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IN THE THIRD JUDICIAL DISTRICT COURT

SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, v. MARK L. SHURTLEFF, Defendant.	**MR. SHURTLEFF'S MOTION TO DISMISS FOR BRADY/GIGLIO AND SPEEDY TRIAL VIOLATIONS AND MEMORANDUM IN SUPPORT** Case No. 141907720 Judge Elizabeth A. Hruby-Mills

Pursuant to Rules 12, 16, and 25(b)(1) of the Utah Rules of Criminal Procedure, the Fifth Sixth, and Fourteenth Amendments to the United States Constitution, Article 1, §§ 7 and 12 of the Utah Constitution, and Utah Code Ann. § 77-1-6(f), Mr. Shurtleff submits this Motion to Dismiss for *Brady/Giglio* and Speedy Trial Right Violations and Memorandum in Support.

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INTRODUCTION AND SUMMARY OF ARGUMENT[1]

The United States Constitution and Utah Constitution guarantee due process rights to every individual accused of a criminal act. Central to the notion of due process is an implicit recognition that prosecutors and the government possess extraordinary power to investigate and bring charges against ordinary individuals. For that reason, the power to prosecute bears with it certain obligations. "In our judicial system, the prosecutor's responsibility is that of a minister of justice and not simply that of an advocate, which includes a duty to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."[2] Prosecutors act as the representatives of "a sovereignty whose obligation to govern impartially is

[1] By way of a separate motion, Mr. Shurtleff has sought permission to file this over-length brief. For the purpose of submitting before the end of the week, as previously represented to the Court, Mr. Shurtleff files the instant motion while the separate request remains pending.

[2] *State v. Todd*, 2007 UT App 349, ¶ 17, 173 P.3d 170 (internal quotation marks omitted).

as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."[3]

Procedural fairness and justice are relevant to the instant motion in two respects. First, the federal and state constitutions impose an obligation on prosecutors to produce to the accused all material, exculpatory evidence. Second, the federal and state constitutions guarantee the right to a speedy trial, which ensures the defendant's right to a fair proceeding will not be prejudiced by undue delay. In this case, Mr. Shurtleff, who has consistently maintained his innocence, has been deprived of both of these rights. Accordingly, he requests the Court exercise its discretion and authority and dismiss the Amended Information.

I. Summary of *Brady/Giglio* Argument

The United States Constitution and Utah Constitution require the State to produce all material information bearing on the allegations against Mr. Shurtleff. To that end, the State must produce any exculpatory evidence, as well as any evidence that could be used to impeach its witnesses at trial. Mr. Shurtleff stands at a considerable disadvantage. The State has virtually unlimited resources to investigate its claims. It can compel the production of documents from third parties, seize evidence through warrants and subpoenas, compel the "cooperation" of witnesses through grand jury proceedings, threats of prosecution, grants of immunity or promises of leniency, and otherwise gather information relating to its theory of the case. Short of the government's good faith, Mr. Shurtleff has no way of knowing the full extent of how the State has investigated, whom it has interviewed, what documents have been seized, and what the State

[3] *Berger v. United States*, 295 U.S. 78, 88 (1935). For this reason, the prosecutor must exercise as much of a "duty to refrain from improper methods calculated to produce a wrongful conviction as [the duty] to use every legitimate means to bring about a just one." *Id.*

knows or thinks it knows about the case and the witnesses. It is precisely for this reason that the United States Supreme Court has repeatedly held that fundamental fairness and due process require the State, as gatekeeper of the evidence and material information, to provide exculpatory and impeachment evidence to criminal defendants.

The State's gatekeeping function and its constitutional mandate, at times, suffer from a systemic flaw that presents serious issues for our criminal justice system. Namely, it is the State that acts as the guarantor of due process. Nearly no oversight mechanism exists to test the quality of the State's good faith review and production of exculpatory evidence, and a defendant will seldom be able to discover a constitutional violation if the State elects not to disclose material information to which it, exclusively, is privy. A defendant's discovery of an error compromising the fairness of the proceeding occurs, if at all, almost always after the fact. [4]

These constitutional concerns are all the more pressing in this complex and unusual case. Here, the State relied on the resources of several federal agencies—the United States Attorney's Office ("USAO"), the United States Department of Justice ("DOJ"), and the Federal Bureau of Investigation ("FBI")—when developing its case against Mr. Shurtleff. Initially, the federal government developed the information through an independent investigation. At some point, however, the United States Attorney's Office for the District of Utah ("USAO-Utah") was

[4] In recent years, there have been several high-profile examples of prosecutorial misconduct in which prosecutors failed to produce exculpatory evidence, including the prosecution of former United States Senator Ted Stevens and prosecutions involving Enron executives. *See* Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxiii-xxvi (2015) (discussing misconduct in Stevens prosecution and similar cases). The Utah Supreme Court recently issued a decision affirming a mere six-month suspension for a prosecutor who failed to timely disclose exculpatory evidence. *In re Larsen*, 2016 UT 26, ¶¶ 34-42.

conflicted out of the investigation, and the United States Department of Justice ("DOJ") Public Integrity Section ("DOJ-PIN") temporarily took over.

Although DOJ-PIN subsequently declined to prosecute Mr. Shurtleff, the United States, through the Federal Bureau of Investigation's local office ("FBI-Utah"), remained heavily involved in the investigation and prosecution of the State's case. By way of example, in September 2013, the United States obtained a sealed order authorizing it to disclose documents obtained during a federal grand jury proceeding to state prosecutors. In early 2014, FBI-Utah formalized its participation in a joint state-federal task force by entering into a Memorandum of Understanding ("MOU") with the Utah State Bureau of Investigation, an agreement which contained specific provisions for coordinating investigations and sharing information. Similarly, on July 9, 2014, shortly before charges were filed in this Case, the United States formally deputized Utah Department of Public Safety ("DPS") Agent Scott Nesbitt, the State's lead investigator in this case, as a Special Deputy United States Marshal. In short, between 2012 and the present, FBI-Utah's agents developed the investigation, participated in interviews of key witnesses, gathered documents, provided and verified information contained in search warrant affidavits, and signed the State's Declaration of Probable Cause.

Given the federal government's heavy hand in this and related prosecutions, the State submitted prudential search requests to the United States for the purpose of obtaining necessary exculpatory material and information. When this approach failed, the State filed its "Motion to Compel the United States Government to Provide Discovery and *Brady* Material to Prosecutors for the State of Utah." The United States resisted efforts to produce the material, claiming that, despite the joint state-federal task force's central role in the development of the State's theories

and this case, it had no duty to comply with constitutional discovery obligations, and it could and would deny the request and withhold the information from the State and Mr. Shurtleff.

Recently, the United States agreed to disclose terabytes of data associated with a federal prosecution of a local businessman, Jeremy Johnson. Unfortunately, as the State has acknowledged, the United States and members of the Task Force[5] continue to refuse to provide information material to Mr. Shurtleff's defense theories and innocence. Moreover, several of the discovery requests made by Mr. Shurtleff remain outstanding. Given the substantial delays in this case and the United States' refusal to disclose, Mr. Shurtleff has been informed and firmly believes he will not receive the necessary information. This, in turn, has unfairly prejudiced and will unfairly prejudice Mr. Shurtleff's ability to present dispositive motions or receive a fair trial.

Given the roadblocks created by the United States and Task Force, the State's inability to comply with its constitutional obligations under *Brady/Giglio*,[6] and prejudice flowing from the State's delay in producing useable exculpatory and impeachment information, Mr. Shurtleff respectfully asks the Court to dismiss the Amended Information with prejudice.

II. Summary of Speedy Trial Argument

The United States Constitution and the Utah Constitution guarantee the right to a speedy trial. The right to a speedy trial not only promotes due process in a criminal case, but also

[5] Mr. Shurtleff uses the term "Task Force" to refer to the joint state-federal investigation, which, at various times, included USAO-Utah, FBI-Utah, DOJ-PIN, and state investigative and prosecutorial agencies, including the Utah Department of Public Safety's State Bureau of Investigation, Salt Lake District Attorney's Office, and Davis County Attorney's Office.

[6] Through the briefing, Mr. Shurtleff uses the term "*Brady*" broadly as shorthand for both exculpatory and impeachment evidence. *See Brady v. Maryland*, 373 U.S. 83, 84 (1963); *Giglio v. United States*, 405 U.S. 150, 152 (1972) (extending *Brady* to include impeachment evidence).

ensures the accused will not be subjected to lengthy pre-trial restraints on liberty and protects against the prejudice inevitably resulting from the passage of time.

Courts considering whether an accused's speedy trial right has been violated will weigh and balance four factors: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant invoked the right to a speedy trial; and (4) the prejudice to the accused.[7] The scope of the last inquiry—prejudice—includes consideration of whether the defendant has suffered from oppressive pretrial incarceration, the defendant's anxiety and concern, and the possibility that his or her substantive defenses have been adversely effected by delay.

The State has violated Mr. Shurtleff's right to a speedy trial. The State filed this case approximately two years ago, and trial will not occur until at least October 2016, if not later. Over these two years, the State has been the primary source of delay. The State's dilatory conduct included filing charges with no basis in law or fact, taking a year to amend the information, and devoting another year to attempting to resolve its *Brady* obligations.

As discussed below, these delays prejudiced Mr. Shurtleff, who has suffered significant anxiety and concern arising out of the personal, media, and financial pressure that will continue unabated until trial or dismissal. Many of the State's allegations rely principally on witness testimony of events that occurred up to a decade ago. The more time that passes, the greater the prejudice to Mr. Shurtleff. These concerns are heightened by the State's failure to produce *Brady* material, which can only lead to months of additional delay. For all these reasons, pursuant Utah Rule of Criminal Procedure 25, Court should find that this case has been compromised by unreasonable and unconstitutional delay and, accordingly, dismiss.

[7] *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

FACTUAL BACKGROUND[8]

I. Mr. Shurtleff's Long-History of Public Service and the Initial Investigation.

1. Mr. Shurtleff served as Attorney General for the State of Utah from 2001 to 2013. At the conclusion of his third term and after approximately twelve years of service, Mr. Shurtleff stepped down as Utah's Attorney General in early January 2013.

2. On November 2, 2012, nearly two years before this case began, Mr. Shurtleff reported to the Office of the United States Attorney for the District of Utah ("USAO-Utah") and Utah Office for the Federal Bureau of Investigation ("FBI-Utah"), information he had learned concerning certain individuals whom he believed should be investigated by federal authorities because of potential federal criminal conduct and a potential conflict of interest in the Utah Attorney General's Office. Mr. Shurtleff's information concerned, among others, Utah-businessman Jeremy Johnson and Utah Attorney General Candidate John Swallow. Mr. Shurtleff disclosed the information to USAO-Utah Assistant United States Attorney ("AUSA") Brent Ward, AUSA Phil Viti, and FBI-Utah Special Agent ("SA") Michelle Pickens.[9]

3. A few days after the 2012 general election in which John Swallow became the Utah Attorney General Elect, Mr. Shurtleff reported to FBI-Utah SA Jon Isakson additional information he had learned concerning individuals whom he believed should be investigated by federal authorities because of potential federal criminal conduct and a potential conflict of

[8] Mr. Shurtleff submits herewith Exhibit A, which he incorporates by reference. Exhibit A is submitted under seal because it contains sensitive information, including information derived from documents already under seal, details on various claims and defenses, information to which the United States may claim ownership and information that could implicate third persons who are or at some point may be under criminal investigation.

[9] As discussed in Exhibit A, SA Pickens is a central figure in this case.

interest in the Utah Attorney General's Office. Mr. Shurtleff's information concerned, among others, Mr. Johnson and Mr. Swallow.

4. Former Attorney General John Swallow took office in January 2013.

5. Shortly after Mr. Swallow took office in January 2013, the Lieutenant Governor's Office and a Special Investigative Committee created by the Utah House of Representatives retained counsel to investigate public allegations that Mr. Swallow had engaged in "potential illegal, improper, or unethical conduct."[10]

6. After conducting its investigation, the Lieutenant Governor's Office determined "there was probable cause to believe that Mr. Swallow violated Utah's election law in five respects during the 2012 Attorney General campaign."[11]

7. The Special Committee concluded (1) Mr. Swallow had, in effect, created a "pay-to-play" system, in which Mr. Swallow provided access to his office in exchange for campaign support or contributions[12]; and (2) Mr. Swallow had improperly inserted himself into a private lawsuit against Bank of America in order to protect the interests of a campaign contributor.[13]

8. After months of investigation and public controversy, Mr. Swallow resigned from the office of Attorney General on December 3, 2013.[14]

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[10] *See* Utah House of Representatives, Report of the Special Investigative Committee, at 19-21 (Mar. 11, 2014) ("House Report"). Mr. Shurtleff was not the subject of the Special Investigative Committee's investigation.

[11] *Id.* at 29.

[12] *Id.* at 6, 38.

[13] *Id.* at 103.

[14] *Id.* at 27.

9. In late 2012 or early 2013, the State Bureau of Investigation ("SBI") and FBI-Utah began working together as part of a joint state-federal task force ("Task Force").[15] Members of the Task Force included Agent Scott Nesbitt from the Utah Department of Public Safety and FBI Special Agents Jon Isakson and Michelle Pickens.[16]

10. Between December 11, 2013 and June 2, 2014, members of the Task Force submitted a series of warrant applications to the Honorable Vernice S. Trease in the Third District Court, State of Utah. The Task Force's affidavits, which were later unsealed and released to the public, contained a series of materially false statements and material omissions.[17] Mr. Shurtleff contends the Task Force used the false statements and material omissions to unconstitutionally and illegally invade his home and personal effects in violation of the federal and state constitutions.[18] He also contends the materially false warrant affidavits, which were inevitably unsealed, created a false public narrative about Mr. Shurtleff's conduct.

11. The purpose and effect of the Task Force's misleading affidavits was to confuse Mr. Swallow's alleged misconduct with Mr. Shurtleff's many years of public service.

[15] *Supra* note 5.

[16] The central role played by Agent Nesbitt, SA Isakson, and SA Pickens is discussed in greater detail in Exhibit A.

