UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA **v.** **MICHAEL T. FLYNN,** **Defendant**	**Crim. No. 17-232 (EGS)**

GOVERNMENT'S SURREPLY TO DEFENDANT'S REPLY IN SUPPORT O MOTION TO COMPEL THE PRODUCTION OF *BRADY* MATERIAL AND F ORDER TO SHOW CAUSE

The United States of America, by and through its undersigned counsel, respectf this surreply to respond to arguments and claims raised for the first time by defendant M Flynn in his Reply in Support of His Motion to Compel Production of *Brady* Material a Hold the Prosecutors in Contempt, *United States v. Flynn*, 17-cr-232 (Doc. 129-2) ("Re filed on October 22, 2019. Although the defendant ostensibly accepts that *Brady v. Ma* 373 U.S. 83 (1963), and the Court's Standing Order, pertain to information that is favo material to his guilt or punishment, his Reply is untethered to that standard. As describ each new argument or claim is unsupported by fact or law, and does not identify favora material information that the government has failed to produce. Accordingly, the defen motion should be denied.

I. *Brady* Does Not Require the Government to Produce Material to an Uncha Individual During an Ongoing Criminal Investigation

preceded his December 1, 2017 guilty plea. *Brady* imposes no such requirement for un individuals. *Brady* requires the government to disclose all evidence that is "favorable t *accused* . . . where the evidence is material either to guilt or punishment." *United State Bagley*, 473 U.S. 667, 669 (1985) (quoting *Brady*, 373 U.S. at 87) (emphasis added). *B* rooted in the Constitutional right to due process. "Due process" imposes constraints on governmental decisions that deprive individuals of "liberty" or "property" interests wit meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v Eldridge*, 424 U.S. 319, 332 (1976). The defendant identifies no court that has found th doctrine applicable outside the context of a formally charged criminal case.[1]

Here, the defendant alleges that he was "entitled to all the *Brady* evidence in the government's possession well before November 2017." Reply at 20. Prior to Decembe however, the defendant had not been charged with a crime. After communications betw government and the defendant's counsel, the defendant agreed to meet with the governm November 2017 (specifically, on November 16, 17, 20, 21, and 29). Each interview wa voluntary. The defendant was represented by counsel, was free to leave at any time, an afforded protections by the government against his statements during those meetings be against him. During the entirety of the interviews, the government had not filed crimin

---

[1] Courts outside of this district have applied *Brady*-type disclosure in civil cases " situations" where a person's liberty was at stake. *See Brodie v. Dep't of Health & Huma* 951 F. Supp. 2d 108, 118 (D.D.C. 2013), *aff'd sub nom. Brodie v. U.S. Dep't of Health Servs*., No. 13-5227, 2014 WL 211222 (D.C. Cir. Jan. 10, 2014). The three decisions

against the defendant, and a plea agreement had not been signed. In short, the governm no obligation to provide the defendant with any information before or during those volu interviews.[2]

Thereafter, the government disclosed to the defendant multiple pieces of inform he now claims are exculpatory: one of the interviewing agents was under investigation misconduct relating to certain text messages that showed a preference for one of the ca for President; the same interviewing agent believed that the defendant had a sure demea did not give any indicators of deception during the January 24 interview; and both inter agents had the impression at the time that the defendant was not lying or did not think h lying. The government also answered various questions from defense counsel. *See* Government's Response to Defendant's Motion to Compel the Production of *Brady* Ma For an Order to Show Cause at 5-6, *United States v. Flynn*, 17-cr-232 (D.D.C. Oct. 1, 2 (Doc. 122) ("Opposition").

After the government made those disclosures, on November 30, 2017, the defen signed the plea agreement and the government filed an information with the Court, cha defendant with one count of "willfully and knowingly" making material false statemen his communications with the Russian Ambassador during an interview with the Federa of Investigation ("FBI") on January 24, 2017 ("January 24 interview"). On December the defendant entered a knowing and voluntary guilty plea. Thereafter, this case was tr to this Court, which issued its Standing Order. *Id.* at 3-7.

Beginning on March 18, 2018, after the issuance of a protective order, the gove provided additional discovery to the defendant. Although the defendant now complain the pace of that discovery, before December 18, 2018, the defendant was in possession the information on which he now bases his argument that the case should be dismissed government misconduct. *See* Reply at 1-2, 16, 26; Notice of Discovery Correspondenc *States v. Flynn*, 17-cr-232 (D.D.C. Oct. 1, 2019) (Doc. 123). Thereafter, on December the defendant and his counsel affirmed for this Court that they had no concerns that pot *Brady* material or other relevant material had not been provided to the defendant. *See* I Transcript at 8-10, *United States v. Flynn*, No. 17-cr-232 (D.D.C. Dec. 18, 2018) ("12/ Hearing Tr."). The defendant further affirmed, under oath, that he wished to proceed to sentencing because he was guilty of making false statements to the FBI. *See id*. at 16.

