IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, v. THEODORE F. STEVENS, Defendant.	No. 08-cr-231 (EGS)

SENATOR STEVENS'S MOTION TO DISMISS THE INDICTMENT; OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL, DISCOVERY, AND AN EVIDENTIARY HEARING

A whistleblower complaint submitted by a Special Agent with the FBI now confirms what the defense has long believed and alleged: the government cheated and lied in order to obtain a verdict against Senator Ted Stevens. The whistleblower is in a position to know, as s/he was "significantly involved in the investigation and prosecution of the defendant." Dkt. 255 at 19. The whistleblower reports "many serious problems . . . encountered in the recent trial of U.S. Senator Ted Stevens" and that s/he "witnessed or learned of serious violations of policy, rules, and procedures as well as possible criminal violations" by members of the prosecution team. *See* Dkt 256-2 ("Compl."), "Motivation"; "Summary of Complaints." These serious violations include fostering an improper relationship with the government's star witness (whom the defense contends fabricated the most important testimony in the case), intentionally withholding exculpatory information from the defense, and scheming to keep an important witness away from the defense after the government's attempts to prepare that witness to testify went badly. The new whistleblower complaint shows unmistakably that government

representatives lied to the Court or stood by silently while other members of the prosecution team represented facts to the Court that simply were not true.

Of course, government misconduct was known to the defense and the Court even before the whistleblower's revelations. The Court has already found that the government used "documents that the government [knew were] false, not true." Tr. (Oct. 8, 2008, p.m.) at 57. And the Court has found that the government intentionally violated Rule 16 of the Federal Rules of Criminal Procedure by withholding relevant bank records from the defense. Compl. ¶ 9.b; Tr. (Oct. 8, 2008, p.m.) at 26-29. We now know from a government insider that the prosecution's misconduct was far more pervasive than previously revealed. As the Court has noted, "[i]f the complaint provides information that was not available to the Court [during trial], and/or information that contradicts the government's representations to the Court at the time, that information could obviously bear on the integrity or result of the trial." Dkt. 255 at 22. As described below, the complaint provides exactly this kind of new information, showing both that the government's misconduct was worse and more extensive than previously known, and that the government lied to the Court about it.

This has been a case of prosecution by any means necessary. The Court should exercise its power to dismiss this indictment. As Judge Black found in *United States v. Omni International Corporation*, 634 F.Supp. 1414, 1438 (D. Md. 1986), a case litigated by Senator Stevens's senior trial counsel, the supervisory power doctrine "is designed and invoked primarily to preserve the integrity of the judicial system." In this case, though the Court labored to try to provide a fair trial, the Court necessarily had to rely on the integrity of the government, and it is now clear that the government's prosecution of Senator Stevens lacked integrity. A federal election has been irreversibly affected. It is too late to change that. But it is not too late to

impose a sanction that lets the government know that this kind of conduct will not be tolerated in the future.

At the very least, Senator Stevens is entitled to a new trial – this time with the benefit of all of the information to which he was entitled the first time. And Senator Stevens is entitled at the least to a new trial in which his defense lawyers are not required to devote enormous amounts of time and other resources to attempting vainly to extract from the government information and materials to which any defendant is entitled.

While the whistleblower's complaint informs the Court of all it should need to know in order to dismiss this case, it would appear that there is still much that the defense and the Court do not know. Only discovery and an evidentiary hearing could hope to uncover the full truth. After such discovery and an evidentiary hearing, the Court could assess whether the defense has finally received all of the information and materials to which it was entitled or whether the government's failure to maintain proper records and evidence (as reported by the whistleblower) has made it impossible for Senator Stevens ever to receive a fair trial.

