CLAIM F.F.

THE PETITIONER WAS DEPRIVED OF HIS DUE PROCESS RIGHTS UNDER BRADY v. MARYLAND, 373 U.S. 83 (1963), AND PROGENY, WHEN THE GOVERNMENT FAILED TO DISCLOSE EVIDENCE FAVORABLE TO THE DEFENSE IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH, AMENDMENTS OF THE UNITED STATES CONSTITUTION.

(a) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE PRE-TRIAL MOTION TO DISMISS RELATING TO THE GOVERNMENT'S PRE-INDICTMENT DELAY AND THE PREJUDICE FLOWING THEREFROM. SEE ALSO, CLAIM C., AND CLAIM F.

(b) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE PRE-TRIAL MOTION TO DISMISS RELATING TO THE GOVERNMENT'S DESTRUCTION OF EVIDENCE HAVING POTENTIALLY EXCULPATORY VALUE. SEE ALSO, CLAIM D., CLAIM F.

(c) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE KNOWN FALSITY OF THE PROFFER STATEMENT AND FBI S.A. MESSING'S TESTIMONY RELATING THERETO. SEE ALSO, CLAIMS J.(a), K.(a), D.D., AND E.E.

(d) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ESTELLE JOHNSON, A KEY EYEWITNESS FOR THE GOVERNMENT. SEE ALSO, CLAIM J.(c), AND CLAIM K.(c).

(e) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO JAMES CORBIN, A KEY EYEWITNESS FOR THE GOVERNMENT. SEE ALSO, CLAIM J.(d), AND CLAIM K.(d).

(f) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO MEMBERS OF THE CITY OF RICHMOND POLICE

DEPARTMENT AS SUSPECTS IN THIS CASE.

(g) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO OTHER UNNAMED SUSPECTS IN THIS CASE.

(h) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE ARREST OF CERTAIN WITNESSES FOR VIOLATIONS OF 18 U.S.C. § 401 (OBSTRUCTION OF JUSTICE) INVOLVING THIS CASE.

(i) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ITS ONGOING INVESTIGATIONS OF PERJURY COMMITTED BY INDIVIDUALS INVOLVED IN THE CASE OF COMMONWEALTH VS. COX AND THE PETITIONER'S UNDERLYING CASE.

(j) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ITS ONGOING INVESTIGATION OF BILLY MADISON AS A SUSPECT.

I. LEGAL AUTHORITIES

Over four decades ago the Supreme Court of the United States, in the case of Brady v. Maryland, 373 U.S. 83 (1963), held that, "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 or bad faith of the prosecution." Id., 373 U.S., at 87.

In United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court made clear that a defendant's failure to request favorable evidence did not relieve the government of its obligation because, "elementary fairness requires it to be

disclosed even without a specific request." Id. 427 U.S., at 110-111, (relying on Berger v. United States, 295 U.S 78, at 88 (1935)). In Agurs, the Supreme Court distinguished three situations in which a Brady claim might arise: First, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was false. Agurs, at 103-104. Second, where the government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence. Agurs, at 104-107. Third, where the government failed to volunteer exculpatory evidence never requested, or only requested in a general way.

The third prominent case on the way to current Brady law is United States v. Bagley, 473 U.S. 667 (1985). The Bagley Court disavowed any difference between exculpatory and impeachment evidence for Brady purposes. The Court in Bagley abandoned the distinction between the second and third Agurs circumstances, i.e., the specific and general - or no request situations. Bagley held that regardless of whether a request was made, favorable evidence is material and constitutional error results from its suppression by the government, "if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Bagley, at 682.

A decade after Bagley this issue was addressed again in

Kyles v. Whitley, 514 U.S. 419 (1995). In Kyles the Supreme Court made several significant holdings concerning four specific aspects of materiality under Bagely which bear emphasis here. First, "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)." Kyles, 514 U.S., at 434. The Supreme Court made clear that, "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., 514 U.S. at 434 (quoting Bagley, 473 U.S., at 678.)

The second point of Kyles is that materiality, "is not a sufficiency of the evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." Id., 514 U.S. at 435.

The third point of Kyles is that a harmless error analysis is unnecessary once materiality has been determined. "In sum, once there has been Bagley error as claimed in this

case it cannot subsequently be found harmless under Brecht [v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)]." Kyles, 514 U.S., at 435.

The fourth point of Kyles is that suppressed evidence must be, "considered collectively, not item by item ... This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Accordingly, "the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Id. 514 US., at 438-439. Upon consideration of these factors, a reviewing court is charged with the responsibility of determining if the suppression of evidence, "undermines confidence in the outcome of the trial." Bagley, 473 U.S., at 678.

In assessing the cumulative affect of the Brady material the Supreme Court in Kyles discussed at length how, "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles, 514 U.S., at 441. During the ruling in Kyles the Supreme Court articulated how the defense could have used the withheld evidence to affect the jury's assessment, damaged the prosecution's case, and laid the foundation for a vigorous argument that the police had been guilty of negligence. Id., 514 U.S., at 441.

"Disclosure ... would have resulted in a markedly weaker case for the prosecution and a markedly stronger one for the

defense ... A jury would reasonably have been troubled by the adjustments to the [eyewitness's] story by the time of the second trial ... These developments would have fueled a withering cross-examination, destroying confidence in [the eyewitness's] story and raising a substantial implication that the prosecutor had coached him to give it ... And even aside from such important details, the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others ... Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses ... [it] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even good faith of the investigation as well ... If the defense had called the [eyewitness] as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies ... Even if [the defense] lawyer had followed the more conservative course ... the defense could have laid the foundation for a vigorous argument that the police had been guilty of negligence ... But however the evidence would have been used, it would have had some weight and its tendency would have been favorable to the defense." Id.

The Supreme Court went on to assess the significance of the evidence withheld and recognized, "that not every item of the State's case would have been directly undercut." Id., at 451, 115 S.Ct., at 1574. The Supreme Court found it,

"significant, however, that the physical evidence remaining unscathed would ... hardly have amounted to overwhelming proof that Kyles was the murderer." Id.

Finally in ruling in favor of the habeas petitioner, the Supreme Court held that, "Since all of these possible findings were precluded by the prosecution's failure to disclose the evidence that would have supported them 'fairness' cannot be stretched to the point of calling this a fair trial." Id., at 454, 115 S.Ct, at 1575. Accord Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003).

The Commonwealth of Virginia has adopted the holdings and principles announced in Kyles v. Whitley, supra, and United States v. Bagley, supra.

The leading Virginia Supreme Court case with respect to Brady claims is Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006). In Workman the Supreme Court of Virginia reversed a trial court and the Virginia Court of Appeals, where both courts concluded that a failure to disclose impeachment evidence, "does not rise to a reasonable probability that the result of the proceeding would have been different." Id., at 641, 636 S.E.2d 372 (2006). The Supreme Court of Virginia explained:

> There are three components of a violation of the rule of disclosure first enunciated in Brady: a) The evidence not disclosed to the accused 'must be favorable to the accused either because it is exculpatory,' or because it may be used for impeachment; b) the evidence not disclosed must have been withheld by the Commonwealth either willfully or inadvertently; and c) the accused must have been prejudiced. Id., at 281-82. Stated

> differently, '[t]he 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.' Kyles v Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). '[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that suppression undermines confidence in the outcome of the trial.' United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985).

Id., 272 Va. 644-645, 636 S.E.2d 374-375.

Likewise, with respect to the requirement of the reviewing court to examine a Brady claim under the lens of how disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable; the law of the Commonwealth reflects that standard. In Taitano v. Commonwealth, 4 Va. App. at 342, 349, 358 S.E.2d 590, at 594 (1987), the Court held that,

> Bagley requires a court to assess the reasonable probability of a different result 'in light of the totality of the circumstances and with awareness of the difficulty of reconstructing in a post-trial proceeding the course that defense and trial would have taken had the defense not been misled by the prosecution's response.' Robinson v. Commonwealth, 231 Va. 142, 152, 341 S.E.2d 159, 165 (1986) (quoting Bagley, 473 U.S., at 683). To accomplish this, the evidence adduced at trial must be compared with what the defendant contends could have been adduced.

Id. 4 Va. App., at 349. See also Davis v. Commonwealth, 1996 Va. App. UNPUB Lexis 618; Carter v. Commonwealth, 1999 Va. App. UNPUB Lexis 409; McCord v. Commonwealth, 2001 Va. App. UNPUB Lexis 9.

II. THERE IS NO PROCEDURAL BAR PRECLUDING THIS CLAIM.

The instant allegations of Brady violations are not procedurally barred, as the Petitioner only recently discovered

the violations after filing the initial *Petition for Writ of Habeas Corpus*, and the *Bill of Particulars*. These violations were not discoverable by the exercise of due diligence before this time, and the instant allegations have not previously been presented to any other court for review. Any facts known to the Petitioner that could form the basis of a prayer for relief at the trial, and in a direct appeal are ordinarily barred from consideration in a *Petition for Writ of Habeas Corpus*. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974); Code of Virginia § 8.01-654(B)(2). However, the procedural bar does not apply to claims of undisclosed exculpatory evidence that was not discoverable prior to trial.

There is, therefore, no bar for presenting newly discovered evidence in a *Petition* which could not have been revealed earlier by the exercise of due diligence and which is presently being considered by a court for the first time. See § 8.01-654(B)(2). The existence of exculpatory and/or impeachment evidence was revealed to the Petitioner by way of a Federal Freedom of Information Act request.

Obviously, during the pendency of his criminal trial and his direct appeal, the factual basis (and the route through which it was gathered) was not previously available to the Petitioner or to his counsel. There was no way for the Petitioner to gather this information from the federal government's file during pendency of the underlying action, save for the government's adherence to Brady, and progeny.

Clearly the prosecuting authority was under an obligation - both legal and ethical - to search the files and interview the agencies working on the government's behalf and disclose this information. However, the prosecuting authority failed to do so - violating clearly established federal law, as determined by the Supreme Court of the United States, and the laws of the Commonwealth. The Petitioner could not raise this claim at trial and on appeal without this previously unknown factual basis; therefore, this issue is properly raised in this *Habeas Petition*.

III. STANDARD OF REVIEW.

The first issue for consideration is the appropriate standard of review under the current procedural posture. Under the laws of the Commonwealth there are different standards for judging the required disclosure of exculpatory material at trial and on appeal. Humes v. Commonwealth, 12 Va. App. 1140, 480 S.E.2d 553 (1991). The Court of Appeals in Humes discussed the, "materiality," standard of Brady and progeny, and recited the distinction between materiality at the trial level and at the appellate level.

> This test of materiality is applied by an appellate court reviewing a case in which the prosecution has failed to disclose exculpatory evidence. **It does not provide an appropriate definition of "materiality" for use pre-trial at the time disclosure is required** since the test necessarily requires hindsight judgment, i.e., whether the non-disclosed evidence might have affected the outcome of the case. A prosecutor when asked to disclose evidence pre-trial is not in a position to determine that question. In addition, even if the prosecution could make that determination, it would lead to the unacceptable conclusion that a prosecutor's obligation is less when

his or her case is strong.

Humes, 12 Va. App., at 1143 n.2, 408 S.E.2d 555 n.2 (emphasis added).

This footnote has been cited as the law of the Commonwealth in several cases, see, e.g., Hughes v. Commonwealth, 16 Va. App. 576, at 594, 431 S.E. 2d 906 (1993), and is presently the law of the Commonwealth.

In the instant case, these claims are being made to this court in the first instance, as if the court is sitting as a trial court. The standard for **pre-trial** disclosure of exculpatory and/or impeachment material is provided by the section of the Brady opinion immediately prior to the traditional, "materiality," quote. The Bagley Court defines exculpatory and or impeachment evidence as, "Such evidence is evidence favorable to an accused, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." Bagley, 473 U.S., at 767. Thus, the evidence that the prosecutor must disclose pre-trial is any, "evidence favorable to the accused … that **may** make the difference between conviction and acquittal." Id., (emphasis added). This is clearly wider in scope than the traditional Bagley standard at the appellate level, "a **reasonable probability** that, had the evidence been disclosed to the defense the result of the proceeding would have been different." Id., 681 (emphasis added). While the Bagley Court did not explicitly hold that these two different standards applied at different stages of

the process, this is the most logical analysis of the reasoning of the decision. This analysis is further bolstered by both the Humes and Hughes decisions - these cases making this explicit distinction the law of the Commonwealth.