[17] Exhibit B contains examples of material omissions and misrepresentations.

[18] U.S. Const. amend IV; Utah Const. art. I, § 14; *Franks v. Delaware*, 438 U.S. 154, 164 (1978).

12. Contemporaneously, DOJ-PIN completed its own investigation into the allegations against Mr. Shurtleff and declined prosecution in or around September 2013.[19]

II. The State's Initial Charging Decision

13. Despite DOJ-PIN's decision, on July 15, 2014, the State filed an information charging Mr. Shurtleff with ten felony counts in the Third District Court, Salt Lake County, State of Utah, Case No. 141907720.

14. The Original Information, which referenced events between October 2008 and May 2013, included the following charges:

Count	Nature of Allegation	Alleged Time of Events
1	Pattern of Unlawful Activity, Utah Code Ann. § 76-10-1603	Conduct allegedly occurred between January 8, 2009 and May 6, 2013.
2	Receiving or Soliciting a Bribe, Utah Code Ann. § 76-8-105	Conduct allegedly occurred between May 4, 2009 and May 5, 2009.
3	Receiving or Soliciting a Bribe, Utah Code Ann. § 76-8-105	Conduct allegedly occurred between June 5, 2009 and June 7, 2009.
4	Receiving or Soliciting a Bribe, Utah Code Ann. § 76-8-105	Conduct allegedly occurred between October 31, 2008 and January 8, 2009.
5	Accepting a Gift, Utah Code Ann. § 67-16-5	Conduct allegedly occurred in February 2011.
6	Accepting a Gift, Utah Code Ann. § 67-16-5	Conduct allegedly occurred between January 1, 2009 and May 1, 2009.
7	Accepting Employment that Would Impair Judgment, Utah Code Ann. § 67-16-4	Conduct allegedly occurred between September 2012 and May 2013.

[19] Dennis Romboy, *No Federal Charges for John Swallow, Mark Shurtleff*, Deseret News (Sept. 12, 2013), http://www.deseretnews.com/article/865586253/Mark-Shurtleff-says-federal-investigation-clears-him-John-Swallow.html?pg=all.

Count	Nature of Allegation	Alleged Time of Events
8	Tampering with a Witness, Utah Code Ann. § 76-8-508(1)	Conduct allegedly occurred on May 8, 2009.
9	Tampering with Evidence, Utah Code Ann. § 76-8-510.5	Conduct allegedly occurred in February 2012.
10	Obstructing Justice, Utah Code Ann. § 76-8-306(1)	Conduct allegedly occurred on May 6, 2013.

15. The State's Original Information compounded a false public narrative by misleadingly including Mr. Swallow as a co-defendant on the case caption.

16. That same morning, the State's lead prosecutor, Salt Lake District Attorney Sim Gill, held a press conference at FBI-Utah's Salt Lake City headquarters for the purpose of announcing the charges against Mr. Shurtleff. Speaking with a representative of FBI-Utah, Mr. Gill characterized the case as the product of a joint state-federal investigation.[20]

17. In the Original Information, the State included a Declaration of Probable Cause signed by Agent Nesbitt, who had just been appointed a Special Deputy United States Marshall, and FBI-Utah SA Isakson.[21] The Declaration contained several of the same material omissions and misleading statements set forth in the search warrant affidavits.

a. Of particular relevance, the Declaration of Probable Cause referenced several individuals who will be key witnesses in this case, including: Marc Jenson; Timothy Lawson; Edward Jeffrey Donner; Stephen Jenson; John

[20] Media reports characterized SA Isakson and Agent Nesbitt as the "principal players in the probe." Robert Gehrke, *Frustrated Utah Prosecutors to Feds: Take Over Swallow, Shurtleff Cases*, Salt Lake Tribune (June 24, 2015), http://www.sltrib.com/home/2662286-155/frustrated-prosecutors-to-feds-take-over.

[21] Information (July 15, 2014) ("Original Information").

Swallow; Kirk Torgensen; Mark Robbins; Darl McBride; Chad Elie; Jonathan Eborn; Timothy Bell; Jennifer Bell; Seth Crossley; Jerry Jenson; Brian Farr; and the Honorable Charlene Barlow.

b. The Declaration also suggested that the charges revolve heavily around several events, including allegations relating to Mr. Shurtleff's involvement in Mr. Jenson's prosecution in 2007 and 2008; Mr. Shurtleff's brief interaction with Mr. McBride in 2009; Mr. Shurtleff's association with Mr. Johnson prior to a separate federal case; lobbying efforts of an online poker playing group; a purported and false pay-to-play arrangement; and Mr. Shurtleff's limited involvement in litigation involving Bank of America.

18. At the time charges were filed, Mr. Gill was campaigning for re-election as Salt Lake District Attorney. Mr. Gill used his prosecution of Mr. Shurtleff and Mr. Swallow to bolster his campaign[22] and won the November 2014 election by a relatively narrow margin.[23]

19. Prior to the election, Mr. Shurtleff filed a motion to verify that the case had not been consolidated with a separate case involving Mr. Swallow. Mr. Shurtleff requested that the

[22] *See, e.g.*, Pat Reavy, *Sim Gill Says He's Seeking Re-Election as District Attorney*, Deseret News (Mar. 18, 2014), http://www.deseretnews.com/article/865598935/Sim-Gill-says-hes-seeking-re-election-as-district-attorney.html (discussing Mr. Gill's review of "potential charges" against Mr. Shurtleff); Dennis Romboy, *Race for Salt Lake County District Attorney Could Be Tight*, Deseret News (Oct. 30, 2014), http://www.deseretnews.com/article/865614240/Race-for-Salt-Lake-County-district-attorney-could-be-tight.html?pg=all.

[23] Mr. Gill received 51.17% of the vote, while his opponent, Steve Nelson, received 48.83%. *See* Salt Lake County Clerk's Office, Official Election Results 2014, General Election, Salt Lake County, Utah (Nov. 18, 2014), *available at* https://slco.org/clerk/electionsEK/results/results_arch/2014General.html.

Court strike a portion of the caption that suggested Mr. Swallow and Mr. Shurtleff were co-defendants. Initially, the State opposed Mr. Shurtleff's motion.

20. Weeks after Mr. Gill was re-elected as District Attorney for Salt Lake County, Davis County Attorney Troy S. Rawlings[24] took over Mr. Shurtleff's case on behalf of the State.[25] Within days of his appearance, after reviewing the pleadings and case law, Mr. Rawlings moved to dismiss Count 1, Pattern of Unlawful Activity. The Court granted the motion.[26]

21. After the election and Mr. Rawlings's appearance, the State also changed course and concluded that it would separately prosecute Mr. Shurtleff and Mr. Swallow. The State also agreed it would no longer characterize Mr. Shurtleff and Mr. Swallow as co-defendants.[27]

III. The State's Amended Information

22. Approximately one year after filing charges, on June 15, 2015, the State narrowed the case against Mr. Shurtleff and filed an Amended Information ("Amended Information").[28]

23. The counts in the Amended Information identified discreet individuals, events, and time periods relevant to the State's theory of the case, including the following:

[24] Mr. Rawlings was appointed Special Utah Attorney General by Mr. Swallow's successor, Attorney General Sean Reyes. The appointment of Mr. Rawlings was borne out of the Utah Attorney General's Office's conflict of interest in investigating and prosecuting Mr. Shurtleff. Because of the conflict, General Reyes granted Mr. Rawlings broad powers of appointment.

[25] Appearance of Counsel (Nov. 18, 2014).

[26] Order on: State of Utah's Mot. Dismiss Count 1, Racketeering, Without Prejudice 1 (Nov. 22, 2014).

[27] More recently, the Salt Lake District Attorney's Office has maintained, despite its prior position, that the two cases are separate and distinct.

[28] Am. Information (June 15, 2015), attached as Exhibit E.

Count	Nature of Allegation	State's Description & Timeframe
1	Accepting a Prohibited Gift, Utah Code Ann. § 67-16-5	• *"First Pelican Hill trip – Marc Jenson"* • Conduct allegedly occurred in May 2009.
2	Accepting a Prohibited Gift, Utah Code Ann. § 67-16-5	• *"Second Pelican Hill trip – Marc Jenson"* • Conduct allegedly occurred in June 2009.
3	Obstructing Justice, Utah Code Ann. § 76-8-306(1)	• *"Lying to the FBI"* • Conduct allegedly occurred in May 2009.
4	Bribery to Dismiss a Criminal Proceeding, Utah Code Ann. § 76-8-509	• *"Mimi's Café meeting with Daryl McBride about Mark Robbins, Tim Lawson, Mark Shurtleff, and subsequent follow-up"* • Conduct allegedly occurred between May 2009 and June 2009.
5	Accepting a Prohibited Gift, Utah Code Ann. § 67-16-5	• *"St. George 'Green House' trip, private jet use, money payments – Jeremy Johnson"* • Conduct allegedly occurred in February 18-21, 2011; January 2009 to May 2010; March 21-27, 2008; and January 2009 and September 2009.
6	Obstruction of Justice, Utah Code Ann. § 76-8-306	• *"Aiding and protecting John Swallow in crimes related to Tim Bell and Bank of America "* • Conduct allegedly occurred between July 2012 and January 2013.

Count	Nature of Allegation	State's Description & Timeframe
7	Official Misconduct, Utah Code Ann. § 76-8-201	• *"Relationship and conduct regarding Tim Lawson – January 2007 – December 2012"* • *"Offering Marc Jenson's money to Daryl McBride at Mimi's Café – May 8, 2009 – June 10, 2009"* • *"Destroying personal letter from inmate Marc Jenson – November 2011 – February 2, 2012"* • *"Failure of duty to the public, State of Utah, and to Judge Jenkins regarding Bank of America, Tim and Jennifer Bell, John Swallow, Jerry Jensen, and Troutman Sanders – July 2012 – January 2013"* • *"Failure of duty regarding solicitation of campaign contributions with John Swallow – October 2008 – January 2009"* • Conduct allegedly occurred between January 2007 and January 2013.

24. Mr. Shurtleff continues to maintain his innocence on each and every charge in the Amended Information. If this case proceeds beyond the instant motion, Mr. Shurtleff intends to challenge the legal and factual sufficiency of the State's allegations through several dispositive motions and trial, if necessary. The bases for the dispositive motions are set forth in greater detail in exhibits filed with the Court and Background, Part VIII, *infra*.[29]

IV. Creation and Investigation of State-Federal Task Force

25. Mr. Shurtleff believes the State's investigation and initial charging decision were driven largely by state and federal investigators in the Task Force. Given its central role in the development of the case and discovery, additional information about the Task Force's inception and work is material to the instant motion.

[29] *Infra* Factual Background ("SOF"), Part VIII; Ex. B (illustrating material omissions and misstatements in the Task Force's warrant affidavits); Ex. C (containing draft motion).

26. In late 2012 and early 2013, several state entities investigated allegations relating to Mr. Swallow's electoral conduct, including the Lieutenant Governor's Office, the House Special Investigative Committee, and the Utah Department of Public Safety.

27. At some point in 2012 or 2013, state and federal investigators and prosecutors either separately or jointly expanded their investigation to Mr. Shurtleff. Participants included SA Sanitha Ulsh, SA Crystal Bowen, Menaka Kalaskar of DOJ-PIN, and Edward Sullivan of DOJ-PIN. No later than 2013, the investigation evolved into a joint state-federal effort. By late 2013, the Task Force's investigation into Mr. Shurtleff appears to have been driven in large part by three individuals: Agent Nesbitt; SA Isakson; and SA Pickens.

28. As discussed in greater detail below, USAO-Utah was recused from the investigation in April 2013. For that reason, DOJ-PIN, which joined the investigation in late 2012, assumed the local federal responsibility for reviewing and investigating the allegations against Mr. Shurtleff and Mr. Swallow.

29. After conducting its own investigation, DOJ-PIN contacted Agent Nesbitt by phone in August or September 2013 to inform the Task Force that the United States was declining to prosecute Mr. Swallow or Mr. Shurtleff. The State has represented that Agent Nesbitt recorded the phone conversation, which included Mr. Sullivan, Ms. Kalaskar, and Jack Smith, who then served as Chief of DOJ-PIN.[30]

30. By letter dated September 13, 2013, DOJ-PIN formally declined prosecution of Mr. Shurtleff. The Chief of DOJ-PIN authored the letter, which was addressed to Mary Rook, Special Agent in Charge of FBI-Utah, read, in relevant part:

[30] Despite requests, the Task Force has not produced a copy of the recording to Mr. Shurtleff.

> Dear Ms. Rook:
>
> The U.S. Department of Justice, Criminal Division, Public Integrity Section, has completed its review of allegations of bribery and fraud schemes involving Utah Attorney General John Swallow and former Utah Attorney General Mark Shurtleff. This letter will confirm that we have concluded that the initiation of criminal proceedings in this matter is not warranted at this time, and we are closing our file. We understand that your office concurs with this decision. . .[31]

31. On September 17, 2013, the Honorable Ted Stewart granted the United States permission to share information gathered as part of a federal grand jury with the District Attorneys for Salt Lake County and Davis County.

32. After DOJ-PIN announced the declination, FBI-Utah nevertheless continued to be actively involved in the investigation and prosecution of Mr. Shurtleff as part of the Task Force.

33. On or about January 13, 2014, FBI-Utah apparently formalized its participation in the Task Force by entering into a Memorandum of Understanding ("MOU") with the Utah Department of Public Safety Special Bureau of Investigation.[32] The MOU, which referenced the "Salt Lake City Public Corruption Task Force," contained the following provisions:

a. Although overall supervision was shared by participating members of the Task Force, the MOU permitted FBI-Utah to "designate one Supervisory Special Agent (SSA) to have direct and daily responsibility for all personnel and investigative matters pertaining to the" Task Force.

[31] The United States refused to provide a copy of the letter to the State or Mr. Shurtleff until April 11, 2016, nearly three years after Agent Nesbitt's conversation with DOJ-PIN and members of the Task Force received the letter. SAC Rook attended a joint press conference announcing the State's case on July 15, 2014. A copy of the letter is attached to Exhibit A.

