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August 23,2007

Mr. Joseph Wayne Eastridge
5836 Massey Road
Spotsylvania, Virginia 22553

Dear Wayne:

Enclosed please find a copy of our Opposition to the Defendant's Motion for Summary Affirmance. As I have previously noted, the Government filed a Motion for Summary Affirmance in this case which is essentially a procedural motion that the Government has filed seeking to have Judge Kollar-Kotelly's decision affirmed without full argument and briefing. We have vigorously opposed this Motion as you can see from the enclosed Opposition.

Please feel free to call me with any questions.

Very truly yours,

Patrick M. Regan

PMR/ek
Enclosure.202927
cc: Paul Comoni, Esquire
John Zwerling, Esquire
Kate Hill Germond, Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH WAYNE EASTRIDGE, *et al.*	:	
Appellants,	:	
v.	:	**No. 07-5083** **(C.A. No. 06-448)**
UNITED STATES OF AMERICA, *et al.*		
Appellees	:	

APPELLANTS' CORRECTED' OPPOSITION TO APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

The Appellants, by and through undersigned counsel, hereby respectfully request that the Court deny Appellees' Motion for Summary Affirmance and further state that the wrongful conduct engaged in by the Appellees, and the surrounding issues of immunity deserve careful review and consideration by this Court, particularly on appeal from a dismissal.

SUMMARY AFFIRMANCE STANDARD

In order to support such a motion, the Appellees have the burden of demonstrating that "'the merits of [their] claim are so clear as to justify expedited action.'" *Egan v. U.S. Agency for Int'l Dev.*, 381 F.3d 1, 3 (D.C. Cir. 2004) (citing *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980)). Appellees' Motion has failed to meet this standard especially in light of the grave harms suffered by the Appellants in this matter.

[1] Appellants filed a nearly identical opposition on May 29, 2007. However, this earlier opposition was accompanied by a memorandum and points of authorities in violation of Federal Rule of Appellate Procedure 27. Counsel for Appellants has spoken with the Clerk's Office concerning this error and now files this Corrected Motion pursuant to the rules of this Court.

Moreover, the legal precedent cited by Appellants effectively demonstrates that Appellants are entitled to reversal of the lower Court's dismissal of this action.

FACTS

Appellants spent decades incarcerated in federal prisons for a crime they did not commit. Appellants' constitutional rights to due process were repeatedly violated by the Appellees. These simple facts are not disputed, and the United States District Court has held these facts to be true. *(See* Exhibit **A,** U.S District Court's May 26, 2005 Opinion.) However, Appellees attempt to escape all liability for such grave violations of the Appellants' constitutional rights. The bold assertion that each Appellee in this matter should be granted blanket immunity for the severe and repeated constitutional violations of the Appellants' due process rights is belied by the facts surrounding this case as well as the legal precedent in this jurisdiction. Judge Collyer, in her 59 page written opinion, details the constitutional violations of Appellants Joseph Eastridge and Joseph Sousa and the decedent Michael Damien. The Court found "that this is the rare case in which Petitioners can prove their 'actual innocence' of the crime charged as well as violations of their constitutional rights at trial." (Judge Collyer's Opinion at p. 59, **Exh. A)**

BRADY INFORMATION

At trial, the Government's theory of the case was that a group associated with a motorcycle gang, the Pagans, was involved in a racially-charged confrontation with three Black men, including Mr. Battle, outside the Godfather Lounge in Washington, DC. After a series of verbal exchanges, Mr. Battle retrieved a handgun from his car and fired

into the group, wounding one of the Pagans. Mr. Battle fled on foot down Wisconsin Avenue. Messrs. Jones, Damien, Eastridge, and Sousa *allegedly* gave chase, with their knives drawn, chasing Mr. Johnnie Battle up to Wisconsin Avenue, across Wisconsin Avenue, where Mr. Battle is seen tripping on a curb, falling backwards, with his arms up, and being stabbed repeatedly by these four defendants.