If the trial court found a Brady violation, the remedy is a constitutional mandate. The non-disclosure of exculpatory evidence is a violation of due process. Brady v. Maryland, 375 U.S. 83 (1963). If there is non-disclosure of Brady material, the remedy at the trial court ranges from suppression of the evidence, grant of a continuance, see United States v. Smith Grading and Paving, Inc., 760 F.2d 527 (4th Cir. 1985), a mistrial, see Nguyen v. Commonwealth, 02 Va. App. Unpub. 1806012 (2002), or collateral proceedings for the disbarment of the withholding prosecutor. See Read v. Virginia State Bar, 233 Va. 560, 357 S.E.2d 544 (1987). See also Code § 19.2-265.4(B) (sanctions for knowing violation of discovery provisions of Rule 3A:11).

Finally, it is worth noting that the **ethical** standards for disclosure of exculpatory evidence supplied by the Rules of Professional Conduct is significantly more stringent than the appellate standard of Brady and progeny. A prosecutor shall;

> make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of the court...

Prof. Conduct Rule 3.8(d)(2000).

Note that the ethical duty of the prosecutor is not

satisfied by the same kind of, "independent source," relief from the constitutional duties of Brady and progeny. See Smith Grading and Paving, Inc., 760 F.2d, at 534 n.6 (4th Cir. 1985) ("the fact that disclosure came from a source other than the prosecutor is of no consequence."). The prosecutor's ethical duties are particularly relevant to the facts of this matter and the procedural posture of the entire prosecution of the Petitioner.

IV. THE FREEDOM OF INFORMATION ACT REQUEST.

On June 22, 2006, the Petitioner filed with the Federal Bureau of Investigation ("FBI") a Freedom of Information Act Request pursuant to 5 U.S.C. § 552 ("FOIA request"). See Pet. Ex 113. Specifically, the Petitioner requested any and all records and/or information relating to: "The abduction and murder of Iloise Cooper on August 30, 1990, in the City of Richmond Virginia." Pet. Ex. 113.

On July 10, 2006, the U.S. Department of Justice responded to said FOIA request stating that the request was, "forwarded to FBI Headquarters from our Richmond Field Office," and the request had been assigned a designation of, "Request No.: 1051873-000; Subject: Murder of Ilouise Cooper." The U.S. Department of Justice, FBI, stated, "We are searching the indices to our central records system at FBI Headquarters for the information." Pet Ex. 114.

On November 03, 2006, after hearing nothing further, the Petitioner inquired of the U.S. Department of Justice, FBI

("DOJ/FBI"), "when [the Petitioner] might anticipate some information from you regarding this matter." Pet. Ex. 115. Oddly, on February 02, 2007, the DOJ/FBI contacted the Petitioner to determine his current interest in pursuing the request and informing the Petitioner that he may, "expect a continuing delay due to the tremendous volume of work at hand." Pet. Ex 116. This correspondence included an attachment which the Petitioner was required to fill in and return. The required form was filled and returned immediately. The designation assigned by the DOJ/FBI remained, "Request No.: 1051873-000; Subject: Murder of Ilouise Cooper." Pet. Ex. 116.

On March,14, 2007, the DOJ/FBI verified that they, "have located approximately **5,324** pages which are potentially responsive to [the] request," designated by the government as, "Request No.: 10518730-000 Subject: Murder of Ilouise Cooper." Pet. Ex 117. On the same date, the DOJ/FBI sent a waiver form in order to allow the Petitioner's supporter, Lynnice Randolph, to, "have access to [the] information." Pet. Ex. 118.

On March 26,2007, the Petitioner returned the waiver form necessary to allow Lynnice Randolph access; agreed to pay the cost of duplication; and requested certain information with regard to any document the government might again withhold. See Pet. Ex. 119.

On May 29, 2007, the DOJ/FBI sent an interim volume of documents designated: "Subject: MURDER OF ILOUISE COOPER; FOIPA NO. 1051873-000." In this interim response, "642 page(s) were

reviewed and 344 page(s) are being released." ("FOIA Vol. I."). FOIA Vol. I. further stated

> This is in response to your Freedom of Information Act request concerning the Murder of Ilouise Cooper. In an effort to expedite the release of information to you, enclosed is an interim release of material (Richmond Field Office File 267-RH-47717 section 1 through 3). Additional records responsive to your request are currently being reviewed.

Pet. Ex 120.

On June 28, 2007, the Petitioner appealed, administratively, every excision, deletion, and redaction made by the DOJ/FBI with respect to FOIA Vol. I. On September 27, 2007, the U.S. Department of Justice, Office of Information and Privacy denied said appeal.

On August 22, 2007, the DOJ/FBI sent a second interim volume of documents designated: "Subject: MURDER OF ILOUISE COOPER; FOIPA NO.: 1051873-000." In this interim response, "1114 page(s) were reviewed and 388 page(s) are being released." ("FOIA Vol. II.") FOIA Vol. II. further stated,

> Document(s) were located which originated with, or contained information concerning other Government agency(ies) [OGA]. This information has been : referred to the OGA for review and direct response to you.

Pet. Ex. 121.

Moreover, pertinent to this Claim FOIA Vol. II. stated, "Enclosed is an interim release of material (Richmond Field office file 267RH-47717-A)." Pet. Ex. 121.

On October 11, 2007, the Petitioner appealed, administratively, every excision, deletion, redaction, and reference to other Government agencies with respect to FOIA

Vol. II.

On November 8, 2007, the Department of Treasury, Financial Crimes Enforcement Network ("FinCEN") sent 36 pages of the 59 pages of documents that originated, or contained information concerning FinCEN pursuant to the FOIA request which the DOJ/FBI forwarded to them for review. See Pet. Ex. 122 ("FinCEN Vol. I.").

On November 14, 2007, the Office of Information and Privacy affirmed in part, on partly modified grounds, and remanded in part the FBI's action on the Petitioner's FOIA request stating,

> With regard to twelve pages of records withheld from you in full, I am remanding your request for reprocessing of these records. The FBI will send any and all reasonable portions of these records to you directly, subject to any applicable fees. You may appeal any further adverse determination made by the FBI.

Pet. Ex. 123.

On January 29, 2008, the DOJ/FBI sent a third interim volume of documents designated: "Subject: MURDER OF ILOUISE COOPER; FOIPA No. 1051873-000." In this interim response, "1259 page(s) were reviewed and 625 page(s) are being released." Pet. Ex. 124 ("FOIA Vol. III."). The Petitioner received this interim release on March 28, 2008.

On April 02, 2008, the Petitioner filed an administrative appeal, objecting to every excision, deletion, and redaction with respect to FOIA Vol. III.

On April 30, 2008, the DOJ/FBI sent a fourth interim volume of documents designated: "Subject: MURDER OF ILOUISE

COOPER; FOIPA No. 1051873-000. In this interim release, "1068 page(s) were reviewed and 623 page(s) are being released." Pet. Ex. 125 ("FOIA Vol. IV.").

On June 16, 2008 the Petitioner filed an administrative appeal, objecting to every excision, deletion, and redaction with respect to FOIA Vol. IV.

On May 09, 2008, the DOJ/FBI sent a fifth interim volume of documents designated: "Subject: MURDER OF LOUISE COOPER; FOIPA No. 1051873-000." In this interim release, "428 page(s) were reviewed and 51 page(s) are being released." ("FOIA Vol. V.").

On June 16, 2008, the Petitioner filed an administrative appeal objecting to every excision, deletion, and redaction with respect to FOIA Vol. V.

To date, the Petitioner still awaits the twelve pages which were remanded for reprocessing.

It is important to note here that every document within FOIA Vol. I., FOIA Vol. II, FOIA Vol. III, FOIA Vol. IV, FOIA Vol. V, and FinCEN Vol. I. concerns the government's investigation of the murder of Ilouise Cooper. Moreover by the government's own admission, the documents were derived from the government's investigative file of the, "murder of Ilouise Cooper." Pet. Ex. 113 through 125.

(a) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE PRE-TRIAL MOTION TO DISMISS RELATING TO

THE GOVERNMENT'S PRE-INDICTMENT DELAY AND THE PREJUDICE FLOWING THERE FROM. SEE ALSO CLAIM C., AND CLAIM F.

The law with respect to the government's pre-indictment delay in violation of the due process clause and the resulting prejudice there from has been previously recited both within the instant *Habeas* proceedings, see Claim C., and in the criminal trial proceedings, see *Motion to Dismiss*, filed August 03, 2001. And, for the sake of brevity, those legal authorities will be incorporated herein as if fully set forth, but will not be recited again here.

However, the Petitioner makes clear that, because of the cumulative nature of the errors and/or prejudice flowing there from, the Petitioner states his intent that each and every legal authority, assertion, or claim be deemed competent to incorporate by reference every other legal authority assertion, or claim of the petition. And, because of the inter-related nature of the facts, allegations, claims, and legal authorities the Petitioner hereby incorporates every fact, allegation, claim, and legal authority into every other fact, allegation, claim, and legal authority.

On August 21, 2001, several pre-trial motions filed in the Circuit Court of the City of Richmond were heard before Judge Margaret P. Spencer in the underlying case. See Motions Hearings Transcript of August 21, 2001 ("8/21/01 M.H.TR."). One of the motions heard on August 21, 2001, was the

Defendant's/Petitioner's *Motion to Dismiss*. The underpinning of the *Motion to Dismiss* was twofold: a) pre-indictment delay; and b) destruction of evidence having potentially exculpatory value. Also pertinent to this claim is another motion heard that day, i.e., *Motion to Compel Discovery*. See 8/21/01 M.H.TR.

During the motions hearing defense counsel called to the stand one of the original detectives from the Richmond Police Department involved in this case, Detective Maurice D. Scott ("Scott"). 8/21/01 M.H.TR., at 7. Scott testified that he was, "involved in the investigation of a murder in 1990, Labor Day weekend of Eloise Cooper." Id., at 7. And, "in the course of that investigation," he spoke with the Petitioner at the police station. Scott testified that he could not recall whether the Petitioner had been charged, nor could he recall how long his conversation with the Petitioner was. Id., 7-8. What Scott did recall was, "after our conversation was over, [Scott] didn't see [the Petitioner] any more." Id., at 8. When asked whether Scott recalled whether his discussions centered around the Eloise Cooper murder, Scott responded, "I can't recall any of the conversation." Id., at 8-9. Scott further testified that he could not recall any conversation he had with the prosecutor, Learned Barry, about the results of Scott's investigation of the Petitioner, nor whether Learned Barry recommended that a prosecution of the Petitioner would be appropriate. Id., at 9. Scott's testimony was that because of the passage of 11-12 years, "today," he did not have any, "independent recollection

of any other information about [the Petitioner's] alleged involvement in the murder of Eloise Cooper." Id., at 9-10. However, when defense counsel asked Scott whether he, "had discussions with Richmond police detectives and/or FBI agents about the matter of Stephen Hood since 1990," Scott testified that, "a number of people have interviewed me that represent this case." Scott recalled that some of those individuals were FBI S.A. Stokes, FBI S.A. Messing, and Detective Wade. Id., at 10-11.

Defense then called another of the original detectives involved in the investigation of this case, Detective Thomas Surles ("Surles"). The testimony of Surles related to his handling of the evidence in the original case in 1990-1991 as he, "worked in the forensic science unit." Id., at 13. However, like Scott, Surles could not recall any of the details regarding his involvement in the case, for that matter Surles could not recall the name of the prosecutor. The only conversation Surles recalled having with a prosecutor was when he, "had a meeting with Mr. Trono and them." Id., at 13-17.

At that point in the hearing the defense counsel argued the *Motion for Leave* to subpoena Learned Barry, and how it related to the *Motion to Recuse*, and the *Motion to Dismiss*. Defense counsel addressed the fact that Scott interviewed the Petitioner, but Scott, "doesn't recall the substance of that." Id., 20. Defense counsel proffered, however, that Learned Barry, "will be able to testify about his meeting with

Investigator Scott after the interview with [the Petitioner] at which time Investigator Scott related to Learned Barry that he's not the one." Id., at 20.

The FOIA documents, however, reveal that the government withheld exculpatory evidence exonerating the Petitioner of this crime. One of the original Richmond Police Detectives was questioned by Richmond Police Detective George B. Wade, and FBI S.A. Messing on 5/08/2000 at his office in Chesterfield County. The unnamed Detective stated that, "[His] recollection is that Hood had an alibi for the time of the offense." FOIA Vol. I., at 174-175. Accordingly, the prosecutor withheld valuable material evidence favorable to the defense, and at the same time, the prosecutor withheld evidence which would have clearly demonstrated the prejudice prong of the Lovasco test for a claim that due process had been violated by the government's pre-indictment delay.

During the motions hearing defense next questioned Richmond Police Detective George B. Wade ("Wade") with regard to when Wade began investigating this case. Wade testified that he began his investigation in February of 2000. See 8/21/01 M.H.TR., at 43. Defense counsel then asked Wade the following:

> Q: And in the course of that investigation, you had an opportunity to review the prior file, the investigative file?
> A: Yes, sir, I did.
> Q: Approximately how many documents have you reviewed in regard to this case?
> A: You want it pages? Volumes?