[32] The MOU was not provided to Mr. Shurtleff until February 2016. A copy of the MOU is attached to Exhibit A.

b. The MOU stated an SSA "with designated oversight for investigative and personnel matters will be responsible for opening, monitoring, directing, and closing [] investigation in accordance with existing FBI policy and the applicable United States Attorney General's Guidelines."

c. Specific control over resources, which included personnel, was "retained by the participating agency heads, who will be kept fully apprised of all investigative developments by their respective subordinates."

d. Under the "Investigative Exclusivity" provision, the parties agreed matters designated for the Task Force would be handled exclusively by the Task Force, there would be no unilateral action by an agency, and "law enforcement actions will be coordinated and cooperatively carried out."

e. Information relating to confidential informants was restricted.

f. The MOU required investigative reporting to be prepared in compliance with FBI policy, and all reports, recordings, and investigative materials were to be maintained or stored by the FBI.

g. Task Force cases would be entered into the FBI computer system.

h. The Task Force would be housed at FBI-Utah's facility.

i. Finally, the MOU restricted information sharing and imposed certain requirements on investigative methods, which, for the most part, were to follow FBI guidelines.

34. On or about July 9, 2014, six months after the MOU was signed, Agent Nesbitt received a special appointment as a Special Deputy United States Marshall.

V. The Task Force's Refusal to Provide Information Relating to a Conflict of Interest

35. In April 2013, USAO-Utah was recused in connection with the investigation or prosecution of Mr. Shurtleff based on an undisclosed conflict of interest.

36. Despite repeated requests for information and documentation, Mr. Shurtleff has been unable to confirm the basis or source of recusal. Under the United States Attorneys' Manual ("U.S.A.M."), USAO-Utah's recusal likely originated in Washington, D.C. Mr. Shurtleff believes the recusal may relate to (a) the relationship between Mr. Johnson, Mr. Swallow, and/or former AUSA Brent Ward, (b) Mr. Shurtleff's November 2012 disclosures to USAO-Utah and FBI-Utah of information relating to what he believed was an effort to bribe a sitting United States Senator, or (c) Mr. Shurtleff's service as a confidential informant ("CI") for FBI-Utah and USA-Utah in a 2007 and 2008 investigation into several individuals' improper attempts to influence a pending prosecution of Mr. Jenson through threats and bribery.[33]

37. During at least one interview associated with this case, in January 26, 2014, FBI-Utah assured a witness that she should not be concerned that the USAO-Utah would become privy to her disclosures, that FBI-Utah was working with state prosecutors, and that USAO-Utah was barred from participating in the investigation or receiving any information in the case.[34]

38. Mr. Shurtleff's counsel has received credible information from both the State and the United States that USAO-Utah's recusal and conflict of interest extended to FBI-Utah.[35]

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[33] Ex. A, §§ I.A-E.

[34] Ex. A, § I.E.

[35] *Id.*

Because the Task Force refuses to provide information relating to the recusal, Mr. Shurtleff has been unable to verify the reach and scope of USA-Utah's and FBI-Utah's conflict of interest.

39. As discussed in greater detail in Exhibit A, Mr. Shurtleff believes USAO-Utah's recusal from the investigation or prosecution of Mr. Swallow and Mr. Shurtleff extended to FBI-Utah. FBI-Utah apparently denies the recusal prevents it from participating heavily in this case.

VI. History of Mr. Shurtleff's Efforts to Obtain Discovery

40. On or about July 30, 2014, the State submitted its standard response to discovery requests. Around that time, the State provided Mr. Shurtleff's counsel with a hard drive at the initial appearance. The hard drive contained a jumble of poorly organized and labeled files.[36]

41. On or about September 10, 2014, Mr. Shurtleff filed an Amended Rule 16 Motion for Discovery.[37] In doing so, Mr. Shurtleff requested all material or information necessary to the preparation of his defense in the possession, custody, or control of state and federal prosecuting and investigative agencies involved in the case. Among other things, Mr. Shurtleff requested:

a. Documents memorializing or authorizing FBI-Utah's involvement in the investigation following DOJ-PIN's declination letter;

b. Files relating to Mr. Shurtleff's participation as a confidential informant in a bribery sting operation directed at Paul Nelson and Marc S. Jenson.

[36] *See* Resp. Req. Disc. (July 30, 2014).

[37] Am. Rule 16 Mot. Disc. (Sept. 10, 2014), attached as Exhibit F. The list summarized above is illustrative, rather than exhaustive.

c. Investigative files for putative witnesses, including Marc Jenson, Paul Nelson, Stephen Jenson, Timothy Lawson, Kirk Torgensen, Scott Reed, Darl McBride, Mark Robbins, Alison Robbins, and Jonathan Eborn.

d. Any and all exculpatory or impeachment evidence, which included "all material and information in the possession of the entire prosecution team."[38]

e. Information relating to possible impeachment of each and every witness who provided information to the State or would testify at trial, including prior records, prior drug or medication use, formal or informal agreements relating to civil or criminal proceedings, and any payments to witnesses.

f. Information on any past, present, or pending complaints, investigations, or disciplinary actions relating to investigative agents; and

g. Information inconsistent with the elements of charged offenses, and any information that establishes a recognized affirmative defense.

42. After initially objecting to the Amended Rule 16 Motion for Discovery, the State represented to the Court that it had produced a "[h]ard drive containing searchable .pdf, [sic] stamped discovery – including both original and new discovery."[39]

43. The hard drive was not anywhere near as searchable as the State suggested, but instead contained a jumbled mass with serious organizational problems and technological deficiencies. To review and evaluate the discovery, Mr. Shurtleff would be forced to expend

[38] *Id.* at 4.

[39] Sec. Suppl. Resp. Req. Disc. (Oct. 17, 2014).

extraordinary time and expense, which is nearly impossible given his limited resources, because of the following issues:

a. Overall, the drive contained three separate folders with approximately 294,511 of unlabelled PDFs. The documents vary in size from 22 KB to 2.1 GB. Without the use of commercial database or e-discovery software, the documents can be searched, if at all, only one at a time.

b. Thousands of documents are useless—containing unrecognizable graphics or PDF productions of unassociated native data. Problematically, the useless documents are intermingled with tens of thousands of other documents, making it difficult to locate relevant or material information.

c. The final bates stamp appears to be SS519925, which suggests there are at least half-a-million pages to review. It is unclear whether the drive contains any duplicates or documents missing from the range.

d. The drive contained two folders of "Native" documents. The first contains 26,909 items comprising 51.4 GB, and the second has 82 files comprising 399 MB. Similar to the PDF documents, these documents lack identifying file names, a fact which increases the cost and burden of review.

44. Although the State could have provided Mr. Shurtleff with a searchable, indexed drive (or at a minimum, distinguished between new and old discovery), it declined to do so.

45. On or about January 30, 2015, after learning of jail recordings in which a key witness, Marc Jenson, made statements relating to his vendetta against Mr. Shurtleff, counsel requested the State produce any recordings of Mr. Jenson, as well as any written or electronic

communications between Mr. Jenson and third parties.[40] Mr. Shurtleff also requested policies of governmental entities for recorded inmate conversations and communications.

46. On March 17, 2015, Mr. Shurtleff's counsel requested the State verify whether all *Brady* and *Giglio* material had been produced.

47. On or about June 15, 2015, Mr. Shurtleff again requested discovery material to his defenses and the State's allegations. Among other things, Mr. Shurtleff requested the following:

a. Copies of any recorded interviews, transcripts, documents, or memoranda associated with interviews of Sovatphone Ouk, Gilbert Salinas, Jeremy Johnson, Mark Robbins, Tasia Wade, Toni Jorgensen, Vincent D'Onofrio, Steve Sandburg, and Steve Carlson, among others, as well as any other interviews relating to the State's investigation;

b. Policies, procedures, and documents relating to improper disclosure of confidential information to the news media, including the identities of individuals who likely leaked the date and time of the execution of a sealed search warrant for Mr. Shurtleff's home;

c. Information and documents relating to state-federal cooperation in the investigation and prosecution, including copies of agreements between participating state and federal agencies and information relevant to the State's allegation that Mr. Shurtleff's voluntary participation in an FBI interview constituted obstruction of justice of a state proceeding; and

[40] A copy of this correspondence is attached to Exhibit A.

d. Documents and details relating to the timing, purpose, and creation of the Task Force, and information relating to a federal grand jury proceeding.[41]

48. Because of delays in the production of certain documents, Mr. Shurtleff became increasingly concerned about improper participation of federal investigators and prosecutors in his case. On or about September 16, 2015, Mr. Shurtleff reiterated his request for all information relating to FBI-Utah's conflict of interest, its role in the prosecution, and its involvement in the investigation or prosecution of any of the witnesses against Mr. Shurtleff. He requested similar information about USAO-Utah's conflict of interest.[42]

49. Shortly thereafter, on September 28, 2015, the State filed its "Motion to Compel the United States Government to Provide Discovery and *Brady* Material to Prosecutors for the State of Utah," which is discussed in greater detail below.[43]

VII. The State's Requests for *Brady* Material and Motion to Compel

50. As detailed in Exhibit A,[44] prior to filing the Motion to Compel, the State sent the United States several prudential search requests for the purpose of complying with constitutional and statutory discovery obligations. Several points about the State's prudential search requests are relevant to the instant motion:

[41] A copy of this correspondence, which sets out the discovery request in greater detail, is attached to Exhibit A.

[42] A copy of this correspondence is attached to Exhibit A.

[43] Mot. Compel United States Gov. to Provide Disc. and *Brady* Material to Prosecutors for the State of Utah (Oct. 17, 2014) ("Mot. Compel").

[44] Ex. A, § II.

a. The State's requests incorporated, sometimes verbatim, Mr. Shurtleff's general and specific requests for *Brady* and *Giglio* material.[45]

b. The State expressly referenced its and the federal government's obligation, as a gatekeeper, to provide all material information bearing on the innocence of the accused.[46]

c. The State recognized FBI-Utah's participation in the investigation and prosecution of Mr. Shurtleff, and indicated that information in FBI-Utah's files could bear directly on Mr. Shurtleff's case.[47]

d. The State represented that agencies of the federal government may possess information relating to Mr. Shurtleff, Mr. Swallow, Mr. Lawson, Mr. Jenson, Mr. Johnson, online poker processing, Senator Mike Lee, Senator Harry Reid, former USA-Utah Ward, the DOJ-PIN declination, and the conflict of interest discussed above that may constitute *Brady* material.[48]

51. In the Motion to Compel, the State represented to the Court that the United States had refused to turn over material bearing on its prosecution of Mr. Shurtleff. As illustrated in Exhibit A, the State's Motion to Compel contained the following points:

[45] Prudential Search Request (Feb. 9, 2015), attached as Ex. G; Prudential Search Request (July 14, 2015), attached as Ex. H.

[46] *Id.*

[47] *Id.*

[48] Ex. H.

a. The State suggested the United States' refusal to produce documents deprived the State of its prosecutorial discretion and ability to evaluate the case and make *Brady-Giglio* decisions.[49]

b. The State said that the United States had insisted that Mr. Shurtleff provide a relevance/materiality proffer.[50] For obvious reasons, courts do not require a specific proffer or request from defendants or the disclosure of defense strategy or work product; moreover, internal guidelines and ethical rules often require prosecutors to disclose exculpatory material in the absence of a specific request.[51] Nevertheless, there was a specific request in this case, which was incorporated into the State's correspondence.

c. The State acknowledged members of the FBI and Agent Nesbitt actively participated in the investigation and prosecution of Mr. Shurtleff, including seeking and obtaining search warrants, cooperating in the investigation, and submitting a probable cause statement with the Information.[52]

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[49] Mot. Compel, at 2.

[50] *Id.*

[51] *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995); U.S.A.M., § 9-5.001 ("Because they are constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence.); *see also* Utah R. Prof'l Cond. 3.8 (imposing requirement without reference to request).

[52] Mot. Compel, at 4-6.

d. The State affirmatively acknowledged its *Brady-Giglio* obligation to disclose "discovery as required by Rule 16 of the Utah Rules of Evidence, which extends to exculpatory evidence or evidence that may be used to impeach a government witness."[53]

e. The State expressed concern, in light of its constitutional duty, that a third-party was "step[ping] into the shoes of the prosecutors actually involved in a case and mak[ing] required decisions[.]"[54]

f. The State cited the United States Attorneys' Manual, which unequivocally acknowledges a prosecutor's "affirmative obligation" to search files within its own office and that of the prosecutorial team.[55]

g. For all those reasons, the State requested that the Court order the United States to produce general and specific *Brady* material.[56]

52. Mr. Shurtleff joined in the State's Motion to Compel for the following reasons:

a. The United States, either through DOJ-PIN or FBI-Utah, participated in early investigation of Mr. Shurtleff and devoted substantial resources to this case and related cases.[57]

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[53] *Id.* at 6.

[54] *Id.* at 7.

[55] *Id.* at 7 (citing U.S.A.M., § 2025).

[56] *Id.* at 9.

[57] Exhibit A, as well as a timeline submitted by the State as a sealed exhibit to the Motion to Compel, underscores the federal government's investigation of areas that bear directly on the State's allegations and Mr. Shurtleff's right to receive related discovery. *See* Ex. A, § I.A.

b. FBI-Utah continued to investigate and provide material aid even after DOJ-PIN declined to prosecute Mr. Shurtleff's case.

c. FBI-Utah's investigation featured heavily in search warrant affidavits used to invade Mr. Shurtleff's home and personal effects.

d. The State would likely proffer SA Pickens and SA Isakson as witnesses, given their role in the investigation.

e. The United States possessed substantial information about key witnesses, including Mr. Jenson and Mr. Johnson.

