UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

LAVON PARKS,
JAMES PARKS,

Defendants.

19-CR-87-LJV
DECISION & ORDER

On July 6, 2023, this Court issued a decision and order precluding the government from offering certain evidence at trial for, among other reasons, various violations of the government's discovery obligations. Docket Item 872.[1] A week later, the government moved "to correct and clarify the record set forth in the Court's sealed decision and order entered at Docket Number 872." Docket Item 883 at 1 (some capitalization removed). The defendants responded on July 24, 2023, Docket Item 901, and the government replied on July 26, 2023, Docket Item 902.

The government's motion raised two issues. First, the government asserted that this Court erred in relying on four cited cases "as evidence that the USAO-WDNY [the United States Attorney's Office for the Western District of New York] has a history of failing to comply with its disclosure obligations." *Id*. at 2-13. Second, the government

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[1] Citations to "Docket Item" are to the docket in this case, 19-CR-87-LJV, unless otherwise noted.

faulted the Court for "appl[ying] an erroneous legal standard of materiality under *Brady*"—that is, *Brady v. Maryland*, 373 U.S. 83 (1963). The Court addresses each argument in turn.[2]

I. The USAO-WDNY's History of Discovery Compliance

The government devotes most of its motion to addressing four cases that this Court cited in its decision and arguing that those cases are not evidence of its "failing to comply with its disclosure obligations." Docket Item 883 at 2-13. For example, the government recites a detailed history of an issue in *United States v. Tyshawn Brown*, 19-CR-222-EAW, and argues that "[b]ecause *Brown* does not stand for the proposition that the government failed to adhere to any disclosure obligations," this Court should "remove[]" the citation to it. Docket Item 883 at 2-5. Likewise, the government goes to great lengths to explain the "similar" situation in *United States v. Coleman*, 19-CR-221-RJA, and argues that *Coleman* "does not merit citation by this Court . . . implying that the government somehow [] acted improperly in its handling" of discovery materials in that case. Docket Item 883 at 5-8.

[2] In its motion, the government also asked this Court to "acknowledge[ ] that the discovery decisions discussed by this Court in [its] Decision and Order,"—that is, Docket Item 872—"were not made by the current prosecution team." Docket Item 883 at 16. There is no reason for this Court to make the requested "acknowledgement." First, the criticisms leveled by the Court apply to the office of the USAO-WDNY, not to individual prosecutors; if the Court believed that only certain prosecutors were at fault, it would have written a different decision. Instead, this Court sees the issue as an office problem. What is more, "the current prosecution team" doubled down on the prior discovery-related decisions, as evidenced by the extensive briefing on the defendants' motions to dismiss. Finally, as in any case—and as this Court often understood as a practicing attorney—counsel of record is accountable for decisions made, no matter who initially or actually made them.

If this Court had said that those cases evidenced violations of the government's disclosure obligations, the government might have a point. But the Court did not say that, and the government's motion mischaracterizes this Court's decision. In fact, this Court said that the cited cases "call into question the government's discovery practices in this District." Docket Item 872 at 2. And there can be little doubt that both cases do exactly that: they demonstrate a fundamental misconception by prosecutors in the USAO-WDNY about what their discovery obligations are.

In *Brown*, for example, Chief Judge Elizabeth A. Wolford repeatedly expressed her concern about how the government viewed its obligation to disclose evidence to the defense. At oral argument on September 17, 2020, Chief Judge Wolford expressed the same concern that this Court has expressed in this case—that the government's search for *Brady* material was not exhaustive enough. *Brown*, 19-CR-222-EAW, Docket Item 46 at 23 ("I'm just concerned about the thoroughness of the search"); *id*. at 45 ("I think the government's review of its files needs to be [] broader than it has been up to this point in time."). Indeed, like this Court in this case, Chief Judge Wolford explicitly noted that "the government's response" to the defendant's argument "makes me question, well, does the government understand its *Brady* and *Giglio* obligations here." *Id.* at 17. And even more pointedly, Chief Judge Wolford said, "the [government's] memo of law . . . clearly misunderstands the difference between *Jencks* and *Giglio*, [and] that says to me that the government doesn't fully understand what its obligations are under *Brady* and *Giglio*." *Id.* at 23. A few months later, the government voluntarily dismissed the indictment. *Brown*, 19-CR-222-EAW, Docket Items 57, 58.