Q: Best you can guess.
A: I would say about a four drawer file cabinet, at least, full of information pertaining to this case.

8/21/01 M.H.TR., at 43.

Defense continued his questioning of Wade regarding various acts of prosecutorial misconduct such as witness tampering, Id., at 52-54. (See also Claim J.(i), and K.(i).), and the initiation of an invalid arrest warrant from the City of Norfolk as well. Id., 54.

The defense next called Ralph T. Fleming ("Fleming"), another of the Richmond police officers involved in the original investigation of the murder of Eloise Cooper. Like Scott, and Surles before him, Fleming did not recall any of the particulars of the investigation in 1990. Neither could he recall: **a)** who handled the evidence, **b)** having any conversation with Scott about the Petitioner, nor **c)** the number of people he interviewed.

The last three pages of Fleming's testimony related to the matter of his being questioned by Wade, Stokes, and another investigator. These investigators, Fleming stated, questioned him regarding the investigation of the Jeffrey Cox matter. Id., at 62. When the agents discussed whether Fleming would meet with them to discuss the matter of the murder of Illoise Cooper, they also asked whether Fleming's, "lawyer would be present and that really bothered," Fleming. Id., at 64.

The next witness called by defense was FBI S.A. Paul

Messing ("Messing"). Id., at 68. Messing testified that he began investigating the matter of the murder of Eloise Cooper around February of 2000. Unlike defense counsel's general questioning of Wade with respect to Wade's, "review [of] the prior file, the investigative file," to which Wade responded was, "a four-drawer file cabinet, at least, full of information pertaining to this case," Id., at 43, defense counsel's question to Messing was more specific:

> Q: And have you had an opportunity to review **the prior investigative file of the Richmond Police Department detectives who investigated the original trial of Jeffrey Cox?**
> A: Yes, sir.
> Q: And how many documents have you reviewed in that file?
> A: Whatever was in there. As to pieces of paper, I wouldn't think there were more than maybe 100 pieces of paper.
> Q: How large is the physical file?
> A: As best I recall, the original police file that we received was no more than one accordion folder.

Id., at 69.

It is important to note that Wade and Messing could not have been testifying about the same file. Specifically, the file to which Messing referred was the, "investigative file of the Richmond Police Detectives who investigated the original trial of Jeffrey Cox," and that file consisted of at most a mere, "100 pieces of paper." Id., at 69. By contrast, the file to which Wade referred was simply, "the prior file, the

investigative file," which consisted of, "a four drawer file cabinet, at least, full of information pertaining to this case." Id., at 43. It is, therefore, self-evident that Messing and Wade could not have been referring to the same file. It is a reasonable probability that the file to which Wade referred was the file referenced in the Petitioner's FOIA request, which consisted of, "approximately 5,324 pages." Pet Ex. 117, i.e., the investigative file, "concerning the murder of Ilouise Cooper ... Richmond Field Office file 267-RH-47717." Pet. Ex 113 through 125. It is within the Richmond Field Office file ... 267-RH-47717 to which Wade referred, that the evidence of an alibi witness was contained and which the government failed to disclose to the defense.

The testimony of Messing continued,

Q: Now, you interviewed people who had known or were acquaintances of [the Petitioner] around the time of the murder?

A: Correct.

Q: And did you ask them their whereabouts during the time of the murder, whether they could recall it?

A: No. Most of them had absolutely no involvement with the incident.

Q: Did you interview a Mark Stillman?

A: Yes.

Q: And did you ask him about his whereabouts the eve of the murder or the day of the murder.

Mr. Young: Judge, I'm just going to object as to how this goes to pre-indictment delay...

Mr. Goodwin: Judge, we're talking about prejudice here. We're talking about availability of witnesses over

time.

Id., at 73-74.

The defense counsel was on the verge of learning about the Petitioner's alibi witness, however, the objection by the prosecutor and the testimony of Messing combined with the government's failure to disclose all worked together to prevent the defense from learning this valuable exculpatory evidence.

Messing's testimony in this regard continued to prevent the government's knowledge of an alibi witness from being entered into the record,

A: I think the question was, did we ask where he was that night.
Q: Right.
A: I can't answer that specific question. Mark Stillman was a friend of [the Petitioner's]. We were trying to get details of [the Petitioner's] life at the time. He was not a suspect in my mind, so I would not have asked him for an alibi for that evening.
Q: But asked him questions about whether or not he may have known where [the Petitioner] was. Certainly, that would be something you'd want to know.
A: I certainly asked him if he knew anything about the incident. Sure.
Q: And was he able to recall specific facts regarding that time frame.
A: Yes.
Q: Was he able to give any information that would tend to indicate [the Petitioner] was not involved in this?
A: I don't think - - he did not provide an alibi for [the Petitioner].
Q: Did you ask - - withdraw that. Did you talk to a

person named Paul Stillman?

A: Yes. And I'm trying to remember now. I might be getting Mark and Paul Stillman mixed up as we sit here today. They're both out of state; is that correct? Right.

Q: One's in Maryland and one is in North Carolina?

A: Right. One of them was much closer to [the Petitioner]. As we sit here right now, I'm confusing myself as to whether it was Paul or Mark.

Q: Well, address the one who you say was closer to [the Petitioner]. Was he able to recall specific events from that time period, 1990?

A: Yes. Nothing of substance, I don't believe.

Q: He couldn't recall whether or not he was with [the Petitioner] the night of the murder or the day after?

A: They definitely could not. Neither one of them could provide an alibi for [the Petitioner].

Id., 76-78.

Although Messing's interview of Mark and Paul Stillman allegedly failed to produce any specific recall on their part with regard to the Petitioner's whereabouts during the time of the murder, the Brady material contained in the FOIA documents revealed that the FBI had been told by one of the original investigators of the Cox case, "that [the Petitioner] had an alibi for the time of the offense." FOIA Vol. I., at 174-175. This revelation by one of the original police detectives was made to Messing and Wade on May 08, 2000, and the 302 of the interview was transcribed on May 22, 2000. However, the government failed to disclose this exculpatory evidence.

Defense counsel then continued to question Messing and

began to ask about the pre-indictment delay:

> Q: Do you know who investigated this case, what agents, prior to your involvement, and how many there were?
> A: I do know there were two.
> Q: Who were they?
> A: Agent Frank Stokes with the FBI and Detective Don Lacy, formerly of the Henrico Police Department.
> Q: And was he with Henrico at the time he was investigating this?
> A: He was. Whether he was on some type of task force, whether he was deputized, I don't recall. But he was a Henrico County police officer.
> Q: From your review of the information in the file, do you know when they initiated their investigation?
> A: Again, I'm sure it was in '99. I want to say October of '99, but it could have been earlier than that.[1]

8/21/01 M.H.TR., at 78-79.

The prosecution knew that this testimony of Messing clearly implied that the federal investigation began in 1999. Moreover, the prosecution and Messing knew this to be false. The FIOA documents reveal an ongoing investigation beginning in 1990-1991. The government may attempt to argue that Messing responded to the specific question of when Stokes and Lacy began their investigation. However, the prosecution possessed the investigative file which, as Wade described, consisted of a

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[1] The FOIA documents make clear that Stokes and Lacy were investigating this case prior to October. The letter from A.U.S.A. James Comey to S.A.C. Thompson dated October 8, 1999, mandated that Stokes and Lacy be **removed** from the ongoing investigation as, "they are the wrong men for the case." FOIA Vol. I., at 116-117.

four-drawer file cabinet, at least. Within this investigative file was an abundance of documents demonstrating that the investigation had been ongoing since 1990-1991. Yet, not only did the government remain silent as Messing knowingly created a false impression of material fact, but the government knew that it had withheld evidence from the defense which established the contrary of what Messing's testimony implied.

Finally, defense called FBI S.A. Stokes ("Stokes"):

Q: Mr. Stokes, I take it you're involved in the investigation of the murder of Eloise Cooper?

A: Yes. Not currently, but I was.[2]

Q: And when did you begin to be involved in that?

A: I believe it was around March of 1999.

Q: And how did you initiate that investigation? Who came to initiate that investigation?

A: I received a call regarding a habeas hearing that Jeffrey Cox -- that his attorneys were involved in. After that, I searched some files in our office[3] and I found a letter that had been sent to our office by Jeffrey Cox.[4]

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[2] It is important to note that Stokes' testimony here was false and the government knew it was false. Stokes was ordered off of this case by A.U.S.A. James B. Comey in a letter to FBI S.A.C. Donald W. Thompson, Jr. dated October 08, 1999. See FOIA Vol. I., at 116-117. This document was withheld by the government. However, in direct contradiction to this order, Stokes remained actively involved in this case. See Pet. Ex. 58, see also Claim F.F. (1).

[3] Stokes' testimony here provides verification that the FBI already had investigative files relating to the murder of Illouise Cooper prior to the habeas hearing of Jeffrey Cox to which Stokes referred.

[4] It is again important to note that Stokes' testimony that he found, "a letter," sent by Cox was misleading. The FOIA documents reveal that what Stokes found in the long existing file was thousands of documents, and, "several letters." See

8/21/01 M.H.TR., at 83-84.

Defense next questioned Stokes as to when he became aware of a statement allegedly made by Billy Madison ("Madison") to Madison's wife, Tracy Madison. Id., at 85.

> Q: How did you become aware of that?
> A: During an interview.
> Q: And that interview was with Tracy Madison?
> A: Yes.
> Q: Prior to that interview, had you reviewed the case file?
> Mr. Trono: Judge, again, the problem here is delay from 1990 to 1999.[5]
> The Court: He's going to tie that up at some other future witness.
> Mr. Trono: We've been down this road time and time again, Judge. Again these are not appropriate questions at this time.
> The Court: He's going to tie that up with some future witness, Mr. Trono. Let's just be patient.
> Mr. Trono: Yes, ma'am.
> Q: Had you reviewed the case file prior to that interview?
> A: What do you mean case file?
> Q: Any information regarding the murder of Eloise Cooper.

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e.g., FOIA Vol. I., at 84-86, and 118-120. The government withheld this evidence and failed to correct Stokes' misleading testimony.

[5] Remarkably, the prosecutor, A.U.S.A. Trono, is posturing that defense counsel is unable to establish a delay from 1990 to 1999, even though A.U.S.A. Trono is fully aware that he has withheld the very evidence which would establish this necessary prong of the Lovasco test during a *Motion to Dismiss* for pre-indictment delay.

A: Right. I'd reviewed our files.
Q: The FBI file?
A: Yes.
Q: And do you know when the FBI file was created?
A: I think the letter from Cox was dated sometime in 1996, as I recall. '96 or '97.
Q: And was that the only information in the file at that time, the letter from Cox.
A: Yes.

8/21/01 M.H.TR., at 86-87.

Here Stokes progresses from misleading to absolutely false testimony and Trono remained silent. The FOIA documents reveal that the FBI file was created as far back as 1990-1991, and consisted of approximately 5,324 pages. Accordingly, when Stokes testified that the FBI file in 1999 concerning the murder of Eloise Cooper consisted of one single letter from a convicted murderer residing in Virginia Department of Corrections, both Stokes and the prosecutor knew it was not true. The prosecutor also knew that the evidence to the contrary had been withheld from defense. Absent Trono's fulfilling his prosecutorial obligation and responsibility under Brady, defense and the Petitioner would never know the truth.

At the close of the hearing defense counsel argued the prejudice prong had been established because, "[the Stillmans] are people who are familiar with [the Petitioner], were familiar at the time and have lost recollections of whereabouts, alibis. Basically, we're talking about,

specifically, the ability to present alibi and the loss of that ability due to the passage of time." 8/21/01 M.H.TR., at 91-92.

Unbeknownst to defense counsel, the government withheld evidence which revealed that a person involved in the original investigation, "rec[alled] that [the Petitioner] had an alibi for the time of the offense." FOIA Vol. I., at 174-175. Had this evidence been disclosed by the government, the prejudice prong would have clearly been satisfied with the government's own file.

Next defense counsel argued that,

> " … it's incumbent upon me to ask this Court for leave to subpoena Mr. Trono to testify about the prosecutorial delay from March or June of 1999 until May of 2001. Now, it does not have to be a 10-year delay, Judge, to prejudice the defendant. What we have is a two-year delay."

Id., at 92.

Unbeknownst to defense counsel, the government withheld volumes of evidence which revealed a delay of 10-11 years. See FOIA Vol. I., at 34,84; 222; 228. See also FOIA Vol. II., at 21; 295-308; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168. Had the prosecutor produced this evidence, defense counsel would have easily satisfied the delay prong by demonstrating, with the government's own file, a delay of 10-11 years.