However, over thirty years later, what has become clear is that Messrs. Jennings, Barber, Jones and Wood *in fact* committed the murder. More specifically, Messrs. Jennings and Wood *inculpated themselves through statements and actions after the murder.* These statements and actions were material exculpatory pieces of evidence with respect to Appellants Eastridge and Sousa and the decedent Michael Damien. *Appellees repeatedlyfailed to disclose these statements to the Appellants.*

More specifically, the Grand Jury testimony of Mr. Jennings and Mr. Wood were never provided to the Appellants. Neither Mr. Jennings nor Mr. Wood testified at the trial. However, Mr. Jennings told the Grand Jury that, after a prior incident that evening, both he and Mr. Wood decided not to go to the Godfather Lounge. Mr. Wood's Grand Jury testimony was substantially similar, adding that Mr. Jennings had driven him home and that he was in "no way involved in any of the events that took place at or near the Godfather Lounge."

At trial, a young woman who was at the Godfather Lounge, Ms. Heim, testified on behalf of the govemment that both Mr. Jennings and Mr. Wood were at the Godfather on November 1, 1974 and that they were present during the encounters at the bar with Messrs. Battle, Brown, and Allen. A number of other government and defense witnesses

offered similar testimony at trial. No witnesses denied the presence of Mr. Wood or Mr. Jennings at the Godfather.

This Grand Jury testimony was not provided to the defense for use at trial. This evidence is particularly exculpatory since counsel for the Appellants repeatedly emphasized that Mr. Jennings and Mr. Wood, among others, were in the group at the Godfather–as a way to suggest that others might have been the murderers. In its closing statement the government ridiculed that defense theory of the case by calling them "Phantoms." The Grand Jury testimony is direct evidence that Mr. Jennings and Mr. Wood had guilty minds and lied to the Grand Jury.

Judge Collyer held that the grand jury testimony was clearly exculpatory, stating:

> As a general matter, false exculpatory statements can produce an inference of guilt. The combination of Ms. Heim's testimony that Mr. Wood and Mr. Jennings were present at the Godfather; that Mr. Jones was among those who chased Mr. Battle; and that Barber and Jennings ran on foot to Mr. Richter's house in Virginia, arriving distraught and wanting to hide, would have materially supported Petitioners' trial argument that the unindicted "phantoms" (no longer phantoms, but identified persons) were more likely the murderers. Had they been aware of the false testimony, defense counsel might have presented Ms. Heim with more-particularized questions about Mr. Wood and Mr. Jennings. Of course, they could also have called both men to testify and to confront their own Grand Jury testimony in an effort to show that persons other than the Petitioners could have committed the murder. (Exh. A at p. 57)

Not only were these exculpatory pieces of evidence material but the nondisclosure prejudiced the Appellants. The Grand Jury transcripts were material and changed the outcome of the case. Had these pieces of evidence been disclosed to the Appellants and

the jury, the outcome of the criminal trial would have been different. The most reasonable interpretation of all the evidence is that Appellants were not present at the site of the murder, and did not aid and abet others in murdering Mr. Battle.

For decades, Appellee United States of America routinely and repeatedly refused to disclose this exculpatory material despite Appellants' numerous requests. Judge Collyer specifically found that "[T]he most reasonable interpretation of all the evidence is that Petitioners did not chase Mr. Battle and did not participate directly in murdering him." (Exh. **A** at p.8) Appellants were wrongly convicted and imprisoned for crimes that they did not commit.

I. THE DOCTRINE OF PROSECUTORIAL IMMUNITY DOES NOT BAR APPELLANTS' COMPLAINT

While prosecutorial immunity is absolute in certain circumstances the case at bar is distinguishable. Prosecutors receive "absolute" immunity for advocatory functions only. Courts have frequently employed a rigid advocatory/investigative/administrative trichotomy in analyzing prosecutorial functions. See McSurely v. McClellan, 697 F.2d 309, 318 (D.C. Cir. 1982)("a prosecutor engaged in essentially investigative or administrative functions receives only the lesser protection of qualified immunity"); see also Dellums v. Powell, 660 F.2d 802, 805 (D.C. Cir. 1981); Taylor v. Kavanagh, 640 F.2d 45 (2d. Cir. 1981); Mancini v. Lester, 630 F.2d 990, 992-93 (3d. Cir. 1980); Briggs v. Goodwin, 569 F.2d 10, 20-21 (D.C. Cir.1977), cert. denied, 437 U.S. 904, 90 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

