SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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UNITED STATES OF AMERICA

Affidavit in Reply and in Further Support of Defendant's Motion to Enforce her Discovery Rights and the Prosecution's Disclosure Obligations

-against-

No. M-04113-03

ELENA RUTH SASSOWER

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STATE OF NEW YORK)
COUNTY OF WESTCHESTER) ss:

ELENA RUTH SASSOWER, being duly sworn, deposes and says:

1. I am the above-named defendant, criminally charged with "disruption of Congress" and facing punishment of six months in jail and a $500 fine.

2. This affidavit is submitted as an aid to the Court to enable it to more easily pierce through the obfuscation and deceit permeating the unsworn "Government's Opposition to Defendant's Motion to Compel Discovery" of Assistant U.S. Attorney Aaron Mendelsohn, dated November 13, 2003.

3. Such opposition is nothing less than a fraud upon the Court, violating a plethora of District of Columbia Rules of Professional Conduct designed to ensure the integrity of judicial proceedings. These include: Rule 3.3(a)(1), proscribing a lawyer from knowingly making "a false statement of material fact or law to a tribunal"; Rule 3.4(d), requiring a lawyer to "make reasonably diligent effort to comply with a legally proper discovery request by an opposing party"; Rules 8.4(c) and (d), denominating as professional misconduct for a lawyer to "engage in conduct involving dishonesty,

fraud, deceit, or misrepresentation"; and to "engage in conduct that seriously interferes with the administration of justice"; and, additionally, Rule 3.8, entitled "Special Responsibilities of a Prosecutor", specifically, Rule 3.8(b) that a prosecutor in a criminal case shall not "file in court or maintain a charge that the prosecutor knows is not supported by probable cause"; Rule 3.8(c) that he shall not "intentionally avoid pursuit of evidence or information because it may damage the prosecution's case or aid the defense"; and Rule 3.8(e) that he shall not "intentionally fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense...".

4. Mr. Mendelsohn's unabashed violations of these applicable Rules of Professional Conduct by his November 13th opposition to my October 30, 2003 "motion to enforce defendant's discovery rights and the prosecution's disclosure obligations" underscore the necessity that he not only be sanctioned, as expressly requested by the second branch of relief sought by my motion, but that the Court refer him to appropriate disciplinary and other authorities, pursuant to its own disciplinary responsibilities under Canon 3D of the Code of Judicial Conduct for the District of Columbia:

> "A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the District of Columbia Rules of Professional Conduct should take appropriate action. A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority."

5. For the convenience of the Court, a Table of Contents follows:

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* * *

Mr. Mendelsohn's False and Misleading Section "I", whose "Factual History" Conceals my Motion's Second Branch of Relief for Sanctions against Him

6. Mr. Mendelsohn begins his opposition (¶1) with a section "I", misnomered "Factual History", containing no "history" whatever. He thus offers no chronology leading up to the motion to counter that presented by ¶¶5-13 of my moving affidavit under the heading, "Mr. Mendelsohn's Dilatory Response to my August 12, 2003 First Discovery Demand, Designed to Thwart my Ability to Address it at a Court Conference", whose accuracy he does not deny or dispute[1]. Such unrebutted paragraphs establish the "dilatory" aspect of my motion's second branch of relief:

[1] Treatise authority and case law for the District of Columbia presumably mirror the rudimentary adjudicative principles appropriate to an adversarial system found in treatises and case law for New York, *to wit*, "[F]ailing to respond to a fact attested to in the moving papers...will be deemed to admit it.", Siegel, New York Practice, §281 (1999 ed., p. 442) – citing *Kuehne & Nagel, Inc. v. Baiden*, 36 N.Y.2d 599 (1975) -- and Siegel, McKinney's Consolidated Laws of New York

"for sanctions against Assistant U.S. Attorney Aaron Mendelsohn for his dilatory, bad-faith, and deceitful response to defendant's First Discovery Demand, wasting resources and necessitating the motion".

7. In lieu of any "Factual History", Mr. Mendelsohn proceeds directly to the U.S. Attorney's receipt of my motion on October 30th. As to this, he states, "The government can discern three arguments to which the government must respond" (at p. 1). The implication is that my motion requires "discernment" because it is unclear or because, due to its length -- which he identifies as a "28-page motion, complete with fifteen exhibits" -- it requires distillation. This is a deceit. There is nothing about my motion requiring "discernment" – as opposed to simple reading: Its requested four branches of relief are concisely set forth by my 1-1/2 page notice of motion. The substantiating facts entitling me to such relief are meticulously organized by my sworn 27-page moving affidavit under section and subsection headings – for which a helpful Table of Contents appears at page 2. Even the substantiating 27 exhibits annexed to the affidavit are listed on a 2-page inventory.

