UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	)	Cause No. 6:17-cr-18-Orl-40KRS
Plaintiff,	)	
vs.	)	
NOOR ZAHI SALMAN	)	
Defendant.	)	

DEFENDANT NOOR SALMAN'S MOTION TO DISMISS OR IN THE ALTERNATIVE MOTION FOR A MISTRIAL

The Defendant, Noor Salman, by and through her undersigned attorney, moves this Court to dismiss this case pursuant to the Fifth and Sixth Amendments to the United States Constitution. Assuming, arguendo, that this Court does not dismiss this action, Ms. Salman, moves this Court to grant a mistrial in this matter. In support thereof, Ms. Salman states the following:

STATEMENT OF FACTS

Background

1. In the early morning hours of June 12, 2016, Omar Mateen committed acts of extreme violence at the Pulse Nightclub in Orlando, Florida shortly before declaring his allegiance to ISIS.

2. After the shooting at Pulse, law enforcement made contact with Mateen's father, Seddique Mateen, brother-in-law, and sister at the latter's residence.

3. Subsequently, at approximately 4:30 AM, state law enforcement made contact with Noor Salman at her condo.

4. The Government alleges that Ms. Salman made incriminating or false statements to state and federal law enforcement agents over the course of the next 10 to 12 hours. The interviews of Ms. Salman occurred over a period of six hours.

Procedural History

5. A criminal scheduling order was entered in Ms. Salman's case on April 12, 2017. Doc. 38. Pursuant to its terms, this Order required the Government to provide the defense with all Brady and Giglio information within 14-days of the Order. *Id*.

6. A status conference was held in this case on April 20, 2017. Regarding a potential CIPA[1] or FISA[2] disclosures, the Government acknowledged that this Court had requested the disclosure of any CIPA or FISA issues. Doc. 51 at 37. The Government specifically advised the Court that: "[t]here are -- I don't anticipate any FISA issue, and I don't anticipate any CIPA filings." *Id*.

7. On May 17, 2017, in response to a defense discovery letter, the Government reasserted the "The government did not utilize a confidential information in the investigation in this case; however, confidential informants did provide information after the attack that the United States does not believe is relevant and does not intend to use at trial.

8. On February 23, 2018, the Government listed Seddique Mateen in its Witness List. On February 28, 2018, the government provided an updated Witness List, which also listed Seddique Mateen.

[1] "Classified Information Procedure Act," 18 U.S.C. App. § 3.
[2] "Foreign Intelligence Surveillance Act," 50 U.S.C. § 1801 *et. seq*.

9. The opening statements in Ms. Salman's trial commenced on March 12, 2018. Doc. 296.

Brady Violation

10. On Wednesday, March 21, 2018, the Government called Shahla Mateen, Omar Mateen's mother, to the stand. The Government specifically elicited questions concerning her knowledge of whether she had ever heard her son make extremist statements in the past.

11. During the cross-examination of Mrs. Mateen, undersigned counsel, Fritz Scheller, questioned Mrs. Mateen concerning a FBI interview of Omar Mateen at which Seddique Mateen had intervened. Although acknowledging the interview, she denied that her husband had any relationship with the FBI.

12. On Thursday 22, 2018, after the Government rested, the defense moved for a reconsideration of Ms. Salman's bond based on the Government's expert's acknowledgement that Ms. Salman never scouted the Pulse nightclub.

13. After the conclusion of the argument, defense counsel stated that it wanted the record to reflect that that it was requesting for all *Brady* material relating to Seddique Mateen.

14. After the cross-examination of Mrs. Mateen and the Brady request. Assistant United States Attorney Sara Sweeney sent an email to the defense on Saturday, March 24, 2018. The email stated the following:

> I have just received authorization to disclose the following information about Seddique Mateen. If you should call S. Mateen to the stand, the government will not seek to elicit any of this information from him.