53. The United States opposed the State's Motion to Compel.

54. In its reply memorandum, the State reiterated its request that the United States be compelled to produce *Brady* material. The State's reply memorandum contained the following:

a. The State could and would not delegate its authority to review and disclose all exculpatory material evidence to third parties.[58]

b. The State represented the United States possessed material information relating to Mr. Johnson.[59]

c. The State emphasized its "duty to learn" of *Brady* information, as well as the breadth of the doctrine which "encompasses any information, directly admissible or not, that would be favorable to the accused in preparing her defense, including information useful to preparation or investigation that

[58] Reply United States Dep't Justice Resp. to State of Utah's Mot. Compel United States Gov't to Produce Disc. and *Brady* Material to Prosecutors for the State of Utah, *State v. Shurtleff*, Case No. 141907720, at 3-4 (Nov. 9, 2015) ("State's Reply to United States").

[59] *Id.* at 5.

may lead to admissible evidence or have some meaningful impact on defense strategy."[60]

d. Finally, the State acknowledges that the mere fact of separate agencies or joint state-federal cooperation does not diminish the State's *Brady* obligations, particularly where the joint state-federal cooperation and investigation were integral to the State prosecution.[61]

55. Following the Motion to Compel, the United States purportedly produced some data stored on hard drives associated with the federal prosecution of Mr. Johnson, as well as some related materials, to the State. The State has represented to Mr. Shurtleff that there will be terabytes of data to review and analyze. The State also represented that it believes hard drives containing material that likely bears on this case went missing or were otherwise altered while in the government's custody or control.

56. The State recently informed Mr. Shurtleff that SA Isakson has produced another hard drive purporting to be a searchable copy of investigative information collected in the case. Mr. Shurtleff has not yet received a copy of the hard drive.

57. For all the reasons discussed above, Mr. Shurtleff has not yet received all of the materials, which in turn prejudices his ability to defend himself against the State.[62]

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[60] *Id.* at 15 n.1 (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), and *Wood v. Bartholomew*, 516 U.S. 1 (1995)).

[61] *Id.* (citing cases).

[62] *Infra* Argument, § I.B.

58. The State has represented to Mr. Shurtleff that the United States and members of the Task Force continue to refuse to provide certain information that Mr. Shurtleff believes and the State acknowledges is material to his defense and a fair trial.

VIII. Mr. Shurtleff's Dispositive Motions

59. Mr. Shurtleff intends to file dispositive motions that will likely be affected by the United States' late disclosure and the State's inability to produce all *Brady/Giglio* material.

60. Mr. Shurtleff intends to file a "Motion to Suppress Unlawfully Obtained Warrants and Request for *Franks* Hearing" ("Motion to Suppress").

a. In the Motion to Suppress, Mr. Shurtleff will show that Agent Nesbitt and members of the prosecution team intentionally or recklessly included dozens of false statements and material omissions in a series of search warrant affidavits for the purpose of obtaining illegal warrants which, as it turns out, became publicly available shortly after the execution of the search warrants, and resulted in the widespread public dissemination of false and misleading information.[63]

b. Mr. Shurtleff intends to seek a *Franks* hearing to cross-examine members of the Task Force, including Agent Nesbitt, SA Pickens, and SA Isakson, about the false statements and material omissions.

c. To effectively conduct the evidentiary hearing and support the Motion to Suppress, Mr. Shurtleff formally and informally requested categories of

[63] Mr. Shurtleff submits an exhibit containing non-exhaustive examples of dozens of material omissions and representations in the search warrant affidavit associated with the search of his residence. *See generally* Ex. B.

documents.[64] As discussed below, Mr. Shurtleff's ability to conduct the hearing and persuade the court will be prejudiced in the absence of all necessary information relating to the investigation.

61. Similarly, Mr. Shurtleff intends to file a "Motion to Dismiss for Prosecutorial Misconduct" ("Motion to Dismiss for Prosecutorial Misconduct").

a. Mr. Shurtleff intends to show that, in addition to the *Franks* violations and *Brady/Giglio* issues, investigators and prosecutors employed by the Salt Lake District Attorney's Office deprived Mr. Shurtleff of his rights to due process by, among other things, improperly creating, sharing or leaking false, misleading, or confidential information for the purpose of creating a false public narrative that not only furthered the careers of investigators and prosecutors, but also prejudiced Mr. Shurtleff's right to a fair trial.

b. Mr. Shurtleff intends to seek an evidentiary hearing to confirm investigatory misconduct, of which Mr. Shurtleff has become aware, concerning the illegal manner in which the media received information pertaining to the execution of a sealed search warrant of his home, as well as prior notice of the time and place of his arrest.

c. Mr. Shurtleff formally and informally requested categories of documents that bear on the leaked information, office procedure, and records of the investigators and prosecutors involved in this case, which have not been

[64] *Supra* SOF, § VI; Ex. A, § III.

forthcoming from the State.[65] Mr. Shurtleff's ability to conduct the hearing and persuade the court will be prejudiced in the absence of all necessary information relating to the prosecution.

62. Mr. Shurtleff also intends to file a "Motion to Dismiss Counts 1, 2, and 5 of the Amended Information" ("Motion to Dismiss Gift Counts").

a. In the Motion to Dismiss the Gift Counts, Mr. Shurtleff intends to show state and federal investigators and prosecutors represented to the Court, under oath, on no fewer than thirteen (13) occasions, that the investigation and claims were chargeable under Utah Code Ann. § 76-8-105. Because the State represented that the conduct was chargeable under Utah Code Ann. § 76-8-105, (and in fact charged that conduct under Utah Code Ann § 76-8-105), it should be barred from pursing claims based upon the plain language of Utah Code Ann. § 67-16-5(3). A draft Memorandum for the Motion to Dismiss Gift Counts is attached as Exhibit C.

b. In the alternative, Mr. Shurtleff may ask the Court to dismiss the State's claims under the Due Process Clause, because Utah Code Ann. § 67-16-5 is unconstitutionally vague ("Motion to Dismiss Based on Vagueness").

c. If Mr. Shurtleff pursues dismissal under an as-applied vagueness defense, his Motion will depend, at least in part, on all material evidence relating to Counts 1, 2, and 5, including but not limited to any evidence of the

[65] *Supra* SOF, § VI.

conflict of interest, potential misconduct by state and federal investigators, and any other exculpatory evidence relating to Mr. Jenson or Mr. Johnson.

IX. Procedural History Relevant to Speedy Trial Violation

63. The State filed the Original Information and obtained a warrant for Mr. Shurtleff's arrest on July 15, 2014.[66]

64. The State arrested Mr. Shurtleff later that day. Mr. Shurtleff was subsequently released pursuant to a Supervised Release Agreement with Salt Lake County Pretrial Services.

65. Mr. Shurtleff attended his Initial Appearance on July 30, 2014.

66. As early as September 10, 2014, Mr. Shurtleff formally requested discovery from the State, including *Brady* materials.

67. On December 5, 2014, the Court held a telephone hearing.

a. The Court struck a hearing date for arguments on outstanding motions, based on the request of the parties.

b. The State indicated its intent to file an Amended Information, which would likely not be ready until early 2015.

c. The parties represented that both sides were awaiting discovery from the Salt Lake District Attorney's Office.

d. The Court requested a written waiver of certain speedy trial rights.

e. The Court scheduled the Preliminary Hearing for February 2, 2015.

[66] The procedural history is outlined in a copy of the docket, which is attached as Exhibit I.

68. On December 9, 2014, Mr. Shurtleff filed a limited "Notice of Waiver of Speedy Trial Rights," indicating that he had agreed to waive rights for the period December 12, 2014 to February 12, 2015, a period of 62 days.

69. On February 2, 2015, the Court reset the Preliminary Hearing for March 23, 2015.

70. On March 23, 2015, the Court reset the Preliminary Hearing for June 15, 2015.

71. On June 15, 2015, the State filed its Amended Information.

72. On June 15, 2015, Mr. Shurtleff conditionally waived the Preliminary Hearing.

73. On June 29, 2015, Mr. Shurtleff was arraigned and entered a "not guilty" plea to the charges in the Amended Information. Mr. Shurtleff moved the Court to continue the matter, based on the need to prepare and file motions, and the Court scheduled a Pretrial Conference for August 10, 2015.

74. On July 27, 2015, the parties filed a "Stipulated Motion to Continue Status / Scheduling Conference," based on discovery issues and preparation of motions. The Court continued the Pretrial Conference to September 28, 2015.

75. On September 28, 2015, the State filed its Motion to Compel. That same day, the Court scheduled a jury trial for May 10-13, 17-20, 24-25, 2016, and ordered pretrial motions be filed at least fifteen weeks before the final Pretrial Conference, which was scheduled for May 2, 2016. The State's Motion to Compel was set for argument on December 1, 2015.

76. On November 25, 2015, the State filed a "Motion to Continue Hearing on Oral Arguments re: State of Utah's Motion to Compel Federal Government." The State represented it continued to work with the United States to reach an agreement on discovery issues, and that it

may be able to obtain information and discovery material through other means. The Court reset the time for argument to February 17, 2016.

77. During a telephonic conference on January 8, 2016, the Court extended the motion cutoff date to February 17, 2016.

78. On January 8, 2016, the Court extended the motion deadline until after the Court considered the State's Motion to Compel the United States, scheduled for February 17, 2016.

79. Throughout this time period, Mr. Shurtleff attempted to obtain all discoverable information to which he is constitutionally entitled to assure a fair trial.

80. On February 15, 2016, the State filed its "Motion to Vacate Hearing on Oral Arguments re: State of Utah's Motion to Compel Federal Government." The State indicated it received a "voluminous quantity of documents responsive to many of the requests" and that some items were in the process of being produced. Based on the request, the Court set a telephonic hearing for March 4, 2016.

81. On March 4, 2016, the Court reset the Final Pretrial Conference for October 17, 2016 and reset the trial for October 25-28, 2016 and November 1-4, 9-10, 2016. The motion deadline was set for August 5, 2016. Although Mr. Shurtleff agreed that additional time was necessary to receive the documents from the State, he did not waive his speedy trial rights. The Court expressly acknowledged that Mr. Shurtleff had made no such waiver.[67]

[67] During the telephone hearing of March 4, 2016, the Court said: "And, and, yeah, and you're certainly by setting trial dates we're not, I, I don't anticipate there would be any sort of waiver or anything but I, not only to make sure you have firm a trial date as you're making the requests, I also do want to have this matter move forwarded as quickly as we can."

82. As of the date of this motion, 706 days (approximately 1 year, 11 months, and 5 days) have elapsed since the State filed its Original Information and arrested Mr. Shurtleff. Discounting Mr. Shurtleff's limited waiver of 62 days, the case has been pending for 644 days.

X. Effect of Procedural Delays

83. Given the considerable outstanding discovery, Mr. Shurtleff is not prepared to go to trial, let alone file pre-trial motions, which rely extensively on information the United States and members of the Task Force refuse to make available to Mr. Shurtleff, but which the State continues to acknowledge is necessary for Mr. Shurtleff to receive a fair trial.

84. As described in greater detail in his declaration,[68] this proceeding has caused Mr. Shurtleff significant stress and anxiety. Moreover, the existence of the criminal case has caused enormous financial pressure on Mr. Shurtleff, who terminated by a reputable law firm because of the negative media stories arising out of the Task Force's investigation, and exacerbated existing financial responsibilities.

85. Additional delays in this case will result in further media coverage, which has been largely negative due in part to media leaks and the misrepresentations contained in warrant affidavits. Negative media coverage, in turn, continues to strain Mr. Shurtleff's reputation in the community, his health, and his financial well-being.

86. The prejudice caused or exacerbated by the State's dilatory conduct will continue until the Court dismisses the Amended Information or a jury returns a favorable verdict.

[68] Mr. Shurtleff's Declaration, which contains confidential information, has been filed under seal as Exhibit D.

ARGUMENT

I. THE COURT SHOULD DISMISS THE AMENDED INFORMATION FOR VIOLATIONS OF DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION AND UTAH CONSTITUTION

The United States Constitution and the Utah Constitution guarantee certain due process rights to every individual accused in a criminal proceeding.[69] A "hallmark of due process" is the right to "receive all material exculpatory evidence that the government possesses[.]"[70]

The United States Supreme Court recognized a defendant's right to exculpatory material in *Brady v. Maryland*.[71] In *Brady*, the issue was whether the government violated a defendant's due process rights in a state case when the prosecution withheld another party's confession until after trial.[72] Concluding the "suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment[,]"[73] the Supreme Court expressly held: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where

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[69] *Cf. Trade Comm'n v. Skaggs Drug Centers, Inc.*, 446 P.2d 958, 965 (Utah 1968) ("Due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.").

[70] *See* Kent R. Hart & Troy Rawlings, *The Need for Legislation to Reform Brady Practices in Utah: Requiring Prosecutors to Disclose All Favorable Evidence to the Defense*, 2 UTAH J. CRIM. L. 32, 32-33 (2016).

[71] 373 U.S. 83 (1963).

[72] *Id.* at 85-86.

[73] *Id.* at 86.

the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[74] The Supreme Court went on to explain:

> Society wins not only when the guilty are convicted but when criminal trials are fair; *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*.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.][75]

The Supreme Court expanded on this principle in *Giglio v. United States*.[76] In *Giglio*, the key witness refused to admit on the stand that a prosecutor previously promised not to prosecute the witness if he testified before a grand jury and at trial.[77] Considering whether the prosecutor's failure to notify the defendant of the promise not to prosecute required a new trial, the Supreme Court concluded that "nondisclosure of evidence affecting credibility" implicated due process.[78] Where the prosecutor failed, either through negligence or deliberate design, to disclose material evidence relating to a witness's credibility, due process demanded reversal of the conviction and a new trial.[79] *Giglio* now stands for the proposition that prosecutors must disclose "any material

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[74] *Id.* at 87; *see also United States v. Bagley*, 473 U.S. 667, 682 (1985) (defining materiality).

[75] *Brady*, 373 U.S. at 87-88 (emphasis added).

[76] 405 U.S. 150 (1972).

[77] *Id.* at 152-53.

[78] *Id.* at 153-54.