II. The Government Did Not Suppress Exculpatory Information Relating to th Creation of the January 24 Interview Report

The defendant now asserts that the government has suppressed exculpatory mat pertaining to the January 24 interview report that documents his false statements to the Reply alleges that the government has suppressed the "original 302" of the January 24 and fabricated certain notes and reports of the January 24 interview. Reply at 23-24. T arguments appear premised on three contentions: that "material" changes were made to interview report after February 10, 2017; that the government hid the fact that the defen a sure demeanor; and that former Deputy Assistant Director ("DAD") Peter Strzok's ha notes were not taken contemporaneously during the interview. *See* Reply at 10-11, 23-2

to the agents about his communications with the Russian Ambassador on January 24, 2
Both interviewing agents' handwritten notes are clear that when they first asked the def
about his contacts with Russia, the defendant spoke about multiple communications, bu
his communications with the Russian Ambassador about the United Nations ("UN") Vo
U.S. Sanctions. *See* Exhibit 1, DAD Strzok's Handwritten Notes of January 24 Intervie
("Strzok Notes") (no mention of U.S. Sanctions or the UN Vote before the agents provi
"reminder" about the UN Vote); Exhibit 2, Other Interviewing Agent's Handwritten No
January 24 Interview at 3 ("Other Agent Notes") (same). Both interviewing agents' no
clear that when they ultimately prompted the defendant about his conversations on the
he repeatedly denied that his efforts were intended to get Russia (or other foreign gover
to change their vote. *See* Other Agent Notes at 3 ("What is your position // No: hey if y
this…;" Question: "Any vote this way, slow down[?]," Answer: "No."); Strzok Notes a
sense where stood on that vote;" "Wasn't hey if you do this it will be that;" Question: "
consider voting this way?," Answer: "No. Where do you stand? What's position."). An
interviewing agents' notes are clear that the defendant maintained that he had "[n]o rec
of speaking with the Russian Ambassador about U.S. Sanctions, and that the defendant
have a "long drawn out" conversation with the Russian Ambassador about "don't do so
Other Agent Notes at 4; Strzok Notes at 3 ("Ø recollection? Not really, I don't rememb
don't do anything;" "Ø long drawn out about don't do something"). The final interview
and *every* draft of that report document those same false statements, in a clear and cons
manner. *See* Drafts of FD-302 Report of January 24 Interview (Exhibit 3).

statement that the other interviewing agent included in the draft of the report. *See* Exhi
4. Neither of those sentences pertain to the defendant's false statements. A careful rev
draft of the interview report dated February 10, 2017, details each of the defendant's m
false statements—which track the agents' handwritten notes. *Id.* at 1-5. In describing h
communications with Russian officials, including his call with the Russian Ambassado
December 29, 2016, the defendant did not disclose his communications with the Russia
Ambassador about the UN Vote or U.S. Sanctions. *Id.* at 1-3. When prompted about th
Vote, the defendant acknowledged he had such a communication, but falsely stated tha
purpose was to "get a sense of where countries stood on the vote." *Id.* at 4. When the a
asked him if he made any comment to the Russian Ambassador about voting in a partic
"Flynn answered, 'No.'" *Id.* With respect to U.S. Sanctions, the defendant specifically
did not" recall such a conversation with the Russian Ambassador (despite having two s
Id. at 4. When the agents pressed the matter, and asked whether the defendant encoura
Russian Ambassador to not engage in a "tit-for-tat," the defendant false stated, "Not rea
don't remember. It wasn't, 'Don't do anything.'" *Id.* at 4-5. When they agents presse
again, the defendant stated that "he did not have a long drawn out discussion about 'do
something.'" *Id.* at 5. The final interview report, just like the agent's handwritten note
all of the above material false statements. *See* Notice (Official Record of January 24 In
Report), *United States v. Flynn*, No. 17-cr-232 (D.D.C. June 6, 2019) (Doc. 85). The e
interview report between February 10 and February 15, largely grammatical and stylist
alter the above-described false statements.