> Seddique Mateen was a FBI confidential human source at various points in time between January 2005 and June 2016.
> During a consent search conducted at Seddique Mateen's residence on June 12, 2016, receipts for money transfers to Turkey and Afghanistan were found. The dates of the transfers were between March 16, 2016 and June 5, 2016. As a result of the discovery of these receipts, an FBI investigation into Seddique Mateen was opened. S. Mateen has not been informed by the FBI about the investigation.
> Further, on November 1, 2012, an anonymous tip indicated that Seddique Mateen was seeking to raise $50,000 - $100,000 via a donation drive to contribute towards an attack against the government of Pakistan.

December 24, 2018 Email of AUSA Sara Sweeney, attached hereto as Exhibit 1.

15. The Government never provided any of this information concerning Seddique's activities prior to March 25, 2018. Furthermore, the Government did not provide any further information, including documentation, concerning the wire transfers or any interviews of Seddique.

16. Moreover, the Government's Brady disclosure did not occur until it rested its case and well after the defense had developed its theory of defense and cross-examined its witnesses.

17. In addition to foregoing belated disclosure, as well as the Government's disclosure failure concerning the casing of the Pulse, the defense also discovered an additional Brady violation.

18. In this context, the Government elicited testimony information from its polygrapher, Ricardo Enriquez, that Noor Salman advised that prior to the Pulse shooting, Omar Mateen left their residence with a firearm placed in a holster on his hip.

19. At the time the Government offered this evidence, they knew that Omar Mateen did not leave the residence with his work firearm holstered on his hip. Indeed, during

the search of Mateen's residence, the Government had recovered the holster for Mateen's .38 work handgun.

20. Although the Government provided a photograph of the holster in a set of photographs of evidence, it was provided with approximately 200,000 other items and was not specifically identified to the defense.

MEMORANDUM OF LAW

"We must send prosecutors a clear message: Betray *Brady*, give short shrift to *Giglio*, and you will lose your ill-gotten conviction."

United States v. Olsen, 737 F.3d 625, 633 (9th Cir. 2013)(Kosinski, J,) (dissenting).

Because the government violated Ms. Salman's Fifth Amendment right to due process and Sixth Amendment right to a fair trial, this Court must dismiss the Government's case. In the alternative, if this Court does not dismiss this action, it should order a mistrial in order to safeguard these fundamental constitutional rights. Indeed, an analysis of the government's conduct in this case establishes a consistent pattern of withholding *Brady* evidence that directly impacted presentation of Ms. Salman's defense.

The first part of this memorandum discusses the government's duty to disclose exculpatory information pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The second part of this memorandum discusses the application of the law to the instant case. Section II concludes that the Government's violation of its constitutional obligations requires the dismissal of this case. In Section III, the memorandum discusses Ms. Salman's alternative motion for a mistrial

I. ***Brady* and its progeny**

a. *A prosecutor's duty*

In the crucible of our federal criminal justice system, the integrity of a federal prosecution is always premised on a prosecutor's recognition that her duty is to ensure that justice is done rather than a devotion to a pursuit that places another "defendant's skin" on the wall. *See Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed 1314 (1935)(concluding that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done."); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-649, 416 S.Ct. 1868, 1878, 40 L.Ed.2d. 431 (1974) (Douglas, J., dissenting)("[A prosecutor's] function is not to take as many skins of victims as possible to the wall, [but] to vindicate the right of the people as expressed in the law and give those accused of crime a fair trial.").

It is apparent that prosecutors have enormous authority in every phase of a criminal case, from an investigation's initiation to a defendant's sentencing. *See, e.g.,* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996) ("In the past thirty years . . . power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system."). Unfortunately, "[t]here is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials." James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981).

b. Brady and its progeny

In a world of prosecutorial privilege, however, there are certain constitutional and ethical standards that still protect a defendant's constitutional rights to due process and a fair trial. In the instant case, these standards were not met as the government withheld *Brady* and *Giglio* evidence from Ms. Salman's defense.

