicide at issue in this case was being investigated by the Niagara Falls Police Department and that the Niagara County District Attorney's Office played a key role in that investigation. There also is no question that the Niagara Falls Police Department and Niagara County District Attorney's Office cooperated with federal prosecutors once the decision was made to fold the homicide into the federal prosecution. *See, e.g.,* Docket Item 780 at 11-12 (transcript of oral argument). Exactly when that happened remains unclear, but for the government to argue that the Niagara Falls Police Department, and not the Niagara County District Attorney's Office, was part of its team is somewhat disingenuous. *See id.* And the United States Attorney's Office's own guidance encourages prosecutors to err on the side of inclusiveness in determining members of the prosecution team. *See* Justice Manual (formerly known as the US Attorney's Manual) § 9-5.002, https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings (last accessed July 4, 2023 at 10:21 a.m.).

Second, as noted above, there was plenty of information in those interviews that constituted *Brady* material. So even if Howard's death relieved the government of its obligation to disclose the material under *Jencks*, it did not relieve the government's obligation under *Brady*. And the fact that the evidence at issue may have been incriminatory as well as exculpatory, *see United States v. Mahaffy*, 693 F.3d 113, 130 (2d Cir. 2012); *United States v. Rivas*, 377 F.3d 195, 199-200 (2d Cir. 2004), or that the government has other evidence contradicting the exculpatory information, *see United States v. Rittweger*, 524 F.3d 171, 181 (2d Cir. 2008), does not change that.

Finally, the government argues that because the defense has known about Rhonda Howard since the case began, the defendants could have and should have interviewed her prior to her death. Docket Item 775 at 5. But that is beside the point. Even if the defense should have interviewed Howard sooner, that does not somehow lessen the government's disclosure obligations. And what is more, if the defense knew about the *Brady* material included in Howard's statements, they would have had more reason to interview her, and might well have done so.

In sum, by deciding not to disclose Howard's recorded interviews, the government did not meet its statutory and constitutional obligations: not only were the interviews clearly discoverable under Rule 16 as items material to preparing the defense, *see* Fed.R.Crim.P. 16(a)(1)(E)(i), but portions of the interviews also constituted *Brady* material. Because the government did not disclose those interviews, the defendants were unable to properly evaluate Ms. Howard's importance in the case and lost the ability to interview her before she died. And for that reason, preclusion of her statement is the only effective remedy. This Court therefore grants the defendants'

motion for reconsideration, Docket Item 745 at 6-7, reverses its prior order, and precludes the government from introducing into evidence the January 21, 2018 excited utterance of Rhonda Howard.

Count 2

Lavon Parks seeks dismissal of Count 2 of the third superseding indictment as a sanction for the government's failure to disclose exculpatory evidence. Docket Item 742 at 6-12. More specifically, he says that the investigative reports relating to the attempted controlled delivery, the interview of Daniel Wilson, and the photo array from which Wilson identified [redacted] as the person who hired him to sign for the package shipped from Puerto Rico all constitute *Brady* material. *Id*. at 6. And Lavon Parks notes that Wilson is now "believed to be deceased and unavailable to testify for the [d]efense at trial." *Id*. at n.2.

In response, the government maintains that the DEA report of Wilson's interview and his identification of [redacted] is not material subject to disclosure under *Brady*. Docket Item 763 at 10. According to the government, even if Wilson were telling the truth, these reports "simply add[ ] an additional co-conspirator [redacted] to the equation … [and do] not remove Lavon Parks from the equation." *Id*. at 10. Moreover, the government argues that the reports are inadmissible hearsay and not relevant, presumably because the government does not intend to introduce any evidence concerning the controlled delivery at trial. *Id*. at 10-12.

The government may very well be correct that these reports do not directly exculpate Lavon Parks, but that does not mean that the reports do not constitute *Brady*

material. The government's theory on Count 2 is that Lavon Parks mailed drugs from Puerto Rico to himself in Western New York. Docket Item 710 at 7. The government initially believed—and told this Court—that Wilson's identification of "D" as the person who hired him to retrieve the drugs meant Lavon Parks, whose nickname is "Dutch," and that the reports were not *Brady* material because they inculpated the defendant. Docket Item 737 at 17. In fact, the government explicitly said that "if it was anybody else [who Wilson identified], of course, that would be *Brady*." *Id.* (italics added). Then, after the government realized that it was mistaken and that Wilson indeed had identified someone else, the government changed course and argued that the material is irrelevant.