[79] *Id.* at 154-55.

that the defense could use to establish bias on the part of a government witness" and the principle that "information held by one prosecutor is attributable to the entire 'prosecutor's office.'"[80]

Over the years, the courts have expanded on *Brady* and *Giglio*: (i) "by mandating that its disclosure requirements apply even without a specific defense request[;]"[81] (ii) by requiring prosecutors to "timely deliver *Brady* material to allow the defendant to make effective use of the material at trial[;]"[82] and (iii) by classifying "all exculpatory evidence possessed by law enforcement . . . as *Brady* material regardless of whether the specific prosecutor in charge of the case has actual knowledge of its existence."[83] The Supreme Court has repeatedly recognized prosecutors' "affirmative duty to search for exculpatory evidence"[84] because they are uniquely situated to "gauge the likely net effect of exculpatory evidence because they alone can know

[80] Hart & Rawlings, *supra note* 70, at 36; *Giglio*, 405 U.S. at 154 ("Moreover, whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").

[81] Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1538-39 (2010); *United States v. Agurs*, 427 U.S. 97, 107 (1976); Hart & Rawlings, *supra* note 70, at 38 ("In essence, *Agurs* created a burden on prosecutors to actively review their case files and evidence to determine for themselves whether any evidence is potentially exculpatory.").

[82] Medwed, *supra* note 81, at 1539; Hart & Rawlings, *supra* note 70, at 39 (citing cases).

[83] Medwed, *supra* note 81, at 1539; *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

[84] Hart & Rawlings, *supra* note 70, at 38.

what is disclosed."[85] Each "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[86]

A *Brady* violation occurs when three elements are met: "(1) the prosecution suppressed evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material."[87] Each element is met in this case. As discussed below, the State has been unable to produce critical exculpatory and impeachment evidence striking at the heart of the allegations, thereby delaying trial and prejudicing Mr. Shurtleff. Accordingly, dismissal is appropriate.

A. Members of the State's Task Force either willfully or inadvertently suppressed exculpatory and impeachment evidence.

The first issue is whether "the prosecution suppressed evidence."[88] Courts consistently hold the prosecutor's constitutional responsibility to disclose exculpatory evidence requires the prosecutor to identify and disclose information in the possession, custody, or control of all of the members of the prosecutorial team, including investigators.[89] Moreover, a prosecutor's good

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[85] *Kyles*, 514 U.S. at 437.

[86] *Id.* ("But whether the prosecutor succeeds or fails in meeting this obligation . . . the prosecutor's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.").

[87] *United States v. Ford*, 550 F.3d 975, 981 (10th Cir. 2008); *see also Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("The evidence at issue must be favorable to accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the States, either willfully or inadvertently; and prejudice must have ensued.").

[88] *See, e.g.*, *United States v. Ford*, 550 F.3d 975, 981 (10th Cir. 2008).

[89] *Kyles*, 514 U.S. at 437-38 ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case... the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.").

faith effort to comply with *Brady* and constitutional due process is not a defense if the State willfully or even inadvertently withholds material exculpatory evidence from the accused.[90]

In this case, the State's obligation to disclose all material information not only extends to information in its possession, custody, or control, but also in the possession, custody, or control of state and federal investigators who participated in the case.[91] This principle holds true even if the evidence "is known only to police investigators and not the prosecutor."[92] As the State acknowledged in prior briefing, courts recognize that *Brady* obligations may "extend across state-federal jurisdictional boundaries."[93]

1. The State possesses actual knowledge of suppressed *Brady* material.

At a minimum, the State possesses actual knowledge of missing audio recordings and unproduced documents. According to the State, Agent Nesbitt once possessed a recording of a phone conversation between the Task Force and DOJ-PIN relating to its decision not to prosecute Mr. Shurtleff.[94] The State has indicated there are audio recordings of a key interview with one of the primary witnesses to this prosecution, Mr. Johnson.[95] The State also represented

[90] *Id.*; *Brady*, 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of prosecutors."); *Strickler*, 527 U.S. at 281-82.

[91] *United States v. Buchanan*, 891 F.2d 1436, 1442 (10th Cir. 1989) ("Knowledge by police or investigators is therefore imputed to the prosecution under *Brady*.").

[92] *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006).

[93] State's Reply to United States 16-17 (Nov. 9, 2015), (quoting *United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979)).

[94] Ex. A, § II.D.

[95] *Id.*

that several 302s relevant to the investigation, recordings and files from Mr. Johnson's federal prosecution, and material within the scope of Mr. Shurtleff's specific *Brady* requests (including information relating to misconduct of investigators and the improper leak of material to the media) have not been produced.[96]

2. The State possesses constructive knowledge of *Brady* material held by members of the Task Force, including participating federal agencies and investigators.

The primary issue in cases involving different actors is whether knowledge of exculpatory or impeachment information in the possession of a party to the investigation may be imputed to the State. In its most simple form, the central question is whether the individual possessing the information belongs to the prosecution team, which includes all "agents of the prosecution," and "both investigative and prosecutorial personnel."[97] For example, the Tenth Circuit recently held that a sexual assault nurse examiner belonged to the prosecution team, because the nurse participated in an exam integral to the investigation.[98] The nurse, who testified at trial, failed to disclose her lack of certifications.[99] Even though the prosecutor lacked knowledge of the nurse's lies about her qualifications, the Tenth Circuit held (a) it "must impute

[96] *Id.* Mr. Shurtleff also believes he is missing audio recordings or transcripts of witness interviews. As discussed above, the State produced a second hard drive to Mr. Shurtleff that not only imposed enormous burdens on his defense, but also created barriers to searching for relevant information. *See supra* SOF, ¶¶ 40, 42, 43.

[97] *Avila v. Quarterman*, 560 F.3d 299, 307-08 (5th Cir. 2009).

[98] *McCormick v. Parker*, No. 14-7095, 2016 WL 1743388, at *5 (10th Cir. May 3, 2016).

[99] *Id.*

her knowledge of her own lack of certification to the prosecutor," and (b) as a result, in the absence of disclosure, "the prosecution suppressed evidence."[100]

In complicated cases involving multiple agencies or state-federal boundaries, courts employ different approaches when evaluating whether constructive knowledge of *Brady* materials should be imputed to the prosecutor or State.[101] Some courts hold "prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection to the witnesses."[102] Other courts rely on a participant or agency theory—for example, the Tenth Circuit has characterized *Brady* obligations as extending beyond the actual knowledge of a specific prosecutor to include "the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in investigative aspects of a particular criminal venture."[103] Still other courts consider a variety of factors, including "(1) whether the party with knowledge of the information is acting on the government's 'behalf' or under its 'control'; (2) the extent to which state and federal governments are part of a 'team,' are participating in a 'joint investigation' or are sharing resources; and (3) whether the entity charged with constructive

[100] *Id.* at *6 (10th Cir. May 3, 2016) ("In reaching this conclusion, we emphasize its essence—i.e., that [the nurse] was part of the prosecution team because she acted at the request of law enforcement in the pre-arrest investigation of the crime.").

[101] *See United States v. Combs*, 267 F.3d 1167, 1173-74 (10th Cir. 2001) (discussing division in federal circuits).

[102] *See, e.g., United States v. Thornton*, 1 F.3d 149, 158 (3d Cir. 1993).

[103] *McCormick*, 2016 WL 1743388, at *5 (internal quotation marks and citations omitted); *see also Avila*, 560 F.3d at 307-08.

possession has 'ready access' to the evidence."[104] Under these various tests, *Brady* material and information within the possession of federal agencies and investigators participating in the Task Force must be attributed or imputed to the State.[105] The State cannot dispute it possesses constructive knowledge of information held by federal agencies. The State made representations to that effect in its Motion to Compel, where it recognized its unique role in a criminal proceeding and the joint nature of the investigation and prosecution of this case.[106] Even in the absence of the State's concession and characterization in its Motion to Compel, the State should be imputed knowledge of the *Brady* material under the tests articulated above.

It is undisputed that the United States, USAO-Utah, FBI-Utah, and DOJ-PIN participated "in investigative aspects of a particular criminal venture.[107] Indeed, Mr. Shurtleff's case is borne out of a state-federal investigation. In 2012, USAO-Utah and FBI-Utah began investigating allegations that related, at least tangentially, to Mr. Shurtleff.[108] After USAO-Utah was recused due to an undisclosed conflict, DOJ-PIN assumed its responsibilities, relying in part on local

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[104] *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006) (discussing imputed knowledge in cases involving state and federal agencies).

[105] *See, e.g.*, *McCormick*, 2016 WL 1743388, at *5 (10th Cir. May 3, 2016). These varying tests are borne out of practical concerns and *Brady* recognition of the government's unique authority and gatekeeper obligations in a criminal case. *See Risha*, 445 F.3d at 306 ("[A] rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process.").

[106] *See, e.g.*, Mot. Compel, at 2, 6-8.

[107] *McCormick*, 2016 WL 1743388, at *5; Ex. A, § I (describing investigation); *supra* SOF, §§ I, IV, V.

[108] Ex. A, § I; *supra* SOF, §§ IV.

investigators, until declining prosecution in September 2013.[109] After DOJ-PIN declined to bring charges against Mr. Shurtleff, the United States actively sought an order permitting it to turn over grand jury materials to the State's investigators, and FBI-Utah, despite a probable conflict of interest,[110] actively participated in the State's joint state-federal Task Force.[111]

For years, federal investigators have participated in interviews of witnesses, shared information with the State, signed off on warrant affidavits submitted to Utah courts, and even submitted a Declaration of Probable Cause in the State's case. The MOU between FBI-Utah and the State underscores the close cooperation of both governments, as well as the federal government's instrumental role in the development of the State's legal theories. In other words, various agencies of the federal government, particularly FBI-Utah, USAO-Utah, and DOJ-PIN, were integrally involved "in investigative aspects"[112] of the case and possess "potential connection to the witnesses."[113] Because the federal agencies acted on the State's behalf, described themselves as a team, actively participated in the underlying investigation, shared resources, and (at times) provided the State with ready access to certain information, the State

[109] *Id.*

[110] *Id.* Notably, some of the same investigators—Agent Nesbitt, SA Pickens, and SA Isakson—were heavily involved in both federal investigations relating to the claims, as well as the State's own investigation. *See* Ex. A, § I.C.

[111] *See, e.g.*, Ex. A, § I.C (describing roles of SA Pickens and SA Isakson).

[112] *Combs*, 267 F.3d at 1173-74.

[113] *McCormick*, 2016 WL 1743388, at *5.

bears constructive knowledge of *Brady* material in its possession, as well as a constitutional obligation to review that material and make it available to Mr. Shurtleff.[114]

Despite this constructive knowledge, the State has failed to produce several categories of *Brady* documents within the possession or knowledge of federal agencies or federal participants in the Task Force. The examples are myriad: (1) the State failed to produce information on conflicts of interest in the USAO-Utah; (2) the State failed to produce information relating to USAO-Utah's application for recusal; (3) the State failed to produce documents relating to a probable conflict of interest within FBI-Utah; (4) the State failed to produce, in their entirety, 302s of material witnesses; and (5) the State failed to produce audio recordings known to have been in the possession of the United States involving Mr. Johnson and Mr. Shurtleff.[115] The absence of these documents is particularly troubling given the fact that the federal investigators at the heart of this investigation—SA Pickens and SA Isakson—were involved in related federal cases and investigations involving witnesses in this case.[116]

The State's lead prosecutor went to admirable and great lengths to acquire the documents from the United States, which refused to produce all of its documents. When prudential search requests failed, the State filed its Motion to Compel, representing the State believed the United

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[114] *Risha*, 445 F.3d at 304 (discussing "issue of cross-jurisdiction constructive knowledge"); *see also United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (concluding duty applied in federal case, where state was "closely aligned with the prosecution" and possessed a "close working relationship" with federal government).

[115] Ex. A, § II.D (discussing representations of State regarding undisclosed evidence); *see also* Ex. A, § III (identifying categories of evidence sought by Mr. Shurtleff).

[116] As discussed elsewhere, members of the Task Force also failed to disclose or make available forensic searches discovered in the course of Mr. Johnson's prosecution. Ex. A, § I.E, II.D.

States possessed several categories of documents that fell within the scope of *Brady*.[117] Despite its efforts, the fact remains that the State has been unable to produce *Brady* material developed in the course of a sweeping joint investigation of Mr. Shurtleff. Under existing precedent, the State's best or "good-faith" efforts do nothing to soften the fact that a *Brady* violation has occurred.[118]

The State may argue that it recently acquired terabytes of data produced by the United States derived from a federal prosecution of Mr. Johnson, and that the State continues to produce material. Yet, *Brady* imposes an obligation to disclose exculpatory evidence "at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case."[119] Here, the State failed to obtain or produce terabytes of data in sufficient time for Mr. Shurtleff to conduct a review prior to trial, especially given the complicated nature of the State's allegations. More importantly, as discussed below, Mr. Shurtleff has endured significant stress, anxiety, and financial difficulties arising out of the State's prosecution—further delays implicate his constitutional rights to a speedy trial.[120] At this point, the State's ability to obtain, review, and disclose material information from federal members of the Task Force is constrained not

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[117] *Supra* SOF, § VII.

[118] *Kyles v. Whitley*, 514 U.S. 419, 432 (1995) ("Brady held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'").

[119] *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976); *see also United States v. Celis*, 608 F.3d 818, 835 (D.C. Cir. 2010)

[120] *Infra* Argument, § IIII.D (discussing prejudice to Mr. Shurtleff).

only by the United States' intransigence but also time. In short, recent and further discovery in this case only compound the violation of Mr. Shurtleff's constitutional rights under *Brady*.

In summary, the State suppressed or failed to provide evidence in at least three respects: (1) by failing to produce audio recordings and documents in the actual possession of members of the Task Force; (2) by failing to produce materials of which it possessed constructive knowledge arising out of heavy federal involvement in the investigation; and (3) by failing to disclose substantial electronic discovery in sufficient time and in a usable format for the trial date. For each of these reasons, the first element of a *Brady* violation has been met.

B. The exculpatory and impeachment evidence once possessed by members of the prosecutorial team is likely favorable to Mr. Shurtleff.