Brady establishes that a prosecutor has a duty to disclose material information that is favorable to the defense. 373 U.S. at 87, 92 S.Ct. at 1196-97 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request 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."). As *Brady* notes, the government's failure to disclose favorable evidence violates due process, irrespective of the good faith or bad faith of the prosecution. *See id.*

In *Giglio,* the Supreme Court concluded that its holding in *Brady* applied to impeachable material. *See* 405 U.S. at 154, 92 S.Ct. at 766 ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within [*Brady*]."); *see also United States v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1986)("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule.").

c. Materiality

An essential question under *Brady* is the issue of materiality. *See Brown,* 785 F.2d at 1465. Evidence is material under *Brady* if it creates "a 'reasonable probability' of a different result." *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). "A

reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[ ] confidence in the outcome of the trial.' " *Smith v. Cain,* — U.S. ——, 132 S.Ct. 627, 630, 181 L.Ed.2d 571 (2012). As this Court has noted, "[w]e have pointed out that the correct test ... for whether evidence is "material" is whether there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *See Brown v. Wainwright,* 785 F.2d 1457, 1465 (11th Cir. 1986).

Evidence may be material even if it appears more likely than not that a trial will result in a conviction. *See Kyles,* 514 U.S. at 434-35, 115 S.Ct. at 1565-66. Thus, "[t]o say that the undisclosed information wasn't material, a court must conclude that the other evidence was so overwhelming that, even if the withheld evidence had been presented to the jury, there would be no "reasonable probability" that it would have acquitted." *Olsen,* 737 F.3d at 628. This standard isn't satisfied if "the State's argument offers a reason that the jury could have disbelieved [the undisclosed evidence], but gives us no confidence that it would have done so." *Smith v. Cain,* — U.S. —— , 132 S.Ct. at 630.

Based on the foregoing, "materiality", for *Brady* and *Giglio* purposes, does not turn on whether there is sufficient evidence to convict. *Kyles,* 514 U.S. at 434, 115 S.Ct. at 1566. Evidence may be material even if it appears more likely than not that a trial will result in conviction. As *Kyles* concluded:

> [a] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant). . . *Bagley's* touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not

> whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Id. Thus, a court cannot apply either a sufficiency of the evidence standard or harmless review to a *Brady* claim. *Id.* at 434-435, 115 S.Ct. at 1566. Finally, in determining this issue of materiality, a court must consider the suppressed evidence cumulatively, rather than item by item. *Id.* at 436, 115 S.Ct. at 1567. A "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecution's responsibility for failing to disclose known, favorable evidence . . . is inescapable." *Kyles*, 514 U.S. at 437-38.

d. The Standard under Napue

The Supreme Court has held that due process is violated when the prosecution knowingly offers false testimony to obtain a conviction and fails to correct such testimony. *See Napue v. Illinois*, 360 U.S. 264 (1959). The "deliberate deception of a court and jurors by the presentation of known false evidence" is "incompatible with rudimentary demands of justice." *Giglio*, 405 U.S. at 153, 92 S.Ct. 763 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (reversing conviction based upon prosecutor's solicitation of knowingly false testimony from a witness). The prohibition articulated in *Napue* applies even if the government does not solicit the false testimony and merely fails to correct it. *Napue*, 360 U.S. at 269. This principle holds true even when the false testimony "goes only to the credibility of the witness." *Id.*

To establish such a claim, a defendant must prove: "(1) the prosecutor knowingly used perjured testimony or failed to correct what he subsequently learned was false testimony; and (2) such use was material, i.e., that there is any reasonable likelihood that the false testimony could . . . have affected the judgment." *Guzman v. Secretary, Dept. of Corrections*, 663 F. 3d 1336, 1348 (quoting *Ford v. Hall*, 546 F.3d 1326, 1332 (11th Cir. 2008)) (quotation marks omitted). This is a "different and more defense-friendly standard of materiality" than the materiality standard for claims brought pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *United States v. Alzate*, 47 F. 3d 1103, 1110 (1995). The "reason the lower materiality burden applies where there is knowing use of perjured testimony is that such a situation involves prosecutorial misconduct and a corruption of the truth-seeking function of the trial." *Id*. at 1110 (citing *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