THE WHISTLEBLOWER'S COMPLAINT

The whistleblower filed an administrative complaint sometime before December 2, 2008. The complaint sets forth the whistleblower's observations of misconduct by members of the prosecution team, apparently over a long period of time. Though the whistleblower witnessed these events as they happened – and other members of the prosecution team either witnessed or participated in them – Senator Stevens did not learn of the whistleblower's observations or his opinion about them until December 11, 2008 – 46 days after the jury returned its verdict. By that time, the whistleblower had submitted his complaint to government officials

outside the prosecution team, and the government had no choice but to reveal it to the defense as *Brady* material.[1]

While the whistleblower's complaint speaks for itself, the information highlighted below is particularly noteworthy.

1. **Improper Relationship with Bill Allen**. Bill Allen was the government's star witness. Allen's testimony that Bob Persons told Allen that Senator Stevens was just "covering his ass" when he requested a bill from Allen was the most important evidence in the case. As set forth in Senator Stevens's Motion for a New Trial, Dkt. 249, at pages 36-39, the defense contends that Allen recently fabricated this testimony. There was no reference to it in any government interview memorandum relating to Allen. It is inconsistent with other information provided by Allen during the investigation. The government never asked Bob Persons about it, and the government had to prod this testimony out of Allen. The government knew, but the defense did not know, that a member of the prosecution team had fostered an inappropriate relationship with Allen [redacted]. What could be more relevant to a defense that testimony was recently fabricated?

The whistleblower also believes that a government representative violated the grand jury secrecy rule and improperly revealed other information to Allen, including

[1] Even then, the government saw fit to wait until after Senator Stevens's December 5 deadline for filing post-trial motions had passed before disclosing the whistleblower's complaint. The whistleblower's complaint is undated, but the government admits that the Office of Public Integrity learned of it on December 2.

information regarding an investigation of Allen. [redacted] This information is highly relevant to Allen's motivation to please the government and should have been disclosed to the defense.

2. **Intentional Redaction of Information Helpful to the Defense**. The whistleblower also reports that another government representative admitted to him or her after the Court excoriated the government for concealing crucial exculpatory material, "that [s/he] redacted the information [from an FBI Form 302] and did so because [s/he] was redacting to fit the Brady/Giglio letter that had previously been provided to the defense." Compl. ¶ 9.a (emphasis added). The September 9 *Brady/Giglio* letter to which the whistleblower refers was false, *see* Dkt. 249 at 33, and providing the exculpatory information that we now learn was intentionally redacted from the Form 302 would have put the lie to that *Brady/Giglio* letter. The defense believed that this was done intentionally to perpetuate the falsehood of the September 9 *Brady/Giglio* letter, but the government represented to the Court over and over again that it was not engaged in "hide the ball" and that any redaction was an unintentional mistake. *See e.g.*, Tr. (October 2, 2008, a.m.) at 27 ("It wasn't hide the ball); *id*. at 11 ("I think it was – it was an error in not giving it, and judge, I would submit to you too that it was not done intentional[ly] by any stretch of the imagination. . . . It was human error."); Tr. (Oct 2, 2008, p.m.) at 32 ("I can just tell you it was a mistake. Nobody had any, any conscious decision or any malintent (phonetic) to

come forward with this Court to try to deliberately deprive this defendant of any, any information or this Court of any order that it issued."); *id*. at 27 ("Judge, it was a mistake. Again, if it was in any way intentional, we could have explained this away or rationalized it away as to why it didn't have to be turned over, and that's not – no, it was a mistake, but again – ."). The whistleblower complaint shows that these government representations were not true.

The whistleblower also reports that even after the full prosecution team learned that exculpatory information had been redacted from the Form 302, at least one member of the team remained "absolutely against" turning over the exculpatory information. Compl. ¶ 12.a. Although the exculpatory information was ultimately revealed to the defense, this episode raises serious questions about the extent to which that particular member of the team honored his or her obligations to disclose other exculpatory information and material.