In direct contradiction to the evidence possessed by the government, and which the prosecutor failed to disclose, Mr. Trono stated in the government's defense:

> I think where Mr. Goodwin's chief complaint ought to be is the delay from 1990 until March of 1999. Of course, the only problem with that is he's put forward an advance

> of no evidence, whatsoever, that, that particular delay was to gain some sort of tactical advantage by the government. From the testimony that the court did hear today, **it's quite obvious what did happen. This case lay dormant because one individual was convicted.** There was a theory about another individual. That case was never made. **And then sometime in 1999, an agent with the FBI happened to reopen the case.** A two-year delay is not much at all given the nature of the case, given the fact that it's a serious case and it occurred sometime before. But nevertheless, Judge, the defendant needs to meet the burden to establish the pre-indictment delay and he has not even come close to that.

Id., at 94-95.

It is self-evident that the prosecutor remained silent while his investigators created false impressions of material facts regarding the pre-indictment delay. The prosecutor himself offered argument which was wholly contravened by his own case file. However, because the prosecutor never fulfilled his legal or ethical obligation to disclose the truth pursuant to Napue, Berger, Brady, and their progeny, neither defense counsel nor the Court was aware of these material facts. Even with the knowledge of the abundance of Brady material withheld by the prosecutor, Robert Trono ("Trono") stated as a representative of the government: "as far as exculpatory information, Mr. Goodwin claims that there has been a pattern of withholding exculpatory evidence. I don't know how strongly I can disagree with that." Id., 96.

With regard to Trono's obligation to disclose exculpatory and impeachment evidence to the defense, Trono stated,

> Mr. Goodwin has had far, far more discovery above and beyond what is received in a typical case. **Beyond that, we have complied with the rules. We understand our obligations with respect to exculpatory in formation that**

> **may come into our possession at any point from here until the-trial date. We will of course, comply with the court's order[6] and our obligations under the rules.**

Id., at 97-98.

Based upon the limited evidence before it, the Court made several decisions without benefit of the exculpatory and/or impeachment evidence, e.g.,

> On the discovery motion, the motion to compel discovery, the Court will order the Commonwealth to disclose all witness statements which may be inconsistent, which may lead to disclosure of exculpatory information, or which are in fact, exculpatory to the defense by 4 o'clock p.m. on Friday, August 24th.

Id., at 98-99.

The government defied this court order, as the FOIA documents clearly demonstrate.

CONCLUSION

With regard to the outcome of the Petitioner's *Motion to Dismiss* the Supreme Court has made clear, "[t]he question is not whether the defendant would more likely than not have received a different [result] with the evidence, but whether in its absence he received a fair [hearing on the motion to dismiss based on the government's pre-indictment delay], understood as a [hearing] 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." Kyles, 514 U.S., at 434.

In the absence of the non-disclosed Brady material the

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[6] See 8/21/01 M.H.TR., at 46.

court found, "that the two witnesses that the defendant referred to were able to recall specific facts about the time frame of 1991 and they could not give the defendant an alibi. But in any event, because of the number of investigators who were involved in the case and had no specific recollection of facts that were not in writing, the defendant might have incurred prejudice as a result of the delay." 8/21/01 M.H.TR., at 99-100.

However, because the government violated the federal law as established under Brady and progeny, neither the trial court, nor defense counsel were made aware that one of the original investigators involved in this case stated that, "his recollection is that Hood had an alibi for the time of the offense." FOIA Vol. I, at 174-175. There exists a, "reasonable probability," of a different result at this hearing, had this fact been known to defense counsel and revealed to the trial court. The government's evidentiary suppression in this regard undermines confidence in the outcome of the trial court's determination with regard to the prejudice prong of the Lovasco test

Likewise, in the absence of the non-disclosed Brady evidence, the trial court found:

> as to the delay from 1990 to 1999, the court will find that the basis of that delay was that there was no evidence or information on which an investigation could proceed. The testimony from witnesses was that the case file was open but dormant during that time.[7] If the basis

[7] To the contrary, no witness testified that this case, "was

> for the delay was that there was no evidence or information upon which any investigation could proceed, the Court cannot find that the government intentionally delayed indicting the defendant to gain a tactical advantage. The time period from March of 1999 to May of 2001, an investigation was proceeding. Although the Court cannot find, based on all of the law it has reviewed, that a time period of less than 24 months is sufficient to constitute delay, which would warrant further inquiry into the reasons for the delay or whether the defendant was prejudiced, the Court will presume that a time period of 24 months might have been sufficient to warrant that, and the Court will find that time period was for investigative purposes.

Id., at 100-101.

> The only information before the court was that a statement was made in 1998, which was not made known to the government until May of 1999, by Mr. Madison, which could have implicated the defendant. Clearly, that statement alone was not sufficient information on which any grand jury could find probable cause to indict. So any delay that occurred between March of 1999 and May of 2001 was for the purposes of legitimate investigative delay, because there is no evidence that the Commonwealth had sufficient information to indict the defendant. Therefore, there is no evidence that the Commonwealth intentionally delayed indicting the defendant to gain a tactical advantage, and the motion to dismiss for pre-indictment delay is denied.[8]

Id., at 101.

Clearly, but for the government's failure to disclose the Brady material discovered by way of the Petitioner's FOIA request, there is a reasonable probability that the outcome of

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open but dormant." This, "testimony," wrongly attributed to a witness was actually derived from Trono's improper argument, i.e., "it's quite obvious what did happen. This case laid dormant because one individual was convicted ... And then sometime in 1999, an investigator, an agent with the FBI happened to reopen the case." Id. at 94

[8] The Court failed to address the government's destruction of evidence having potentially exculpatory value, which was also a part of the underpinning of the motion to dismiss. See Claim D., F., and F.F.(b).

the proceeding on Petitioner's motion to dismiss for pre-indictment delay would have different. Bear in mind that a review of materiality for the purposes of a claim of a Brady violation is not a sufficiency of the evidence test, but rather a reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome.

Had the Brady material been disclosed to defense counsel he would have been able to adduce the following:

1) The investigation of this case never, "lay dormant,". Instead, there was an ongoing investigation beginning as early as 1990-1991, contrary to the testimony of the government agents and the position stated by the prosecutor. Defense counsel was precluded from contradicting the government's false assertions and false testimony in this regard. See, e.g., FOIA Vol. I., 34,84, 222-228. See also FOIA Vol. II, at 21, 295-308, 321-324; FOIA Vol. III at 29, 600-606, and FOIA Vol. IV at 168.

2) An individual involved in the original investigation stated to the government agents that, "[the Petitioner] had an alibi for the time of the offense," and the result of that precluded a prosecution of the Petitioner in 1990-1991. This statement was made to, and transcribed by Messing, however, as a result of the government's violation of Brady; defense counsel was precluded from questioning Messing regarding this matter. See FOIA Vol. I at 174-175.

3) The, "case file," consisted of thousands of documents,

as opposed to a single letter. FBI S.A. B. Frank Stokes created a false impression of material facts with regard to this issue, and defense was precluded from revealing that this government agent testified falsely in this regard while the prosecutor remained silent. See section IV, *supra*.

4) The government's investigation of this crime involved at least 10 members of the narcocide detectives of the Richmond Police Department. See section (f), *infra*.

5) The government's investigation of this case involved a litany of other suspects. See section (g), *infra*.

6) Several of the witnesses in this case have given drastically different statements regarding their testimony. See sections (d), (e) and (i), *infra*.

7) The government arrested and prosecuted several individuals for violations of 18 U.S.C. § 401 during the government's grand jury investigation of this case in federal court. See section (h), *infra*.

8) That, "since the trial [of Cox], all of the forensic evidence ha[d] been destroyed, to include tissue samples taken from underneath the fingernails of Cooper." See section (b), *infra*.

9) That on October 8, 1999, Stokes was ordered off of the case, however, in direct contravention to the order of his superior, Stokes remained actively involved in the investigation. See FOIA Vol. I., 116-117 219-221, FOIA Vol. II., 309. But cf. Pet. Ex. 58.

In conclusion, defense counsel was precluded from adducing evidence during this hearing which would have been contrary to the decision of the trial court. Defense counsel clearly would have established a pre-indictment delay of 10-11 years, and that the delay provided the government with a tactical advantage over the defendant, and, that the delay severely prejudiced the defendant. Accordingly,, "the disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." Kyles, at 441, 115 S.Ct. 1569; accord Monroe v. Angelone, 323 F.3d 286 (4th Cir. 2003); Workman v. Commonwealth, 272 Va. 633, 636 S.E.2d 368 (2006); Taitano v. Commonwealth, 4 Va. App. 342, 349, 358 S.E.2d 590, 594 (1987).

(b) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE PRE-TRIAL MOTION TO DISMISS RELATING TO THE GOVERNMENT'S DESTRUCTION OF EVIDENCE HAVING POTENTIALLY EXCULPATORY VALUE. SEE ALSO, CLAIMS D., AND F.

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The existence of tissue samples under the victim's fingernails was withheld from the Petitioner, along with the subsequent destruction of the tissue samples before they were forensically tested. The prosecution at one point in time was in possession of the physical evidence that could have

definitively resolved the identity of at least one of the perpetrators of the abduction and murder of the victim in this case. The government recovered tissue samples from underneath the fingernails of the victim after the murder. See FOIA Vol. II., at 322-323. That physical evidence was not presented at the trial of Cox, nor was it presented at the trial of the Petitioner. Further, that physical evidence was never mentioned to the attorneys for either Cox or the Petitioner. In fact, defense counsel was specifically advised that no physical evidence was recovered from the victim's fingernails. The subsequent destruction of that potentially definitive evidence by the government was not revealed to the Petitioner, nor explained by the government - imposing, as a matter of law, the inference that the evidence would have been damaging to the prosecution's case had the, "tissue samples," been presented. FOIA Vol. II., at 323.

The existence of potentially definitive evidence was never disclosed to defense counsel or the Petitioner. The government's destruction of this potentially definitive evidence was never disclosed to defense counsel or the Petitioner. In fact, the government specifically and actively misled defense counsel and the Petitioner regarding this evidence. See Commonwealth's *Response to Defendant's Motion to Dismiss*, filed by Robert Trono on May 13, 2001, at 3 ("The government anxiously awaits the defendant's proof that these clippings, which indeed have been lost, contain human flesh.").

Notwithstanding the government's challenge that the Petitioner provide, "proof that these [fingernail] clippings contain human flesh," Id., according to documents withheld from the Petitioner the physical evidence which had been, "**destroyed,"** by the government was, in fact, **"tissue samples taken from underneath the fingernails of Cooper."** FOIA Vol. II., at 323.

Moreover, contrary to the government's false assertion that the physical evidence was merely, "lost," which tended to imply a mere inadvertent happenstance, the withheld document gives the opposite inference of a purposeful bad faith event: "Since the trial [of Cox], **all of the forensic evidence has been destroyed, to include tissue samples taken form underneath the fingernails of Cooper."** FOIA Vol. II., at 323. See also FOIA Vol. I., at 125. While the government's actions are certainly relevant on the issue of prosecutorial misconduct, it is clear that the Petitioner was deprived of exculpatory and/or impeachment evidence that would have been devastating to the government's case. At the very least, the Petitioner was knowingly, specifically, and actively deprived of a 'missing evidence' inference at trial.

It is important to note that this document was generated in order for Trono to gain authority to open a federal investigation into the alleged wrong-doing of the Richmond government officials in the prosecution and conviction of Cox. See FOIA Vol. II., at 321 ("Richmond Division requests FBIHQ

authority to investigate captioned matter under 267 classification."). Accordingly, Trono's statement to his superiors that, "Since the trial [of Cox], all of the forensic evidence has been destroyed, to include tissue samples from underneath the fingernails of Cooper," was made to advance the proposition that the Richmond authorities had indeed acted in bad faith, with corruption at its core, and that, therefore, an investigation into the Richmond government's bad faith actions was necessary. See FOIA Vol. II., at 322 ¶3, and 4. To the contrary, when this same issue was raised by the Petitioner, Trono misled the defense and the Petitioner, by implying that there were no, "tissue samples," and even if that evidence once existed - it was simply, "lost," rather than, "destroyed."

(c) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO THE GOVERNMENT'S KNOWLEDGE THAT THE PROFFER STATEMENT WAS FALSE AS WAS THE TESTIMONY OF FBI S.A. MESSING RELATING THERETO. SEE ALSO CLAIMS J.(a), K.(a), D.D., AND E.E., *SUPRA*.

