SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES OF AMERICA v. MATTHEW HESSLER, CHRISTOPHER LITCHFIELD, DANIEL MELTZER DYLAN PETROHILOS, CALY RETHERFORD, and CAROLINE UNGER Defendants.	Case Nos. 2017 CF2 7212 2017 CF2 1235 2017 CF2 1176 2017 CF2 7216 2017 CF2 1378 2017 CF2 1355 Chief Judge Robert E. Morin Trial: June 4, 2018 Next Event: May 31, 2018 Trial Readiness Hearing (Continued)

REPLY TO GOVERNMENT'S OPPOSITION AND MOTION FOR ADDITIONAL FINDINGS OF BRADY VIOLATIONS FOR NOT DISCLOSING AN ADDITIONAL SIXTY-NINE PROJECT VERITAS RECORDINGS AND ADDITIONAL SANCTIONS, INCLUDING DISMISSAL

Comes Now, Dylan Petrohilos Matthew Hessler, Christopher Litchfield, Clay/Caly Retherford, Daniel Meltzer and Caroline Unger (collectively, "Defendants"), by Counsel, pursuant to D.C. Super. Court R. 12 and 16, hereby replies to the Government's Opposition to the Motion to Dismiss, and we now, in light of the Government's additional Brady violations, request the Court find additional Brady violations and grant Sanctions in the form of dismissal of the indictment, and for its Motion, states the following:

Our adversarial system is premised on the belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. 1194.

In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused … violates due process where the evidence is material either to guilt or

to punishment, irrespective of the good faith or bad faith of the prosecution."

Favorable information is any information that might help the defense attack the Government's case or mount an affirmative defense. In determining what must be disclosed under Brady "the [prosecution's] guiding principle must be that the 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." Zanders v. United States, 999 A.2d 149, 163-64 (D.C. 2010).

Accordingly, while a finding of bad faith should result in nearly universal dismissal, a court may still dismiss if the conduct is perceived as willful or with a reckless disregard for the requirements of Brady, which places an obligation on the prosecutor to: 1) learn of potential Brady in the possession of the prosecution team, *see* Kyles v. Whitley, 514 U.S. 419, 437-38 (1995); 2) disclose the information "with no time for strategic delay," Biles, 101 A.3d at 1021; and, 3) have "systems in place to *ensure* that it was alerted to [exculpatory] information." Vaughn v. United States, 93 A.3d 1237, 1258 (D.C. 2014).

Factors relevant to a recklessness inquiry include timing of Brady disclosures, United States v. Chapman, 524 F.3d 1073, 1085 (9th Cir. 2008) ("the dates on many of the subsequently disclosed documents post-date the beginning of trial"); representations by the Government of compliance with discovery obligations, *id.* ("The AUSA repeatedly represented to the court that he had fully complied with Brady and Giglio, when he knew full well that he could not verify these claims."); and failure to provide the Court and defense with complete information or to correct misapprehensions of the Court. Vaughn, 93 A.3d at 1237 ("The Government not only failed to give the defense (or the court) accurate or complete information, it then stood by at trial

and allowed the defense's ignorance and the court's erroneous understanding of the pertinent facts to persist."). See Chapman, 524 F.3d. at 1085.

All of the above factors are present here. The Government's most recent disclosure comes less than one week before trial, the Government again failed to give accurate or complete information to defense counsel and the Court, and already went through two other trials knowing it had Brady evidence in its possession.

THE GOVERNMENT'S UNDERSTANDING OF BRADY EVIDENCE IS FLAWED

On May 30, 2018, the Government sent an e-mail to the Chambers of the Honorable Chief Judge Morin in an attempt to explain why sixty-nine additional Project Veritas recordings were not disclosed to defense.[1]

In that e-mail, the following is noted:

> "I focused my review of the recordings on the following: (1) did the recording contain information about the ACB[Anti-Capitalist Block]; (2) did the recording contain statements by or conduct of defendants in this case; (3) was there anything on the recording that could constitute evidence of a defendant's knowledge, intent, purpose for the charged conduct (innocent or otherwise); and (4) did the recording contain Brady information for the charged conduct."

Although this e-mail contains reasons for the Government recklessly not disclosing **sixty-nine** additional Project Veritas recordings, a majority of which are Brady violations, the instant motion focuses on another misrepresentation to the Court.

[1] Counsel has not attached the e-mail due to privacy concerns. Further, it is unnecessary because the Court was copied on the e-mail. Other recordings may have violated Brady but due to time constraints, Counsel is only focused on one and will allude to the others on the record during the Trial Readiness hearing tomorrow morning.