8. As to the "three arguments" which Mr. Mendelsohn purports to be able to "discern", he neither accurately summarizes the four branches of relief identified by my notice of motion – nor the "arguments" with respect thereto presented by my affidavit. Indeed, most striking – and revealing -- about Mr. Mendelsohn's three summarized "arguments" is that he altogether omits the second branch of my motion, which is for sanctions against him for "his dilatory, bad-faith, and deceitful response to

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Annotated, Book 7B, CPLR 3212:16. "If a key fact appears in the movant's papers and the opposing party makes no reference to it, he is deemed to have admitted it", *id.* Undenied allegations will be deemed to be admitted. *Whitmore v. J. Jungman, Inc.*, 129 N.Y.S. 776, 777 (S.Ct., NY Co. 1911).

defendant's First Discovery Demand, wasting resources and necessitating this motion" – as to which the entirety of my moving affidavit presents the substantiating particulars.

9. One need do no more than peruse the Table of Contents to my moving affidavit (at p. 2) to clearly see that Mr. Mendelsohn's sanctionable misconduct in connection with my August 12th First Discovery Demand (Exhibit "A")[2] is the organizing principle around which the entire affidavit is structured. Thus, after a three-page section setting forth the "dilatory" background to his response, the 22 subsequent pages of my affidavit are under a section heading, "Examination of Mr. Mendelsohn's October 3, 2003 letter, purporting to make discovery" – to which there are three subheadings, addressed to the three deceits on which his non-production rests:

> (a) "Mr. Mendelsohn's First Deceit: That the requested 'documents and tangible objects' are 'not relevant to the case'" [pp. 7-20];
>
> (b) "Mr. Mendelsohn's Second Deceit: That the requested 'documents and tangible objects': 'do not exist'" [pp. 20-24]; and
>
> (c) Mr. Mendelsohn's Third Deceit: That the requested records are 'protected by USCP privacy guidelines" [pp. 24-27].

10. Mr. Mendelsohn's opposition does not deny or dispute a single fact particularized by these pages in substantiation of my ¶15 "overview", *to wit*:

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[2] Exhibits "A" - "O" herein referred to are annexed to my October 30th moving affidavit. Exhibits annexed to this reply, continue the sequence, beginning with Exhibit "P".

"15. ...[That as to 26 requests in my August 12th Discovery Demand] Mr. Mendelsohn's October 3rd letter has made production as to six (#2, #4, #7, #19, #21, #22)[fn.5], with only two and possibly three of these being complete (#19, #21, #4). In declining production as to 20 other requests, Mr. Mendelsohn varyingly claims that the requested discovery is 'irrelevant to the case' (13x: #1, #3, #5, #6, #8, #9, #10, #11, #13, #14, #15, #18, #20); that the records sought 'do not exist' (8x: #5, #6, #8, #9, #10, #12, #16, #17); that they are 'protected by USCP privacy guidelines' (6x: #3, #11, #13, #14, #15, #20); and/or that the blacking-out of information is pursuant to *United States v. Holmes*, 346 A.2d 517, 518-19 (DC. 1975) and *Davis v. United States*, 315 A.2d 157, 161 (D.C. 1974) (#23, #24, #25, #26). Although these two cited cases would appear to give the prosecution the right to deny disclosure of the names of its witnesses, sought by the final four requests of my Discovery Demand, virtually all of Mr. Mendelsohn's responses to the preceding 22 requests for 'documents and tangible objects' are false, in bad-faith, and deceitful." (¶15, underlining added)

11. Yet, rather than make an appropriate explanation to the Court in mitigation of what he is unable to deny or dispute, namely, that his responses to my 22 requests for "documents and tangible objects" are, as demonstrated, virtually all "false, in bad-faith, and deceitful"[3], he engages in further deceit[4]. Thus, in the last paragraph

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fn.5 "Mr. Mendelsohn's production consists of:
#2: DC Code Section 10-503.16
#4: USCP General Order on its Citation Release Program and DC Code Section 23-1110
#7: my 39-page May 21, 2003 fax to U.S. Capitol Police Detective Zimmerman (Exhibit "I")
#19: my signed notation on May 23, 2003 in the Capitol Police Prisoner's Property Book (Exhibit "J-1");
#21: my signed notation on June 25, 1996 in the Capitol Police Prisoner's Property Book (Exhibit "J-2")
#22: U.S. Capitol Police Chief Gary Abrecht's February 18, 1997 letter to me (Exhibit "N-1")."

