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9 Attorney for Defendant
10 ERIC TAYLOR MCDAVID

11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE EASTERN DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,)
14 Plaintiff,)
15 v.)
16 ERIC TAYLOR MCDAVID)
17 Defendant.)

Case No. CR-S-06-035 MCE

**DEFENDANT'S REPLY IN SUPPORT
OF MOTION FOR ORDER
REQUIRING THE GOVERNMENT TO
SHOW CAUSE HOW AND WHY IT
WITHHELD DOCUMENTS FROM THE
DEFENSE WHICH IT SHOULD HAVE
PRODUCED PRIOR TO TRIAL**

Date : September 3, 2015
Time : 9:00 a.m.
Judge: HON. Morrison C.
England

REPLY

18 The government, in its Opposition to Defendant's Motion
19 for an Order to Show Cause ("Motion," Dkt. No. 473), attacks
20 a series of straw man arguments without addressing itself to
21 the Motion's actual request. Contrary to the government's
22 assertions, the Motion in no way seeks to collaterally
23 challenge the terms of the plea and settlement agreements, to
24 raise any new claim, to relitigate any issue in the settled
25 2255 Motion, or to compel production of any documents from

26 Reply Mtn For OSC

1 the government. Rather, as the government does acknowledge,
2 the Motion invokes the Court's broad inherent power to order
3 the government to show cause "how and why" it withheld so
4 many overtly discoverable documents from the defendant
5 (Motion at 1:22; emphasis added) -- including prominently the
6 defendant's correspondence with the informant, the FBI's
7 behavioral analysis of defendant and corresponding
8 instructions to the informant, and documents concerning the
9 FBI's call for and abrupt cancellation of a polygraph
10 examination of the informant.

11 Contrary to the government's assertion, the Motion
12 plainly does not ask the Court to determine whether Brady and
13 Rule 16 violations occurred. Rather, it is based on the
14 understanding that *Brady* and Rule 16 violations did occur.
15 At the hearing on January 8, 2015, the Court rightly referred
16 to the government's withholding as "*Brady* with a capital B."
17 (Motion at 4:22 (quoting the Court from the reporter's
18 transcript of the January 8, 2015 hearing (emphasis added).)
19 The government itself acknowledged at the same hearing: "If
20 these documents had come to the attention of the prosecutors,
21 we believe they would have been turned over as *Brady*
22 material." (1/8/15 RT at 20:20-22.) Similarly, the
23 government has acknowledged the impropriety of its
24 withholding, calling it "inadvertent" and a "mistake." (See
25 Motion (Dkt. No. 472) at 4:2-12 (citing and quoting earlier
26 statements by the government to the Court and the news
27 media).) It is axiomatic that even the government's
28 inadvertent failure to produce documents to a defendant that

1 would have been helpful to the defense constitutes a Brady
2 violation.

3 The government argues, without offering any showing or
4 support, that "McDavid's request for an Order to Show Cause
5 is merely an effort to re-litigate his settled § 2255 claims,
6 cloaked as an attempt to invoke the Court's inherent powers"
7 (Opposition at 12:11-12), and that "McDavid's argument that
8 the United States should have disclosed the FOIA Documents in
9 the discovery process in his criminal prosecution is a naked
10 attempt to re-litigate his settled § 2255 claims."

11 (Opposition at 16:18-19). But a simple reading of the Motion
12 makes clear that it is in no way an effort to relitigate the
13 2255 claims, let alone revisit the plea or sentence.¹

14 The government also states it is considering whether to seek
15 to void the plea agreement and sentence based merely on the
16 suggestion in the Motion that the Court follow up on its
17 previously stated interest to determine "what happened."

18 (See Opposition at 11, FN 6, and Motion at 4:18-22 (quoting
19 the Court from January 8, 2015).)² The government has not
20 explained its rationale for believing this might constitute a
21

22 ¹Nor, as the government contends, does the Motion "ask
23 the Court to order the United States to produce un-redacted
24 copies of the FOIA Documents produced by the FBI, which were
25 redacted pursuant to the exemption provisions of the FOIA."
(Opposition at 1:23-25.) Nowhere does the Motion ask the
26 Court to order the government to produce any documents.

27 ²The defense does not intend, by the Motion, to cast
28 aspersions on any particular individual or agency, and does
not dispute that the U.S. Attorney's Office negotiated the
settlement of defendant's 2255 motion in good faith. But the
simple fact remains that only the government can account for
the grave "mistakes" made, and it should do so, lest those
mistakes be repeated.

1 breach of the plea and settlement agreements, and defense
2 counsel is at a loss to see how any reading of those
3 instruments could support such a view. Defendant has not
4 breached the terms of the plea and settlement agreements and
5 has no intention of doing so. Certainly, on January 8, 2015,
6 defendant's 2255 counsel could have affirmed the Court's
7 inquiry to the government - "what happened?" - without
8 departing from the plea and settlement agreements.³ There
9 should be no different result in the present context.
10 The Motion merely asks the Court to follow up on its own
11 stated interest to determine from the government why it
12 withheld acknowledged *Brady* materials, guided and protected
13 by the most cherished principles of open government and
14 accountability.

15 Respectfully submitted

16 August 27, 2015

17
18 /s/ *Mark Reichel*

19 Mark Reichel
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27 ³New revelations spilled out even during the January 8,
28 2015 hearing, for instance, that the long withheld
correspondence was found easily in a file in the FBI's
Sacramento Field Office. (1/8/15 RT at 18:22 - 19:3.)