And regardless, the fact that someone other than Lavon Parks enlisted Wilson to retrieve the drugs at the very least creates issues about venue since if Lavon Parks were not mailing drugs to himself, he would have little connection with the alleged attempted possession of those drugs in this district. In fact, the government seems to recognize that, arguing that venue is proper in this district because of the "substantial steps" taken by Parks in the Western District of New York before causing the package to be mailed from Puerto Rico "back to himself in Niagara Falls for distribution." *See* Docket Item 710 at 7-8; *see also id*. at 4-5.

The government also argues that it was not required to disclose the reports because it excised that proof—and anything involving SA Bongiovanni—from its case-in-chief. Docket Item 763 at 13-14. But that argument likewise misses the mark. The government cannot simply remove certain evidence from its case and then pretend that

the evidence does not exist. In other words, the government still must review materials connected to even excised proof as part of its discovery obligations.

Nevertheless, this Court believes that dismissing Count 2 is too draconian a remedy and unwarranted. Instead, this Court will preclude the government from offering any evidence that Lavon Parks was attempting to ship drugs to himself in the Western District of New York as a sanction for its late disclosure. If that preclusion results in proof insufficient to establish venue here, Lavon Parks may again seek dismissal of Count 2 at trial.

[redacted]

After this Court found that law enforcement violated the defendants' rights by unreasonably [redacted], the government moved *in limine* to propose limits to the testimony of [redacted], [redacted]; the defendants, in turn, moved to preclude [redacted] trial testimony, Docket Item 640. The defendants argued that without the impermissible extension of [redacted], the search, and the charges against [redacted], the government never would have learned about [redacted], let alone secured [redacted] cooperation and anticipated testimony in this case. Docket Item 640 at 5. In sharp contrast, the government responded that the exclusionary rule does not require preclusion because the attenuation doctrine and the inevitable discovery doctrine—both "exceptions to the exclusionary rule"—cut in favor of allowing [redacted] to testify. Docket Item 692 at 3-4.

As noted above, this Court originally found that [redacted] could testify. [redacted] But after an *in camera* review of investigative reports at the government's request, Docket Item 861, the Court decided to revisit that decision based on information in those reports. *See* Docket Item 729 (sealed text order). More specifically, the Court was concerned about "1) the timing of [redacted] desire to cooperate with federal authorities [redacted]; and 2) whether the government would have inevitably learned about [redacted] involvement without the [redacted]." *Id.* Having now reconsidered the issue in light of the new information, the Court precludes [redacted] testimony.

Attenuation

In deciding whether the attenuation doctrine permits a witness connected with illegally seized evidence to testify, courts consider four factors: 1) "the stated willingness of the witness to testify"; 2) "the role played by the illegally seized evidence in gaining his cooperation"; 3) "the proximity between the illegal behavior, the decision to cooperate[,] and the actual testimony at trial"; and 4) "the [motivation of police] in conducting the search." *United States v. Reyes*, 157 F.3d 949, 954 (2d Cir. 1998) (quoting *United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir. 1980)); *see also United States v. Ceccolini*, 436 U.S. 268 (1978). Here, the Court was told that [redacted] did not decide to cooperate with the government until a year and a half after the illegal search and that the connection between the illegal search and [redacted] decision to cooperate was attenuated as well. *See* Docket Item 616 at 10; *see also* Docket Item 737 at 17-18. But as the government later conceded at an *ex parte* oral argument, that was not

entirely true because [redacted] wanted to cooperate with the authorities—and at least one federal agent and one federal prosecutor knew about that—just a few days after the illegal search was conducted. *See* Docket Item 737 at 17-23.