3 Apparently, Mr. Mendelsohn was aided in this misconduct, including by his supervisors, as revealed by his statement to Senior Judge Ronald Wertheim at the October 16th conference:

"Your Honor, it's the Government's position that many of the documents or records that the Defendant requests are irrelevant to the case at bar, as well as many of the documents that she requests do not exist. I went over these requests with representatives in the counsel's office, U.S. Capitol Police, as well as with my

of his section "II", "The Government's Response to Defendant's Restated Request for Discovery", he seeks to mislead the Court as to what is before it. He does this by purporting:

> "... defendant offers no new evidence or legal analysis that could alter the foundation of the government's October 3, 2003 response to defendant's August 20, 2003 [sic], request for discovery. The government believes that much of the 'tangible evidence' defendant requests (1) does not exist, (2) is not relevant to the matter at hand, and (3) is protected by United States Capitol Police privacy guidelines. Defendant counters this by writing that, in fact, the material does exist, is relevant, and is not protected by United States Capitol Police privacy guidelines. Defendant, however, offers no factual or legal basis for her contentions. The government has attached an additional copy of the government's original response to defendant's August 20, 2003 [sic], request for discovery." (¶11, underlining added).

12. This, after pretending in the first paragraph under that section "II" that my requested documents are not within the purview of Superior Court Criminal Rule 16(a)(1)(C) – which he accomplishes by expurgating the Rule's operative language. Thus, his ¶3 states:

> "Defendant's Rule 16 claims must fail. Super. Ct. Crim. R. 16(a)(1)(c) limits discovery to those items 'within the possession, custody or control of the government [and] which are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.' Defendant's requested items in this case do not meet the Rule 16 requirements. The government does not intend to introduce any of the requested materials. Therefore the material never became subject to the terms of Rule 16(a)(1)(c), and as such, is not discoverable."

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supervisors, and I responded to the best of my ability handing over the only documents that were relevant or that existed in this case." (Exhibit "Q", pp. 5-6, underlining added).

[4] "when a litigating party resorts to falsehood or other fraud in trying to establish a position, a court may conclude that position to be without merit and that the relevant facts are contrary to those asserted by the party", Corpus Juris Secundum, Vol. 31A, 166 (1996 ed., p. 339); "The resort to falsehood and evasion by one accused of a crime affords of itself a presumption of evil intentions, and has always been considered proper evidence to present to a jury upon the question of the guilt or innocence of the person accused.", *People v. Conroy*, 90 N.Y. 62, 80 (1884).

13. This is an even more brazen, pathological deceit than Mr. Mendelsohn's ¶11, since he could be expected to know that the Court would immediately recognize his deletion of the operative language of Rule 16(a)(1)(C) pertaining to "documents and tangible objects... which are material to the preparation of the defendant's defense" (underlining added). As to Mr. Mendelsohn's knowledge of the Rule as an Assistant U.S. Attorney engaged in criminal prosecutions where discovery is a constant issue, such is not only established by the opening sentence of my Discovery Demand, expressly requesting:

> "'documents and tangible objects', pursuant to Superior Court Criminal Rule 16(a)(1)(C) – all of which I deem 'material to the preparation of [my] defense' and expect to introduce as exculpatory" (Exhibit "A"),

but by his presence at the August 20th court conference before Senior Judge Mary Ellen Abrecht, where, after asking him whether he was going to comply with my Discovery Demand, I cited that language of the Rule (Exhibit "P", pp. 43-44), as well as by his presence at the October 16th court conference before Senior Judge Ronald Wertheim, where I also cited that language in responding to Judge Wertheim's question as to whether "we [are] ready to set a trial date" (Exhibit "Q", pp. 4-5).

14. These two paragraphs of Mr. Mendelsohn's opposition, ¶¶3 and 11 – indeed, either paragraph standing alone -- suffice for the Court to "throw the book" at Mr. Mendelsohn, including by referring him to disciplinary authorities. However, as hereinafter shown, Mr. Mendelsohn's deceit continues well beyond these paragraphs.

**Mr. Mendelsohn's False and Misleading Section "II"
as to my Entitlement to Production of "Documents and Tangible Objects"
Sought by my August 12, 2003 First Discovery Demand**

15. Mr. Mendelsohn's section "II" (at pp. 2-6) is addressed to the first "argument" he claims to have "discern[ed]" from my motion. This "argument" is paraphrased by his "Factual History" (at p. 1) as:

> "Defendant again seeks discovery of the 26 items as detailed in her August 20, 2003 discovery request".

16. Immediately obvious is that Mr. Mendelsohn has misdated my Discovery Demand. The correct date, August 12, 2003, appears on the face of the Discovery Demand (Exhibit "A") and repeatedly in my October 30, 2003 motion, beginning with the first branch of relief in my notice of motion:

> "to compel production of the 'documents and tangible objects', sought by defendant's First Discovery Demand, dated August 12, 2003"

17. Further obvious is that my motion is directed not to 26 items, but, rather, to the first 22, constituting "documents and tangible objects". This is clear from my overview ¶15, hereinabove quoted.

