

**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION - FELONY BRANCH**

<b>UNITED STATES OF AMERICA</b>	<b>:</b>	<b>Criminal Case Nos.</b>	<b>2017 CF2 1176</b>
<b>v.</b>	<b>:</b>		<b>2017 CF2 1378</b>
	<b>:</b>		<b>2017 CF2 1235</b>
<b>DANIEL MELTZER,</b>	<b>:</b>		<b>2017 CF2 1355</b>
<b>CLAY RETHERFORD,</b>	<b>:</b>		<b>2017 CF2 7212</b>
<b>CHRISTOPHER LITCHFIELD,</b>	<b>:</b>		<b>2017 CF2 7216</b>
<b>CAROLINE UNGER,</b>	<b>:</b>		
<b>MATTHEW HESSLER, and</b>	<b>:</b>	<b>Chief Judge Morin</b>	
<b>DYLAN PETROHILOS</b>	<b>:</b>		

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**Order**

This matter comes before the Court on the United States’ Motion to Reconsider (“the Motion”) certain aspects of the Court’s earlier ruling concerning the government’s failure to disclose discoverable material to the defense. The government’s stated concern is to address any suggestion, express or implied, that the government made intentional misrepresentations to the Court when discussing the Project Veritas videos in its possession.<sup>1</sup> The government also requests the Court to clarify that, when it described the prosecutor’s conduct as “intentional,” the Court was not making a finding that government counsel had made purposeful misrepresentations.

As a basis for its Motion, the government proffers that its failure to make known the existence of the undisclosed materials was the result of a misunderstanding of the Court’s

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<sup>1</sup> In an earlier hearing, this Court questioned why the government represented that turned over only one Project Veritas video when in fact the government had received multiple videos. When the Court referred to the government turning over only “one video” it was addressing the fact that the government represented that there was only one video to which it made redactions. As was made clear in later remarks at the hearing, the reference to “one video” was not a suggestion by the Court that there was only one the Project Veritas’ video, but a reference to the number of Project Veritas’ videos that had been redacted by the government.

questions and directives and an incomplete analysis of its discovery obligation, and not an attempt to deceive the Court.

### **1. Entertaining the Motion**

The first issue to address is whether the Court should entertain the Motion. As made clear at the hearing, the government's Motion is very limited in its scope. The government confirmed that it does not seek reconsideration of (1) the Court's finding of a Constitutional violation and violation of Sup. Ct. Crim. Rule 16 resulting as a result of the government's failure to turn over or disclose the existence of a number of videos, (2) the Court's finding that the failure to disclose the videos was intentional<sup>2</sup> or (3) the sanctions imposed by the Court as a result of the violations. The government also made clear that it is not seeking reconsideration as a vehicle to appeal any of the Court's earlier rulings. The "laser-like" focus of the Motion, as stated by the government, is to allay any concerns and to represent that the prosecutors did not make intentional misrepresentations to the Court.

Although this Court has the inherent authority to decide a reconsideration motion, it is not required to "give the matter full de novo review as if the original motion itself were before" it. *Perry v. Sera*, 623 A.2d 1210, 1218 (D.C. 1993). Because entertaining the Motion will not affect

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<sup>2</sup> As indicated at the time of its ruling, the Court made clear the limited nature of its finding that the actions by the government were "intentional." The Court found that:

"[i]t was intentional in the sense that the Government made intentional decisions that it made not to disclose. I'm not prepared to find that it was necessarily malevolent, but counsel before me is not able to make representations . . ."

Hearing, 05/31/2018 Tr. at 36:5-24. In the hearing on the present Motion the government confirmed that the failure to disclose the existence of the additional videos was intentional and not a mistake. ("The Court: . . . it was clear, at that point, that your office had intentionally decided not to disclose the information. [Prosecutor]: And that's accurate. That's 100 percent accurate."). Motion Hearing, 10/12/2018 Tr. at 11).

the dispositions of these cases,<sup>3</sup> a strong argument can be made that the Court should not entertain the Motion. Nevertheless, in the Court's view, there is value to considering the Motion because of the collateral consequences to the individuals involved,<sup>4</sup> to complete the record and to prevent future occurrences. Because of the limited nature of its request and for the reasons stated, the Court will exercise its discretion and entertain the government's Motion.

## **2. The Government's Obligations**

Under *Brady v. Maryland*, the Supreme Court made clear that "suppression by the prosecution of evidence favorable to the accused . . . violates due process . . ." 373 U.S. 83, 87 (1963). The Court of Appeals has noted that *Brady* does not tolerate the "government[']s failure to turn over an easily turned rock." *Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014) (internal citation omitted). Separate from its obligation under *Brady*, the government has an obligation to produce items, such as videos, that are "material to the preparation of the defendant's defense." Sup. Ct. Crim. Rule 16(a)(C). The disclosures must be timely and made "in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation." *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011). Finally, to ensure fairness in the process, the government must give "accurate or complete" information about the items it controls or possesses, and not stand by and allow ". . . erroneous understanding of the pertinent facts to persist." *Vaughn* 93 A.3d at 1262.