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1. Contrary to the false Proffer Statement (Pet. Ex. 23), and contrary to agent Messing's testimony (TR. tr., at 271, 273, 275, and 278-279), documents withheld by the government reveal that, "eyewitnesses testified that a white male wielding a five to six inch bladed **hunting-type knife,**" abducted the victim. FOIA Vol. I., at 1. The government's knowledge that the

eyewitnesses stated that the knife used by the culprits was identified as a, "six-inch **hunting-type knife,"** was never revealed to the Petitioner. However, this evidence is contrary to the false Proffer Statement, and Messing's testimony related thereto, which stated that it was a, "medium size [8-inch] chef knife" that was used.

2. Contrary to the false Proffer Statement, the government's investigation revealed that, "A third white male by the name of [_____] has been identified as having been present at the time Cooper was murdered." FOIA Vol. I., at 1-2. This evidence was never revealed to defense counsel or the Petitioner. However, this evidence is contrary to the false Proffer Statement and Messing's testimony relating thereto which stated that there was only Madison and the Petitioner present.

3. The government withheld information that Cox, "was wearing a brown 'buck knife' type case on his belt." FOIA Vol. I., at 154. Further, the government withheld the fact that the, "Commonwealth's Attorney lost the brown leather case, [and] buck knife." FOIA Vol. II., at 199. This evidence of a, "'buck knife' type case, [and] buck knife," is consistent with all of the eyewitness testimony against Cox, however, it is entirely contrary to the false Proffer Statement. Moreover, the loss of this evidence deprived the Petitioner of the ability to independently test the knife owned by Cox, and to independently compare the knife owned by Cox with the wounds found on the

victim. The existence of this physical evidence and the subsequent loss of this evidence was never disclosed to defense counsel or the Petitioner. Likewise, the loss of this physical evidence was never explained to defense counsel or the Petitioner.

4. The government withheld exculpatory and/or impeachment evidence derived from statements made on 05/08/2000 to federal agents by one of the original investigators involved in this case. Contrary to the false Proffer Statement, the withheld statements of the original investigator, in pertinent part states,

> If [Barry] had any concern about the guilt of [Cox] it was dispelled by a number of events. First was [Estelle Johnson's] reaction when [Cox] was brought into the courtroom at the preliminary hearing. [The original investigator] demonstrated to interviewers how ... [Estelle Johnson] indicat[ed] that he was the individual.

FOIA Vol. I., at 174.

The existence of this evidence was never made known to defense counsel or the Petitioner. This document was never disclosed to defense counsel or the Petitioner. This evidence was not only clearly exculpatory and material impeachment evidence as it is contrary to the Proffer Statement, this evidence was also contrary to the testimony of Messing regarding the false Proffer Statement.

5. Additionally, this same undisclosed document (FOIA Vol. I., at 174-175) provided further exculpatory and/or impeachment evidence stating,

> [The original investigator's] recollection is that, following the arrest of Hood on cocaine distribution

> charges, [the original investigator] received a telephone call from [_____] advising [him] that Hood was not the right guy. [The original investigator's] recollection is that Hood had an alibi for the time of the offense.

FOIA Vol. I., at 175.

The existence of this alibi which the original investigator recalled and which eliminated the Petitioner from being involved in these crimes is diametrically opposed to the Proffer Statement. It is beyond serious question that if defense counsel had been provided this exculpatory and impeachment evidence which was, in fact, generated by Messing, defense counsel's use of this document, along with other evidence, would have had a devastating affect on the government's knowing use of the false Proffer Statement. Moreover, the alibi evidence here would have caused a different result (when used properly by competent counsel) with respect to the Petitioner's *Motion to Dismiss*. The existence of an alibi would have been devastating to the government's entire case. See also FOIA Vol. IV., at 483 (The Petitioner's alibi was investigated and confirmed by the two trial attorneys for Cox prior to Cox's trial, and by the two private investigator's hired by Cox, "after the fact," which, "eliminated [the Petitioner] as a suspect").

6. On December 07, 2001 the government executed a search warrant on 103 Yew Avenue, Colonial Heights. See Pet. Ex. 43. 103 Yew Avenue was to be the marital residence of the Petitioner and Louise Branson. This search warrant produced volumes of, "handwritten letters," and, "related items," to

Louise Branson from the Petitioner. See FOIA Vol. III., at 127 (dated 12/13/2001) see also FOIA Vol. I., at 334 (dated 12/07/2001 - transcribed 03/04/2002). However, the government only disclosed two of those handwritten letters. See Pet. Ex. 37. All of the, "hand-written letters" and, "related items" dated 11/06/2001, or later, contained exculpatory and impeachment evidence relating to the false Proffer Statement which could have been used by competent counsel to seriously damage any reliability or credibility of the false Proffer Statement. However, none of the other, "hand-written letters," and, "related items," were ever disclosed to defense counsel or the Petitioner.

7. Between 11/12/2001 and 01/04/2002, an investigation was performed by the government (The FBI, the Richmond Police, and members of the Henrico County Sheriff's office), of all of the Petitioner's telephone calls to Louise Branson. This investigation entailed the government making recordings of the telephone calls from the Petitioner, while incarcerated in the Henrico County Jail, to Louise Branson. See FOIA Vol. I., at 339; FOIA Vol. III., 579-586. In large part, these recorded telephone conversations contained exculpatory and impeachment evidence regarding the false Proffer Statement. The existence of the recordings was never disclosed to defense counsel nor to the Petitioner. In fact, in an apparent breach of FBI policy and procedure the recordings were not entered into ELSUR until 02/18/2003 - over one year after the conclusion of the

investigation - over ten (10) months after the trial of the Petitioner, and - over five (5) months after the final judgment (sentencing) in the underlying criminal case. See FOIA Vol. I., at 340 ("Due to inadvertence on the part of Case Agent, these recordings were never entered into ELSUR"). It was the exculpatory and impeachment evidence contained in these CDs which precipitated the search warrant on 103 Yew Avenue mentioned above. See Pet. Ex. 43, 112, and 113. If the CDs had been turned over to defense counsel, the Petitioner would have been provided further evidence negating the veracity of the Proffer Statement, while demonstrating that others in addition to the government, Goodwin, and the Petitioner knew that the Proffer Statement was false.

8. Contrary to the false Proffer Statement and the testimony of Messing related thereto which stated that the knives in the sheath were a, "large," (10-inch) chef knife, a, "medium," (8-inch) chef knife, and a serrated bread knife; the government knew that the sheath was uniquely designed and fabricated to hold only a 10-inch chef knife, a serrated bread knife, and a small paring knife. See Claim D.D., *supra*. The fact that the sheath was only capable of carrying, and in fact did only carry, a 10-inch, a serrated, and a small paring knife was established and confirmed by several witnesses, however, the witness statements which were of exculpatory and impeachment value in this regard were never disclosed to defense counsel or the Petitioner. On 09/29/1999, for example,

the original notes of an interview by government agents that in pertinent part states that the Petitioner, "had a sheath that had three (3) knives 10 [inch], 8 [inch] brad [sic] serrated and 2-inch paring." FOIA Vol. II., at 125 (a)-(b) see also Pet. Ex. 94. The original notes of another interview by the government likewise stated that, "Steve had a sheath held Chef's knife, serrated knife, and paring knife. Hood always had three (3) knife sheath at work." FOIA Vol. II., at 132. See also, Pet. Ex. 94. Likewise, a later interview of the Petitioner stated that the only knives ever contained in the sheath were a, "bread, chef, [and] paring ... small chef, large chef, bread/serrated knife." FOIA Vol. II., at 154 see also, Pet. Ex. 94. The independent corroboration of the obvious physical limitations of the sheath, and the only knives the Petitioner carried in the sheath, was never disclosed to defense counsel or the Petitioner. The identity of the independent witnesses who corroborated the truth of the physical evidence was never disclosed to defense counsel or the Petitioner. These undisclosed witnesses and their statements to federal agents would have been a powerful source to impeach the false Proffer Statement and Messing's knowingly false testimony related thereto.

9. Contrary to the false Proffer Statement, the FBI file revealed that on 02/16/1991 the, "police took Hood to a public place witnesses, [Johnson and Corbin] did not identify him." FOIA Vol. III., at 29. This exculpatory evidence was never

disclosed to defense counsel or the Petitioner. Clearly, this evidence eliminated the Petitioner as a suspect in 1991, both before and after the trial of Cox, accordingly this document was favorable to the defense because of its exculpatory value, and because it revealed the ongoing unconstitutional pre-indictment delay and the prejudice flowing there from. Likewise, this undisclosed evidence would have been yet another source of impeachment of the false Proffer Statement and Messing's knowingly false testimony related thereto.

Further, the FBI's investigation continued to state, "It is **believed** that Stephen Hood was taken to some public place in order for eyewitnesses against [Cox, Estelle Johnson and James Corbin,] to view Hood." FOIA Vol. III., at 34. The inability of eyewitnesses to these crimes to identify the Petitioner could have been used by competent counsel to have a devastating affect on the prosecution's case. Of course, the Respondent may argue that these two undisclosed documents merely excluded the Petitioner from being the knife wielding culprit because the witnesses never identified the driver of the car.

However, the non-disclosure of exculpatory evidence does not end here. The FBI's documents which were never disclosed to defense counsel or the Petitioner further revealed that, "Steve has brown hair," and, "Police took Hood to a public place [witnesses against Cox, Johnson and Corbin] did not identify him." FOIA Vol. IV., at 168. This investigative report clearly and totally eliminated the Petitioner as having any involvement

with these crimes. The inability of the eye witnesses to identify the Petitioner as the knife wielding culprit now has the additional declaration that the Petitioner has, "brown hair," just a few days before Johnson was to testify that the driver of the car had, "blond hair." See Pet. Ex. 1. It may be argued that the eyewitnesses never identified the driver, however, the eyewitness did identify one glaring and distinguishing feature about the driver - the driver of the car had, "**blond hair.**" Pet. Ex. 1, at 85. Thus, the FBI file completely eliminated the Petitioner from being either of the culprits involved in these crimes. This undisclosed document would have been a valuable source to impeach the false Proffer Statement, and this FBI document would have been a devastating source of impeachment of the FBI agent's testimony relating to the false Proffer Statement.

Moreover, it is probable that had this evidence been disclosed to defense counsel and the Petitioner, a successful *Motion to Dismiss* would have been the result, when used by competent counsel. See Claim F.F(a). Clearly, this document, this evidence, and this information, all withheld from the Petitioner, undermines confidence in the verdict.

(d) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ESTELLE JOHNSON, A KEY EYEWITNESS FOR THE GOVERNMENT. SEE ALSO, CLAIMS J.(c), AND K.(c), *SUPRA*.

Estelle Johnson ("Johnson") was one of the eyewitnesses for the government in the trial of Cox in 1991, and the trial of the Petitioner in 2002. See Pet. Ex. 1, and TR. tr. At both the trial of Cox, and the trial of the Petitioner, Johnson's testimony was essentially the same. See Pet. Ex. 1, and Tr. tr. The only exception was Johnson's positive identification of Cox during the viewing of photo arrays, the preliminary hearing, and the trial of Cox. The Proffer Agreement, however, prevented defense counsel from adducing that identification testimony in the Petitioner's trial, even though the government knew that Johnson never recanted or equivocated her positive identification of Cox as the knife wielding abductor of the victim - which of course is in direct contradiction to the false Proffer Statement.

However, it has been recently discovered by the Petitioner that the government failed to disclose an abundance of documents, evidence, and information which revealed that Johnson offered false testimony in the trial of Cox, and by obvious corollary and analogy, therefore, offered false testimony in the trial of the Petitioner, known to be such by the government. This valuable impeachment evidence was never disclosed to defense counsel or the Petitioner. In remarkable contravention of due process, the government's investigation revealed that Johnson committed perjury in the trial of Cox, and then, the same government officials solicited essentially the exact same testimony known to be false in the trial of the

Petitioner. As another violation of due process, the government refused to disclose this impeachment evidence to defense counsel or the Petitioner.

One undisclosed FBI document in pertinent part states,

> An interview of [ ] who testified against [Cox] has offered extremely conflicting statements between both **her** current recollection of the abduction of Cooper and **her** actual trial testimony in 1991.

FOIA Vol. I., at 85 (dated 06/28/1999).

This statement made by federal agents was clearly in reference to Estelle Johnson as she was the only female eyewitness regarding the case that provided, "actual trial testimony in 1991," regarding the, "abduction of Cooper." Id. The existence of this powerfully damaging impeachment evidence with regard to one of the two eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. Clearly, this document would not only serve to impeach the eyewitness, but more importantly, this document would expose to the trial court the nature and extent of the prosecutorial misconduct of Trono, and the government at large in this case.

Again, on 09/28/1999 the federal agents stated,

> "An interview of [ ] who testified against [Cox] has offered extremely conflicting statements between both **her** current recollection of the abduction of Cooper and **her** actual trial testimony in 1991."