While prosecutors may have immunity for acts performed within the scope of their prosecutorial duties, prosecutors **are liable** for actions taken which are investigatory in nature. See e.g., Kalina v. Fletcher, 118 S. Ct. 502, 139 L. Ed. 2d 471 (U.S. 1997); Buckley v. Fitzsimmons, 509 U.S. 259 (1993); Rex v. Teeples, 753 F.2d 840, 844 (10th Cir. 1985); Briggs v. Goodwin, 569 F.2d 10, 19-20 (D.C. Cir. 1977) Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973).

Here, the prosecutors received Brady evidence while investigating a criminal offense. During the investigation, Appellees actively sought and received witnesses statements in the ***form*** of grand jury testimony. This is no different from the typical scenario wherein a police officer obtains a statement from a witness containing exculpatory information (during an investigation) and fails to turn over such Brady information to the prosecutor involved in the case. In such a scenario, the Courts have routinely held that the plaintiff's Brady rights have been violated and immunity does not exist for the actions taken by the police officer. ***See*** e.g., Bembenek v. Donohoo, *355* F. Supp. 2d 942 (E.D. Wisc. 2005); McMillian v. Johnson, 878 F. Supp. 1473 (M.D. Ala. 1995); Sanders v. English, 950 F.2d 1152 (5th Cir. 1992); Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989).

Courts have held a prosecutor's failure to preserve evidence as non-advocatory. Our case is similar to Henderson v. Fisher, 631 F.2d 1115 (3d. Cir. 1980) (per curiam) (knowing failure to preserve exculpatory evidence held to be non-advocatory) and Wilkinson v. Ellis, 484 F.Supp. 1072 (E.D. Pa. 1980) (destruction of evidence held to be non-advocatory). In the case at bar, the prosecutors knowingly failed to disclose

exculpatory information. The effect of this non-disclosure is uniquely similar to the cases cited above, i.e, a violation of Appellants' due process rights to a fair trial.

Additionally, Appellees are not entitled to "qualified" immunity since their actions violated the constitutional rights of the Appellants pursuant to Brady. According to the undisputed caselaw, federal officers are not entitled to "qualified" immunity if their conduct violated clear constitutional rights. See Harlow v. Fitzgerald, 457 US 800 (1982). In Brady, the 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. at 87 (1963).

The standard for disclosure in criminal cases is "materiality." Evidence is material if there is a reasonable probability that the disclosure of evidence would change the outcome of the proceeding. United States v. Bagley, 473 U.S. 667, 682 (1985). There can be no question here. Judge Collyer specifically held that the Appellees violated the clear constitutional rights of the Appellants by failing to disclose material exculpatory evidence. (Exh. **A** at p. 57) Appellees Guemeri and Linsky are not entitled to "qualified" immunity since their actions violated the unadorned constitutional rights of the Appellants.

Further, actions taken after a given plaintiff's conviction may be beyond the scope of the immunity. *Houston v. Partee*, 978 F.2d 362, 368 (7th Cir. 1992). Even assuming arguendo that the Appellees were engaged in solely "advocatory" functions during the investigation of the murder of John Battle and during the criminal trial of the Appellants

in this matter, Appellees' claim for blanket prosecutorial immunity still fails. More specifically, Appellees repeatedly violated the constitutional rights of the Appellants long *after* their wrongful convictions. (See Exhibit B, Affidavit of Kate Hill Germond). To argue that the individual Appellees were engaged in merely "advocatory" functions in the ***decades*** following the criminal trial in this matter simply does not carry weight.

Centurion Ministries, through the work of Kate Germond, became involved in the case of Messrs. Eastridge, Damien and Sousa in 1987. After an in-depth screening process, Centurion Ministries became assured that the Appellants were innocent. In December of 1989, Kate Germond made formal requests for any and all exculpatory information concerning the Appellants in the possession of the United States Attorneys' Office, including the Appellees in this matter. (See Exhibit B at ¶¶ 1-5). These requests were rebuffed by the Appellees.