## **3. The Government's *Brady* Obligations in These Cases**

The Court recognizes that the discovery process in these cases was complex, involving hundreds of defendants and their attorneys. In previous hearings, this Court, and other judges

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<sup>3</sup> After the Court imposed the sanctions, the government moved to dismiss with prejudice all charges against the defendants. The Court granted the government's motion.

<sup>4</sup> In addition to potential consequences to the individual prosecutor, some defendants have filed a motion for attorney's fees, and others have filed motions to seal records.

handling companion cases, recognized the government's efforts to provide the defense with extensive discovery, including cell phone content and hundreds of videos it had in its possession. At the same time, the extensive nature of the discovery did not relieve the government of its obligation to disclose all exculpatory information or information that was material to the preparation of a defense.

As indicated by the Court when imposing the sanction of dismissing the conspiracy count in this case,<sup>5</sup> the government was prosecuting defendants based on a theory of collective responsibility. Under conspiracy law, defendants who participate in a conspiracy can be held criminally liable for the conduct of other conspirators, even though the defendants did not personally engage in that criminal conduct or even know the individuals who did.

*Pinkerton v. United States*, 328 US 640 (1946).

Consequently, the collective actions of persons who were engaging in relevant Inauguration planning activities, including evidence that persons were planning non-violent activities<sup>6</sup> at the same location and same time as the planning of the other criminal activities, and evidence of which defendants attended planning meetings and which did not, would be important to the preparation of any defense and would, in some cases, be exculpatory as to whether an individual defendant was intending to engage in a conspiracy or a riot. Such information would be important to a jury's decision whether a defendant was engaging in unlawful behavior or merely present at the protests exercising his or her First Amendment rights when other persons at

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<sup>5</sup> One factor among others considered by the Court in imposing the sanction was the fact that the government disclosed the existence additional videos on the eve of trial preventing the defense from reviewing the contents of the videos and the extent of the conduct or Project Veritas in making the videos.

<sup>6</sup> At the earlier motion hearing the Court suggested to the prosecution that planning of non-violent activities would be *Brady* information. (The Court: "For example, . . . if there were statements about non-confrontation, nonviolence that I mean obviously, I am not telling you anything new but . . ." at which the prosecutor explained the limited personal observations of an undercover officer at the planning meetings. 4/6/2018 Tr. at 90).

the protest were engaging in independent criminal activity. In addition, all such planning meetings would put in context the events that occurred on Inauguration Day and would be material to the preparation of any defense by competent defense counsel.<sup>7</sup> As the Court of Appeals has made clear, when determining whether materials should be disclosed, “[t]he defense perspective controls . . . ‘[T]he critical task of evaluating the usefulness and exculpatory value of the information is a matter primarily for defense counsel, who has a different perspective and interest from that of the police or prosecutor.’” *Vaughn*, 93 A.3d at 1254 (quoting *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010) (internal citation omitted).

Notwithstanding the discoverable nature of the videos, the government offered contemporaneous explanations (to another judge) as to why it failed to disclose the existence or content of the undisclosed Project Veritas videos.<sup>8</sup> These explanations provide insight into the government’s perspective on what it thought its discovery obligations were with respect to the undisclosed videos.<sup>9</sup> Having reviewed the government’s explanations and its proffered analysis as to why it did not disclose certain matters to the defense, at this time, the Court has no reason

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<sup>7</sup> For example, in other related trials, the government presented as a witness an undercover officer who attended some but not all of the planning sessions and described what he observed and saw including statements by some that there may be destruction of property during Inauguration protests. By contrast, the government represents that the undisclosed videos in its possession depict individuals in the planning sessions giving instructions on being nonviolent or how to deescalate when confronted by hostility at the planned Inauguration activities. Such videos would be relevant to the jury’s understanding as to the totality of what occurred at the planning meetings and who was present at the meetings and would be material to any competent defense counsel’s preparation of a defense.

<sup>8</sup> The lead prosecutor who handled discovery matters was in trial before another judge at the time the Court ruled on the defense motion for sanctions for discovery violations.

<sup>9</sup> The lead prosecutor’s explanations were made to Judge Knowles presiding at a companion trial, shortly after learning of the order of this Court imposing sanctions against the government. 5/29/2018 Tr. at 158-161. In summary, the prosecutor explained that based on her understanding of earlier rulings by judges, she focused on only disclosing materials that looked at an individual’s purpose and intent to attend the “Anti-Capitalist Bloc” and beyond that the government sought to protect other people’s First Amendment rights, their opinions and their intent to participate in other activities not involving the alleged riots.

to believe that the government had additional malevolent motives, such as intentionally suppressing evidence. While the Court accepts the government's current representations about its motives and actions, some observations are appropriate.