interview report in its possession. Second, the most "original" interview documents are handwritten notes themselves, which the government provided to the defendant and det defendant's multiple false statements. Third, even if an earlier draft of the interview re existed, there is *no* reason to believe it would materially differ from the interviewing ag handwritten notes or the other drafts—all of which state that the defendant made the sp false statements to which the defendant admitted guilt. Fourth, the interviewing agents statements to FBI and Department of Justice ("DOJ") officials immediately following t interview on January 24, 2017, confirm that the defendant made multiple false statemer is why DOJ officials immediately contacted the White House after the interview (the N Security Advisor had just lied to the FBI about his communications with Russia). And defendant's false statements to the FBI on January 24, 2017, were the same false staten he made just days earlier to Vice President Michael Pence, White House Chief of Staff Priebus, White House Press Secretary Sean Spicer, and *The Washington Post*.[4]

The defendant also now adopts the position that DAD Strzok's handwritten note not taken contemporaneously during the interview. *See* Reply at 24-25. However, for the defendant relies on a handwriting expert, whose declaration provides the unremarka

---

[3] *See, e.g.*, Reply, Ex. 2 at 4 (DAD Strzok described the defendant to former FBI Lisa Page on January 24, 2017, as "denying it all").

[4] *See Face the Nation Transcript January 15, 2017: Pence, Manchin, Gingrich*, C NEWS (Jan. 15, 2017) (Vice President recounting that defendant told the Vice President (defendant) did not discuss sanctions with the Russian Ambassador); *Meet The Press 0* NBC NEWS (Jan. 15, 2017) (Priebus recounting defendant told him "[t]he subject matte

conclusion that the expert could render "no conclusion" on whether the notes were writ the interview. Reply, Ex. 16 at 3.[5] The defendant also does not contest the authenticity other interviewing agents' notes, which confirm the defendant's multiple false statemer interviewing agents repeatedly attested to the accuracy of the final interview report, wh confirm the defendant's false statements. *See, e.g.,* FD-302 of Other Interviewing Age Jan. 31, 2018 (Exhibit 4) ("all of the information in the FD-302 [of the January 24 inter accurate").

The defendant also places significant weight on DAD Strzok's remark that the d had "a very 'sure' demeanor and did not give any indicators of deception." Strzok 302 Without citation or explanation, the defendant intimates that such words were edited ou earlier draft of the interview report. *See* Reply at 24. There is no evidence that that occ that the government attempted to suppress those statements. It informed the defendant assessment before the defendant signed the plea agreement and pleaded guilty, and doc DAD Strzok's assessment in a separate interview of DAD Strzok (which it provided to defendant in discovery). Moreover, DAD Strzok's assessment does not exonerate the d There is ample public evidence that the defendant also convincingly lied to other gover officials about his conversations with the Russian Ambassador. The defendant made th false statements to the Vice President, White House Chief of Staff, and White House Pr Secretary, each of whom repeated the defendant's false statements on national televisio

III. The Government Did Not Suppress Exculpatory Text Messages

The defendant further alleges that the government is "suppressing" text messag between DAD Strzok and Page that are "exculpatory and material."[6] Reply at 6. They neither. Specifically, the defendant refers to text messages quoted in a CNN article. O message concerns a January 10, 2017, discussion to conduct interviews based on the pu release of a report from Christopher Steele. There is no indication that Strzok and Page referring to the defendant. To the contrary, the interview of the defendant was not relat Steele report, or any such "pretext." Rather, the interview of the defendant followed ev January 23, 2017, the day before his FBI interview, when the White House Press Secre recounted that he had recently spoken with the defendant, and the defendant had again speaking to the Russian Ambassador about U.S. Sanctions. *See White House Briefing* *Spicer – Full Transcript*, Jan. 23, 2017, CBS NEWS. The defendant also refers to text m that appear to relate to FBI conversations with the media. There is nothing "exculpator

---

[6] The government informed the defendant about the existence of the text message their import on November 30, 2017; later informed the defendant that it had learned the additional text messages that it did not have access to at that time; provided a hyperlink new text messages when they became available; and provided additional text messages pertaining to the defendant when it later came in possession of still more text messages Opposition at 8-9. For the first time, the defendant claims that text messages from a hy that the government provided on June 24, 2018, can no longer be downloaded. *See* Rep

the messages. They occurred on February 14, 2017—weeks after the defendant had pr
false statements to the FBI.[7]