In fact, the reports disclosed to the Court on the eve of trial and to the defendants a week later indicate that just four days after [redacted] expressed his desire to cooperate and that Bongiovanni, the FBI agent then assigned to the case in Western New York, knew exactly that.[13] Docket Item 741 at 2; Docket Item 861. The government's failure to disclose the investigative reports is troubling, as is the omission of this information from the government's timeline of [redacted] decision to cooperate.[14] And while the Court credits the government's explanation that prosecutors "did not put those two things together"—that is, did not connect [redacted] desire to cooperate after his arrest to his actual cooperation with "our office, the Western District of New York," *see* Docket Item 737 at 18—the fact remains that an FBI agent and prosecutor from the Western District of New York knew about [redacted] desire to cooperate long before the government took [redacted] up on his offer, *see id*. at 23.

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[13] What is perhaps even more troubling is that the defendants consistently argued that the government's timeline was inaccurate and that [redacted] expressed his willingness to cooperate right after his [redacted] arrest. Clearly the defendants' version of events has proven more accurate, and it was not until the government submitted the investigative reports it withheld from disclosure to this Court for its *in camera* review that this came to light. *See* Docket Item 861.

[14] Again, the Court does not suggest that the government was deliberately trying to hide the ball. On the contrary, the Court suspects that the government's failure to disclose resulted from its attempt to excise Bongiovanni from the case and its subsequent assumption that documents written by or related to Bongiovanni were therefore unimportant—or, at least, less important.

So the connection between [redacted] cooperation and the illegal search—both temporally and causally—is much closer than what the government initially represented. Four days is a far cry from the eighteen months the government argued was the time between [redacted] and [redacted] decision to cooperate, and separating [redacted] cooperation from the [redacted] and the suppressed evidence is nearly impossible. Indeed, [redacted] connection to this case clearly was triggered by nothing other than the illegal search. And for that reason, the illegal search is too closely connected with his role as a witness to permit his testimony at trial based on the attenuation doctrine.

Inevitable Discovery

Nor does the inevitable discovery doctrine save [redacted] testimony. Under that doctrine, the fruit of an illegal search may nevertheless be admitted at trial if the government proves that it inevitably would have been discovered without the constitutional violation. *United States v. Heath*, 455 F.3d 52, 55 (2d Cir. 2006). "[T]he inevitable discovery doctrine is available only where there is a high level of confidence that each of the contingencies required for the discovery of the disputed evidence would in fact have occurred." *Id*. In deciding whether fruit of an illegal search would have inevitably been discovered, the "central question" is "[w]ould the disputed evidence inevitably have been found through legal means 'but for' the constitutional violation? If the answer is 'yes,' the evidence seized will not be excluded." *Id*. The burden of proof on this issue is with the government. *See United States v. Cabassa*, 62 F.3d 470, 474 (2d Cir. 1995).

Here, the government initially claimed that two witnesses—[redacted] and [redacted]—identified [redacted] as an associate of Lavon Parks [redacted] *See* Docket Item 692 at 15-16. But at oral argument, the government explained that [redacted] and [redacted] identified [redacted] only after the government learned about [redacted] as a result of the illegal search, asked [redacted] and [redacted] about him, and showed them [redacted] photo. [redacted] And other than the government's *ipse dixit* speculation that [redacted] would have identified [redacted] the government offers nothing supporting its assertion.

For that reason, the government has not met its burden of proving that it inevitably would have obtained [redacted] testimony even if the illegal search never occurred.[15] And because neither the attenuation doctrine nor the inevitable discovery doctrine applies, the exclusionary rule precludes [redacted] testimony as the fruit of an illegal search.[16]

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[15] Even if the government may have stumbled on [redacted] as it suggests, that does not mean that [redacted] would have willingly cooperated with the government were it not for the charges against him stemming from the illegal search. And that adds to the speculative nature of the government's position.

[16] Because the Court finds that the exclusionary rule precludes [redacted] testimony, it need not and does not address whether preclusion should be imposed as a sanction for the late disclosure of the reports at issue.

Motion to Dismiss Third Superseding Indictment

The defendants seek dismissal of the third superseding indictment as a sanction for the government's discovery violations. Docket Items 742, 745, 769. In support of that drastic remedy, the defendants recite a litany of withheld and late Rule 16 disclosures and alleged violations of the government's disclosure obligations under *Brady* and *Giglio*. *Id*. In response, the government claims that because the defendants now have everything to which they are entitled, there is no prejudice and there need be no remedy. Docket Item 763. And the government insists that it has not violated any of its disclosure obligations. *Id*. at 24-26.