Subsequently, on December 14, 1990, John Zwerling and Kate Germond, met with supervisory personnel at the United States Attorneys' Office. During this meeting, Kate Germond discussed the results of her investigation which concluded that Mr. Battle was murdered by Steven Jones, Chesley Barber, Charles Jennings and John Woods. (Exhibit B at ¶ 7). Shortly thereafter, Jim McCloskey, Founder of Centurion Ministries, sent a letter recapping the December 14" meeting, specifically requesting any statements or grand jury testimony of Jennings, Woods and Barber. This formal request was rebuffed by the Appellees. However, the United States Attorney's Office agreed to review their entire file including any grand jury materials and share with Centurion Ministries what the prosecutors determined to be appropriate. (Exhibit B at ¶ 8).

On June 17, 1991, the government responded to these requests and stated that they had examined the above requested grand jury materials among other items and also engaged in a lengthy telephone conversation with Appellee Joseph Guemeri. Based on the above, the government concluded that the version of events provided by Appellants was patently incredible. The government also stated that there was no evidence to suggest that Appellants were innocent. This information is undisputed proof that Appellee Guerrieri violated the Appellants' constitutional rights well over fifteen years after the criminal trial in question. Clearly, Appellees can not argue that their conduct well after the criminal trial in this matter was solely advocatory.

Four years later, in 1995, pro bono counsel filed a §23-110 motion in Superior Court along with a motion seeking discoverable information including the grand jury material now known to be the Brady material relied upon by Judge Collyer. Incredibly, Appellees opposed these motions. Appellants were denied a hearing and it took an additional ten (10) years of litigation before Federal Judge Rosemary Collyer ordered the grand jury material disclosed. (Exhibit B at ¶ 13).

Notably, Appellants were wrongfully convicted in January of 1976. Despite numerous requests, Appellees failed to turn over the exculpatory grand jury transcripts for a period of well over two decades. Appellants spent this time incarcerated in federal prison for a crime they did not commit.

II. THE UNITED STATES IS NOT IMMUNE FROM SUIT FOR APPELLEE PROSECUTORS' CONDUCT.

Appellees attempt to escape liability by claiming that the doctrine of sovereign immunity bars suit against the United States of America. Well true, the doctrine of sovereign immunity is normally enveloping, the unique facts of this case compel the Court to disregard this policy and hold the United States liable for its actions.

The United States Supreme Court has recognized that Congress did intend for municipalities and other local governments to be included among those 'persons" *to* whom $1983 applies. See Monell v. Department of Social Services of City of New York, 436 US. 658, 681 (1978). States and other municipalities, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief. Id-

> Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels. Id. at 690-91.

More specifically, when the execution of a government's poky or custom, whether made by its lawmakers or by those whose edicts or acts "may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. Appellants' injuries are a direct result of such an official policy or custom.

Here, Appellants have put forth a valid claim against Appellee United States of America for creating and maintaining an unconstitutional custom, policy and/or practice of failing to disclose material exculpatory evidence in violation of a defendant's due process rights under Brady. Appellants have also put forth a valid claim against Appellee United States of America for creating and maintaining an unconstitutional custom, policy and/or practice of failing to adequately train and supervise its employees and agents, including the named Appellees in this case, regarding failing to disclose material exculpatory evidence in violation of a defendant's due process rights under Brady.

Although 42 U.S.C. §1983 does not explicitly define the United States as a ''person" free to be sued for civil rights and constitutional violations, the thrust of the statute as well as the unique facts of this case demonstrate that sovereign immunity is inapplicable. Here, Appellees were engaged in a criminal investigation and prosecution of a *state* law crime. If the underlying crime of which Appellants were originally charged had occurred in any alternative location in the United States (other than the District of Columbia), a state and/or municipality would have surely investigated and prosecuted the matter. If so, Appellants' legal claims would undoubtly be applicable pursuant to 42 U.S.C. §1983 and the governmental agency and/or municipality involved would not he entitled to sovereign immunity, See Monell, discussed supra. Appellees were performing a typically held state function. See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982) ("the power to create and enforce a legal code, both civil and criminal" is one of the quintessential functions of a State.)