3. **Allen's Bank Account Information**. Similarly, the whistleblower's complaint confirms that the government intentionally withheld relevant discovery – Allen's bank account information – and ambushed the defense with it at trial. Members of the prosecution team "decided not to provide defense counsel Allen's bank account records," and when "the prosecution decided to use a check of Allen's as an exhibit even though it had not previously been turned over in discovery," "[p]rosecutors decided not to provide that check to the court and defense before using it as a government exhibit." Compl. ¶ 9.b (emphases added). Although the Court imposed a sanction for this deliberate flouting of the discovery rules, again it raises serious questions: What else would have been revealed in the checking account records? What else did the government fail to provide to the defense? How is it possible to give back to the defense the countless hours it spent before and during trial trying to guess at what was contained in documents that the government intentionally did not provide to the defense?

4. **Scheming to Keep a Witness and Brady Information Away from the Defense**. The whistleblower states that a government representative "inappropriately created [a] scheme to relocate [a] prosecution witness that was also subpoenaed by the defense during trial." Compl. ¶ 11 (emphasis added). The whistleblower recounts that the government brought Rocky Williams to Washington, D.C. "weeks before trial for multiple trial preparatory sessions." Compl. ¶ 11.a. What happened next bears quoting at length:

> After the final preparatory session, which included a mock cross examination, prosecutors decided Williams was not a witness the prosecution wanted to use. [A government representative] advised [s/he] came up with a great plan to send Williams home because [s/he] was so "concerned" about Williams' health that it would allow prosecutors to send him back to Alaska, even though Williams was also under a defense subpoena. I advised [government representatives] multiple times that they should advise the defense counsel and the judge before executing their plan. I was ignored. They had me send Williams home.

Id. Williams had exculpatory information in his possession that had not been disclosed. *See* Dkt. 103 at 1, 5-8, Ex. C. When the defense complained, the government claimed that there was "no Brady-related evidence suppressed by the government, and at no time did the government intend to engage in any type of deception." *See* Dkt. 106 at 1. The government maintained that its decision to send Williams back to Alaska without first notifying the defense or the Court was "made in good faith." *Id*. We now know from the whistleblower that these representations were false.

5. **The Government Investigation**. The whistleblower reports additional mind-boggling violations of the government's obligation to turn over information helpful to the defense. For example, we learn from the whistleblower that one employee working on the investigation "accepted multiple things of value" from potential witnesses including artwork and employment for a relative. Compl. ¶ 2. As the Court has observed, the government at trial

offered evidence that Senator Stevens received artwork and employment for relatives. Dkt. 255 at 10. The parallel is stunning. Yet, the government never provided this information to the defense.

The whistleblower also reports information that reflects poorly on the credibility of the government investigation. For example, a government representative had inappropriate relationships with a number of other potential witnesses besides Allen, improperly shared information on a number of occasions and engaged in misrepresentations to others in law enforcement and to at least one court.

6. **Improper Documentation and Handling of Evidence**. The whistleblower reveals that a government representative "documented very little in FBI files" and that large amounts of records have been mishandled. The Court may recall that the defense's Information Technology specialist found the government's electronic production in this case to be the "most disorganized hardest to figure out electronic production" he had ever seen. Tr. (Oct. 8, 2008, p.m.) at 25; Tr. (Sept. 12, 2008) at 18-21. The defense was forced to come to the Court on multiple occasions to try to rectify the problems, and the defense has no confidence at all that it received the information and the materials that it should have received. *See, e.g.*, Dkt. 60; Dkt. 65. The revelation that records and evidence have been mishandled suggests that it may be impossible ever to have confidence that the government has made a complete production of information and materials. Indeed, the charges in the whistleblower complaint suggest that the government interview memoranda in this case may well be totally unreliable, which calls into question whether the government can ever now meet its obligation to produce exculpatory information to the defense.

7. **Inappropriate Relationships/Communication with the Media**. The whistleblower reports that a member of the prosecution team "had inappropriate relationships/communication with members of the media." Compl. ¶ 7. This allegation warrants further exploration. Any attempt to influence the media which in turn could impact the jury is utterly unethical and improper. In light of this danger, the defense team had no substantive communications with the media.