FOIA Vol. I., at 119.

Three more months of further investigation had been accomplished since FOIA Vol. I., at 85, *supra*, and the FBI's position with regard to Johnson's testimony remained unchanged. Johnson continued to offer extremely conflicting statements

regarding both her current recollection of the abduction of Cooper and her actual trial testimony in 1991. This document and information was never disclosed to defense counsel or the Petitioner.

This FBI document further revealed that Johnson and Corbin, the government's two **eyewitnesses,** recanted or changed their testimony from the trial of Cox with the exception of their identification of Cox in 1990 as the knife wielding culprit. Bear in mind that the government adduced essentially the exact same testimony from both Johnson and Corbin in the 1991 trial of Cox as the government adduced in the 2001 trial of the Petitioner. The solicitation of the exact same testimony in both trials is constitutionally abhorrent; and the prosecutorial misconduct is exposed by this FBI document which in pertinent part states,

> Numerous interviews continue regarding this investigation and during a meeting on September 27, 1999, AUSAs Comey and Trono advised that the FBI would basically have to prove that [ ] and Hood were the actual killers of Cooper and **even though previous witnesses against [Cox] have since recanted or changed their testimony from the time in 1990 of the trial to the present time, this would not make any difference in that their identifications of [Cox] in 1990 were not recanted.**

FOIA Vol. I., at 120 (emphasis added).

This document, and information was deliberately and actively withheld by the government, and was never disclosed to defense counsel or the Petitioner.

On 11/23/1999 the FBI's investigation led to the overarching conclusion that the testimony of Johnson and Corbin had deteriorated to the point of having no probative value. On

11/23/1999 the FBI generated a document with a singular purpose, i.e., "To report the **facts** of the case." FOIA Vol. I., at 124 (emphasis added). The primary statement in the 11/23/1999 document plainly states, "Original witness testimony has **changed drastically** concerning the abduction/homicide." FOIA Vol. I., at 124 (emphasis added). Neither this document nor this information was ever disclosed to defense counsel or the Petitioner. The government adduced from these witnesses the same testimony in the trial of the Petitioner as the, "original witness testimony," notwithstanding the FBI's determination that the testimony had, "changed drastically." FOIA Vol. I., at 124.

As the investigation progressed, the assessment of the eyewitnesses' statements degraded further to the point of being described as a direct contradiction to the trial testimony. This information was never disclosed to defense counsel or the Petitioner. On 12/16/1999 the federal government's documents revealed the following, albeit abusively redacted, statement regarding the witnesses in this case:

> Subpoena [_____] before a grand jury. Interviews of the [_____] have produced contradictory statements, and indicate that the [eyewitnesses] may have produced inaccurate testimony at the trial of [Cox]. In addition, [eyewitnesses] may have provided information which directly contradicts the testimony of the eyewitnesses at trial.

FOIA Vol. I., at 127 see also FOIA Vol. II., 328.

This information regarding the government's eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. Clearly, the government had an abundance of

evidence which fell within the definition of impeachment evidence under Brady and progeny. Equally clear is the government's pattern of illegally withholding said Brady material from the Petitioner and his defense counsel.

Early on in the investigation, the Richmond field office of the FBI under the direct oversight and authority of Robert Trono, conveyed the following information to the FBI office in Louisville:

> [Cox] was eventually convicted of this crime, based on eyewitness testimony which identified him as Cooper's abductor. Investigation at Richmond has determined that [Cox] may have been convicted on false or perjured testimony.

FOIA Vol. II., at 317.

This FBI communiqué further states,

> Richmond has also developed information that prominent Richmond [individual(s)] may have influenced the identification of [Cox] and the subsequent questionable testimony by eyewitnesses. In addition, several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox].

FOIA Vol. II., at 318.

The Richmond FBI employed this information as grounds to seek permission to travel by air to Louisville in order to conduct the interview of an individual. This valuable evidence regarding the, "false or perjured testimony," was never revealed to the defense counsel or the Petitioner. Likewise, the evidence of a prominent Richmond individual possibly having, "influenced ... the questionable testimony of witnesses," was never disclosed to defense counsel or the Petitioner. Moreover, the information and evidence that,

"Richmond City Police Personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox]," was never disclosed to defense counsel or the Petitioner.

The FBI documents recently discovered by the Petitioner further revealed compelling impeachment evidence which conclusively determined that, "**at least one** of the eyewitnesses committed perjury." The document from the Richmond FBI dated 05/25/1999 definitively revealed the following evidence:

> Interviews of the eyewitnesses who testified against [Cox]have revealed that **at least one of the eyewitnesses committed perjury**. The testimony of this eyewitness has been determined to be false and incorrect, and this has been corroborated by the second eyewitness. A polygraph was administered to the eyewitness, and the results indicated that the testimony and statements of the eyewitness were deceptive. In addition, other witnesses have indicated that Richmond City Detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322 (emphasis added).

This evidence and information that at least one of the eyewitnesses committed perjury, and the purported official corruption of witness coercion involved in this case was never disclosed to defense counsel or the Petitioner.

It is beyond serious question that an ethical and legally responsible Assistant United States Attorney, an Assistant Commonwealth Attorney, as well as the investigators involved in this case were aware that this information fell into the disclosure demands of Brady and progeny. Likewise, it is beyond serious question that in the hands of competent counsel this evidence and information would have been employed in a mighty

way to the detriment of the prosecution's case, and to the benefit of the Petitioner. This evidence would have, at least, precluded the prosecution from any attempt to put Johnson or Corbin on the witness stand to testify at all, much less allow the introduction of essentially the same testimony. Once the FBI concluded that the witness, - "at least one of the eyewitnesses committed perjury," - the government could not in good faith know what, if any, testimony from the eyewitnesses was truthful. Undoubtedly, at least some - if not all - of the eyewitness testimony in the trial of the Petitioner was known to be perjury, or at least false, incorrect, or inaccurate.

Finally, on 08/17/1999, the Richmond FBI sought to establish a wire tap under the authority of AUSA Robert Trono for violations of Title 18 U.S.C. § 1623 ("False Declarations Before A [federal] Grand Jury Or Court"). The factual underpinning for the request to establish said wire tap states,

> Investigation to date has revealed that **both** [Johnson and Corbin] **offered false testimony** during the trial of [Cox]... the murder trial of [Cox] in 1991.

FOIA Vol. III., at 85.

It was with this factual underpinning, and under the direction and authority of Trono, that authorization was provided to the Richmond FBI on August 18, 1999 and endorsed by the S.A.C. on 08/24/1999. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. This evidence clearly falls within the demands for disclosure pursuant to Brady and progeny.

The FBI investigation revealed that both of the

eyewitnesses provided false testimony in the murder trial of Cox, and by natural corollary and analogy both eyewitnesses very likely provided false testimony in the trial of the Petitioner. If proper pre-trial disclosure had been made by the government, any competent counsel would have been able to either preclude the eyewitness testimony, or destroyed the witness and/or the prosecutor if the witnesses did testify.

Accordingly, "since all of these possible [options and] findings were precluded by the prosecution's failure to disclose the evidence that would have supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." Kyles, 514 U.S. , at 454 *supra*.

(e) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO JAMES CORBIN, A KEY EYEWITNESS FOR THE GOVERNMENT. SEE ALSO CLAIMS J.(d), AND K.(d), *SUPRA*.

James Corbin ("Corbin") was one of the two eyewitnesses for the government in the trial of Cox in 1991, and in the trial of the Petitioner in 2002. See Pet. Ex. 1, and TR. tr. It is also well documented that at both the trial of Cox in 1991, and the trial of the Petitioner in 2002, the testimony of Corbin was essentially the same. See Pet. Ex. 1, and TR. tr. The only exception was Corbin's positive identification of Cox during the trial of Cox. The Proffer Agreement, however, prevented defense counsel from adducing the identification testimony in the Petitioner's trial, even though the government

knew that Corbin never recanted or equivocated his positive identification of Cox as the knife wielding abductor of the victim - which, of course, is in direct contradiction to the false Proffer Statement.

However, it has recently been discovered by the Petitioner that the government failed to disclose an abundance of documents, evidence and information which revealed that Corbin offered false testimony in the trial of Cox, and by obvious corollary and analogy, very likely offered false testimony in the trial of the Petitioner, known to be such by the government. This valuable impeachment evidence relating to a key eyewitness for the government was never disclosed to defense counsel or the Petitioner. In remarkable contravention to the demands of due process, the government's investigation revealed that Corbin committed perjury in the trial of Cox in 1991, then the same government officials solicited essentially the same false testimony, known to be false, in the trial of the Petitioner. Further exacerbating the violation of due process by the knowing use of false testimony, the government refused to disclose this valuable impeachment evidence and information to defense counsel or the Petitioner in direct violation of Brady, and progeny.

One undisclosed FBI document in pertinent part states,

> [An individual] at the time has furnished a totally different version of [Corbin's] observations as they relate to **his** trial testimony.

FOIA Vol. I., at 35 (dated 05/13/1999) (emphasis added).

This statement by federal agents was clearly in reference

to Corbin as he was the only male eyewitness regarding this case that provided, "trial testimony," relating to, "observations," of the abduction/murder. The existence of this powerfully damaging impeachment evidence with regard to one of the only two eyewitnesses in this case was never disclosed to the defense counsel or the Petitioner. Clearly, this document, this evidence, and this information would not only serve to impeach the government's eyewitness, but equally important, this evidence would serve to expose the nature and extent of the prosecutorial misconduct of Trono, and the government at large, relating to this case.

On 06/28/1999, the FBI issued a, "Case Status Report," with respect to this case. This document provided powerful evidence impeaching Corbin and his 'eyewitness testimony.' In pertinent part this FBI document related to this case and assigned to, "AUSA Robert Trono," states,

> Part of [Corbin's] **plea agreement** was to cooperate fully with any and all law enforcement authorities and to undergo a polygraph examination, if necessary. Within the past several moths, [Corbin] was polygraphed by SA [_____] and was deceptive on three key areas of **his** testimony which **he** had offered at the trial of [Cox] in February of 1991.

FOIA Vol. I., at 85 (emphasis added). See also FOIA Vol. I., 119 (dated 09/28/1999).

This document, evidence, and information was never disclosed to defense counsel or the Petitioner. Clearly, this evidence establishes that Corbin was testifying in the trial of the Petitioner under the terms and benefits of a plea agreement. The existence and nature of Corbin's plea agreement

was never disclosed to defense counsel or the Petitioner in direct violation of Brady and progeny, as well as Giglio and progeny. Likewise, the existence and nature of Corbin's deception, as well as which key areas of his testimony were deceptive was never disclosed to defense counsel. Bear in mind that Corbin's testimony, "which he had offered at the trial of [Cox] in February of 1991," was the same testimony Corbin offered in the trial of the Petitioner in 2002. Accordingly, the government knew that, at minimum, the same three key areas of testimony in the trial of the Petitioner were equally deceptive. However, the government remained silent while it knowingly solicited the same deceptive testimony. In the hands of competent counsel this document, this evidence, and this information would have had a devastating affect on the government's case against the Petitioner. Likewise, the revelation of Trono's misconduct throughout this case erodes any confidence in the outcome of the underlying criminal case.

Undermining the confidence in the outcome of the instant case, this extremely telling document further states that based on this, and other information including Johnson's false testimony,

> Assistant United States Attorneys (AUSAs) James B. Comey and Robert E. Trono have agreed after reviewing all of the investigation to date there is much reasonable doubt in the trial of [Cox] for the murder of Cooper.

FOIA Vol. I., at 85 see also FOIA Vol. I., at 119.

Remarkably, the same false and/or deceptive testimony used in the Cox trial which revealed, "much reasonable doubt in

the trial of [Cox]," is the exact same false/deceptive testimony that Trono solicited in the trial of the Petitioner. Yet, the government refused to disclose this evidence to defense counsel or the Petitioner, and prosecuted the Petitioner based upon the same false eyewitness testimony, which caused much reasonable doubt in the prior trial.

On 09/28/1999, the FBI issued another, "Case Status Report," containing much of the same information as the Report issued on 06/28/1999 mentioned above. See FOIA Vol. I., at 85. However, in addition the 09/28/1999 Report also included a, "Summary of Investigation Since Last Submission." The updated summary provided in pertinent part,

> Numerous interviews continue regarding this investigation and during a meeting on September 27, 1999, AUSAs Comey and Trono advised that the FBI would basically have to prove that [ ] and Hood were the actual killers of Cooper **and even though previous witnesses against [Cox] have since recanted or changed their testimony from the time in 1990 of the trial to the present time, this would not make any difference in that their identifications of [Cox] in 1990 were not recanted.**

FOIA Vol. I., at 120 (emphasis added).