II. Analysis

The Government's *Brady* violations in this case have placed Ms. Salman, the jury, and this Court in a dark wood where the search for truth has been thwarted.[3] It is apparent from the Government's belated disclosure that Ms. Salman has been defending a case without a complete set of facts and evidence that the Government was required to disclose. In this regard, the Government's actions have prevented Ms. Salman from both conducting a

[3] *See* Dante Aligheni, La Divina Commedia, Inferno, Canto I, (1472) (Midway through this Life we are borne upon; I found myself in a dark wood, Where the way of truth was wholly lost and gone).

complete investigation, engaging in complete and thorough cross-examination, presenting evidence material to her defense, and developing alternative theories of defense,[4]

In light of the Government's assurance to the Court that CIPA and FISA were not at issue in Ms. Salman's prosecution, its representation in its March 25, 2018 email that it has now been authorized to disclose the information to the defense is both peculiar and troubling. Indeed, to the extent that said authorization was based on national security concerns, the Government still had an obligation to notify the Court. Moreover, there is a process in place that assures that in such situations, *Brady* material will still be disclosed to the defense. *See, e.g.*, 18 U.S.C. App. § 6.

Alternatively, if the Government does not believe that the information falls under CIPA or FISA, then the Government's theory of *Brady* is that a prosecutor need not disclose such exculpatory evidence, unless a supervisor authorizes it. Even the most restrictive conception of the of the Fifth and Sixth Amendment does not subject these sacrosanct provisions to the predilections or perhaps whims of a supervisory bureaucratic.[5]

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[4] An essential problem in this case is that the defense is still faced with the Government's inchoate disclosure regarding Seddique Mateen. Despite the Government's email, it still has not provided the defense with any reports or documentation concerning Seddique Mateen's conduct, including his transfer of funds. Notwithstanding this failure, there are two viable theories of defense that could have been developed, but have been precluded, by the Government's actions. First, Omar Mateen conspired with his father, rather than Noor Salman, to commit the acts. Alternatively, the FBI's purported interviews with Ms. Salman were directed to evading the negligence they exercised with their own informant with to finding an additional culprit rather than their own informant.

[5] As one author noted:

> The greatest evil is not now done in those sordid 'dens of crime' that Dickens loved to paint. It is not done even in concentration camps and labor camps. In those we see its final result. But it is conceived and ordered (moved, seconded, carried, and minuted) in clean, carpeted, warmed, and well-lighted

The evidence withheld by the Government establishes that Seddique Mateen was working for the Government as an informant for an eleven-year period from 2005 to June 2016. Thus, he was working with the Government until the time of the Pulse attack. It further showed that he may have been involved in the promotion of violent activities during the time he was working with the FBI. Moreover, the Government's belated disclosure demonstrates that he was providing funds to unknown sources in Afghanistan and Turkey and thus has been under criminal investigation. What is also established is that the Government's intended to use Seddique Mateen as a witness without disclosing any of the information to the defense.

Against this backdrop, the Government's conduct has had a significant impact on Ms. Salman's defense. If the Government had provided this information, the Defense would have investigated whether a tie existed between Seddique Mateen and his son, specifically whether Mateen's father was involved in or had foreknowledge of the Pulse attack. This would have been directly relevant to whether Ms. Salman had to make a cover story for Mateen's parents. Notably, evidence previously provided by the Government shows that when Shahla Mateen informed Seddique Mateen that her son had lied about his dinner with "Nemo," his reaction was that he did not care.

Furthermore, in its order denying bond, this Court found that Seddique Mateen was a central character precisely because of his potential ability to prevent the attack. Doc. 24 at 22 ("[A] cover story was necessary to prevent suspicion on the part of Mateen's parents due to his absence from the Ramadan observance."). If the evidence shows that Seddique had some

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> offices, by quiet men with white collars and cut fingernails and smooth-shaven cheeks who do not need to raise their voice.

C.S. Lewis, The Screwtape Letters at xxxvii (1961 ed.).

level of foreknowledge—based on his financial transaction or an affinity for ISIS—such a story would have been completely unnecessary, and Salman's texting would indicate that she was the dupe and not the provocateur claimed by the Government. On the eve of the defense case, the defense is in no position to investigate.