IV. The Defendant's Lies Were Material Under the Law

The defendant also claims, again for the first time, that his lies to the FBI were
material because the agents asked him "nothing relevant to efforts to interfere in the 20
election." Reply at 27-28; *but see* Statement of Offense at 1-2, *United States v. Flynn*,
232 (D.D.C. Dec. 1, 2017) (Doc. 4) ("FLYNN's false statements and omissions impede
otherwise had a material impact on the FBI's ongoing investigation into the existence c
links or coordination between individuals associated with the [Trump] Campaign and R
efforts to interfere with the 2016 presidential election."). His false statements to the FB
January 24, 2017, were absolutely material. At the time of the January 24 interview, th
conducting a counterintelligence investigation into whether individuals associated with
campaign of then-candidate Donald J. Trump were coordinating with the Russian gove
its activities to interfere with the 2016 presidential election. *See* SPECIAL COUNSEL RO
MUELLER III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 201
PRESIDENTIAL ELECTION (Mar. 2019) ("Special Counsel Report"), Vol. I. at 1. The def
conduct and communications with Russia went to the heart of that inquiry. Actions suc
defendant's communications with the Russian Ambassador about U.S. Sanctions could
been indicative of such coordination.

The Supreme Court has held that a false statement is material if it has "a natural
to influence, or [is] capable of influencing, the decision of the decision making body to

was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995).[8] The defendant's false statements during the January 24 interview clearly meet that standard. It was imp that the FBI determine whether and why such communications with the Russian Amba occurred. The defendant's false statements inhibited the FBI's ability to obtain that cri information, raised questions about why the defendant would lie to the FBI about such communications, and fundamentally influenced the FBI's investigative activity going f

V. The Defendant Waived Any Potential Conflict of Interest

For the first time in his Reply, the defendant proclaims that his representation b counsel presented an "intractable conflict of interest," and through that conflict "the go sat back and harvested a guilty plea." Reply at 17-18. The defendant, however, omits government had discussions about this issue with his counsel. Whether or not there wa conflict of interest, the government raised the potential issue with the defendant's coun the government ever spoke to the defendant. *See* Brandon L. Van Grack, Memo to File 2017 (Exhibit 5). On November 1, 2017, and November 16, 2017, the government affi flagged the potential issue for the defendant's counsel. In both instances, the defendan counsel indicated that they had "thoroughly discussed" the issue with their client, who "any such conflict." *Id.* Additionally, during the scheduled sentencing hearing on Dec 2018, the defendant declined the Court's invitation to have the Court appoint "an indep attorney to speak with [the] defendant, review the defendant's file, and conduct necessa research to render a second opinion for [the] defendant." 12/18/2018 Hearing Tr. at 9.

VI. The Government Had Ample Justification to Interview the Defendant as P Ongoing Investigation

The defendant also now argues that the information he seeks will prove that the no factual or legal basis for a criminal investigation." Reply at 14-16. In support, the c cites to the standard necessary to obtain a warrant pursuant to the Foreign Intelligence Surveillance Act ("FISA"). *See* Reply at 14, n.11. Obtaining a FISA warrant, howeve entirely different from the FBI interviewing an individual as part of an ongoing counterintelligence investigation. Here, there were multiple bases for the FBI to interv defendant. The defendant's false statements publicly attributed to him by White House about his communications with Russia were alone a sufficient and appropriate basis for conducting the investigative step of interviewing the defendant.

VII. There is No Basis for Sanctions, Including Dismissal

In his Reply, the defendant also seeks a new category of relief, that "this Court dismiss the entire prosecution for outrageous government misconduct." Reply at 32; *se* at 3 ("dismiss the entire prosecution based on the outrageous and un-American conduct enforcement officials and the subsequent failure of the prosecution to disclose this evid in a timely fashion or at all"). The defendant does not state under what federal or local seeking such relief, or cite to relevant case law.[9] In order to provide a response, the go presumes, given the context in which this request for relief arose, that the defendant is

dismissal as a remedy or sanction for a purported failure to comply with *Brady* and/or t
Court's Standing Order.

There is no basis for the new relief requested, or any sanction. In the first instar
government has complied with *Brady*, and this Court's Standing Order, as set forth in d
the government's Opposition and herein. The government tendered more than 22,000 p
material, including much of the material that the defendant relies upon for its allegation
example, the defendant's suppression allegations in his Reply (at 5-14, 28) are based en
text messages and other materials that the government provided in discovery, or that we
publicly available prior to the defendant reaffirming his guilt on December 18, 2018. A
described *supra*, there is no merit to the defendant's claims that the government "suppr
exculpatory text messages or an exculpatory "original 302."