This document, evidence, and information was never disclosed to defense counsel or the Petitioner. Neither the nature, extent, nor the content of the eyewitnesses' changed testimony and/or recanted testimony was ever disclosed to defense counsel or the Petitioner. However, notwithstanding Trono's statement that the witnesses changed and/or recanted their testimony provided in 1990, Trono solicited essentially the same testimony provided in 1990 in the trial of the Petitioner which the witnesses had since changed and/or

recanted. And, defense counsel and the Petitioner were left unaware of this prosecutorial misconduct due to the government's refusal to comply with the demands for disclosure under Brady, and progeny.

On 11/13/1999 the FBI's investigation led to the overarching conclusion that the testimony of Johnson and Corbin had reached the point of having zero probative value. On 11/13/1999, the FBI generated a document with a singular purpose, i.e., "To report the **facts** of the Case." FOIA Vol. I., at 128. The primary statement in the 11/13/1999 document states,

> Original witness testimony has **changed drastically** concerning the abduction/homicide.

FOIA Vol. I., at 124 (emphasis added).

Neither this document, nor this information were ever disclosed to defense counsel or the Petitioner. The government, however, educed from the, "original," witnesses essentially the same testimony in the trial of the Petitioner as the, "original witness testimony," notwithstanding the FBI's determination that the testimony had, "**changed drastically**." FOIA Vol. I., at 124. In the hands of competent counsel this powerful impeachment evidence, derived from and confirmed by an FBI investigation, would have resulted in the preclusion of the testimony of Johnson and Corbin.

On the other hand, if the government chose to put these witnesses on the stand after providing defense counsel with this Brady material, competent counsel would have destroyed the

witness through the FBI's impeachment of the witnesses and/or exposed the prosecutorial misconduct of Trono in soliciting testimony known to be false, inaccurate, or incorrect.

As the FBI investigation progressed, the government's assessment of the eyewitnesses' statements deteriorated to the level as to be described as a direct contradiction to the trial testimony. This information was never disclosed to defense counsel or the Petitioner.

On 12/16/1999, the federal government's document revealed the following, albeit extensively redacted, statement regarding the eyewitnesses in this case,

> Subpoena [ ] before a grand jury.
> Interviews of the [ ] have produced contradictory statements, and indicate that the [eyewitnesses] may have provided inaccurate testimony at the trial of [Cox]. In addition, [eyewitnesses] have provided information which contradicts the testimony of the [eyewitnesses] at trial.

FOIA Vol. I., at 127. See also FOIA Vol. II., at 328.

This information regarding the government's eyewitnesses in this case was never disclosed to the defense counsel or the Petitioner. Clearly, the government had an abundance of evidence which fell within the definition of impeachment evidence under Brady and progeny. However, equally clear is the pattern of illegally withholding said Brady material from the Petitioner and his defense counsel.

Early on in the investigation by the Richmond Field Office of the FBI, under the direct oversight and authority of Robert E. Trono, the Richmond FBI conveyed the following information to the FBI office in Louisville:

> [Cox] was eventually convicted of this crime, based on eyewitness testimony which identified him as Cooper's abductor. Investigation at Richmond has determined that [Cox] may have been convicted on false or perjured testimony.
>
> FOIA Vol. II., at 317.

> This FBI communiqué further states,

> Richmond has also developed information that prominent Richmond [individual(s)] may have influenced the identification of [Cox] and the subsequent questionable testimony by eyewitnesses. In addition, several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox].
>
> FOIA Vol. II., at 318.

This FBI stated these facts and information as a basis to seek permission to travel by air to Louisville in order to conduct an interview of an individual. This evidence favorable to the defense regarding the, "false or perjured testimony," was never disclosed to defense counsel or the Petitioner. Likewise, the evidence or information of a prominent Richmond individual(s) possibly having, "influenced ... the questionable testimony of witnesses," was never disclosed to the Petitioner or defense counsel. Moreover, the information and evidence that, "Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox]," was never disclosed to defense counsel or the Petitioner. Furthermore, the existence of this evidence and information was never disclosed to defense counsel or the Petitioner.

Additional FBI documents recently discovered by the Petitioner revealed further compelling evidence which

conclusively determined that, "**at least one of the eyewitnesses committed perjury.**" This document from the Richmond FBI dated 05/25/1999 definitively revealed the following information:

> **Interviews of eyewitnesses who testified against [Cox] have revealed that at least one of the eyewitnesses committed perjury.** The testimony of this eyewitness has been determined to be false and incorrect, and this has been corroborated by the second eyewitness. A polygraph was administered to the eyewitness, and the results indicated that the testimony and statements were deceptive. In addition, other witnesses have indicated that Richmond City Detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322 (emphasis added).

This evidence and information that at least one of the eyewitnesses committed perjury, the government's corruption of witness coercion involved in this case, and the fact that the detectives themselves committed perjury was never disclosed to defense counsel or the Petitioner.

An Assistant United States Attorney, an Assistant Commonwealth Attorney, as well as federal investigators and Richmond Police Detectives would recognize that this information and evidence fell within the demands for disclosure under Brady and progeny. Likewise, it is beyond serious question that in the hands of competent counsel this evidence and information would have been employed in a mighty way to the extreme detriment of the prosecution's case, and a powerful benefit to the Petitioner. This evidence and information, in the hands of competent counsel, would have, at minimum, precluded the prosecution from attempting to put Corbin or Johnson on the stand to testify at all, much less allow the

introduction of the same testimony. Once the FBI concluded that the witnesses - "at least one of the eyewitnesses committed perjury," -- the government could not ethically or legally know what portion, if any, of the testimony from the eyewitnesses was truthful. Undoubtedly, some - if not all - of the eyewitness testimony in the trial of the Petitioner was known by the government to be perjury, or at least false, incorrect, or inaccurate.

Finally, on 08/17/1999, the Richmond FBI sought to establish a consensual wire tap under the authority of AUSA Robert Trono for violations of Title 18 U.S.C. § 1623 ("False Declarations Before A [federal] Grand Jury Or Court"). The factual underpinning for the request to establish said wire tap states,

> Investigation to date has revealed that **both** [Corbin and Johnson] **offered false testimony during the trial of [Cox]** ... the murder trial of [Cox] in 1991.

FOIA Vol. III., at 85 (emphasis added).

It was with this factual underpinning, and under the direction and authority of Trono, that authorization for the wire tap was provided to the Richmond FBI on 08/18/1999, and endorsed by the S.A.C. on 08/24/1999. This document, evidence, and information was never disclosed to defense counsel or the Petitioner. The existence of this document, evidence, and information was never disclosed to defense counsel or the Petitioner. Clearly, this evidence and information fell within the demand for disclosure pursuant to Brady and progeny.

The FBI investigation consistently and repeatedly

revealed that both of the eyewitnesses very likely provided false testimony in the murder trial of [Cox], and by natural corollary and analogy, both eyewitnesses provided false testimony in the trial of the Petitioner. All the while, the government remained silent knowing that defense counsel and the Petitioner were unaware due to the government's failure to comply with its ethical and legal obligations under Brady and progeny. Further, the FBI investigation revealed that the Richmond Police potentially induced or coerced false testimony ... Worse yet, the federal prosecutor solicited the same potentially false/coerced testimony in order to indict, try, and convict the Petitioner.

The defense counsel and the Petitioner were never aware of the government's, and the eyewitnesses' violations in this case. If proper pre-trial disclosure had been performed by the government under the commands of due process, any competent defense counsel would have been able to preclude the eyewitness testimony, or destroy the witness and/or the prosecutor in the event that the prosecutor introduced the same testimony.

Accordingly, "since all of these possible [options, and] findings were precluded by the prosecution's failure to disclose the evidence that supported them, 'fairness' cannot be stretched to the point of calling this a fair trial." Kyles, 514 U.S. , at 454 *supra*.

Additionally, it is important to note that Corbin was promised immunity to avoid being prosecuted for perjury. See

FOIA. Vol. III., at 543. On 04/19/1999 the promise of immunity made to Corbin was plainly documented as follows,

> In conferences with Assistant United States Attorneys James B. Comey and Robert E. Trono, they have assured that in the event [_____] as the abductor of Cooper was, in fact, not truthful and/or suborned, [Corbin] will not be prosecuted for perjury if, in fact, **his** identification was coerced in any way.

FOIA Vol. III., at 453.

The promise of the federal prosecuting authority not to prosecute one of the eyewitnesses in this case was never disclosed to defense counsel or the Petitioner. The existence of an immunity agreement; or offer of immunity was never disclosed to defense counsel or the Petitioner. The result of the offer of immunity made by federal authorities to Corbin was never disclosed to defense counsel or the Petitioner. This is in addition to the plea agreement under which Corbin was already cooperating, "fully with any and all law enforcement authorities," which was also never disclosed to defense counsel or the Petitioner. See FOIA Vol. I., at 85 see also FOIA Vol. I., at 119. This Giglio evidence was never disclosed to defense counsel or the Petitioner.

(f) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO MEMBERS OF THE CITY OF RICHMOND POLICE DEPARTMENT AS SUSPECTS IN THIS CASE.

As early as 1991, the FBI was investigating officers of the Richmond Police Department ("RPD") as suspects in the murder of the victim in this case. At least ten (10) sworn law

enforcement officers of the RPD had reason to believe that they were being investigated by the FBI as suspects in this case. An attorney in the City of Richmond represented these ten (10) police officers in making a federal Freedom of Information Act request in 1991, in order to obtain all documents related to the federal investigations of these officers. See FOIA Vol. II., at 296-308 (request dated 04/11/1991). These documents were produced to the Petitioner in response to the Petitioner's federal Freedom of Information Act request relating to the, "Murder of Ilouise Cooper." See Pet. Ex. 113-125.

Along with other non-specified suspects, some of these suspects in a federal Continuing Criminal Enterprise investigation[9] were officers and administrators of the RPD. The means, methods, thoroughness, reliability, and veracity of a police investigation is subject to mandatory disclosure as impeachment evidence under Brady and progeny. See Workman, 272 Va., at 646; Kyles, 514 U.S., at 445. The fact that the Richmond Police Department itself, along with several of its officers, were actually suspects in the abduction and murder of Ms. Cooper was withheld from the Petitioner and his counsel. The fact that the investigating authority and its officers were themselves suspects in the crime for which the Petitioner was prosecuted is certainly exculpatory evidence and impeachment evidence that would have been devastating to the Commonwealth's

[9] also known as a "§ 267" investigation in the vernacular

case.

Further, on 04/15/1999, the federal authorities created a master file index related to a Continuing Criminal Enterprise and the murder of Ms. Cooper. See FOIA Vol. II., at 20-21. This federal file was created, "in order to facilitate an efficient management of this case which is expected to produce an extensive volume of investigation." FOIA Vol. II., at 21. In this document, the Petitioner is named as a suspect, along with other individuals not named in the document due to redaction made by the FBI. See FOIA Vol. II., at 21. The matter was also captioned as a, "Drug Related Homicide - Other Law Enforcement Individuals." FOIA Vol. II., at 21. Thus, it is plain that throughout the investigation of the Continuing Criminal Enterprise and the murder of Ms. Cooper, from 1991 through 1999, various law enforcement officers were suspects in the murder.

Additionally, on 05/04/1999, certain federal agents sent a communiqué, "To request authorization and concurrence of travel of a Special Agent and Special Federal Officer," to travel by air to Louisville in order to conduct an interview of an individual on May 06, 1999 through May 07, 1999. In large part, the factual underpinning provided by the Richmond FBI in order to be granted authority to travel to Louisville stated, **"several Richmond City Police Department personnel have been identified by witnesses as influencing or offering false or misleading testimony during the trial of [Cox]."** FOIA Vol. II.,

at 317-318.

Moreover, on 05/25/1999, the Richmond FBI sent a request to FBIHQ seeking, "authority to investigate captioned matter under 267 classification." FOIA Vol. II., at 321. A 267 classification is one in which authority is granted to investigate a Continuing Criminal Enterprise under Title 21 U.S.C § 848. See, e.g., FOIA Vol. II., at 323. As part of the factual underpinning for the FBIHQ to consider in order to justify and authorize a 267 classification, the Richmond FBI under the direction and authority of AUSA Robert E. Trono, provided the following,

> [Cox] was convicted of the murder based on the testimony of two eyewitnesses who identified him as Cooper's abductor. The eyewitnesses were identified and interviewed by Richmond city detectives suspected of having a professional relationship with noted Richmond [_____] ... A review of financial records in captioned matter, along with information through interviews, indicate that [_____] was paid a substantial sum of money by [_____]. During this same period of time, Richmond city detectives changed their focus of their investigation ... In addition, other witnesses have indicated that Richmond City detectives may have pressured the eyewitnesses to identify [Cox] as Cooper's abductor.