ARGUMENT

I. The Indictment Should Be Dismissed.

United States v. Omni International Corporation, 634 F.Supp. 1414 (D. Md. 1986), should be a guidepost to the Court. Senator Stevens's senior trial counsel was defense counsel in that case. *Omni* was a criminal tax prosecution in which the defense asserted before trial that the indictment should be dismissed because the government inappropriately learned of attorney-client privileged communications. *Id*. at 1416. During the course of a 28-day evidentiary hearing on whether the attorney-client privilege was breached, it was discovered (after considerable work by the defense and Judge Black) that the government had altered interview memoranda in order to strengthen its position that the attorney-client privilege had not been breached. *Id*. at 1423-25. The government produced the memoranda to the defense and the court without indicating that they had been altered.

The government argued in *Omni* that a no-harm, no-foul standard should apply, because, in fact, the attorney-client privilege had not been breached. *Id*. at 1438.

Judge Black rejected the government position:

> Repeated instances of deliberate and flagrant misconduct justify dismissal of the indictment . . . . Court decisions emphasize the unifying premise in all of the supervisory power cases – that although the doctrine operates to vindicate a defendant's rights in an individual case; it is designed and invoked primarily to preserve

> the integrity of the judicial system. The Court has particularly stressed the need to use the supervisory power to prevent the federal courts "from becoming accomplices to such misconduct." . . . It simply is wrong for Government personnel to act as they have done here. This type of conduct cannot and must not be condoned; in fact it must be strongly condemned.

Omni, 634 F. Supp. at 1438-39 (citation omitted) (*quoting United States v. Payner*, 447 U.S. 727, 745 (1980)).

Here, the whistleblower's complaint combined with the record developed to date leaves little doubt that there have been "repeated instances of deliberate and flagrant misconduct," that have gravely jeopardized the "integrity of the judicial system." *Id*. This misconduct includes the following.

[redacted]

2. The government knowingly presented false evidence to the jury. *See* Tr. (Oct. 8, 2008, p.m.) at 54, 89.

3. The government deliberately schemed to remove a witness from the jurisdiction so that the defense would not learn that the evidence was false. *See* Compl. ¶ 11.

4. The government did not tell the Court the truth when it told the Court that it removed the witness from the jurisdiction in "good faith." *Compare* Compl. ¶ 11 *with* Dkt. 106 at 1.

5. The government created a false *Brady/Giglio* letter on September 9, 2008. *See* Dkt. 130, Ex. E, at ¶ 17(c).

6. The government deliberately redacted exculpatory material from a FBI Form 302 so as not to reveal the falsity of its September 9, 2008 *Brady/Giglio* letter. *See* Compl. ¶ 9.a.

7. The government falsely represented to the Court that the redaction of exculpatory material was inadvertent. *Compare* Compl. ¶ 9.a *with* Tr. (Oct. 2, 2008, a.m.) at 11, 27; Tr. (Oct. 2, 2008, p.m.) at 27, 32.

8. A government representative fostered an inappropriate relationship with the government's star witness, who delivered the blockbuster "Ted's just

covering his ass" testimony. *See* Tr. (Oct. 1, 2008, a.m.) at 52; Compl. ¶ 1.h.

9. The government failed to keep appropriate records and failed to maintain evidence properly. *See* Compl. ¶ 13-14.

10. The government intentionally withheld bank records to which the defense was entitled under Rule 16. *See* Compl. ¶ 9.b; Tr. (Oct. 8, 2008, p.m.) at 26-29.

11. The government had inappropriate relationships/communications with members of the media. *See* Compl. ¶ 7.

12. The government failed to turn over large quantities of exculpatory information, including the subject matter of the whistleblower's complaint itself. *See generally* Compl.; ¶ Dkt. 103 at 1-2, 5-7; Dkt. 126 at 1-6; Dkt. 130 at 13-16.[2]

The misconduct in this case is far more pervasive than that which confronted Judge Black in *Omni*. It is also more pervasive and severe than what occurred in *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008), in which the Ninth Circuit upheld the trial court's dismissal of a criminal prosecution after the prosecution team failed on three occasions to turn over impeachment material in a timely manner. If this is not a case for dismissal, what is?