THE GOVERNMENT INTENTIONALLY FAILED TO DISCLOSE THIRTY-FIVE VIDEOS FROM THE "ACTION CAMP"

Yet again, the Government provided false information to the Court. In Vaughn, the District of Columbia Court of Appeals overturned a conviction for Aggravated Assault and Assault on a Law Enforcement Officer for the same conduct as the instant matter. In Vaughn, the Government failed to timely provide the defense with Brady information regarding one of its witnesses. The Court of Appeals overturned the conviction based on the fact that the Government did not disclose – to the Court – the entirety of Brady evidence in its possession.

The Government, in its case in chief, plans to introduce evidence that an undercover officer attended an action camp that took place on several days from January 14-18, 2017. During the first trial in this matter, Officer Adelmeyer testified that he did not remember faces of people at the action camp. So much so, that the Judge precluded him from testifying.

On April 6, 2018, during a hearing to determine whether co-conspirator statements heard by Officer Adelmeyer could come in as evidence, Ms. Kerkhoff begins to discuss a meeting Officer Adelmeyer attending on January 14. See, April 6, 2018 Hr'g Transcript at 77:6-78:13, attached hereto as Exhibit 1.

Counsel for Mr. Litchfield, then alerts the Court that Judge Leibovitz previously precluded Officer Adelmeyer regarding any statements made at a spokes council meeting on January 14th and then again on January 18, 2017. See, April 6, 2018 Hr'g Transcript at 80:15-82:10, attached hereto as Exhibit 1. Ms. Kerkhoff retorted that Officer Adelmeyer attending an "action camp" that was going on for several days. See, April 6, 2018 Hr'g Transcript at 82:25-83:5 attached hereto as Exhibit 1.

The following back and forth ensued regarding the action camp:

> THE COURT: No, no, it took me a while to figure out you were speaking about two different things. She is not speaking about the spokes-council meeting. She was speaking about the -- purportedly, a meeting that occurred before that. Did you understand that when you were looking at the video?
>
> MS. BRADSHAW: There's no video of this.
>
> THE COURT: What is it?
>
> MS. BRADSHAW: This -- this is just -- we're going off the paper description and the testimony that happened and Ms. Kerkhoff's representations. I'm a little confused here, Your Honor. The designations are as content, out of spokes-council meeting, attending -
>
> THE COURT: Right. We have that clarified now. So is there -- is there a video or a tape of this or what is there?
>
> MS. KERKHOFF: No, Your Honor. The officer attended. The officer reported back to his officials. This is in part where -- as there was testimony, they received information from their undercover in advance of January 20th, that individuals were anticipating breaking property during the anticapitalist block, and it is documented in his after-the-fact notes that he took.
>
> THE COURT: So live testimony?
>
> MS. KERKHOFF: Correct. It's live testimony.

The Government, at the time of making that affirmation, knew that it was in possession of thirty-five videos from the action camp that took place over the course of several days. Since

one of the Government's factors for determining whether evidence should be disclosed was co-defendant involvement, it is certainly relevant, material, and exculpatory to the defense that there were 35 videos of this action camp, and without any appearance from the co-defendants in this matter. Especially because Ms. Kerkhoff proffered to the Court that co-defendants were present at the action camp. Like in Vaughn, had the Court been alerted to the lack of co-defendant attendance over the 4 days this event was going on, it would have likely precluded those statements from being entered into evidence.

Also analogous to Vaughn, the government unilaterally decided that evidence that directly controverts the government's witness's account of what happened at the action camp would not help prepare a defense or was not favorable to the defense and therefore not discoverable under Rule 16 or Brady.

Additionally, the content of the action camp discussions is relevant, material, and exculpatory. As the government admitted in its May 30, 2018 email to the Court, many of these videos from the action camp at American University involved discussions of de-escalation tactics. So if Officer Adelmeyer did see co-defendants at the action camp, it is disturbing that the government is taking the position that videos showing co-defendants teaching other co-defendants how not to engage in violent protest is irrelevant to a case about violent protests.

The Government is in possession of at least 35 videos that show that this action camp had many facets and that attendance at the camp did not mean that a defendant conspired to riot. But for the recent uncovering of Brady violations by the Government and its agents, they would not have informed defense counsel they were in possession of this exculpatory evidence.