18. As already highlighted, the first and last paragraphs of this section "II" are flagrant deceits: ¶3 falsifying the applicability of Rule 16(a)(1)(C) and ¶11 falsely claiming that my motion has "no factual or legal basis". Between these are seven intermediate paragraphs which draw on and presage these two framing paragraphs. Thus, immediately following Mr. Mendelsohn's ¶3 expurgation of the operative language of Rule 16(a)(1)(C), his ¶4 asserts "more significantly... these records are not the kind envisaged by Rule 16(a)(1)(C)". Likewise, Mr. Mendelsohn's culminating ¶11 declaration that I have offered "no factual or legal basis for [my] contentions" is

presaged by the bald assertions in his ¶5: "There is no suggestion that these records contain any exculpatory or other evidence relevant to this defendant's guilt or innocence in this particular matter. There is no indication that any of the officer's records relate to this defendant in any way"; in his ¶8: "there is no indication that the records are evidence material to the preparation of the defense of this case"; and in his ¶9 "Defendant has not sufficiently proffered any reason to obtain personnel records of police officers related to this case".

19. The untruthfulness of these bald assertions – for which Mr. Mendelsohn conspicuously omits all citation to paragraphs of my moving affidavit to impede verification of the true facts – is established by examination of the affidavit. Such examination further shows that his ¶5 declaration that:

> "the government is not required to produce the documents pursuant to Brady v. Maryland, 373 U.S. 83 (1963) and Super. Ct. Crim. Rule 17(c)"

is as indefensible a deceit as his expurgation of Rule 16(a)(1)(C) in his ¶3. Indeed, demonstrated by my affidavit is that the 22 requests for "documents and tangible objects" sought by my Discovery Demand are so profoundly exculpatory as to establish that the criminal charge against me is not just baseless, but unprecedented and malicious (¶¶16-18, 29-33, 37, 40).

20. It must be noted that although Mr. Mendelsohn's false and deceitful ¶¶3 and 11 plainly relate to all 22 requests for "documents and tangible objects", encompassed by my Discovery Demand, the situation is somewhat ambiguous with respect to his intermediate ¶¶4-10. Their reference to "records" is confusing and can be reasonably interpreted as being used synonymously for the requested "personnel

files" and "personnel records" of the involved police officers, to which these paragraphs clearly object. If so, Mr. Mendelsohn's assertions in these paragraphs have NO bearing on my entitlement to these 22 requests — except to the extent that six of them encompass requests for officer personnel records. This is further obscured by Mr. Mendelsohn's failure to cite to any paragraphs of my affidavit or even to the requests from my Discovery Demand so that it might be clearly understood what he is talking about.

21. Tellingly, no mention of the "USCP privacy guidelines" appears in these intermediate paragraphs – notwithstanding "USCP privacy guidelines" were the SOLE basis upon which Mr. Mendelsohn's October 3rd letter (Exhibit "B") declined production of personnel records, apart from the claim that they were not "relevant". My affidavit detailed their relevance – particularly as relates to Sergeant Bignotti, the true arresting officer, against whom I filed a police misconduct complaint in 1996 (Exhibit "M"), which was supposedly "thorough[ly] investigat[ed]" (Exhibit "N-1") (¶¶40-42, 45-47, 57) – as well as the insufficiency of Mr. Mendelsohn's production in response to my follow-up request for the "USCP privacy guidelines" to which his October 3rd letter referred (¶¶51-56).

22. As to the *Lewis* checks, to which Mr. Mendelsohn refers in his ¶¶6-7, such pertain only to the government's witnesses. Plain from the false and misleading police documents underlying the prosecution against me is that the government witnesses will not include Sergeant Bignotti, Detective Zimmerman, Special Agent Lippay – or anyone whose testimony would establish the true facts of my arrest,

detailed by at ¶¶16-17, 21-26, 40-42 of my affidavit – without the slightest rebuttal by Mr. Mendelsohn – *to wit*:

> "that it was, an unprecedented response by Capitol Police to entirely proper conduct by me, orchestrated by, and in concert with, New York Home-State Senators Hillary Rodham Clinton and Charles E. Schumer, as well as the Senate Judiciary Committee, in advance of the "hearing", for which Officer Jennings was the 'cover'." (¶17, underlining in the original).

Mr. Mendelsohn's False and Misleading Section "III" Pertaining to the Third Branch of Relief Sought by my Motion

23. Mr. Mendelsohn's section "III" (at p. 6) purports to respond to the second "argument" he has been able to "discern" from my motion. According to Mr. Mendelsohn,

> "Defendant wishes to know when the United States Attorney's Office received the defendant's 39-page facsimile to the U.S. Capitol Police Department and her ''memorandum' to U.S. Senate Judiciary Committee Chairman Orrin Hatch and Ranking Member Patrick Leahy." (at p. 2)

24. As to these two documents – which Mr. Mendelsohn conspicuously fails to identify with any dates -- he states that the U.S. Attorney came into possession of them "in early to mid September" (p. 6).