Not only should the case be dismissed under the supervisory powers doctrine, but it should also be dismissed under the Due Process Clause of the Fifth Amendment. *See United States v. Wang*, No. 98 CR. 199 (DAB), 1999 WL 138930, at *37 (S.D.N.Y. Mar. 15, 1999) (finding a due process violation and dismissing an indictment due to the government's failure to provide defense counsel with "material information" until the "eve of trial," and its delay in disclosing that its key witness was unavailable and would not be called to testify); *United States v. Lyons*, 352 F. Supp. 2d 1231, 1251-52 (M.D. Fla. 2004) (finding a due process violation,

[2] A government witness has also alleged severe government misconduct. *See* Dkt. 243 (Letter from Mr. Anderson). That allegation is the subject of a separate defense motion for discovery and an evidentiary hearing. Dkt. 241.

dismissing the remaining counts of the indictment, and refusing to order a new trial because of the government's multiple and flagrant *Brady* and *Giglio* violations).

Prosecutors play a special role in our system of justice, and by necessity, courts and defendants rely on the government fulfilling its responsibilities with integrity. The government's "obligation to govern impartially is as compelling as its obligation to govern at all; and [its] interest, therefore, in a criminal prosecution is not that it shall win a case, but that, justice shall be done." *Strickler v. Greene,* 527 U.S. 263, 281 (1999) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)). Sadly, that did not happen here. The Court and the public can have no confidence in the integrity of this proceeding, because it can have no confidence in the integrity of the government's conduct in this case. The indictment should be dismissed.

II. A New Trial Should Be Ordered, with Discovery and an Evidentiary Hearing

If the Court is not inclined to dismiss the case at this juncture, Judge Bates's decision in *United States v. Quinn*, 537 F. Supp. 2d 99, 107 (D.D.C. 2008), should guide the Court as it considers whether to grant a new trial. In *Quinn*, the government failed to disclose to the defense that it had become highly suspicious of the truthfulness of a government witness it intended to call. *Id.* at 109-110. The government decided before trial not to call the witness, but instead of informing the defense of its concerns, allowed the defense to deliver an opening statement based on the assumption that the witness would testify and that the government believed that the witness was truthful. *Id.* at 105. Defense "counsel was left to formulate the defense theme and opening statement on the erroneous belief that the 'critical' government witness would be appearing." *Id.* at 109. When the witness did not in fact testify, the government argued that there was no prejudice to the defendant. *Id*. at 112-13. Judge Bates disagreed. He found that if the information had been disclosed, the defendant "could have presented a very different opening and closing argument and could have conducted stronger

cross-examinations, particularly of [a government agent] to great effect." *Id*. at 116. Judge Bates, citing the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419 (1995), found that this information could have been used to conduct a "pointed attack on the government's investigation." *Quinn*, 537 F. Supp. 2d at 115-16. As the Tenth Circuit has observed, "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible *Brady* violation." *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986); *see also Lindsey v. King*, 769 F.2d 1034, 1042 (5th Cir. 1985) (granting new trial because withheld Brady evidence carried with it the "potential . . . [for] the discrediting . . . of the police methods employed in assembling the case.")