The fact that Seddique Mateen had sent money to Turkey for substantial period and just one week before the attack potentially places Omar Mateen's actions in a different light. As a result, they also support Noor Salman's defense that she did not aid and abet her husband's terroristic attack. The discovery indicates that Omar Mateen was searching plane tickets to Turkey prior to his attack on his Pulse. This fact, in a vacuum, did not seem to have much probative value. Now, the fact the Seddique was sending money to Turkey and Afghanistan indicates the possibility that Omar Mateen was planning to travel to either of those countries to join forces with a terroristic organization. Such an intent would belie the Government's theory that Noor Salman was present and aware that her husband had been planning to provide material support to terrorist organization in the United States as charged in the indictment. Because of the Government's decision to make a *Brady* disclosure after 12 days of trial, the defense cannot investigate, develop, or present such a theory in its defense of Ms. Salman.

Moreover, the defense's questioning of the Government's witnesses has also been hindered by the Government's actions. During the cross-examination of Shahla Mateen, she denied any relationship between Seddique Mateen and the FBI although she knew her husband attended an interview between Omar Mateen and the FBI. She denied any knowledge of a relationship between Seddique Mateen and the FBI. This was either false and

the Government knew it since Seddique Mateen had been working with the FBI for eleven years or Seddique Mateen had kept this information from his wife – a situation ripe for cross-examination.

In this regard, Mrs. Mateen first testified, if she knew her son was planning something bad she would have informed her husband and then the FBI. On redirect, the Government focused on having her testify that she would have gone directly to the FBI. The fact that Mrs. Mateen would have informed her husband first indicates that she has knowledge of his relationship with the FBI. Alternatively, it indicated his control over her. Concerning this latter point, if Seddique Mateen exercised such control then his and his family's statements to the FBI, if not their testimony, would be tainted by Seddique Mateen's desire to evade responsibility in this matter at the expense of Noor Salman.

Unfortunately, the Government's *Brady* violation not only impacted the cross-examination of Mrs. Mateen, but also impacted the cross-examination of other Government witnesses. For example, the defense's cross-examination of Special Agents Mayo and Enriquez were also hindered by the Government's actions. During Mayo and Enriquez's interviews of Ms. Salman, the FBI held a press conference in which it attempted to justify its decision not to pursue Omar Mateen, despite his troubling statements concerning extremism in the past. In such a situation, the Government's unwavering focus on Noor Salman, rather than Seddique Mateen, could have been designed to find a culprit other than the father.

Furthermore, in regard to Agent Enriquez, the belated *Brady* disclosure casts his decision not to polygraph Ms. Salman in a different light. Based on the Government's prior disclosures, Agent Enriquez was scheduled to travel to Mississippi on June 17 to June 18,

2016. However, he was informed not to pursue the polygraph without explanation. Although the Government contended during the trial that the decision was predicated on Ms. Salman's retention of counsel, the Government was aware that Ms. Salman did not retain counsel until June 20, 2016. Thus, the decision to cancel the polygraph was predicated on other grounds. Based on the Government's disclosure, it is possible that the decision was based on the FBI's desire to implicate Noor Salman, rather than Seddique Mateen in order to avoid scrutiny of its own ineptitude with the latter.

Similarly, the Government's actions impacted the cross-examination of the prosecution's expert witnesses including the cross-examination of its experts concerning Omar Mateen's phone calls. The records show consistent calls between Omar Mateen and his father. In the absence of the Government's *Brady* disclosure, those communications had limited probative value as they could be discarded as normal communications between father and son. However, now the extent and timing of those calls assume a different cast as they could have been evidence of the conspiracy between the two. Moreover, the timing of the calls is now critical based on the money transfers made by Seddique Mateen. Significantly, even with the Government's belated disclosure, the defense cannot even pursue such an investigation based on the disclosure's paucity.