25. Such paraphrase of my motion's third branch of relief and Mr. Mendelsohn's response thereto are materially false and misleading

26. My third branch of relief was:

> "(3) for disclosure by the U.S. Attorney for the District of Columbia:
>
> (i) as to whether he was in possession of defendant's 39-page May 21, 2003 fax to U.S. Capitol Police when Assistant U.S. Attorney Leah Belaire signed a May 23, 2003 letter on his behalf, declining to make a plea offer, purporting to make 'current and comprehensive discovery', and purporting to be unaware of *Brady* evidence;

(ii) as to when he came into possession of the exculpatory materials identified by defendant's May 28, 2003 memorandum to U.S. Senate Judiciary Committee Chairman Orrin Hatch and Ranking Member Patrick Leahy, including defendant's 39-page May 21, 2003 fax to the U.S. Capitol Police".

27. Thus concealed by Mr. Mendelsohn is the important issue, presented by my motion, as to the duty of Capitol Police to have turned over to the U.S. Attorney my 39-page May 21st fax to Detective Zimmerman (Exhibit "I") *at the same time* as it turned over the various other documents which Ms. Belaire annexed to her May 23rd letter to me (Exhibit "F"). This, not only because the May 21st fax to Detective Zimmerman was:

> "plainly *Brady* evidence of which the U.S. Attorney needed to be 'aware' in completing Section VII of its form letter relating to '*Brady*' – as, for instance, when Ms. Belaire's May 23rd letter affirmatively represented that the U.S. Attorney was 'currently aware of no such evidence' (Exhibit "F", p. 6) -- but because it was essential to the U.S. Attorney's independent evaluation of whether there was any basis to prosecute a 'disruption of Congress' charge – a charge requiring that I 'willfully and knowingly engaged in disorderly and disruptive conduct with the intent to impede, disrupt, and disturb... '" (¶20, emphasis in my moving affidavit).

28. Thus also concealed is Mr. Mendelsohn's own duty to have obtained and reviewed the exculpatory documents identified by my May 28th memorandum to Senate Judiciary Committee Chairman Hatch and Ranking Member Leahy (Exhibit "K-1"). As to that memorandum, Mr. Mendelsohn does not deny my ¶35 that I gave him one, if not two, copies on June 20th, or my ¶40 that I commented to him on that date that if he did not know that the case against me was "not just bogus, but malicious", it was because "his clients [were] not honest".

29. As this third branch of relief did not ask when the U.S. Attorney received a "memorandum to U.S. Senate Judiciary Committee Chairman Orrin Hatch and Ranking Member Leahy", Mr. Mendelsohn's claim to have "discern[ed]" my request for same is a deceit, designed to conceal that he took no steps to obtain the exculpatory evidence which my May 28th memorandum identified so as to evaluate whether, in fact, he had a legitimate case to prosecute.

30. Indeed, on Thursday, November 20th, I learned that the most important exculpatory evidence – the case file materials substantiating my request to testify for which I had been arrested —had never been procured by the U.S. Attorney, but was still in the possession of the Senate Judiciary Committee. It was then that I received a phone call from Matt, one of the Committee clerks, requesting that I pick up the boxes containing these materials. I told him I could not do so, first and foremost because they were exculpatory evidence which I would require to be presented at my trial, as expressly set forth in my May 28th memorandum (Exhibit "K-1"). I gave him Mr. Mendelsohn's telephone number to confirm that fact.

31. In the early evening of Monday, November 24th, I received a fax from Mr. Mendelsohn, dated November 25th (Exhibit "R"), stating:

> "I am in receipt today of approximately six boxes of material from the U.S. Senate Judiciary Committee. I have not personally reviewed these boxes, and I will return these boxes to you at the next court date in the above matter on December 3, 2003."

32. It is a further reflection on Mr. Mendelsohn's profound unfitness as a prosecutor that he not only sees no obligation to review this exculpatory material in discharge of his on-going obligation to access the legitimacy of his continued

prosecution of the criminal case against me, but – with a trial upcoming – would interfere with its evidentiary integrity by returning possession to me.

Mr. Mendelsohn's False and Misleading Section "IV" Pertaining to the Fourth Branch of Relief Sought by My Motion

33. Mr. Mendelsohn's section "IV" (at pp. 7-10) purports to respond to the third "argument" he has been able to "discern" from my motion. According to Mr. Mendelsohn,

> "defendant seeks sanctions and any other relief that may be proper against the United States Attorney for the District of Columbia for failing to provide the defendant with alleged Brady evidence (her own correspondence with the U.S. Senate and U.S. Capitol Police), and the other discovery requests to which the government has already responded.