THE GOVERNMENT MISLED THE COURT AND FAILED TO COMPLY WITH A COURT ORDER REGARDING THE PROJECT VERITAS VIDEOS

The defense has also learned since the last hearing that the government misled the Court and the defense and failed to comply with a Court Order compelling production of "the entirety" of Project Veritas videos in the government's possession. In the same April 6th hearing as discussed above, the Court heard argument regarding a Motion to Compel discovery filed by this trial group. At the time, the defense moved to compel the original Project Veritas video that it had received in discovery—the only video the defense knew existed. The Court began the argument by asking the government for its position on what it had in its possession and what was available to the defense counsel:

> THE COURT: Now, I'd like to deal next is the motion to compel discovery. . . . And that primarily has to do with the proffer of exhibit -- of a video of the planning meetings; is that correct?
>
> DEFENSE COUNSEL: That's correct, Your Honor.
>
> THE COURT: What don't I -- do you mind if I get the government's position on what they have and what's available to them or not before you argue?
>
> MS. KERKHOFF: Yes, Your Honor. As outlined and as testified to by the detective during the first trial, the government -- the Metropolitan Police Department requested from a number of sources where we got information they may have videos, such as news organizations or in this case, the Veritas group that we had observed portions of edited video. ***Detective Cumberson contacted the group and asked if they would be willing to provide unedited video. They provided unedited video. We posted the video.*** It's not the original. We did not

have a witness. We did not take any testimony.

See April 6, 2018 Hr'g Transcript at 8:8-9:2, attached as Exhibit 1. Here, the government misled the Court and the defense counsel to believe that it had received only one video and that the government had "posted the video" to the discovery portal. As we have now learned, the government actually received 66 video and 3 audio recordings from Project Veritas, but only posted a small fraction of them to the discovery portal. The government proceeded to discuss two edits made to the January 8, 2018 planning meeting video, never revealing the existence of the third redaction or the other videos. The government concluded: "They have exactly what we have as I've described." *Id.* at 12:3-4.

Counsel for Mr. Hessler continued to press the issue, requesting the "original video files that were introduced to the government." *Id.* at 12:7-8. The Court, unaware of the existence of additional video files, pushed back.

> MR. CLENNON: Well, Your Honor, I think that we're entitled to the original video files that were introduced to the government.
>
> THE COURT: ***You're misunderstanding what the government is saying. They have [been] representing that those have been produced to you. Am I misunderstanding what the government's saying? They've indicated that they've produced that to you.*** Now, if you're talking about the original, they appear to be in the possession of a third party, unless I'm misunderstanding something.

Id. at 12:7-17. The government remained silent, failing again to correct the misunderstanding that it had many more videos in its possession from Project Veritas that had not been produced.

At the conclusion of the argument, despite these misleading positions from the government, the Court ruled broadly:

> THE COURT: I'm going to order the uncropped or the cropped portions be turned over to the defense. ***And again -- let me just put a formal order here and it's not to suggest -- I doubt the government's representations. It's -- you are officers of the Court, but I am ordering you, the entirety of whatever is in the government's possession to be turned over to the defense.***

Id. at 19:14-20. It is clear on the face of this Order that the Court intended the government to produce all of the videos and audio recordings received from Project Veritas. But if there were any doubt about the breadth of this Order, the government should have at that point requested a clarification that it was not required to produce other Project Veritas videos from events it deemed to be irrelevant to the case. Although the defense would have objected, at least all parties could have addressed this issue with at least a few months before trial. Instead, the government remained silent.

Based on the government's representations today, it is clear that the government did not produce "the entirety of whatever is in the government's possession." Rather, it selectively produced seven videos in response to this Order. Four of these videos were unedited videos of the January 8, 2017 planning meeting. Three new videos, which had never before been disclosed, were also produced from "pre-planning videos." Although the government attempted in an email to defense counsel to distinguish these events, they were filmed at the same location on the same day by the same person and provided by the same source, Project Veritas. Even with this disclosure, the government still failed to produce (or even disclose) the remaining Project Veritas videos.

THE GOVERNMENT CANNOT CURE ITS RECKLESS CONDUCT

The Inauguration Protest occurred on January 20, 2017, over 14 months ago. The

Superseding Indictment in this matter was returned over a year ago. The Government has succeeded in misleading over 200 co-defendants, their attorneys, and three Honorable Superior Court Judges to believe there were only seven videos in its possession from Project Veritas. Only by Order of the Court and more recently, its own disclosures, we now know the truth, that the Government withheld 69 additional recordings by Project Veritas and altered others.

The fairness of these proceedings are now called into question and cannot be cured through continuance or other means. The defense has lost any opportunity it had to further investigate the newly discovered evidence and provide its clients with a fair trial. Over time, memories of witnesses fade, witnesses have moved, all of which affect defense investigation strategy.

When defense counsel interviewed the maker of the original planning meeting video, there were many answers of "I don't recall". When Officer Adelmeyer testified at the November trial, he also answered "I don't recall". When Detective Pemberton testified during the trial earlier this month, he answered "I don't recall". The Government's plethora of witnesses who don't recall facts occurring over a year ago speak to the fact that defense has lost any opportunity to investigate the action camp and its infiltrators.