Additionally, while the Government has disclosed that Mateen was under FBI investigation based on statements he made while at work, the Government has repeatedly failed to disclose that his father played a significant role in that investigation. The initial disclosure of an intelligence report indicated only that an unidentified undercover informant "was informed that the FBI was investigating allegations against Omar Mir Seddique

Mateen, during which the [informant] became very upset." The report further noted that the unidentified informant was informed that Mateen had made several comments to include alleging that he had become a member of Hizballah, had relatives who were members of al-Qaeda, had spoken as if though he was a member of the Muslim Brotherhood, had claimed to have proven himself to his spouse and others in war zones, appeared to be pleased with the alleged death of FBI agents who participated in the investigation of the Boston City Marathon Bombings, was friends with the Boston City Marathon Bombers, had transported electronic devices to be utilized for apparent nefarious purpose, that the FBI was constantly harassing him and his family, and that he was aware that the terrorist attacks of the U.S. Embassy in Benghazi were going to happen because of who he was connected with.[6]

In light of the Government's Saturday disclosure, twelve days into trial, we can now infer—although the Government has, to this day, not disclosed that the CHS referenced in this report is Seddique Mateen—that Mateen's father played a significant role in the FBI's decision not to seek an indictment from the Justice Department for false statements to the FBI or obstruction of justice against Omar Mateen.

Although the defense did eventually find these reports in the discovery, the Government's actions excluded Seddique Mateen as the person referenced in these reports. the Government had represented that "confidential informants did provide information after the attack that the United States does not believe is relevant and does not intend to use at trial." These statements excluded Seddique Mateen as a confidential informant, because he had been interviewed by the FBI regarding the attack, testified to the grand jury, and was

[6] These documents were dumped deep in discovery in an xml format, which is confusing.

obviously a relevant witness, as he was placed on the Government's and the defense's witness list.

The Government's actions have not only prevented Ms. Salman from presenting a full defense, but also has impacted her right to testify. In this context, the defense cannot give Ms. Salman adequate advice about whether she should testify. During its proffer, the defense had indicated that Ms. Salman was aware of her father-in-law's intervention. This Court, however, saw that as a negative not as a positive, indicating that it provided her incentive to build a cover story. Full disclosure of Seddique Mateen's work as an undercover and the subsequent investigation of him may well cast Ms. Salman's knowledge in a different light, impacting the advice counsel gives her whether she testifies or not. However, without that investigation, deciding whether to have Salman testify is significantly more difficult.

This is part of a repeated pattern. The Government, as earlier noted by the Court, learned only two days after the attack that the forensic evidence from Salman's phone contradicts her third alleged statement, raising significant doubt as to the veracity of that statement. The Government indicates that it cured this with its expert disclosure. The defense disagrees that the Government cured it. While the defense became aware of the fact that Ms. Salman did not visit the Pulse nightclub through expert investigation (at considerable expense), the Government's expert disclosure did not, as the Government contends, reveal that the Government was no longer contending that the scouting had occurred. The expert disclosure contained no opinion and instead simply referenced a power point that did not make clear that the Government was not contending that it was not possible for Salman and Mateen to have visited the Pulse in the manner described in Ms. Salman's alleged statements.

Indeed, the defense did not file the motion *in limine* seeking to preclude opening argument that the Pulse had been targeted until after receiving an amended PowerPoint on February 23 making this far clearer.

Nor did the Government's behavior abate after the Court's admonishment. On Friday, Ms. Sweeney, on the Rule 29 Motion argued to this Court, relied on part on Agent Enriquez's testimony regarding the fact that Salman had stated to Agent Enriquez that "Omar took his handgun from the closet, put it in his holster, covered it with his shirt, and said he was going to see his friend Nemo." Ms. Sweeney further stated that Agent Enriquez made clear that this gun was Mateen's work .38, which was later found in Mateen's vehicle outside the Pulse nightclub in its case. The fact that this statement was also impossible, was known to the FBI, despite Ms. Sweeney's continued reliance on this statement. Ms. Sweeney also knows that the FBI found evidence clearly contradicted this statement even before finding that the Pulse nightclub was not cased. During the search of Ms. Salman and Mateen's home, Mateen's work holster for his .38 caliber pistol was found at their home during their search. The photograph of this holster was produced but buried inside discovery, unlabeled within 200,000 documents. It was omitted from the evidence produced by the Government during trial. Moreover, the Government failed to produce the inventory list for the search, so the omission was not immediately noticeable. In light of Agent Enriquez's statement, Ms. Sweeney was aware that the discovery of Mateen's holster at his home clearly contradicted Salman's statement that Mateen had worn it when he left to see Nemo. And actually, this substantiated her earlier statement that Salman had seen a gun case on the kitchen counter but didn't know whether a gun was in it. Again, it is somewhat ironic that Ms. Sweeney later