The point is not that the government necessarily "failed to adhere to [its] disclosure obligations" in *Brown*, *see* Docket Item 883 at 5, and this Court did not cite *Brown* for that proposition, *see* Docket Item 872 at 2. The point is that *Brown* is another case that calls into question how the USAO-WDNY views its obligations to disclose evidence to the defense and therefore "call[s] into question the government's discovery practices in this District." *Id.* And this Court correctly cited *Brown* for that proposition.

The same is true of *Coleman*, which the government says presents a "situation . . . similar to the *Brown* case." *See* Docket Item 883 at 5. In *Coleman*, Judge Richard J. Arcara explicitly cited, apparently with approval, much of Chief Judge Wolford's reasoning in *Brown*. *See Coleman*, 19-CR-221-RJA, Docket Item 86 at 12-16. And while Judge Arcara found that he did not have enough information to "decide the issues pertinent to the *Brady/Giglio* dispute," there is little doubt that he also was concerned about the government's view that it can avoid all its disclosure obligations—including *Brady* and *Giglio* obligations—with respect to documents written by or otherwise connected to a witness simply by stating that "it does not intend to call him as a witness at trial." *Id*. at 10-11, 16 (concluding that the magistrate judge's acceptance of the government's representation "oversimplify[ies] the *Brady/Giglio* issue").

Again, the point is not that Judge Arcara found a violation of the government's discovery obligations: he did not. The point is that he called into question the government's understanding of its obligations: he did. That is the same concern that Chief Judge Wolford had in *Brown* and one of the same concerns that this Court has in this case. And so, like *Brown*, *Coleman* "call[s] into question the government's

discovery practices in this District," Docket Item 872 at 2, and this Court correctly cited it for that proposition.[3]

The other two cases cited by this Court with which the government takes issue—*United States v. Padua*, 20-CR-191-LJV, and *United States v. Morgan*, 18-CR-108-EAW—*are* different: Both those cases indeed involved explicit findings that the government violated its discovery obligations. But the government says that this Court nevertheless miscited those cases because "*Morgan* is distinguishable," Docket Item 883 at 9, and "the facts and circumstances of *Padua* are very different from the facts and circumstances of this case," *id.* at 10. Again, the government is superficially correct: the disclosure violations in those cases were different than the violations here. But those cases, like this case, most certainly "call into question the government's discovery practices in this District," and this Court correctly cited them for that proposition. Docket Item 872 at 2.

[3] Although the government has gone to great lengths to try to distinguish this case from *Brown* and *Coleman*, it cannot avoid one powerful similarity—the government's flawed strategy to insulate its prosecutions from indicted former DEA Special Agent Joseph Bongiovanni. In all three cases, Bongiovanni served as a case agent and wrote reports; were it not for his indictment in this District, he more than likely would have been a government witness in each case. After Bongiovanni's indictment became public, the government made the decision to proceed with cases in which he was involved but endeavored to "excise[] evidence involving" him from the cases. *See, e.g.*, Docket Item 763 at 13; *see also Brown*, 19-CR-222-EAW, Docket Item 46 at 30; *Coleman*, 19-CR-221-RJA, Docket Item 86 at 10. But that strategy caused problems in *Brown*, *Coleman,* and here: the government erroneously concluded that because Bongiovanni would not be a witness, it did not have an obligation to search for, review, and disclose reports he wrote that contained Rule 16, *Brady*, *Giglio,* and *Jencks* material. Moreover, as courts began to hear argument on these issues of non-disclosure, it became increasingly clear that at least some assistants in the USAO-WDNY misunderstood their obligations under Rule 16, *Brady*, *Giglio,* and *Jencks*.

In *Padua*, the government twice made a late disclosure of cell phone evidence. First, the Court agreed with defense counsel that there may have been a violation of the government's disclosure obligations with respect to a codefendant's cell phone, but the Court forgave that violation and declined to preclude evidence found on the phone because "there was no prejudice to the defense." *See United States v. Padua*, 20-CR-191-LJV, Docket Item 187 at 3. Then, on the eve of trial, the government sought to admit evidence on Padua's own cellphone—evidence that the government had the ability to access for more than a year but that the government neglected to access and to turn over to the defense until just before trial was scheduled to begin. *Id.* Because of that late disclosure, the Court precluded the government from using the cellphone evidence at trial. *Id*. And when the Court declined to reverse itself after several government requests, the prosecutor's summation included errors that were so egregious that the Court declared a mistrial with prejudice and dismissed the indictment. *Id*. at 4-6; *see id*. at 6-13 (explaining decision in detail).