The second factor is whether the relevant evidence is "favorable to the accused, either because it is exculpatory, or because it is impeaching."[121] Courts recognize evidence may be favorable to the accused for a variety of reasons.[122] In *Brady v. Maryland*, the Supreme Court held a co-defendant's suppressed confession to the actual crime raised concerns under the Due Process Clause.[123] Similarly, in *Giglio v. United States*, the government's promise to not charge a witness constituted favorable impeachment evidence.[124]

Since *Brady* and *Giglio*, courts have recognized a diversity of contexts in which evidence may be favorable to the accused and material. By way of example, courts have recognized the following evidence triggers the government's constitutional mandate to review and disclose:

[121] *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999).

[122] *Kyles* 514 U.S. at 444-47 (discussing types of exculpatory evidence).

[123] 373 U.S. 83, 84 (1963).

[124] 405 U.S. 150, 152 (1972).

a. Inconsistent representations by the government, including the omission of statements by investigators that favor the accused[125];

b. Inconsistent statements of different witnesses about events or the defendant[126];

c. Inconsistencies in a particular witness's statements or testimony[127];

d. Inconsistent statements before a grand jury[128];

e. Inconsistencies between rough notes and/or video and final police reports[129];

f. Significant omission of facts or details in prior statements or testimony[130];

g. An informant's heavy role in guiding or manipulating an investigation[131];

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[125] *See United States v. Frost*, 125 F.3d 346, 381-82 (6th Cir. 1997) (concluding district court erred in failing to hold a hearing on non-disclosure of governmental employee's statements); *Conley v. United States*, 332 F. Supp. 2d 302, 323 (D. Mass. 2004) (discussing withholding of FBI memorandum), *aff'd*, 415 F.3d 183 (1st Cir. 2005); *United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997) (concluding federal agent's information about an inconsistent statement by a police officer constituted *Brady* material).

[126] *Kyles*, 514 U.S. at 453-54 (concluding suppressed document "may have shown that the police either knew it was inconsistent with their informant's . . . statements . . . or never even bothered to check the informant's story against known fact").

[127] *Id.*; *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (concluding eyewitness's statements should have been disclosed, where witness made contradictory statements at trial); *United States v. Minsky*, 963 F.2d 870, 875 (6th Cir. 1992) (concluding non-disclosure of 302s constituted *Brady* violation, because the reports would have shown the witness made false statements to the FBI).

[128] *See United States v. Tincher*, 907 F.2d 600, 602 (6th Cir. 1990) (reversing conviction where prosecutor failed to provide copy of agent's grand jury testimony).

[129] *United States v. Pelullo*, 105 F.3d 117, 122 (3d Cir. 1997).

[130] *Smith*, 132 S. Ct. at 630; *cf. Strickler*, 527 U.S. at 282 (omitting a witness' prior testimony could amount to a *Brady* violation when that testimony could be used to impeach the witness).

[131] *Banks v. Dretke*, 540 U.S. 668, 672 (2004) ("The State's suppression of Farr's informant status is 'material' for *Brady* purposes."); *cf. Roviaro v. United States*, 353 U.S. 53, 60-61 (1957) ("Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a

h. Coaching of a witness[132];

i. Payments or other inducements to witnesses[133];

j. Criminal records of key witnesses[134];

k. Pending charges or investigations against a witness or informant[135];

l. A witness's or informant's improper involvement in the investigation[136];

m. Information or potential leads an investigator failed to follow[137];

n. An investigation or possible misconduct by an investigator in the case, including information related to "lying on search warrant applications"[138];

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cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.")

[132] *Kyles*, 514 U.S. at 453; *Tillman v. State*, 2005 UT 56, ¶ 68, 128 P.3d 1123 (holding prosecution should have disclosed transcripts suggesting witness had been coached.)

[133] *Bagley v. Lumpkin*, 798 F.2d 1297, 1301 (9th Cir. 1986) (discussing non-disclosure of ATF contracts).

[134] *United States v. Perdomo*, 929 F.2d 967, 972 (3d Cir. 1991); *cf. Milke v. Ryan*, 711 F.3d 998, 1012 (9th Cir. 2013). In *Milke*, the Ninth Circuit recognized that a state court's focus on the discoverability of evidence, as opposed to the prosecution's obligation to review and disclosure of exculpatory evidence, was contrary to *Brady*. *Id.* at 1006-07.

[135] *Milke*, 711 F.3d at 1012 (concluding *Brady* violation occurred based on non-disclosure of officer's violation of policy, internal investigation, and lies under oath or other misconduct).

[136] *Kyles*, 514 U.S. at 453; *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1461 (9th Cir. 1992).

[137] *Kyles*, 514 U.S. at 450; *cf. United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (holding defendant was entitled to new trial, where prosecutor turned a blind eye and failed to disclose source that could have shown coercion).

[138] *United States v. Veras*, 51 F.3d 1365, 1374 (7th Cir. 1995) (separately noting that, based on allegations against officer, office recused itself from investigation and transferred case); *Kyles*, 514 U.S. at 453 (noting evidence may show "the lead police detective who testified was either less than wholly candid or less than fully informed").

o. An investigator's "uncritical readiness to accept the story and suggestions of an informant whose accounts were inconsistent"[139];

p. A governmental agency's improper participation in the underlying facts in a manner that supports the defense theory[140]; or

q. Non-disclosure of an investigator's personal interest in a case.[141]

Here, Mr. Shurtleff believes the State, members of the Task Force, and United States possess evidence supporting either Mr. Shurtleff's innocence or impeaching state and federal investigators and primary witnesses. Non-exhaustive examples include the following:

Nature / Description of Evidence	**Reasons Favorable to Mr. Shurtleff / Material**
1. Audio recording of a phone conversation between DOJ-PIN and state investigators, including Agent Nesbitt, around the time of DOJ-PIN's declination.	The recording will provide an explanation of DOJ-PIN's decision to decline to prosecute Mr. Shurtleff, the extent of its investigation, and possibly a discussion of the conflict of interest preventing federal involvement. The recording may also contain discussions of whether FBI-Utah was authorized to participate in the investigation, as well as a discussion of the United States sharing information from the grand jury proceeding with state investigators, which occurred at or about the same time as the recording. This is particularly relevant, because DOJ-PIN declined prosecution. Materiality to Mr. Shurtleff's Defense:

[139] *Kyles*, 514 U.S. at 453.

[140] *United States v. Fernandez*, 136 F.3d 1434, 1438 (11th Cir. 1998) (concluding defendant may be entitled to evidence relating to links between corrupt drug smuggler and federal employee); *Schledwitz v. United States*, 169 F.3d 1003, 1015 (6th Cir. 1999) (concluding defendant was entitled to information relating to witness's "extensive involvement in the investigation," because it would have allowed the defendant to more effectively conduct cross-examination for the purpose of showing the witness was not a disinterested expert).

[141] *State v. White*, 81 S.W.3d 561, 568-69 (Mo. Ct. App. 2002) (concluding prosecutor should have disclosed romantic relationship between investigator and witness).

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
	• Exculpatory material relating to DOJ-PIN's decision not to prosecute; • Exculpatory material relating to a conflict of interest with USAO-Utah and possibly FBI-Utah; • Impeachment of SA Pickens and SA Isakson based on FBI-Utah's possible improper involvement in the proceeding; • Impeachment of Agent Nesbitt based on his failure to conduct a fair or uncritical investigation in light of DOJ-PIN's decision not to prosecute; and • Impeachment of Agent Nesbitt based on bias or a personal interest in the case.
2. Audio recordings of meetings between the Task Force investigators, the State's prosecutor, and Jeremy Johnson	Mr. Johnson forms a central part of the case against Mr. Shurtleff. The State references Mr. Johnson in the Original Information and Declaration of Probable Cause. Based on the Amended Information, Mr. Johnson's testimony will likely be relevant to Counts 5-7, and it will be instrumental at trial. Mr. Johnson's initial interviews with the State are instrumental to assessing (a) whether Mr. Johnson made inconsistent statements in later interviews; (b) whether the State sought to coerce or subtly direct Mr. Johnson into certain testimony; (c) evidence of offers to Mr. Johnson; (d) whether Agent Nesbitt accurately included information from Mr. Johnson in the search warrant affidavits; and (e) whether Agent Nesbitt intentionally destroyed material evidence that formed a part of the investigation. Materiality to Mr. Shurtleff's Defense: • Exculpatory material arising out Mr. Johnson's early statements about Mr. Shurtleff; • Impeachment of Mr. Johnson based on his own or other witness's statements; • Impeachment of Agent Nesbitt based on material misrepresentations and omissions pertaining to Mr. Johnson in the search warrant affidavits; and • Impeachment of Agent Nesbitt based on the mishandling and possible destruction of audio recordings.
3. Documents describing or	After USAO-Utah was recused based on an undisclosed

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
relating to DOJ-PIN's decision to decline to bring charges against Mr. Shurtleff in September 2013.	conflict of interest, DOJ-PIN assumed responsibility for overseeing the investigation into Mr. Shurtleff for conduct that purportedly involved Marc Jenson and Mr. Johnson. DOJ-PIN managed the investigation from the fall of 2012 until September 2013, when DOJ-PIN formally declined to bring charges against Mr. Shurtleff. Given its involvement in the investigation and decision to not prosecute Mr. Shurtleff, it is reasonable to assume that DOJ-PIN and the United States possess information and documents relating to the early investigation, which formed a critical part of the investigation, and evidence that supported its decision to not bring charges against Mr. Shurtleff. Materiality to Mr. Shurtleff's Defense: • Exculpatory or impeachment evidence discovered by DOJ-PIN in the course of its investigation; • Exculpatory or impeachment evidence possibly disclosed to a federal grand jury;[142] and • Exculpatory or impeachment evidence based on conflicts of interest in USAO-Utah and possibly FBI-Utah.
4. Documents describing or relating to USAO-Utah's conflict of interest and recusal from the prosecution.	USAO-Utah's conflict of interest likely arises out of a. Mr. Shurtleff's service as a confidential information in a federal investigation targeting Paul Nelson and Mr. Jenson in 2007 and 2008, which relates to Counts 1, 2, 4, and 7 of the Amended Information; b. Mr. Nelson's connection to USAO-Utah from 2007 to 2009, which relates to Counts 1, 2, 4, or 7; or c. Former USA Brent Ward's relationship to Mr. Swallow, which relates to Counts 3, 6, and 7. USAO-Utah was involved in early investigation. A conflict of interest would bear directly on early interviews with witnesses, the collection of documents, a potential grand jury

[142] It is unclear whether a grand jury convened. DOJ-PIN's and the subsequent motion to unseal grand jury proceedings strongly suggest certain grand jury materials were shared with the State. If a grand jury convened and declined to bring charges, it would likely be based on the existence of exculpatory materials, including insufficient evidence to support issuing an indictment.

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
	proceeding, and the focus and propriety of its investigation. It may also affect FBI-Utah's conflict, discussed below, or lead to information regarding USAO-Utah's involvement in the case following its recusal. Materiality to Mr. Shurtleff's Defense: • Evidence of timeline of federal involvement in the investigation; • Impeachment of federal agents participating in the investigation relating to continued involvement of USAO-Utah after recusal; and • Impeachment of Agent Nesbitt based on involvement with USAO-Utah.
5. Documents describing or relating to FBI-Utah's possible recusal, as well as items memorializing, authorizing, or describing FBI-Utah's continued involvement following USAO-Utah's recusal and/or DOJ-PIN's declination letter.	Based on information from third parties, Mr. Shurtleff believes FBI-Utah has or had a conflict of interest that prevented it from participating in the investigation. The conflict may be substantially similar to that of USAO-Utah. It also may arise out of the fact that some of the same federal agents involved in this investigation participated in a federal bribery investigation into Mr. Nelson and Mr. Jenson in 2007 and 2008.[143] FBI-Utah was involved in early investigation. A conflict of interest would bear directly on early interviews with witnesses, the collection of documents, a potential grand jury proceeding, and the focus and propriety of its investigation.

[143] This conflict appears to be exacerbated by the fact that investigators in the case against Mr. Shurtleff worked with USAO-Utah in the investigation and prosecution of Mr. Johnson. As a result, investigatory materials developed in Mr. Johnson's prosecution, including communications between USAO-Utah and FBI-Utah that reference Mr. Shurtleff, would illustrate or demonstrate the extent to which USAO-Utah continued to exercise control or influence over the prosecution of Mr. Shurtleff, despite its recusal and the conflict of interest. It is precisely this reason—to demonstrate the involvement of conflicted agencies and prove investigatory bias at any evidentiary hearings and trial—that Mr. Shurtleff has requested the State produce such information. This is especially true where the State relied heavily on representations of FBI-Utah throughout the search warrant affidavits. *See generall*y Ex. A, § I.C (discussing role of SA Isakson and SA Pickens); Ex. B (discussing search warrant affidavits).

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
	Materiality to Mr. Shurtleff's Defense: • Evidence of timeline of federal involvement in the investigation; • Impeachment of federal agents participating in the investigation relating to possible conflict of interest; • Impeachment of Agent Nesbitt based on statements obtained from FBI-Utah used in search warrant affidavits;
6. Documents describing, containing, or relating to the United States' use or disclosure of information that Mr. Shurtleff voluntarily provided to FBI-Utah and USAO-Utah prior to the declination and the formal filing of this case.	As discussed above, Mr. Shurtleff voluntarily met with USAO-Utah and FBI-Utah prior to the formal filing of charges. Mr. Shurtleff reported his concern that individuals who were already the subject of investigations had engaged in conduct rising to the level of federal crimes, including but not limited to purported efforts to bribe a sitting United States Senator in connection with proposed legislation relating to online gaming and FCC matters. Based on the State's representations, Mr. Shurtleff has cause to believe the United States' handling of this case, including its participation in this investigation and prosecution, bear directly on the information provided by Mr. Shurtleff. The information will explain, at least in part, why and how Mr. Shurtleff was targeted for prosecution. Materiality to Mr. Shurtleff's Defense: • Exculpatory evidence relating to charges of obstruction of justice and/or relating to Mr. Johnson; • Impeachment of members of the Task Force.
7. Documents, transcripts, filings, or any other evidence relating to a federal grand jury, including the documents disclosed to state investigators after the United States sought and obtained an order permitting it to share information with Davis and Salt Lake Counties.	It is unclear whether a grand jury convened. DOJ-PIN's and the subsequent motion to unseal grand jury proceedings also strongly suggest certain grand jury materials were shared with the State. If a grand jury convened and declined to bring charges, it would likely be based on the existence of exculpatory materials. Materiality to Mr. Shurtleff's Defense: • Exculpatory or impeachment evidence discovered by DOJ-PIN in the course of its investigation;

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
	• Impeachment of Agent Nesbitt relating to statements and evidence relied on in search warrant affidavits.