argued to this court that admissions by Salman saying that she didn't see him leave with the gun, which might be technically true, might constitute obstruction of justice. Attached hereto as Exhibit 2.

Finally, the Government subpoenaed the Pulse server logs within days of the attack. These logs showed all the IP addresses that had visited the Pulse, and potentially could exclude Mateen and Salman's devices from having visited the Pulse Night Club, as Salman had reportedly claimed "On Friday night, June 10 2016, late night, Omar was looking at a website for the Pulse Nightclub and when i saw what he was looking at, he said this is my target." It is clear from discovery that the FBI attempted to verify this statement by Salman by comparing IP addresses, as they also subpoenaed the IP addresses of Salman's home router and for Salman and Mateen's Google and Facebook accounts. None of these ultimately matched Salman's IP addresses but the Government withheld this evidence until the defense specifically requested the IP logs for the Pulse server. This is a pattern of conduct that the FBI investigation had discredited Salman's core admissions. This pattern should be considered by the Court in dismissing Counts I and II for the Government's latest *Brady* violation.

Based on the it belated disclosure, the Government has prevented the defense from developing and pursuing alternative and viable theories of defense including, but not limited to the tenets that: 1) Omar Mateen and his father, rather than Ms. Salman, conspired to support ISIS; or 2) the FBI's focus on Ms. Salman was based on its own motive to avoid responsibility for its failures with its own informant, Seddique Mateen, as well as his son.

Both theories have strong support based on the Government's belated disclosures. Moreover, both theories would have supported Ms. Salman's defense.

III Alternative Request for a Mistrial

Assuming, arguendo, that this Court does not grant Ms. Salman's motion to dismiss, this Court should grant a mistrial in this matter.

"The decision whether to grant a mistrial is within the sound discretion of the trial court." *See United States v. Roper*, 874 F.2d 782 (11th Cir.), *cert. denied*, 493 U.S. 867 (1989). However, where the failure to disclose evidence leaves a defendant "unduly surprised" and "without an adequate opportunity to prepare a defense," it is appropriate to grant a mistrial. *United States v. Mackin*, 793 F.3d 703, 705 (7th Cir. 2015) (quoting *United States v. De La Rosa*, 196 F.3d 712, 715 (7th Cir. 1999)); *see also United States v. Deutsch*, 475 F.2d 55, 57 (5th Cir. 1973) (granting a mistrial for failure to produce personnel files of government witnesses), *overruled on other grounds by United States v. Henry*, 749 F.2d 203 (5th Cir. 1984); *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009) ("Where the district court concludes that the government was dilatory in its compliance with Brady, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial.").

In the instant case, a mistrial is warranted based on the Government's Brady violations. The Government's decision to provide Brady material after it rested has deprived Ms. Salman of fully defending herself against the serious charges against her. To be sure, the Government's belated disclosure has come after investigation have been pursued and a

theory of defense has been developed. It comes far after a theory of defense has been developed in the absence of all relevant facts. And it comes after opening statements have been made and the cross-examination of the prosecution's witnesses have been completed. Compelling Ms. Salman to proceed in such a situation not only is antagonistic to her constitutional rights to a fair trial and the effective assistance of counsel, but also rewards the Government's conduct. The Constitution cannot withstand such an assault.

WHEREFORE NOOR SALMAN moves this Court to dismiss the Indictment. Alternatively, Noor Salman moves this Court to grant a mistrial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On March 26, 2018, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing all counsel of record.

Respectfully submitted,

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