Here, a government insider "witnessed or learned of a series of violations of policy, rules and procedure as well as possible criminal violations" by members of the prosecution team. Compl. "Summary of Complaints." In a clear violation of *Brady*, this insider's view was not disclosed to the defense until after the trial. The whistleblower's observations contain substantial impeachment material against the government's key witness. The defense also could have used the whistleblower's allegations to raise questions in the jurors' minds about the integrity of the government's investigation, of this prosecution, and of the government's entire case against Senator Stevens. Senator Stevens also needed to have the whistleblower's information in order to investigate whether additional misconduct occurred. The government has an affirmative duty to disclose evidence that may be the "tip of the iceberg" of other misconduct even if the government has not investigated whether or not that is the case. *See United States v. Burnside*, 824 F. Supp. 1215, 1258 (N.D. Ill. 1993) (government has an affirmative duty to disclose mere indications of improper conduct by witnesses and government

personnel "so as to enable defense counsel to undertake the inquiry which the government deliberately avoided"); *see also United States v. Shaffer*, 789 F.2d 682, 691 (9th Cir. 1986) (affirming grant of new trial where failure to disclose the impeachment evidence regarding key government witness undermined confidence in trial outcome, including "tip of the iceberg" evidence).

Furthermore, the whistleblower's complaint alleges an inappropriate relationship between a government representative and Bill Allen. It alleges that the government representative revealed confidential information to Allen, and may even have disclosed the existence of other investigations of Allen's criminal conduct. Improper favors to key witnesses are a recognized basis for a new trial. As the Seventh Circuit held in *United State v. Boyd*, 55 F.3d 239 (7th Cir. 1995), "[h]ad the jury known that the prisoner witnesses were receiving favors . . . all with the permission or connivance of the U.S. Attorney's Office, the jury might have wondered whether the witnesses were not receiving implicit assurances of compensation for their testimony going far beyond anything promised in their plea agreements, the terms of which had been revealed to the jury." *Id.* at 246. "In short," the court asked, "might not the prosecution's case have collapsed *entirely* had the truth come out about the behavior and the treatment of these witnesses?" *Id.*

At the very least, Senator Stevens is entitled to a new trial with the ability to use this information in his defense.[3] But the whistleblower's complaint also leaves many questions unanswered that can and should be explored through discovery and an evidentiary hearing, if the Court elects not to enter an immediate dismissal. For example, what information was revealed to

[3] The misconduct in this case far exceeds what the defense understood occurred in the case of *United States v. Oruche*, 484 F.3d 590 (D.C Cir. 2007). The breadth of the misconduct, supported by the complaint of a government insider, undoubtedly impacts the integrity of the entire prosecution.

Allen by the government? What was said during one-on-one meetings with Allen? How many times did government representatives meet with Allen alone? Were these meetings documented consistent with FBI policies and procedures? What government actions were not documented? What do the agents' notes say? Can the government's interview memoranda ever be relied upon? What evidence was not handled properly? What did the government find so troubling about its preparation of Rocky Williams that it schemed to send him to Alaska? Why was the September 9 *Brady/Giglio* letter created with false information in it? How was the redaction of the interview memoranda performed? How is it possible that so much exculpatory information was not disclosed? Why was a government representative "absolutely opposed" to providing exculpatory material to the defense? What else should have been produced to the defense but was not? What were the nature of the inappropriate relationships and communications with the media? Why didn't the government disclose that at least one of its representatives received things of value from potential witnesses?

A district court has discretion to order discovery and an evidentiary hearing post-trial in appropriate circumstances, including when newly discovered information comes to light. *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007). "According to the Supreme Court, 'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is' entitled to a new trial, 'it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.'" *Id.* (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). "In fulfilling this duty, a district court has broad discretion to fashion discovery mechanisms suitable to the case before it" and "is required to conduct [an] evidentiary hearing . . . if the admissible evidence presented by the petitioner, if

accepted as true, would warrant relief as a matter of law." *Id.*[4] *See also, e.g. See United States v. Kelly*, 790 F.2d 130, 134 (D.C. Cir. 1986) (holding that district court abused its discretion in denying an evidentiary hearing "[i]n the absence of countervailing sworn evidence from the government"); *United States v. Koubriti*, 297 F. Supp. 2d 955, 959, 972 (E.D. Mich. 2004) (court conducted post-trial evidentiary hearing to ascertain the impact of government's failure to disclose a letter containing arguably exculpatory information; Court ordered non-party to produce relevant documents). As the D.C. Circuit has noted, "Factual findings are particularly important where, as here, the governmental misconduct charged is extraneous to the trial and so is not documented in the trial record." *Kelly*, 790 F.2d at 139.