In its earlier explanation and its current Motion, the government states that it was concerned about protecting the First Amendment activities of individuals who were not charged with criminal offenses, and had "sensitivity" about disclosing the identity of the Project Veritas videographer.<sup>10</sup> In the Court's view, such concerns would have been more appropriately addressed by identifying the existence of the videos and their content to the Court and seeking a protective order limiting their use or distribution. Because the government did not follow this course, the Court and the defense were left with a misimpression of what materials were in the possession of the government. As the Court of Appeals has made clear, "*Brady* does not authorize the government to engage in a game of hide-and-seek, or require the defense to 'scavenge for hints of undisclosed *Brady* material.'" *Vaughn*, 93 A.3d at 1258.

Moreover, to the extent the Court and the government operated under different understandings, the government, as the only party who had full knowledge of the extent of Project Veritas videos in its possession, had ample opportunity to "correct the court's [and defense counsel's] erroneous understanding of the pertinent facts." *Vaughn* 93 A.3d at 1262.

This is particularly true where the government made repeated assurances to the Court that it was

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<sup>10</sup> During the Motion hearing the Court inquired whether there any agreement with Project Veritas or its members and the government to protect their identity. In a supplemental submission, the government represents that the only member of the prosecution team that had any substantive contacts with a Project Veritas was the lead detective. Apparently, when providing its video, representatives of Project Veritas requested that any videographer's identity be redacted before a video was disclosed. The government represents that the detective told the Project Veritas that the prosecution would try to redact the identity of any videographer as a matter of course, but there might come a time when a videographer's identity had to be disclosed. The government further represents that Project Veritas representative made no request to conceal the identity of the organization thereafter.

engaging in broad disclosure of information – over and above that required by its discovery obligations. Obviously, the parties and the Court should have been working from the same knowledge of facts about the number of Project Veritas videos in the government’s possession and the extent of that organization’s involvement in making the videos.

**4. Specific Instances of Inquiry that Concern the Government**

At hearing on the Motion, government counsel (who was not involved in the prosecution of the cases) suggested that his review of the transcripts and case files led him to conclude that there was a fundamental misunderstanding between the prosecutors, the defense, and the Court when discussing discovery matters concerning Project Veritas. The result, in the government’s present view, is that “ships passed in the night.” Motion hearing, 10/12/18 Tr. at 23.

From government’s perspective, two specific instances of “ships passing in the night” occurred at the April 6, 2018, pretrial motion hearing, where the Project Veritas videos were extensively discussed.<sup>11</sup> At the beginning of that hearing, the Court made a broad inquiry “to get the government’s position on what they [the government] have and what’s available to [the defense] or not [.]” 4/6/18 Tr. at 8. This general question was asked in the context of available Project Veritas videos. Apparently, the government interpreted this inquiry as narrowly directed only to the Project Veritas videos it had already produced and redacted, rather than as a general inquiry as to all items from Project Veritas that were in the government’s possession. Similarly, at the conclusion of the April 6 hearing, after extensive discussion about the Project Veritas videos and the redactions made by the government, the Court formally ordered “the entirety of what is in the government’s possession to be turned over to the defense.” 4/6/18 Tr. at 19.

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<sup>11</sup> The Court addresses on the representations made during the April 6, 2018 hearing based on its understanding of the government’s concerns presented in the Motion. The Court has never raised concerns with any of the representations made by the prosecutors (Ms. Keil and Mr. Baset) who appeared later in these cases in which the motions for sanctions were discussed. Their representations were complete and consistent with their obligations as officers of the Court.

Again, notwithstanding an all-encompassing order that the government disclose Project Veritas videos in its possession, the government interpreted this order as limited to only the video to which it had made redactions.

In both instances, to the extent the government considered the Court's questions and directives to be limited in nature, there was a fundamental misunderstanding of the Court's intent. As it subsequently made clear, and as apparently understood by defense counsel, the Court intended that the government disclose all materials it had from Project Veritas to the defense. The government having such a limited understanding of the Court's questions and directives, however, only highlights the need for the government to be complete and fulsome in its disclosures to the Court and the parties as to what is in its possession, so that all are operating on the same knowledge of facts.

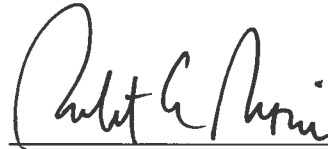
### **Conclusion**

The government's pursuit of a broad theory of collective criminal responsibility carried with it an equally broad obligation to provide discovery. In the Court's view, the government did not fulfill its responsibilities. Nevertheless, based on the government's contemporaneous explanations together with its robust disclosure of other materials, its active attempts to seek guidance from the Court on other discovery matters, and a review of the entire record, the Court concludes that the government's failure was one of incorrect analysis of its discovery obligations or misunderstanding of the Court's directives and not an attempt to make purposeful misrepresentations to the Court. Based on the results of these cases, however, should complex,



or even simple, cases arise in the future, the Court would not expect similar misunderstandings to occur.

Date: November 9, 2018

A handwritten signature in black ink, appearing to read "Robert E. Morin". The signature is written in a cursive style with a large initial "R".

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Chief Judge Robert E. Morin  
*Signed in chambers*

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