In addition to the evidence above, several of Mr. Shurtleff's general and specific requests for *Brady* material remain outstanding.[144] Mr. Shurtleff specifically requested information and documents relating to leaks of confidential information, prior investigations of agents involved in this investigation, witnesses in this case, and documents demonstrating Mr. Shurtleff's assistance with a federal sting operation involving Mr. Jenson and Mr. Nelson.[145] In response to the initial request, the State produced a hard drive containing a mass of largely unsearchable, unorganized, irrelevant, and unlabelled documents. Because of the cost and complexity of review, Mr. Shurtleff has not been able to review each and every document. Nevertheless, the State informed Mr. Shurtleff that the original discovery does not contain unredacted federal 302s that bear on the allegations, recordings and files seized in the course of Mr. Johnson's federal prosecution, and other material within the scope of Mr. Shurtleff's discovery requests.

For this reason, Mr. Shurtleff briefly sets out the reasons that these additional specific categories of evidence would be favorable and material to his case.[146]

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
8. Investigative files for	Several of the individuals referenced in the Declaration of

[144] Ex. A, § III (discussing several categories of outstanding discovery).

[145] *Id.*; *supra* SOF, § VI.

[146] Mr. Shurtleff incorporates Exhibit A, by reference, insofar as it includes additional details about the State's investigation and Mr. Shurtleff's defenses that underscore materiality. *See generally* Ex. A, §§ I-II.

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
putative witnesses.	Probable Cause, Amended Information, and search warrant affidavits were either investigated or participated in investigations at one time, including Marc Jenson, Timothy Lawson, John Swallow, Kirk Torgensen, Darl McBride, and individuals associated with the online poker industry. Materiality to Mr. Shurtleff's Defense: • Exculpatory material disproving the State's allegations; • Impeachment of trial witnesses based on inconsistent statements, particularly Mr. Jenson, whose statements have varied from 2010 to the present; and • Impeachment of trial witnesses based on investigations into possible misconduct, including but not limited to Agent Nesbitt and Mr. Jenson.
9. Information for impeaching witnesses at trial, including prior records, prior drug or medication use, formal and informal agreements, and any payments to witnesses.	Similar to above, Mr. Shurtleff has cause to believe there is impeachment evidence for several key witnesses, particularly Mr. Jenson, Mr. McBride, Renee Crowley, and individuals associated with the online poker industry. Materiality to Mr. Shurtleff's Defense: • Impeachment of trial witnesses based on inconsistent statements or version of events; and • Impeachment of trial witnesses on formal/informal agreements or personal interest, including but not limited to Agent Nesbitt and Mr. Jenson.
10. Information on any past, present, or pending complaints against agents who participated in the investigation.	As discussed illustrated in Exhibit B, the search warrant affidavits in this case are riddled with material omissions and misrepresentations, which may be the subject of a future Motion to Dismiss. Materiality to Mr. Shurtleff's Defense: • Impeachment of investigators, particularly Agent Nesbitt, based on omissions and misrepresentations in the search warrant affidavits; • Evidentiary support for Mr. Shurtleff's Motion to Suppress; and • Evidentiary support for Mr. Shurtleff's Motion to Dismiss for Prosecutorial Misconduct.

Nature / Description of Evidence	Reasons Favorable to Mr. Shurtleff / Material
11. Copies of recorded interviews, transcripts, documents, or memoranda.	Careful examination of recorded interviews, transcripts, and memoranda suggests that members of the Task Force placed material omissions and misrepresentation in search warrant affidavits that reinforced a false public narrative about Mr. Shurtleff and the underlying allegations. To adequately prepare the Motion to Suppress and for trial, Mr. Shurtleff needs every copy of a recorded interview, any transcript in the possession of the Task Force, and any notes and memoranda associated with the underlying investigation. Materiality to Mr. Shurtleff's Defense: • Impeachment of trial witnesses based on inconsistent statements or version of events; • Impeachment of investigators, particularly Agent Nesbitt, based on omissions and misrepresentations in the search warrant affidavits; and • Evidentiary support for Mr. Shurtleff's Motion to Suppress.
12. Policies, procedures, and documents relating to the improper disclosure of confidential information to the news media.	The evidence suggests that a member or members of the prosecutorial team leaked confidential information relating to a search warrant on Mr. Shurtleff's residence. To support his Motion to Dismiss for Prosecutorial Misconduct, Mr. Shurtleff requested information relating to the leak. Materiality to Mr. Shurtleff's Defense: • Evidentiary support for Mr. Shurtleff's Motion to Dismiss for Prosecutorial Misconduct; and • Impeachment of investigators involved in the media leak.

The instant motion rests primarily on the State's failure to produce the evidence identified in paragraphs 1 through 7.[147] These additional areas underscore the many instances in which the Task Force's delay in collecting, identifying, reviewing, and producing exculpatory evidence in a

[147] In Exhibit A, Mr. Shurtleff also sets out in detail evidence which is material to his defense and could be used to impeach the State's witnesses. *See* Ex. A, § III.

timely or useable fashion has not only reinforced the Task Force's false public narrative, but also substantially prejudiced Mr. Shurtleff's ability to timely prepare his defense.[148]

For the reasons listed above, the State, United States, or members of the Task Force either possess or possessed evidence containing exculpatory evidence or information that could be used to impeach key witnesses. Because undisclosed evidence would be favorable to Mr. Shurtleff's defense, the second element of a *Brady* violation has been met.

C. The State's failure to produce all *Brady* and *Giglio* material has prejudiced Mr. Shurtleff and compromised the fairness of this proceeding.

The third inquiry is whether the evidence is material.[149] "Evidence is material if 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'"[150] "A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine[] confidence in the outcome of the trial."[151]

In a seminal decision, *Kyles v. Whitley*, the Supreme Court held materiality "turns on the cumulative effect of all such evidence suppressed by the government," rather than an exclusively item by item approach, and the "prosecutor remains responsible for gauging that effect regardless

[148] *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."). In *Agurs*, the Supreme Court specifically held that no such specific request is required. *Id.* at 107-08.

[149] *United States v. Ford*, 550 F.3d 975, 981 (10th Cir. 2008).

[150] *Browning v. Trammell*, 717 F.3d 1092, 1106 (10th Cir. 2013) (quoting *Smith v. Cain*, 132 S. Ct. 627, 630 (2012)).

[151] *Smith*, 132 S. Ct. at 630 (internal quotation marks omitted); *Strickler v. Greene*, 527 U.S. 263, 290 (1999) ("As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.").

of any failure by the police to bring favorable evidence to the prosecutor's attention."[152] Lower courts draw "no distinction between exculpatory evidence and impeachment evidence."[153]

Viewed in the aggregate, the undisclosed evidence is material in two respects. First, the State's evidence is material insofar as the State's failure to produce it affects Mr. Shurtleff's pre-trial dispositive motions. If this case proceeds beyond the instant motion, Mr. Shurtleff intends to file the following: (a) the Motion to Suppress based on *Franks v. Delaware*, which allows the accused to seek an evidentiary hearing and suppression of evidence obtained through the use of false or misleading statements in search warrant affidavits; (b) the Motion to Dismiss Based on Prosecutorial Misconduct, based on deprivations of due process arising, at least in part, out of members of the Task Force improperly creating, sharing, or leaking false, misleading, and confidential information for the purpose of creating a false public narrative during the 2014 election season; (c) the Motion to Dismiss Gift Counts, based on the State's prior under-oath representations; and (d) the Motion to Dismiss Based on Vagueness, which will raise an as-applied challenge to Counts 1, 2, and 5.

As detailed in the preceding section,[154] Mr. Shurtleff's ability to pursue this relief and lay adequate groundwork for evidentiary hearings for the Motion to Suppress and Motion to Dismiss Based on Prosecutorial Misconduct depend heavily on the timely production of all exculpatory documents, including all documents relating to the conflict of interest and recusal of federal

[152] *Kyles*, 514 U.S. at 421; *see also id.* at 436 ("The fourth and final aspect . . . materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item.").

[153] *Browning*, 717 F.3d at 1106.

[154] *Supra* SOF, § VIII (describing bases of motions).

agencies, the conduct of agents, documents forming the basis of impeachment of key witnesses, the media leaks, Mr. Shurtleff's assistance with a federal investigation into Mr. Jenson and Mr. Nelson, and any other evidence calling into question the reliability of the investigation or demonstrating misconduct of the Task Force. By depriving Mr. Shurtleff of his ability to assert constitutional and statutory defenses, the State's failure to produce is significant enough to "undermine[] confidence in the outcome" of this proceeding.[155]

Second, the evidence is material insofar as "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding" would be different at trial. In nearly every motion based on *Brady*, a party seeks to compel discovery or the trial has already occurred. This presents a unique case. Given the centrality of the undisclosed evidence to the investigation and testimony of key witnesses, there is a reasonable probability that Mr. Shurtleff cannot receive a fair trial consistent with the demands of the Due Process Clause, because of the State's failure to produce. At this point, neither the State nor Mr. Shurtleff possesses adequate resources to effectively search terabytes of data for material exculpatory and impeachment evidence in the partial production by the United States. Similarly, the State cannot represent to the Court that it has responded to each and every one of Mr. Shurtleff's specific requests for *Brady* material.[156]

Indeed, this case illustrates why courts require timely production of *Brady* material—so that the accused may make adequate use prior to trial without compromising the fairness of the

[155] *See Smith*, 132 S. Ct. at 630 (internal quotation marks omitted); *see also Kyles*, 514 U.S. at 453 (characterizing evidence as material when it provides grounds for an attack on the reliability, thoroughness, and good faith of the investigation, impeaches the credibility of witnesses, or bolsters the defense's case against the government).

[156] *See* Ex. A, § III (describing categories of evidence).

proceeding.[157] As discussed below, existing and prospective delays in this case arising out of the Task Force's (mis)handling of this case have compromised and will continue to compromise Mr. Shurtleff's right to a speedy trial.[158] For the reasons identified in preceding sections, there is a reasonable probability that any adverse findings at trial would be different, because undisclosed evidence bears directly on the credibility of the Task Force, as well as key witnesses.[159] Stated differently, the State's failure to produce *Brady* material in a useable form or timely fashion would substantially undermine confidence in the outcome of any unfavorable verdict.

Where exculpatory and impeachment evidence bearing directly on the State's allegations and the credibility of its witnesses cannot or will not be produced, Mr. Shurtleff contends that the Court should exercise its supervisory power over a criminal case or discretion under Rule 16 and dismiss, as discussed below.

D. The appropriate remedy for the State's violation of *Brady* is dismissal.

Mr. Shurtleff asks the Court to exercise its authority to remedy constitutional violation and dismiss the case with prejudice. Alternatively, Mr. Shurtleff asks the Court to dismiss the Amended Information pursuant Utah Rule of Criminal Procedure 16. Although standards for these approaches differ slightly, the analysis and outcome are substantially similar.

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[157] *See, e.g.*, *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011) ("[E]xculpatory evidence must be disclosed in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation.").

[158] *Infra* Argument, § II.D.

[159] *Supra* Argument, §§ I.B-I.C.

1. Dismissal operates as a remedy for violations of a defendant's federal or state constitutional right to exculpatory evidence.

Courts may dismiss a criminal case based on "outrageous government conduct if the conduct amounts to a due process violation."[160] When conduct does not rise to a violation of due process, courts may exercise their supervisory authority and dismiss for egregious discovery violations or prosecutorial misconduct.[161] "The purposes underlying the use of courts' supervisory powers are broad and include implementing remedies for violations of recognized rights and remedies designed to deter illegal conduct."[162] Often, courts exercise this authority and dismiss "only when the defendant suffers substantial prejudice and where no lesser remedial action is available."[163] Notably, courts have dismissed for *Brady* violations. For example, in *United States v. Chapman*, the Ninth Circuit held a district court properly exercised its authority by dismissing an indictment when the government failed to disclose 650 pages of *Brady* material, which included conviction records and impeachment material.[164] Other courts have reached similar outcomes in the face of substantial *Brady* violations.[165]

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[160] *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991).

[161] *Gov't of Virgin Islands v. Fahie*, 419 F.3d 249, 258 (3d Cir. 2005); *United States v. Chapman*, 524 F.3d 1073, 1087 (9th Cir. 2008); *Barrera-Moreno*, 951 F.2d at 1091 ("These powers may be exercised for three reasons: to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal conduct.").

[162] *Fahie*, 419 F.3d at 258 (citing *United States v. Hastings*, 461 U.S. 499, 505 (1983).

[163] *Chapman*, 524 F.3d at 1087 (internal quotation marks and citations omitted) (concluding mistrial was not an adequate remedy, because the outcome would favor the government).

[164] *Chapman*, 524 F.3d at 1087-88.

[165] *United States v. Wang*, No. 98-CR-199, 1999 WL 138930, at *54 (S.D.N.Y. Mar. 15, 1999) (concluding allowing case to proceed to trial in absence of key witness, after government failed

Similarly, in *State v. Tiedemann*, the Utah Supreme Court recognized that the Utah Constitution provides a separate and alternative basis for dismissing a criminal case when the State destroys exculpatory evidence.[166] The Utah Supreme Court adopted a balancing approach:

> In cases where a defendant has shown a reasonable probability that lost or destroyed evidence would be exculpatory, we find it necessary to require consideration of the following: (1) the reason for the destruction or loss of the evidence, including the degree of negligence or culpability on the part of the State; and (2) the degree of prejudice to the defendant in light of the materiality and importance of the missing evidence in the context of the case as a whole, including the strength of the remaining evidence.[167]

Expressly adopting a case-by-case approach, the Utah Supreme Court cautioned that neither culpability nor prejudice was dispositive.[168] "The touchstone for the balancing process is fundamental fairness."[169] To that end, a court may dismiss where either culpability or prejudice would operate—in tandem or separate—to make a proceeding "fundamentally unfair."[170]

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to disclose material information, would violate due process and the Sixth Amendment); *United States v. Ramming*, 915 F. Supp. 854, 867 (S.D. Tex. 1996) ("Here, it appears that the duty of the government to not prosecute where the evidence at best is disputed, leaves the defendants' Sixth Amendment right to a fair trial snared on the branches of strange and subverted truth."); *United States v. Dollar*, 25 F. Supp. 2d 1320, 1332 (N.D. Ala. 1998).

