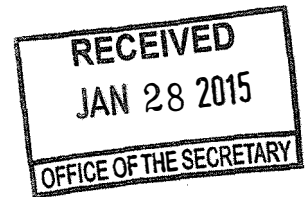


UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



In the Matter of
THOMAS A. NEELY, JR.
Respondent.

Administrative Proceeding File No. 3-15945

**RESPONDENT'S REQUEST FOR BRADY MATERIALS
AND LIST OF DOCUMENTS WITHHELD**

Respondent THOMAS A. NEELY, JR. ("Respondent"), by and through counsel, hereby requests that this Court enter an order directing the Securities and Exchange Commission Division of Enforcement ("Division") to produce all *Brady* materials in this case and to submit a list of documents or categories of documents withheld pursuant to the authority contained in Rules of Practice 230 (17 C.F.R. § 201.230(c)). In support thereof, Respondent states as follows:

THE DIVISION HAS AN OBLIGATION TO PRODUCE UNDER *BRADY*

In *Brady v. Maryland*, the United States Supreme Court held "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." 373 U.S. 83, 87 (1963). Subsequent decisions have held that the government has a constitutionally-mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process Clause. See *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not

occur.”). *Accord, e.g., Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs*, 427 U.S. 97 (1976); *Kyles v. Whitley*, 514 U.S. 419, 433–34 (1995). It is well settled that *Brady*’s disclosure requirements extend to materials that, whatever their other characteristics, may be used to impeach a witness. *Bagley*, 473 U.S. at 676.

Brady has been incorporated into Commission Rule of Practice 230(b)(2). See 17 C.F.R. § 201.230(b)(2).¹ Commission Rule 230(b)(1) allows the Division to withhold certain documents from production, including documents that are privileged, as well as internal memoranda, notes, or writings prepared by Commission employees, or documents that are otherwise work product, among others. 17 C.F.R. § 201.230(b)(1). Commission Rule 230(b)(2) provides, in relevant part, that nothing in Commission Rule 230(b) authorizes the Division, in connection with an

¹ § 201.230 Enforcement and disciplinary proceedings: Availability of documents for inspection and copying.

* * *

(b) Documents that may be withheld.

(1) The Division of Enforcement may withhold a document if:

(i) The document is privileged;

(ii) The document is an internal memorandum, note or writing prepared by a Commission employee, other than an examination or inspection report as specified in paragraph (a)(1)(vi) of this section, or is otherwise attorney work product and will not be offered in evidence;

(iii) The document would disclose the identity of a confidential source; or

(iv) The hearing officer grants leave to withhold a document or category of documents as not relevant to the subject matter of the proceeding or otherwise, for good cause shown.

(2) Nothing in this paragraph (b) authorizes the Division of Enforcement in connection with an enforcement or disciplinary proceeding to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.

17 C.F.R. § 201.230(b).

enforcement proceeding, “to withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.” 17 C.F.R. § 201.230(b)(2). “The Division is required by 17 C.F.R. § 201.230 (Rule 230) to make available its investigative file to a respondent and may not withhold, contrary to the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963), documents that contain material exculpatory evidence.” *In the Matter of John Thomas Capital Management Group LLC, d/b/a Patriot28 LLC, and George R. Jarkesy, Jr.*, S.E.C. Administrative Law Proceeding File No. 3-15255, Initial Decision, ALJ Carol Fox Foelak, Oct. 17, 2014. In *Strickler*, the United States Supreme Court explicitly held that a prosecutor’s open file discovery policy in no way substitutes for or diminishes the government’s obligation to turn over all exculpatory evidence pursuant to *Brady*. 527 U.S. 263, 283 (1999). The prosecution has an ongoing constitutional responsibility to turn over all exculpatory material, whenever they find it. In *Imbler v. Pachtman*, the Court held that even “after a conviction, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction.” 424 U.S. 409, 427, n.25 (1976).

While Respondent has requested disclosure and production in this case,² the United States Supreme Court has also held that the duty to disclose material exculpatory evidence is applicable even when there has been **no** request for that information by the accused and that the duty to disclose also extends to impeachment evidence. See *City of Anaheim, Administrative Proceedings Rulings Release No. 586 (July 30, 1999)*, 70 SEC Docket 881, 881 (citing *United States v. Agurs*, 427 U.S. 97, 107 (1976) and *Bagley*, 473 U.S. at 676). Furthermore, “[t]he prosecutor has an affirmative duty to learn of and disclose any exculpatory or impeachment evidence known to other government agents, including any agents or officers involved in the investigation.” *Discovery and*

² Respondent’s counsel informally requested *Brady* material by email on September 12, 2014. See also Respondent’s Motion for Extension of Time filed herein on October 6, 2014.

Access to Evidence, 40 GEO. L.J. ANN. REV. CRIM. PROC. 363, 371 (2011).

Under *Brady*, the prosecutors have an affirmative duty to search possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf, including the police, *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), and to cause files to be searched that are not only maintained by the prosecutor's or investigative agency's office, but also by other branches of government "closely aligned with the prosecution." *United States v. Brooks*, 966 F.2d at 1503 ("affirmative duty of inquiry"). See *United States v. Beers*, 189 F.3d 1297, 1304 (10th Cir. 1999) ("[i]nformation possessed by other branches of the federal government, including investigating officers, is typically imputed to the prosecutors of the case" for *Brady* purposes); *United States v. Jennings*, 960 F.2d at 1490 ("[t]his personal responsibility cannot be evaded by claiming lack of control over the files ... of other executive branch agencies").