34. This is Mr. Mendelsohn's substitution for my motion's fourth branch:

> "(4) for such other and further relief as may be just and proper, including sanctions against the U.S. Attorney for the District of Columbia for failing to comply with the mandatory disclosure obligations imposed upon him by law, reflected by the May 23, 2003 'discovery' letter, signed on his behalf by Assistant U.S. Attorney Leah Belaire."

35. His initial ¶13 contains numerous misstatements, perhaps none so bizarre as that my motion "implies" that the U.S. Attorney was in possession of both my 39-page fax to Detective Zimmerman and my "'memorandum' to U.S. Senate Judiciary Committee Chairman Orrin Hatch and Ranking Member Leahy" on May 23rd, when I was "sent" the "initial discovery letter, signed by Assistant United States Attorney Belaire".

36. That there is NO such implication as to my 39-page fax is reflected by my motion's third branch, specifically asking for disclosure by the U.S. Attorney:

(i) as to whether he was in possession of defendant's 39-page May 21, 2003 fax to U.S. Capitol Police when Assistant U.S. Attorney Leah Belaire signed a May 23, 2003 letter on his behalf, declining to make a plea offer, purporting to make "current and comprehensive discovery", and purporting to be unaware of *Brady* evidence".

37. As to my memorandum to Chairman Hatch and Ranking Member Leahy, there is also NO such implication – a fact which Mr. Mendelsohn may be presumed to recognize in stripping the memorandum of any date. Obviously, to the extent that the unidentified memorandum to which Mr. Mendelsohn refers is dated May 28, 2003 – and, based on my affidavit, that would be the significant memorandum to which to refer – my motion could not possibly imply that a May 28th document was in the possession of the U.S. Attorney on May 23rd, five days earlier.

38. In any event, obscured by Mr. Mendelsohn's ¶13, as likewise by his ¶14, is that the U.S. Attorney's *Brady* obligations are not limited to what was in its possession on May 23rd, but are on-going. Such is reflected by Ms. Belaire's May 23rd letter, pertinently quoted at my ¶36:

> "This letter contains both a plea offer and discovery for the above-captioned case. This discovery is, to the best of our knowledge, current and comprehensive. If we learn of any additional discoverable information or evidence, we will disclose that to you as quickly as possible."

39. Mr. Mendelsohn's ¶14 concedes that "Brady requires the government to disclose information which is within the government's possession and which is material and favorable to the defendant". However, he argues that the U.S. Attorney did not violate *Brady* because it was not in "possession" of the 39-page fax "or other U.S. Capitol Police documents on May 23, 2003." Whether or not this statement is true as to the 39-page fax (Exhibit "I") – and there is NO SWORN STATEMENT before

the Court on that subject -- it is demonstrably NOT TRUE for "other Capitol Police documents", which, as pointed out by my ¶20, were annexed to Ms. Belaire's May 23rd letter (Exhibit "F").

40. If, as Mr. Mendelsohn claims, the U.S. Attorney did not have "possession" of the 39-page fax until "early to mid September", is he saying that seasoned Capitol Police did not turn it over when it transmitted other documents to the U.S. Attorney on or about May 23rd to commence the criminal prosecution against me?

41. If so, it was not because Capitol Police was unaware of my 39-page fax to Detective Zimmerman. Quite the contrary. From the moment of my May 22nd arrest by Sergeant Bignotti – indeed, even before she put me in handcuffs – I insisted that she call Detective Zimmerman, alerting her to my phone conversation with him the previous day and my 39-page fax. At Capitol Police Station, I continued to insist that Detective Zimmerman be called and that my 39-page fax be produced. I believe it was only because of my non-stop insistence that, ultimately, Detective Zimmerman arrived, although without the 39-page fax, which he confirmed having received. He was so completely dismissive about it[5] that I insisted he produce it so that we might review it directly. After he returned with the fax, we did review it. Still, he continued to be utterly disrespectful of its content. With crude language, he told me he had no use for it and was going to throw it out, unless I wanted it back. To this, I gave him emphatic

[5] Detective Zimmerman particularly faulted me for not including my 1996 police misconduct complaint (Exhibit "M") – which my fax to him had stated (Exhibit "I", p. 2) I would bring with me to Washington, along with the file of my criminal case. Although I told Detective Zimmerman that I had brought them down – and that they were readily accessible from my possessions – he was not interested in taking the opportunity to examine them, as I invited him to do.

warning – within hearing of other Capitol Police officers -- that he had better not destroy it because it was not only exculpatory evidence, but would be my "Exhibit A".