The underlining principle of 42 U.S.C. $1983 is severely disturbed if Appellees are held immune from suit. The specific purpose of the statute is to protect individuals such as the Appellants. More specifically, Appellants' constitutional rights *to* due process were repeatedly violated. 42 U.S.C. $1983 should be "broadly construed against all forms of official violation of federally protectedrights," Monell at 701. Moreover,

> [absent] a clear statement in the legislative history supporting the conclusion that § 1 was not to apply to the official acts of a municipal corporation-which simply is not present-there is no justification for excluding municipalities from the "persons" covered by [42 U.S.C. §1983] ... Monell at 701.

Granting immunity to the Appellees in this instance would have the practical effect of denying an entire subset of individuals the rights afforded to them pursuant to 42 U.S.C. §1983. This large subset of individuals would include most, if not all, criminal defendants in the District of Columbia. This is true since Appellee United States is solely responsible for the prosecution of criminal matters in the District of Columbia.

Such a decision would severely restrict or impede the purpose of this important statute. "Purpose of federal civil rights statute (42 USCS § 1983)...is to interpose federal courts between states and people, as guardians of people's federal rights..." Mitchum v. Foster, 407 U.S. 225 (1972) This is exactly what Appellants' Complaint alleged. Appellants have alleged that their federal rights to due process and a fair trial have been violated. Here, the unique situation is that Appellees violated Appellants' federal rights while undertaking a largely held state function, i.e, investigation and prosecution of a state law criminal offense. See Alfred L. Snapp & Son Inc. v. Puerto Rico ex rel. Barez, 458 U.S. 592, 601 (1982). 42 U.S.C. §1983 is a vital tool used to protect constitutional

rights. An entire set of persons living in the District of Columbia which potentially face criminal prosecution should not be forbidden from using such an important instrument.

Appellee prosecutors' argument that they should not be considered "state" actors is of no moment. First, as stated previously, Appeellees were performing **a** typically held state function when their violations of Appellants' constitutional rights occurred. Second, even assuming arguendo that the Court finds that the Appellee prosecutors were not "state" actors, Appeelles Linsky and Guerrieri are subject to suit pursuant to Bivens v. **Six** Unknown Federal Agents, 403 U.S. 388 (1971); see also Kingsley v. Bureau of Prisons, 937 F.2d 26, 31 (2d. Cir. 1991) (In a Bivens action, damages may be obtained for injuries consequent upon the violation of the Constitution *by federal officials.*)

Simply put, there is no justification for failing to hold Appellees liable for its repeated violations of Appellants' due process rights as well as its actions in creating and maintaining an unconstitutional custom, policy and/or practice under Brady.

CONCLUSION

WHEREFORE, this Court should DENY Appellees' Motion for Summary Affirmance and allow this appeal to proceed.

Respectfully submitted,

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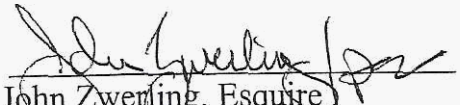
By: 

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CERTIFICATE OF SERVICE

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Regan Zambri & Long, PLLC, Attorneys for Appellants.

Two copies of the foregoing Appellants' Corrected Opposition to Appellees' Motion for Summary Affirmance and proposed Order was sent via first class mail, postage paid, this 31st day of May, 2007 to the following:

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John C. Kruesi, Jr.
Counsel Press

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH WAYNE EASTRIDGE, *et al.*

Appellants, :

v. : **No. 07-5083**
(C.A. No. 06-448)

UNITED STATES OF AMERICA, *et ah*

Appellees

ORDER

Upon consideration of Appellees' Motion for *Summary* Affirmance, and Appellants' Opposition thereto, it is this ____ day of _____,2007;

ORDERED that Appellees' Motion be, and the same hereby is DENIED.

_____
Judge, U.S. Court of Appeals for District of Columbia Circuit

cc: Patrick M. Regan, Esquire
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