Nor did law enforcement officials engage in "outrageous" conduct during the cr
investigation and prosecution of the defendant. On January 24, 2017, when the defend
his interview, the FBI was engaged in a legitimate and significant investigation into wh
individuals associated with the campaign of then-candidate Donald J. Trump were coor
with the Russian government in its activities to interfere with the 2016 presidential elec
defendant was not "ambushed" at the interview, and the interviewing agents certainly d
engage in "outrageous" conduct that undermines the fact that he lied. Reply at 1, 7. Th
documents produced by the government in discovery show that the FBI asked the defen
permission to conduct the interview, informed the defendant that the questions would c
"contacts with the Russian Ambassador to the United States," interviewed the defendar

quoting from documents. For example, the Reply states that, according to the Strzok 3
agents decided they would not confront the defendant if he did not confirm his stateme
Reply at 8. But the Reply omits the sentence in the Strzok 302 preceding that referenc
DAD Strzok explained that "if Flynn said he did not remember something they knew h
they would use the exact words Flynn used . . . to try to refresh his recollection." Repl
(emphasis added).

The interviewing agents' handwritten notes and report provide further confirma
the defendant was not "trap[ped]." Reply at 1. The interviewing agents repeatedly sou
prompt the defendant to provide a truthful response. When the defendant first failed to
his calls with the Russian Ambassador about the UN Vote and U.S. Sanctions, the agen
the topics themselves. When the defendant then denied making a request to the Russian
Ambassador about the UN Vote, the agents nevertheless asked him if he made any com
the Russian Ambassador about voting in a particular way. And when the defendant spe
denied talking at all about U.S. Sanctions, the agents nevertheless asked him whether th
Ambassador told him that the Russian government had taken the defendant's request in
account. Such conduct demonstrates that the agents were not in search of a crime, but
about what had happened and why—which the defendant failed to provide. Had they w
"trap[]" the defendant into a false statement charge, they would not have prompted him
repeatedly to correct his statements.

For all of the above reasons, it is no surprise that with the same set of facts, the
and his prior counsel previously represented to this Court that the circumstances of the

FBI," he responded, under oath, "No, Your Honor." 12/18/2018 Hearing Tr. at 8.[10] Th
then asked the defendant if he understood that "by maintaining your guilty plea and co
with sentencing, you will give up your right forever to challenge the circumstances und
you were interviewed," to which the defendant answered, "Yes, Your Honor." *Id.* And
the Court queried whether the defendant wanted an opportunity to withdraw his plea be
of the interviewing agents had been investigated for misconduct, the defendant stated "
Your Honor." *Id.* at 9. His counsel likewise represented to the Court that their client w
"entrapped by the FBI," and that they did not contend "any misconduct by a member o
raises any degree of doubt that Mr. Flynn intentionally lied to the FBI." *Id.* at 11-12.

The Reply, thus, fails to identify any *Brady* violations or "outrageous" conduct
criminal case, and certainly no such conduct that is "clear and convincing." Reply at 3

---

[10] *See also* 12/18/2018 Hearing Tr. at 8 (Court: "At the time of your January 24th,
interview with the FBI, were you not aware that lying to FBI investigators was a federa
Defendant: "I was not – I was aware."; Court: "You were aware?"; Defendant: "Yeah.

[11] Even if the Court were to find that the government had violated *Brady*, which it
the relief that the defendant requests for the first time in his Reply would be inappropri
baseline remedy for a *Brady* violation in this district is retrial, not dismissal. *United Sta
Pettiford*, 627 F.3d 1223, 1228 (D.C. Cir. 2010) ("If we find a Brady violation, a new t

VIII. Conclusion

Though rife with new claims, allegations, and arguments, the Reply does not id information favorable and material to the defendant's guilt or sentencing that the gover not provide. The defendant's protestations of innocence and being misled into a guilty demonstrably false, and do not justify the production of additional material under *Brad* Court's Standing Order. Accordingly, the defendant's motions to compel production o material should be denied.

Respectfully submitted,

JESSIE K. LIU
United States Attorney
D.C. Bar No. 472845

By: _____*/s/*_____

Brandon L. Van Grack
Special Assistant U.S. Attorney
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 233-0968

Jocelyn Ballantine
Assistant United States Attorney
555 4th Street, NW
Washington, D.C. 20530
(202) 252-7252

Dated: November 1, 2019

CERTIFICATE OF SERVICE

I, Brandon L. Van Grack, certify that I caused to be served a copy of the for
electronic means on counsel of record for the defendant on November 1, 2019.

/s/

Brandon L. Van Grack
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 233-0968

Attorney for the United States of America