42. Why, too, did Mr. Mendelsohn, who was on notice of my May 21st fax to Detective Zimmerman and other exculpatory documents, from as early as June 20th, take no steps to bring them into the U.S. Attorney's "possession"? Tellingly, Mr. Mendelsohn does not respond to my query (at ¶30) as to "when he first read" my 39-page fax (Exhibit "I")– which, because of its dispositive nature, I asserted he "must be required to identify". As stated:

> "29. ...over and beyond Mr. Mendelsohn's recognition from reading the 39-page fax of the relevance of the requested 'documents and tangible objects' [sought by my August 12th Discovery Demand], he could be expected to recognize that he would be unable to prove the necessary 'intent' to sustain the criminal charge against me for the respectful, First Amendment-protected innocent act of requesting to testify at the Committee's public hearing to confirm a 'lifetime' federal appellate judge, captured by the videotape.
>
> 30. As Mr. Mendelsohn not only failed to drop the prosecution of this case over these many months, but again and again engaged in oppressive, hard-ball tactics to railroad me to trial, without discovery[fn.9], he must be required to identify when he first read my 39-page fax to Detective Zimmerman."

43. Indeed, Mr. Mendelsohn did not have to obtain "possession" of my 39-page fax to have read its 2-page letter to Detective Zimmerman and its most pertinent component parts – as they were all posted on the Center for Judicial Accountability's website, www.judgewatch.org – a fact identified by both my June 16th memo to Ralph

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[fn.9] "This includes his unethical attempt to get me to stipulate that if he consented to adjournment of the August 20th court conference, I would agree that this case would come on for trial within 30 days of the rescheduled September 19th

Nader, Public Citizen, and Common Cause (Exhibit "L", p. 2) AND my May 28th memorandum to Senate Judiciary Committee Chairman Hatch and Ranking Member Leahy (Exhibit "K-1", fn. 2, fn. 6) – copies of which he does not deny I gave him in hand on June 20th (¶32).

44. As for Mr. Mendelsohn's assertion (¶14) that "the government is not required to provide notice of material that defendant herself wrote and sent to the U.S. Capitol Police or the U.S. Attorney", he provides no legal authority for the proposition that such would not fall within *Brady* so long as it is exculpatory. As Mr. Mendelsohn concedes, there is always the possibility that I had not "kept a copy of [my] own correspondence" – and certainly, my writing and sending correspondence, is not confirmation of receipt by the intended recipients.

45. Moreover, as to his claim (¶14) that "the government cannot turn over any alleged Brady evidence to defendant that either does not exist or is not in the government's possession", Mr. Mendelsohn has not in any way challenged the discussion in my moving affidavit (¶¶43-50) that his bald claim – eight times repeated in his October 3rd letter – "that requested documents 'do not exist' is patently preposterous and unbelievable." (¶43).

46. Notwithstanding Mr. Mendelsohn's ¶15 claim that my motion is "a transparent attempt to convert a non-existent discovery violation" under *Brady* into "grounds for dismissal" – and his ¶18 assertion that I have in fact requested "dismissal based on Rule 16" -- I have not sought any such dismissals. However, based on the

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conference date. [*See* ¶14 of my August 6th motion to adjourn the August 20th court conference]."

showing in my motion, ANY ethical prosecutor would have moved for dismissal in recognition of the fact that he simply had NO CASE to prosecute.

47. That Mr. Mendelsohn, instead of taking such ethically-dictated action, protests that a dismissal:

> "would prevent the government from introducing witness testimony concerning defendant's criminal actions, and would allow defendant to escape punishment for those actions." (¶15)

is a measure of how bereft he is of any respect for the probative evidence before him establishing, as a matter of law, NO "criminal actions" on my part – and NO basis for any "punishment". Indeed, such appears to be reinforced by one of the cases Mr. Mendelsohn himself cites (at p. 5), *Matter of M.W.G.*, 427 A.2d 440 (D.C. 1981), which, in discussing a disorderly conduct charge arising from speech, made pertinent comments about the training of police, and quoted from *Williams v. District of Columbia*, 136 U.S. App. D.C. 56, 419 F.2d 638 (1969) that:

> "[T]he circumstances under which words are spoken are of critical importance in deciding whether the Constitution permits punishment to be imposed."

No rational person, having a modicum of understanding as to the fundamental democratic principles on which this country is founded, could view my respectful request,

> "Mr. Chairman, there's citizen opposition to Judge Wesley based on his documented corruption as a New York Court of Appeals judge. May I testify?",

made at the conclusion of the Senate Judiciary Committee's May 22nd "hearing" to confirm a nominee to a "lifetime" federal appellate judgeship, as constituting "criminal

actions" warranting "punishment" – and certainly not when the "circumstances" of that respectful request are known.