THE ONLY APPROPRIATE SANCTION IS DISMISSAL

The Supreme Court has held that "when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld." Illinois v. Fisher, 540 U.S. 544, 547-48 (2004). See, Vaughn, 93 A.3d at 1254 ("If the information was favorable, suppressed, and material, then reversal is required, 'irrespective of the good faith or bad faith of the prosecution.'") (quoting Brady, 373 U.S. at 87). See also United States v. Mitchell, 365 F.3d

215, 255 (3d Cir. 2004) ("[A]s a legal matter, the question of good faith versus bad faith is a distinction without a difference in the Brady context.").

For instance, the Court of Appeals in Vaughn wrote:

> "[W]e are left with many questions about the Government's behavior in this case, including: (1) How could the Government have so misconstrued the findings of the OIA investigation as memorialized in the full OIA Final Report as ultimately unrevealing regarding Officer Childs credibility? (2) How could the Government have failed to realize at trial that it had not given the court the full OIA Final report, particularly when the trial court specifically asked if the five-page copy it had in hand was the complete report? (3) How could the Government have made the representations it did about the consequences of the Inmate A incident or have allowed Officer Childs to testify without qualification about his lack of notice or understanding of those consequences, in light of the information contained in OIA Investigator Collins's sworn affidavit? But these questions ultimately go to whether the Government acted in bad faith, which, as we noted at the outset, is irrelevant to the issue raised before this court: whether the Government violated its constitutionally imposed disclosure obligations."

The question of bad faith is not relevant here. Nor is the question of the motives behind the late disclosure. The question for the Court is what appropriate remedy will level the scales of justice. Mr. Petrohilos, Mr. Litchfield, Mr. Rutherford, Ms. Unger, and Mr. Meltzer have all had their constitutional right to due process violated by the United States Government and its Agents. The misconduct goes deeper than clipping one video. The Government has now provided the Court with at least 35 additional reasons why the Indictment should be dismissed.

Respectfully submitted,

s/
Andrew O. Clarke (DC Bar # 1032649)
ANDREW CLARKE LAW, PLLC
1712 I Street NW, Suite 915
Washington, DC 20006
(202)780-9144
a.clarke@aclarkelaw.com
Counsel for Dylan Petrohilos

s/
Mark B. Sweet (DC Bar # 490987)
Michelle Bradshaw (DC Bar # 241341)
WILEY REIN LLP
1776 K Street NW
Washington, DC 20006
202-719-4649
msweet@wileyrein.com
mbradshaw@wileyrein.com
Counsel for Christopher Litchfield

s/
Charles P. Murdter (DC Bar # 375905)
601 Pennsylvania Avenue NW
Suite 900 South
Washington, D.C. 20004
(202) 638-6959
murdterlaw@hotmail.com
Counsel for Caroline Unger

s/
Cary Clennon (DC Bar # 366816)
P.O. Box 29302
Washington, D.C. 20017
(202) 269-0969
clennonlegal@hotmail.com
Counsel for Matthew Hessler

s/
Sharon Weathers (DC Bar # 467618)
717 D. Street, N.W., Suite 300
Washington, D.C. 20004
703-725-9674
sweathers@verizon.net
Counsel for Clay/Caly Retherford

s/
Mark L. Goldstone, Esq.
Bar #394135
1496 Dunster Lane
Rockville, Maryland 20854
(301) 346-9414
mglaw@comcast.net
Counsel for Daniel Meltzer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion for Sanctions was sent via case file express to Jessie K. Liu, United States Attorney, and all remaining co-defendants in this case on this 30th day of May 2018.

/s/ Andrew O. Clarke
Andrew O. Clarke, Esq.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION – FELONY BRANCH

UNITED STATES OF AMERICA v. MATTHEW HESSLER, CHRISTOPHER LITCHFIELD, DANIEL MELTZER DYLAN PETROHILOS, CALY RETHERFORD, and CAROLINE UNGER Defendants.	Case Nos. 2017 CF2 7212 2017 CF2 1235 2017 CF2 1176 2017 CF2 7216 2017 CF2 1378 2017 CF2 1355 Chief Judge Robert E. Morin Trial: April 17, 2018 Next Event: April 6, 2018 Trial Readiness Hearing

[PROPOSED] ORDER

Upon consideration of Defendants Matthew Hessler, Christopher Litchfield, Daniel Meltzer Dylan Petrohilos, Clay/Caly Retherford and Caroline Unger's Motion for Sanctions in this matter, it is this_____day of_____, 2018,

ORDERED that the Government's Superseding Indictment Against Matthew Hessler, Christopher Litchfield, Daniel Meltzer, Dylan Petrohilos, Clay/Caly Retherford, and Caroline Unger is dismissed with prejudice.

_____
The Honorable Robert E. Morin
Superior Court of the District of Columbia