In arguing that the defendant was not entitled to a mistrial, the government insisted that the government "[did]n't think we had a fair trial in this case"—that it was "deprived of a fair trial." *Id*. at 5. This Court understood that to mean that the government should have been forgiven for disclosing key evidence to the defense on the very eve of trial. In fact, the Court noted that the government's attitude seemed to be that disclosure deadlines were "aspirational"[4] and that the government had

[4] This Court used that same word—"aspirational"—to describe the government's attitude about its disclosure obligations in this case. Docket Item 780 at 4 ("It's a . . . pattern that I've seen from the United States Attorney's Office in cases in front of me, and that I've read about in other cases in this [D]istrict, that the government seems to

previously made that very argument. *See id*., Docket Item 140 at 36 (transcript noting that the government acknowledged that a prior argument that disclosure deadlines were just suggestions was poor language). So *Padua* certainly evidences what this Court believed was the government's fundamental misunderstanding of its disclosure obligations, which resulted first in the preclusion of evidence, and then—via a somewhat circuitous route—in a mistrial with prejudice.

And while the government tries to blame its disclosure violations in *Morgan* on "the volume of the electronic discovery involved" which it says "had nothing to do with the government's *Brady/Giglio* obligations," *see* Docket Item 883 at 9, the fact is that Chief Judge Wolford found that "the government['s] mishandl[ing] of discovery" was "self-evident and [could] not be reasonably disputed," *United States v. Morgan*, 493 F.Supp.3d 171, 180 (W.D.N.Y. 2020). Indeed, the disclosure violations in *Morgan* resulted in dismissal of the indictment. *Id*. The only question, Chief Judge Wolford said, was whether the disclosure violations resulted from "insufficient resources . . ., a lack of experience or expertise, an apathetic approach to the prosecution . . ., or perhaps a combination of all of the above." *Id.* So there is no doubt that like *Brown, Coleman*, and *Padua*—and like this case—*Morgan* "call[s] into question the government's discovery practices in this District." *See* Docket Item 872 at 2.

The government correctly notes that the type of discovery violation in *Morgan* was different than here and that the disclosure issues in this case were being argued

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take its obligations to provide materials to the defense in criminal cases as aspirational and not a requirement. And that -- and that concerns me.").

while the issues in *Morgan* were unfolding. *See* Docket Item 883 at 9-10. In fact, this Court said exactly that in its decision with which the government now takes issue. *See* Docket Item 872 at 2. But what the government apparently fails to appreciate is that there is a problem with the way the USAO-WDNY understands and handles its discovery obligations in this District[5]—a problem that, based on the violations and arguments made here, the USAO-WDNY still has not addressed, let alone fixed. And perhaps the best evidence of that is the second argument that the government makes in the motion at issue.

II. The Standard for Government Disclosure

Federal Rule of Criminal Procedure 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). "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). Rule 16 was intended to

[5] In its reply, the government argues that this Court cited only four other cases as demonstrating a discovery problem in the USAO-WDNY and that given the hundreds of cases prosecuted by that office, "four cases charged over the course of three years (five if you count the instant case), does not establish a pattern." *See* Docket Item 902 at 3. This Court did not do an exhaustive search in compiling the list of comparative cases; on the contrary, those cases simply are the ones that came to mind immediately. But the government's noncompliance or late compliance with discovery obligations is a defense refrain that is all too familiar to this Court. So the Court's failure to cite other cases should not be read as an across-the-board endorsement of the USAO-WDNY's discovery practices in all but the cited cases.

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).

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, 1 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.

That—almost verbatim—is what this Court said in its prior decision about the government's disclosure obligations. *See* Docket Item 872 at 29-30. And what this Court said in its prior decision largely quotes Rule 16 or Second Circuit case law. But the government faults this Court for "appl[ying] a heightened materiality standard that is not required" either by law or by the standards for federal prosecutors. Docket Item 883 at 14. That heightened standard, the government says, "would require prosecutors to . . . disclose evidence pre-trial upon the mere possibility that such evidence would or could lead to exculpatory evidence." *Id*. Again, the government misreads what this Court wrote in its decision and mischaracterizes the message.