48. The true crime committed is Capitol Police's unprecedented, totally unjustified arrest of me on May 22nd, thereafter compounded by the U.S. Attorney's unethical, oppressive and harassing conduct. Such prosecutorial misconduct was first formally put before the Court by my August 6th adjournment motion – and now by my October 30th discovery/disclosure motion. For Mr. Mendelsohn to claim (¶16) that my sanctions request is "without merit and should be denied without a hearing" – and to imply, by quoting *Duddles v. United States*, 399 A.2d 59, 63 (D.C. 1979), that my "definitive motion papers" do not "make factual allegations, which, if established, would warrant relief", being "merely conclusory", is yet a further flagrant deceit by him, warranting the strongest condemnation and disciplinary action.

49. As for Mr. Mendelsohn's assertion (¶17) that in order for me "to prevail on [my] constitutional claim", [I] must show that the police acted in bad faith" – for which he cites *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) – such case, in fact says the opposite:

> "The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence.", at 57.

50. In any event, there is no need to look beyond the manner in which Mr. Mendelsohn responded to my August 6th adjournment motion[6] – and now to my

[6] That August 6th motion was unopposed when it was decided by Senior Judge Stephen Eilperin in an undated order faxed to me on August 14th -- a fact acknowledged by Judge Eilperin's subsequent September 3, 2003 memorandum and order.

October 30th discovery/disclosure motion, as hereinabove particularized – for confirmation of the bad-faith which characterized commencement of this prosecution and his subsequent behavior. Obviously, but for Mr. Mendelsohn's bad-faith, he would have responded to the serious and substantial allegations of misconduct presented by these motions, rather than pretending they were not there. Indeed, he would have been eager to confront them

51. The prejudicial result of Mr. Mendelsohn's bad-faith refusal to confront the fact-specific, document-supported allegations of my motions is that a prosecution which should have been dropped months ago was continued – needlessly burdening me and this Court – and casting shame on the U.S. Attorney's Office.

52. As to Mr. Mendelsohn's deceit (¶18) that "the government is more than willing to accede to the exclusion of any alleged discoverable materials that the government is unable to provide defendant", I am not seeking to exclude *any* discoverable materials. Quite the contrary. As the first sentence of my Discovery Demand reflects, I expect to introduce all 22 of the requested "documents and tangible objects" as "exculpatory" (Exhibit "A").

53. Finally, Mr. Mendelsohn's inapt citation (¶18) to *Brown v. United States*, 372 A.2d 557, 560-561 (D.C.), cert. denied, 434 U.S. 921 (1977), as to the "appropriate test for determining sanctions for lost or destroyed evidence", following

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Nevertheless, Mr. Mendelsohn, knowing that the motion had already been decided, filed opposition later in the day on August 14th, signed by Assistant U.S. Attorney Edward O'Connell on his behalf. Such included a certificate of service falsely attesting that it had been faxed to me on that date. That I had not, in fact, received any such opposition by fax is reflected by ¶¶18-23 of my August 17th motion for reargument, etc. Indeed, upon my subsequent receipt of this opposition by mail, I requested the fax receipt – which Mr. O'Connell and Mr. Mendelsohn refused to produce.

upon his inapt citation (¶17) to *Arizona v. Youngblood*, also involving the government's failure to preserve evidence, suggests that Mr. Mendelsohn's eight responses in his October 3th letter that requested documents "do not exist" may be a euphemism for their destruction. Mr. Mendelsohn must be required to particularize his meaning of "do not exist", already shown to be "patently preposterous and unbelievable" by my moving affidavit (¶¶43-50).

Conclusion

54. The powerful, inspiring words of a unanimous Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), germane to the instant motion, apply to more than the government's obligation to make discovery/disclosure:

> "our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' [fn]"

55. Demonstrated by my moving papers was that I had been "treated unfairly" by the Department of Justice's representative, Mr. Mendelsohn, and that his October 3th response to my August 12th Discovery Demand was "false, in bad-faith, and deceitful" with regard to virtually all 22 requests for "documents and tangible objects" (¶15).

56. As demonstrated by this reply, Mr. Mendelsohn's opposition is no less "false, in bad-faith, and deceitful" throughout.

Needless to say, Mr. Mendelsohn's belated opposition neither identified nor addressed his oppressive, advantage-taking conduct, particularized by my motion (¶¶14-18).

WHEREFORE, it is respectfully prayed that the relief sought in my October 30, 2003 notice of motion be granted in all respects, with referral of Assistant U.S. Attorney Mendelsohn's documented violations of District of Columbia Rules of Professional Conduct to appropriate disciplinary and other authorities, pursuant to Canon 3D of the Code of Judicial Conduct for the District of Columbia.

Elena Ruth Sassower

ELENA RUTH SASSOWER

Sworn to before me this
3rd day of December 2003

Beth Avery

Notary Public

BETH AVERY
Notary Public - State of New York
NO. 02AVA5056824
Qualified In Westchester County
My Commission Expires 3/11/06