As noted above, the Court is troubled by the government's view of its obligations, especially in light of the history also noted above. The government's argument that it was not required to search for *Brady* material in the files of the state investigators and prosecutors who began this case and turned it over to the government is troubling. The government's insistence that it was not required to disclose a government witness's statement because that statement was demonstrably false is troubling. The government's position that because it has answers to defense arguments that certain evidence is exculpatory it need not disclose that evidence to the defense is troubling. As this Court noted above and as it has noted previously in this case, when assessing whether evidence might be exculpatory or valuable to the defense, the government seems to have looked at the evidence narrowly through adversarial eyes and not generously as *Brady* and its progeny counsel. All that is troubling.

What is more, while the government may be correct that the defendants now have everything to which they are entitled, there can be little doubt that the defendants

have suffered prejudice. While this case has been pending, two witnesses—Rhonda Howard and Daniel Wilson—died, and because the government had not disclosed their statements and related documents to the defense, the defendants were deprived of the opportunity to evaluate each witness's significance and to interview those witnesses before they died. As discussed above, the Court has fashioned remedies for those violations—perhaps the most egregious examples—but there were other discovery violations as well.

Federal Rule of Criminal Procedure 16 was intended to provide defendants with "liberal discovery"—albeit not discovery of "the entirety of the government's case." *U.S. v. Percevault*, 490 F.2d 126, 130 (2d Cir. 1974). Rule 16(a)(1)(E) requires the government to disclose documents or tangible evidence if: "the item is **material** to preparing the defense; the government intends to use the item in its case-in-chief at trial; or the item was obtained from or belongs to the defendant." Fed.R.Crim.P. 16(a)(1)(E) (bold added). "Material" evidence includes evidence that relates to a defendant's response to the government's case-in-chief. *U.S. v. Armstrong*, 517 U.S. 456 (1996). And that disclosure obligation continues until and during the trial. Fed.R.Crim.P. 16(c).

Under *Brady,* "[t]he government has a duty to disclose evidence favorable to the accused when it is material to guilt or punishment." *United States v. Madori*, 419 F.3d 159, 169 (2d Cir. 2005) (citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963)). The Government's obligations extend "not only [to] evidence that tends to exculpate the accused, but also [to] evidence that is useful to impeach the credibility of a government witness"—so-called *Giglio* material. *United States v. Coppa*,

267 F.3d 132, 139 (2d Cir. 2001) (citing *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972)). *Brady* and *Giglio* material "must be disclosed in time for its effective use at trial . . . or at a plea proceeding." *Coppa*, 267 F.3d at 146.

The defendants cite a litany of alleged disclosure violations in connection with Rule 16 and *Brady*, and they ask the Court to dismiss all charges against them. *See* Docket Items 742, 745, 769. That severe sanction is not warranted here because this Court has fashioned sanctions that it believes adequately remedy the violations. Moreover, the Court does not question the government's motives or integrity in making the decisions that this Court now criticizes. But if defendants who face the power and authority of the United States Department of Justice are to have a fair trial, the government cannot look at the evidence through the eyes of prosecutors and turn over only what is obviously and directly exculpatory. Instead, prosecutors should view the evidence from their opponents' perspective and ask themselves, "What would I do with this if I represented the defendant?"

Dismissal is not the appropriate sanction here. But it may be the next time. And so this Court strongly encourages the United States Attorney's Office to honor the assurances it offered in *United States v. Morgan*: "a focus and commitment by [the United States Attorney's Office's] leadership to take necessary and appropriate steps, including increased supervision and training, to ensure that such failures are addressed and do not occur in the future." *See United States v. Morgan*, 18-CR-108-EAW, Docket Item 647 at 2.

CONCLUSION

For the reasons stated above, the government may not offer the excited utterance of Rhonda Howard into evidence and [redacted] may not testify. Moreover, the government is precluded from offering any evidence on Count 2 that Lavon Parks was attempting to ship drugs to himself in the Western District of New York. The defendants' motion to dismiss or for sanctions is otherwise denied.

SO ORDERED.

Dated: July 6, 2023
Buffalo, New York

s/ Lawrence J. Vilardo
LAWRENCE J. VILARDO
UNITED STATES DISTRICT JUDGE