As this Court noted in its prior decision, the government repeatedly tried to defend its disclosure failures in this case by explaining that the evidence was not "material" because the government had answers to what the defendants might use that

evidence to argue. A government witness's statement that defendant James Parks's truck was parked at his house shortly after the homicide does not "change the calculus" with respect to his "guilt" because "[t]he government does not believe that James Parks was the shooter." *See* Docket Item 763 at 17. A statement by the same government witness that someone named "Mike" was present at the scene around the time of the shooting need not have been disclosed because that statement was "inaccurate[;] it's not true" and the government has a video to prove it. *See* Docket Item 780 at 17-19. Even though the government believed that defendant Lavon Parks had been identified as the person who hired a government witness to retrieve drugs—and even though the government itself said that "if it was anybody else" who that witness identified, "of course [that witness's identification] would be *Brady*," Docket Item 737 at 17—the fact that the witness had indeed identified somebody else was not *Brady* material because that "simply add[ed] an additional co-conspirator to the equation." Docket Item 763 at 10.

But a statement by a government witness that the vehicle of a defendant who allegedly served as a lookout during a homicide was parked at that defendant's residence right after the homicide is exculpatory. The fact that a government witness identified someone other than the defendant as the person who hired him to pick up the drugs involved in the indictment is exculpatory.[6] And regardless of whether a

[6] In fact, as just noted, before the government realized that its witness had identified someone else, it had conceded exactly that. And even if, as the government now argues, that identification of someone else merely adds another "co-conspirator to the equation," *see* Docket Item 763 at 10, following up on that certainly would be material to preparing the defense, and the document would therefore be discoverable under Rule 16.

government witness was lying or mistaken or confused when she said that someone named Mike was present at the scene, her statement should have been disclosed to the defense as material under Rule 16, or exculpatory under *Brady,* or useful to impeach her credibility under *Giglio.*

The point is that the government seems to approach its discovery obligations by finding ways *not* to disclose evidence and excuses for not disclosing it sooner or at all. So this Court suggested that as a vehicle for deciding whether it should disclose certain evidence, the government should not look at the evidence as it had been doing—through the eyes of prosecutors—but rather should put itself in the other side's shoes and ask how that evidence might be seen and used by the defense. In fact, doing that might go a long way toward resolving what this Court believes is a longstanding problem in the USAO-WDNY, as the Court noted in its earlier decision. *See* Docket Item 872 at 28-30.

Contrary to the government's argument, *see* Docket Item 883 at 14, this Court did not say that the government must "disclose evidence pre-trial upon the mere possibility that such evidence would or could lead to exculpatory evidence." Contrary to the government's argument, *see id.*, this Court did not even say that the government was "[r]equired" to "'view the evidence from their opponents' perspective.'" Instead, this Court suggested that the government attorneys try to look at the evidence through their opponents' eyes as a vehicle to better understand their discovery obligations. Indeed, it is difficult for this Court to fathom how prosecutors can turn over all evidence that is "material to preparing the defense," *see* Fed.R.Crim.P. 16(a)(1)(E), if they do not do

that. And the USAO-WDNY's strident opposition to what this Court suggested speaks volumes about what this Court perceives as a discovery problem in the USAO-WDNY.

CONCLUSION

This Court will take the USAO-WDNY at its word when it says that its repeated statement that it "is acutely aware of its obligations and takes them seriously" is "not simply a 'mantra' or 'empty words' being repeated." *See* Docket Item 883 at 13. Nevertheless, for the reasons stated above and in this Court's prior decision, Docket Item 872, this Court remains troubled about how the USAO-WDNY "view[s] its obligations, especially in light of the history" noted in that decision and above.

Perhaps that concern is unwarranted. Perhaps this Court, and Judge Arcara, and Chief Judge Wolford have been too liberal in our reading of the government's discovery obligations. Or perhaps the issues in this case, and *Morgan*, and *Padua*, and *Brown*, and *Coleman* are aberrations, and the defense's drumbeat of violations in those and many other cases in this District is unwarranted. Time will tell.

In sum, to the extent that the above "clarif[ies]" the decision and order entered at Docket Number 872, the government's motion is GRANTED. The government's motion to correct and clarify the record, Docket Item 883, is otherwise DENIED.

SO ORDERED.

Dated: July 27, 2023
Buffalo, New York

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