United States v. Safavian, 233 F.R.D. 12, 17 (D.D.C. 2005). "The prosecutor has an affirmative duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Gamble v. Fischer*, No. 13 CIV. 1048 PGG KNF, 2014 WL 2751043, at *16 (S.D.N.Y. June 6, 2014) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). See also *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("A promise made by one attorney must be attributed, for these purposes, to the Government."). The *Bagley* Court construed *Brady* to extend a prosecutor's disclosure obligation to materials possessed by other branches of the government, specifically, a prosecutor's investigative arm. *Bagley*, 473 U.S. at 671 n.4.

Under these principles, and because the Enforcement Counsel of the Board of Governors of the Federal Reserve System ("FRB") and the Division are sharing information and documents with regard to Respondent, the Division has the constitutional obligation to disclose any *Brady* material in its possession, including but not limited to *Brady* material that the Division has learned from the FRB. See generally, Mark D. Villaverde, *Structuring the Prosecutor's Duty to Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471 (2003).

Brady prohibits the prosecution from "supress[ing]" material, favorable evidence, 373 U.S. at 187, 83 S.Ct. 1151, but that does not mean that the prosecution's duty to disclose is limited to evidence within the actual knowledge or

possession of the prosecutor. It is well-settled that the prosecution has a duty to learn of and disclose information "known to the others acting on the government's behalf in the case...." *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

United States v. Reyerros, 537 F.3d 270, 281 (3d Cir. 2008).

In the Division's "Response to Respondent's Motion for Extension of Time," filed October 8, 2014, the Division acknowledged its responsibility to produce *Brady* material:

The Division acknowledges that under the Rule 230(b)(2), the Division may not withhold from its Rule 230 production any documents that contain material exculpatory evidence, and when the Division made its "open file" electronic production, the Division did not withhold any known documents or evidence that falls into that category. Accordingly, when Respondent's counsel asked Division counsel to confirm whether the Rule 230 production included all material exculpatory evidence, Division counsel responded that the Division was unaware of any documents that would qualify as Brady material, and certainly nothing that was withheld from the production. The Division has not encountered any documents or evidence that would qualify as Brady material since that time.

(emphasis added).

However, Respondent's counsel's investigation reflects that despite the Division's acknowledgement of its responsibilities, there is in fact *Brady* material in this matter that has not been produced to Respondent.

UNPRODUCED *BRADY* MATERIALS

Brady is not limited to the production of documents, but also encompasses information and evidence. *See Harris v. Lafler*, 553 F.3d 1028, 1034 (6th Cir. 2009) ("*Brady* is not limited to formal plea bargains, immunity deals or other notarized commitments. It applies to 'less formal, unwritten or tacit agreement[s],' so long as the prosecution offers the witness a benefit in exchange for his cooperation, . . . so long in other words as the evidence is 'favorable to the accused.'"); *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984) ("*Brady* material is not limited to statements of witnesses but is defined as exculpatory material").

Upon information and belief, there are *Brady* materials in existence that have not yet been produced to Respondent by the Division. For example, upon information and belief, in November or December of 2014, the Division conducted an approximately one-hour long telephone interview of an individual with information very favorable to the defense. It is most unlikely that the Division interviewed this individual for about one hour without learning of some information required to be disclosed under *Brady*, yet no such information has been disclosed to Respondent. Given that the Division is presumably interviewing many individuals and documents in preparation for trial and that it is likely those interviews or documents have yielded at least some exculpatory information, Respondent reasonably believes that since the Division's representation about *Brady* compliance on October 8, 2014, the Division has obtained *Brady* material that it has not produced to Respondent.

CONCLUSION

Based on the above, it is clear that the Division has not produced any *Brady* material. It is also clear that the Division is or should be aware of the existence of *Brady* material. Therefore, Respondent requests that this Court direct the Division to produce all *Brady* material of which it is or should be aware within seven days from the Court's order.

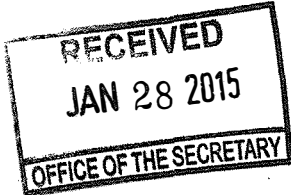
In addition, for those same reasons, Respondent requests that this Court require the Division to submit for review a list of documents or categories of documents withheld pursuant to the authority contained in Rules of Practice 230 (17 C.F.R. 201.230(c)).³

³ 17 C.F.R. § 201.230(c) provides:

(c) Withheld document list. The hearing officer may require the Division of Enforcement to submit for review a list of documents or categories of documents withheld pursuant to paragraphs (b)(1)(i) through (b)(1)(iv) of this section or to submit any document withheld, and may determine whether any such document should be made available for inspection and copying. When similar documents are withheld pursuant to paragraphs (b)(1)(i) through (b)(1)(iv) of this section, those

FACSIMILE COVER SHEET

2025 3rd Avenue North, Suite 500
Birmingham, Alabama 35203



FAX NO. (205) 323-8907
TEL NO. (205) 323-1888

Date: January 28, 2015

FROM: Theresa Boackle, White Arnold & Dowd

TO: Office of Secretary	FACSIMILE NUMBER:
	202-772-9324

TOTAL PAGES INCLUDING THIS PAGE: 8

RE: Tom Neely, Admin. No.: 3-15945

CONFIDENTIALITY NOTICE

The documents accompanying this telecopy transmission cover sheet contains information from the law firm of White Arnold & Dowd P.C. The information is confidential and is intended solely for the use of the individual or entity to which it is addressed. The information may be subject to the attorney/client privilege. If you are not the addressee, you are hereby notified that any disclosure, copying or distribution of all or part of the documents, and/or the taking of any action in reliance on the contents of this telecopied information, is strictly prohibited, and that the documents should be returned to this firm immediately. If you have received this communication in error, please notify us immediately by telephone and return the original message to us at the above address via U.S. Postal Service. We will reimburse your reasonable costs. Thank you.