In *United States v. Espinosa-Hernandez*, 918 F.2d 911 (11th Cir. 1990), a Customs Service agent in charge of the criminal investigation of the defendant was indicted, after the defendant's trial, for making false statements on his job application regarding past use and sale of drugs. *Id.* at 913. The district court refused to conduct an evidentiary hearing, holding that the newly discovered evidence "would be purely impeaching." *Id.* The Eleventh Circuit reversed, asserting that the Customs Agent "stands accused of serious and disturbing breaches of the public trust. Without the benefits of discovery and an evidentiary hearing, it is impossible to say that evidence of [the Agent]'s misconduct is merely impeaching." *Id.* at 914. Thus, even thought the agent was not accused of misconduct in the defendant's trial, the court

[4] In *Velarde*, the court found that the petitioner did not satisfy the Tenth Circuit's standard for an evidentiary hearing "because, by his own admission, he was unable to procure the necessary evidence . . . without judicial compulsion." 485 F.3d at 560. As a result, the court granted petitioner's request for judicially compelled discovery. *Id.*; *see 3 Charles Alan Wright et al. Federal Practice and Procedure* § 557 at n.41 (3d ed. 2004 & Supp. 2008) (citing *Velarde*) ("Where the defendant made showing that further investigation would more likely than not lead to facts the defendant could use to effectively cross-examine government witness, it was error to deny defendant's motion for a new trial without granting an opportunity for discovery under the court's subpoena power.").

noted that evidentiary hearing might turn up evidence of "perjury in a proceeding similar to [defendant's] trial. If so, the discovered evidence would be beyond that of mere impeachment and a new trial would be necessary to 'remove the taint' from [defendant's] conviction." *Id.* at 914.

The whistleblower's complaint goes well beyond the allegations in *Espinosa.* It alleges misconduct relating to and fundamentally affecting this defendant's trial. The allegations come from "a federal employee with extensive knowledge of the investigation and trial in this case." Dkt. 255 at 4. Many of them raise additional questions or suggest additional avenues of inquiry. Discovery and an evidentiary hearing are necessary to explore the allegations and to fashion a remedy if the Court is not persuaded to dismiss on the face of the complaint.

In the *Omni* case, Judge Black was reluctant to hold an evidentiary hearing. Most judges, of course, rely on the representations of government representatives, as well they should in appropriate circumstances. But here the government's representations to date have not been reliable. Judge Black found, at the end of the hearing that he had been reluctant to hold, that:

> The AUSA's failure to be fully candid could have had tragic consequences. The Court was faced with the issue of whether or not to permit an evidentiary hearing. If the Court had blindly relied on the AUSA's representations, no hearing would have been held. . . . In light of all the testimony adduced at the [28-day-long] evidentiary hearing, it is clear that this case rises to the high threshold imposed for invocation of the supervisory power [to dismiss]. The Court condemns the manner in which the Government proceeded, and cannot now stand idly by, implicitly joining the federal judiciary into such unbecoming conduct.

Omni Int'l Corp., 634 F. Supp. at 1434, 1438–39.

If the Court has not learned enough to date to dismiss this case, it should hold an evidentiary hearing. Only then will we know the full story.

CONCLUSION

In a case awash with extraordinary revelations, the whistleblower's complaint is perhaps the most shocking and important. An FBI Special Agent has alleged that his or her colleagues engaged in intentional constitutional violations in the course of investigating and prosecuting this defendant and others. Because of their source, these allegations are highly credible. The misconduct is utterly inexcusable. The Court should dismiss the indictment or, at a minimum, grant a new trial and order discovery and an evidentiary hearing.

Dated: December 22, 2008

Respectfully submitted,

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