FOIA Vol. II., at 322.

This information, and evidence regarding the Richmond Police themselves, "influencing or offering false or misleading testimony," was never disclosed to defense counsel or the Petitioner. Likewise, this information, and evidence of witness coercion by the Richmond City Police Department was never made available to defense counsel or the Petitioner.

Even though the FBI maintained a full page deletion rate

of 55% of the documents responsive to the Petitioner's FOIA request (see subsection IV., *supra*), the response still contained several interviews, and other documents indicating the FBI's belief that the Richmond Police detectives themselves were suspects in this case. See, e.g., FOIA Vol. I., at 145-147, 152-158, 174-175, 200; FOIA Vol. II., 199-200, 327-328; and FOIA Vol III., at 543.

It is also vital to underscore here the value of this impeachment evidence with regard to the Petitioner's *Motion to Dismiss* for Pre-indictment Delay. See subsection (a), *supra*.

(g) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO OTHER UN-NAMED SUSPECTS IN THIS CASE.

As previously noted, the federal authorities created a master file index related to a Continuing Criminal Enterprise and the murder of the victim in this case. See FOIA Vol II., at 20-21. This federal file index was created, "in order to facilitate an efficient management of this case which is expected to produce an extensive volume of investigation." FOIA Vol. II., at 21. In this document the caption of the case file indicates the Petitioner as a suspect, along with other individuals not named, and yet to be discovered due to the redaction made by the FBI. See FOIA Vol II., at 21. Along with the Petitioner, "other law enforcement individuals," and the redacted names of individuals, other suspects are also listed. These other suspects are not named in the Exhibits, but are

consistently designated by the FBI simply as, "ET AL." See FOIA Vol. II., at 21. The fact that additional persons including law enforcement personnel, currently not identified, were also named or known as suspects in the murder of Ms. Cooper was never made available to defense counsel or the Petitioner.

For example, on 04/02/1999, the FBI identified a, "third white male by the name of [_____] ... as having been present at the time Cooper was murdered." FOIA Vol. I., at 1-2. On 09/25/2000, a consensual phone tap was approved. An unnamed individual, "agreed to make consensually monitored contact," with another un-named individual, "in an attempt to get **him** to confess his involvement in Cooper's murder." FOIA Vol. III., at 87. On 01/12/1991, investigation revealed,

> that in the western black community and on Church Hill the theory in this case is as follows: A black drug dealer was murdered. He was supposed to have been murdered by another black drug dealer. The friends and family of the man killed, rather than kill the killer decided to kill his mother ... two white dudes picked the contract up and killed the mother. The woman that was killed was the mother of the drug dealer.

FOIA Vol. III., at 601.

On 04/27/1991, the FBI investigation revealed that an un-named individual in November of 1991, "had been bragging about the murder of Cooper," ... and that, "the Richmond Police were 'dumb'." This un-named individual, "had bragged about killing Cooper." FOIA Vol. V., at 1-2. All of the evidence with regard to the litany of other un-named suspects was with held from defense counsel and the Petitioner.

(h) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE

WITH REGARD TO THE ARREST OF CERTAIN INDIVIDUALS FOR VIOLATIONS OF TITLE 18 U.S.C. § 401 INVOLVING THIS CASE.

The federal prosecuting authorities involved in this case held several federal grand jury proceedings related to this case. On 07/23/1999, a certain individual was arrested for violating Title 18 U.S.C. §401 relating to the murder of Ilouise Cooper. See FOIA Vol. I., at 79. For the record, 18 U.S.C. § 401 states,

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as –
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in the official transactions;
> (3) Disobedience or resistance to its writ, process, order, rule, decree, or command.

The acts which would fall under a violation of this federal law are far reaching - from evasive testimony of witnesses see, Lang v. United States, 55 F.2d 922 (2nd Cir. 1932), to bribes, see, Keeny v. United States, 17 F.2d 976 (7th Cir. 1927), and refusing to testify. See United States v. Wilson, 640 F.Sup. 238 (N.D. W.Va. 1986). Perjury, of course, is also contemplated by this statute. See e.g., The Dunnigan Sisters, 53 F.2d 502 (D.C. N.Y. 1931), as is influencing or impeding witnesses. See Re Savin, 131 U.S. 267 (1889); Re Cuddy, 131 U.S. 280 (1889); Carlson v. United States, 209 F.2d 209 (1st Cir. 1954).

The name of the individual arrested on 07/23/1999 for

violating 18 U.S.C. §401 relating to this case was never disclosed to defense counsel or the Petitioner. The nature of or the existence of the alleged violation which precipitated the arrest of this individual relating to this case was never disclosed to defense counsel or the Petitioner. Whether the arrest resulted in a conviction of this individual for violating 18 U.S.C § 401 was never disclosed to defense counsel or the Petitioner. Clearly, this evidence and information was favorable to the defense for impeachment purposes.

Likewise, on 08/25/1999 a certain individual was arrested for violations of 18 U.S.C. § 401 relating to the murder of Ms. Cooper. See FOIA Vol. I., at 94. The name of the individual arrested on 08/25/1999 for violating 18 U.S.C. § 401 relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. The nature of nor the existence of the alleged violation which precipitated the arrest of this individual relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. Whether the arrest resulted in a conviction of this individual for violating 18 U.S.C § 401 was never disclosed to defense counsel or to the Petitioner. Again, it is plain that this evidence and information was favorable to the defense for impeachment purposes.

Finally, other previously undisclosed documents and information within the response to the Petitioner's FOIA request indicate completed arrest(s) of individual(s) by the

federal authorities relating to the murder of Ms. Cooper. See, e.g., FOIA Vol. II., at 114-115. The identity of the arrested individual(s) relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. The nature nor the existence of any federal arrest of individual(s) related to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. Whether the arrest(s) resulted in a conviction of the individual(s) relating to the murder of Ms. Cooper was never disclosed to defense counsel or the Petitioner. This evidence and information clearly fell within the demand for disclosure under Brady and progeny, due to the impeachment value this evidence and information presents.

(i) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ITS ONGOING INVESTIGATION OF PERJURY COMMITTED BY INDIVIDUALS INVOLVED IN THE CASE OF COMMONWEALTH V. COX, AND THE PETITIONER'S UNDERLYING CASE.

As recently as May, 1999, certain FBI agents and federal officers were conducting field interviews in the furtherance of their investigation of the murder of Ms. Cooper, the victim in this case. On May 04, 1999 various federal law enforcement agents sought permission to travel to another FBI field office in order to conduct witness interviews, based partly on the belief that Cox, "was set up," and that Cox had been, **"convicted on false or perjured testimony."** FOIA Vol. II., at 317. Further, a prominent figure figure in Richmond was

believed to have, "influenced the identification of [Cox] and the subsequent questionable testimony." FOIA Vol. II., at 318. The fact that the FBI believed a witness in the Cox trial was suspected of providing false testimony, or had actually committed the crime of perjury, was never disclosed to defense counsel or the Petitioner. The fact that the FBI believed that witnesses were influenced or coerced into providing questionable testimony was never disclosed to the Petitioner at trial, nor to the Petitioner's defense counsel.

Later, on May 25, 1999, the FBI was confident that at least one of the eyewitnesses who testified against Cox committed perjury. See FOIA Vol. II., at 322. The same two eyewitnesses who testified on behalf of the government in the Petitioner's case - without any disclosure from the government that, "at least one," of those same witnesses had previously committed perjury in connection with the murder of Ms. Cooper. Furthermore, this same document (FOIA Vol. II., at 322) strongly suggests that these eyewitnesses and RPD detectives were influenced by a prominent figure. There are further implications that this same prominent figure was thought to have, "funneled money to detectives and eyewitnesses." These allegations of official corruption were never disclosed to defense counsel or the Petitioner. This information and evidence was favorable to the defense because one of the lead investigators in the prosecution of the Petitioner was himself a Richmond Police Detective: Detective George B. Wade.

Moreover, several of the witnesses who testified at the hearing on the Petitioner's *Motion to Dismiss* were themselves some of the original Richmond Police Detectives involved in this case. See subsection (a), *supra*. See also 08/21/2001 M.H. Tr. With respect to this issue, it cannot be over emphasized that the same two eyewitnesses in the Cox case are the same two eyewitnesses in the Petitioner's case, and that the testimony of both witnesses at both events was essentially the same. However, the FBI concluded that, "at least one of the eyewitnesses committed perjury," and the government illegally withheld that information and evidence from defense counsel and the Petitioner.

Further, it was strongly believed that certain un-named individuals, suspects, and witnesses were continuing to commit perjury in the federal grand jury proceedings related to the murder of Ms. Cooper, as well as the Cox habeas hearings. See FOIA Vol. I., at 68, 84, and 86; FOIA Vol. II., at 327-328; FOIA Vol. III., at 82, and 85. In fact, Corbin was promised by AUSAs James B. Comey and Robert E. Trono that he would, "not be prosecuted for perjury if, in fact, **his** photo identification was coerced in anyway." FOIA Vol. III., at 543.

(j) THE GOVERNMENT WITHHELD EVIDENCE FAVORABLE TO THE DEFENSE WITH REGARD TO ITS ONGOING INVESTIGATION OF BILLY MADISON AS A SUSPECT IN THIS CASE.

It is not contested by anyone that at least two

individuals were involved in the abduction and murder of Ms. Cooper. One of the individuals developed as a suspect in these crimes has always been Billy Madison. However, Billy Madison has never been arrested, charged, indicted, tried or convicted of any offense related to the abduction and/or murder of Ms. Cooper, in spite of being named as the murderer in the false Proffer Statement. The means, methods, thoroughness, reliability, and veracity of a police investigation is subject to mandatory disclosure as impeachment evidence under Brady and its progeny. See Kyles, 514 U.S., at 445; Workman, 272 Va., at 646. However, the reason for Maidson's glaring absence from any legal proceedings related to the abduction and murder of Ms. Cooper has never been explained to defense counsel or the Petitioner.

The glaring absence of Madison from any prosecution relating to these crimes may, therefore, be attributable to one or many combination of reasons, all of which would fall under the demands for disclosure under Brady and/or Giglio. For example, (1) as noted above, the means, methods, thoroughness, reliability, and veracity of a police investigation related to Madison; (2) any evidence derived from the government's investigation of Madison which exculpates the Petitioner; (3) any evidence derived from the government's investigation of Madison which impugns the veracity of the Proffer Statement; (4) any and all consideration or promises of consideration conferred by the government on Madison; (5) any plea agreements

or offers made to Madison, any and all promises or offers of immunity, and/or any and all promises of leniency relating to Madison; (6) any testimony or statements by Madison which exculpates Madison and/or the Petitioner (including any denials made by Madison); (7) any impeachment evidence derived from the investigation of Madison as it relates to Tracy Madison, e.g., reasons to testify falsely, alcoholism, drug use, psychological or psychiatric history, domestic violence and so forth.

Considering Madison’s glaring absence from any legal proceedings relating to the abduction and murder of Ms. Cooper, and the broad scope of Brady and Giglio, it is very likely that the government withheld from defense counsel and the Petitioner exculpatory or impeachment evidence derived from the government’s investigation of Madison.

CONCLUSION

The prosecutor is charged with constructive knowledge of all information which is known to all of the prosecutor's agents and servants. In this matter the prosecutor, as well as several of the witnesses who testified in the incidents of the Petitioner's trial and pre-trial proceedings who were themselves federal and state law enforcement officers, had personal and **actual knowledge** of material and compelling exculpatory evidence. The prudent prosecutor will always resolve doubtful questions in favor of disclosure.

Such disclosure will serve to justify trust in the prosecutor as the representative of a sovereign whose interest

in a criminal prosecution is not that it should win a case, but that justice shall be done. Kyles, 514 U.S., at 339 *supra*. It is manifestly clear that justice was not done with respect to the Petitioner, that the due process guarantees of the United States Constitution and the Virginia Constitution were violated, and the Petitioner was deprived of a fair trial by the government's failure to disclose exculpatory and impeachment evidence to the Petitioner or his trial counsel.

"When police or prosecutors conceal significant exculpatory or impeachment material in the state’s possession, it ordinarily incumbent on the state to set the record straight." Banks v. Dreke, 540 US 668, at 675-676 (2004).

WHEREFORE, based on the facts and the authorities cited herein, the Petitioner prays that this Honorable Court will grant the Writ of Habeas Corpus or, in the alternate, take this claim under advisement until the conduct of the plenary hearing on the Petitioner’s habeas claims, and after the taking of said evidence, issue the Writ with prejudice, along with whatever relief the Court may deem appropriate.

Respectfully submitted,

Stephen James Hood, by counsel.

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Robert M. Lorey

I ASK FOR THIS:

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