[166] *State v. Tiedemann*, 2007 UT 49, ¶ 41, 162 P.3d 1106.

[167] *Id.* ¶ 44. The *Tiedemann* court also advised courts to consider a non-exhaustive list of factors used in the context of Rule 16, which is discussed below. *Infra* note 174.

[168] *Id.* ¶ 45 ("If the behavior of the State in a given case is so reprehensible as to warrant sanction, a sanction might be available even where prejudice to the defendant is slight or only speculative. If prejudice to the defendant, on the other hand, is extreme, fairness may require sanction even where there is no wrongdoing on the part of the State. In between those extremes, we have confidence that trial judges can strike a balance that preserves defendants' constitutional rights without undue hardship to the prosecution.").

[169] *Id.* ¶ 45.

[170] *Id.* ¶ 42; *supra* note 168.

2. The Court may dismiss the case based on the State's failure to comply with discovery obligations under Utah Rule of Criminal Procedure 16.

Utah Rule of Criminal Procedure 16 provides an alternative basis for dismissal. Under Rule 16, the prosecutor must disclose certain material or information of which he has personal knowledge.[171] The material and information includes "evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment[,]" as well as "any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense."[172] If the Court concludes that a violation of Rule 16 occurred in the course of the proceeding, it "may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances."[173]

Depending on context, Utah courts evaluating Rule 16 violations consider several non-exhaustive factors, the most important of which appears to be prejudice.[174] "[W]hen the

[171] Utah R. Crim. P. 16.

[172] Utah R. Crim. P. 16(a).

[173] Utah R. Crim. P. 16(g).

[174] *State v. Redcap*, 2014 UT App 10, ¶¶ 13-15, 318 P.3d 1202 (focusing discussion on prejudice); Utah R. Crim. P. 30; *see also Tiedemann*, 2007 UT 49, ¶ 41 (referencing list of non-exhaustive factors, including (a) accurate or inaccuracy of prosecutor's representations about discovery, (b) tendency of an omission or misstatement misleading defense counsel in a manner that prejudices the outcome, (c) the prosecutor's culpability, and (d) extent to which appropriate investigation by defense would have discovered missing evidence). With the exception of culpability and materiality, both of which are discussed below, it is unclear whether these factors apply to this particular context. Given the United States' position, Mr. Shurtleff will not be able to obtain the information on his own. While the State's lead prosecutor has consistently made

defendant can make a credible argument that the prosecutor's errors have impaired the defense, it is up to the State to persuade the court that there is no reasonable likelihood that absent the error, the outcome of trial would have been more favorable for the defendant."[175] Recently, the Utah Court of Appeals appeared to import *Tiedemann*'s two-part balancing inquiry into its Rule 16 analysis.[176] As discussed above, this inquiry centers on the nature of the State's culpability and degree of prejudice "in light of the materiality and importance of the missing evidence[.]"[177]

3. Under the facts of this case, dismissal is the appropriate and reasonable remedy under either a constitutional theory or Rule 16.

Under either a constitutional framework or the Utah Rules of Criminal Procedure, the appropriate remedy is dismissal. For all the reasons discussed in the preceding sections, the State failed to produce exculpatory material and information in light of the Task Force's heavy involvement in the investigation and prosecution of this case.[178] Some of the State's discovery failures may have been inadvertent. Many, however, rise to the level of a deliberate and egregious effort by members of the Task Force (including FBI-Utah, USAO-Utah, DOJ-PIN, and

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accurate representations about discovery, the same cannot be said for all members of the prosecution team. *See* Ex. A, § II (discussing interactions between State and United States).

[175] *State v. Knight*, 734 P.2d 913, 921 (Utah 1987) (reversing conviction where State failed to disclose evidence in violation of Rule 16).

[176] *State v. Jackson*, 2010 UT App 328, ¶ 20, 243 P.3d 902 (quoting *Tiedemann*, 2007 UT 49, ¶ 44).

[177] *Id.*

[178] *Supra* Argument, § I.B-I.C.

Agent Nesbitt) to withhold or otherwise obfuscate material, exculpatory evidence in a manner that rises to the level of an "egregious discovery violation"[179] or "bad faith."[180]

The Task Force's conduct has and will continue to substantially prejudice Mr. Shurtleff by depriving Mr. Shurtleff of the ability to vet the State's theory of the case, complete his dispositive pre-trial motions, or utilize exculpatory and impeachment evidence at evidentiary hearings and trial.[181] Given the importance of the evidence,[182] it cannot be said that the State's treatment of evidence did not make the case "fundamentally unfair."[183] Because non-disclosure or destruction of evidence strikes at the heart of the investigation and the credibility of key witnesses, no remedy short of dismissal would cure the State's discovery failures. This is especially true where the State cannot dispute it would be unable to produce all exculpatory material without implicating or jeopardizing Mr. Shurtleff's right to a speedy trial.[184]

Accordingly, while courts ordinarily prefer to grant a new trial or compel discovery when the government fails to produce exculpatory evidence, the issues presented in this case present an exceptional instance in which substantial delays, destroyed recordings, the critical nature of the

[179] *Fahie*, 419 F.3d at 258; Ex. A, § II.D (discussing missing audio recordings); *supra* SOF, § VI.

[180] *Tiedemann*, 2007 UT 49, ¶ 41; *supra* SOF, § VI.

[181] *Supra* SOF, § VI, ¶; Ex. A, § II.E.

[182] *Supra* Argument, § I.B-I.C.

[183] *Tiedemann*, 2007 UT 49, ¶ 42 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 61 (1988) (Stevens, J., concurring)).

[184] *See infra* Argument, § II (discussing Mr. Shurtleff's right to a speedy trial and the substantial prejudice to Mr. Shurtleff if this case continues to be delayed).

remaining evidence, and the Task Force's intransigence, which continues to delay production, provide an appropriate basis for dismissal.

E. Conclusion

A prosecutor has a "sworn duty . . . to assure that the defendant has a fair and impartial trial."[185] Under the Sixth Amendment and Due Process Clause, the State bears an affirmative obligation to collect, review, and discloses all exculpatory or impeachment evidence. As the State's prosecutor recently observed: "prosecutors, indisputably, have an enormous influence over the fairness of criminal proceedings because only they, either by themselves or vicariously through their law enforcement colleagues, possess potentially exculpatory evidence. When favorable evidence is not disclosed to the defense, no one will ever know about the very existence of the evidence. . . . [T]he integrity of the entire criminal justice process hinges on prosecutors fulfilling their duties under *Brady*."[186]

Notwithstanding the State's recent efforts in this case, its "responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."[187] The State had a constitutional and ethical obligation to provide the accused with any evidence that tends to show his innocence.[188] Throughout this lengthy investigation, the Task Force

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[185] *United States v. Chapman*, 524 F.3d 1073, 1088 (9th Cir. 2008) (internal quotation marks omitted); *see also State v. Hamblin*, 2010 UT App 239, ¶ 18 n.5, 239 P.3d 300 (recognizing prosecutor has a reasonability to see justice done).

[186] Hart & Rawlings, *supra note* 70, at 34.

[187] *Kyles v. Whitley*, 514 U.S. 419, 438 (1995)

[188] *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972); Utah R. Prof'l Conduct 3.8(d); A.B.A. Formal Op. 09-454 (July 8, 2009); *see also* A.B.A. Formal Op. 467 (Sept. 8, 2014).

conducted dozens of interviews, sought search warrants, collected documents, and otherwise developed a theory of the case under the aegis of the state and federal government. In doing so, the Task Force exercised its unique ability to acquire and collect information that would not otherwise be available or even known to Mr. Shurtleff. Now, participants in the investigation refuse to produce documents that bear materially on the State's allegations and the credibility of its witnesses. The State's conduct compromises Mr. Shurtleff's ability to assert legal arguments in dispositive pre-trial motions, and it jeopardizes his right to a fair trial. For all these reasons, Mr. Shurtleff respectfully asks the Court to dismiss the Amended Information with prejudice.

II. THE COURT SHOULD DISMISS THE INFORMATION FOR VIOLATION OF MR. SHURTLEFF'S RIGHT TO A SPEEDY TRIAL.

The Sixth Amendment and Due Process Clause of the Fourteenth Amendment of the United States Constitution guarantee "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[189] The Utah Constitution and Rule 25 of the Utah Rule of Criminal Procedure contain similar protections.[190] These provisions are intended to prevent the accused from being prejudiced by delays, decrease the risk of lengthy pretrial incarceration,

[189] U.S. Const. amend. VI; *State v. Younge*, 2013 UT 71, ¶ 16, 321 P.3d 1127 (quoting *Barker v. Wingo*, 407 U.S. 514, 515 (1972)).

[190] Utah Const. art. I, § 12; Utah R. Crim. P. 25(b) ("The court shall dismiss the information or indictment when: (1) There is unreasonable or constitutional delay in bringing defendant to trial[.]"); Utah Code Ann. § 77-1-6(1)(f); *see also Younge*, 2013 UT 71, ¶ 16 n.21 (noting that challenges under the Utah Constitution are analyzed similar to United States Constitution); *State v. Pelton*, 2015 UT App 150, ¶ 10, 353 P.3d 184 (same). Where, as here, the trial delay gives rise to a constitutional violation, it operates as "a bar to any other prosecution for the offense charged." Utah R. Crim. P. 25(d).

minimize the impairments to an individual's liberty while on pretrial release, and "shorten the disruption of life caused by arrest and the presence of unresolved criminal charges."[191]

The remedy for a violation of the right to a speedy trial is dismissal.[192] When analyzing whether an individual has been deprived of the right to a speedy trial in violation of due process, courts consider four factors established by the Supreme Court in *Barker v. Wingo*: (1) the length of the delay; (2) the reasons for the delay; (3) whether and how the defendant asserted the right to a speedy trial; and (4) prejudice to the defendant.[193] "No single factor is determinative or necessary, rather all four are considered to determine whether a violation has occurred."[194] In this case, each factor weighs in favor of dismissing the allegations against Mr. Shurtleff.

A. The length of delay weighs in favor of dismissal.

In *Barker*, the Supreme Court concluded the "length of the delay is to some extent a triggering mechanism."[195] In the absence of "presumptively prejudicial" delay, "there is no necessity for inquiry into the other factors that go into the balance."[196] The Supreme Court has suggested "a delay approaching one year is presumptively prejudicial."[197] "If the defendant

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[191] *United States v. MacDonald*, 456 U.S. 1, 2 (U.S. 1982); *see also Doggett v. United States*, 505 U.S. 647, 656 (1992) (discussing prejudice at length).

[192] *Barker*, 407 U.S. at 522; *Younge*, 2013 UT 71, ¶ 16; Utah R. Crim. P. 25(b).

[193] *Barker*, 407 U.S. at 530; *State v. Knill,* 656 P.2d 1026, 1029 (Utah 1982).

[194] *United States v. Seltzer*, 595 F.3d 1170, 1176 (10th Cir. 2010) (concluding two-year delay was unreasonable and dismissing for violation of constitutional speedy trial right).

[195] *Barker*, 407 U.S. at 530.

[196] *Id.*

[197] *Younge*, 2013 UT 71, ¶ 18 (citing *Doggett*, 505 U.S. at 652 n.1); *see also United States v. Grimmond*, 137 F.3d 823, 828 (4th Cir. 1998); *United States v. Batie*, 433 F.3d 1287, 1290 (10th

shows a presumptively prejudicial delay, the court then considers 'the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination[.]'"[198] "The longer the delay, the more likely it is that the first factor weighs in the defendant's favor."[199]

Nearly two years ago, on July 15, 2014, the State filed the Original Information and arrested Mr. Shurtleff.[200] Even excluding Mr. Shurtleff's limited waiver, twenty months have elapsed since the inception of the case, a time period which is presumptively prejudicial.[201] Although the charges are complex, the existing and future delays have been unreasonable, as discussed below. Accordingly, the first factor should weigh in favor of Mr. Shurtleff.

B. Discovery issues not attributable to Mr. Shurtleff are the primary reasons for delay, which weighs in favor of dismissal.

"The second factor . . . is especially important, and the burden is on the government to provide an acceptable rationale[.]"[202] "[D]ifferent weights should be assigned to different reasons."[203] A prosecutor's "deliberate attempt[s] to delay the trial in order to hamper the defense should be weighted heavily against the government[,]" while "more neutral reason[s] such as negligence or overcrowded courts should be weighted less heavily but nevertheless

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Cir.2006) ("Delays approaching one year generally satisfy the requirement of presumptive prejudice.").

[198] *United States v. Larson*, 627 F.3d 1198, 1208 (10th Cir. 2010).

[199] *Id.*

[200] *Supra* SOF, § IX; *id.* ¶ 82.

[201] Trial is not set to begin until October 25, 2016, which will be approximately four months after the instant motion was filed.

[202] *Larson*, 627 F.3d at 1208.

[203] *Barker*, 407 U.S. at 531.

should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant."[204] "*Barker* stressed that official bad faith in causing delay will be weighed heavily against the government."[205] "Delays attributable to the defendant do not weigh against the government."[206]

Here, the primary reasons for delay are attributable to the State. Initial delays arose out of the SLDA's decision to characterize Mr. Swallow as a co-defendant and pursue claims that found no basis in fact or law until after the election in November 2014, which Mr. Gill won by a narrow margin.[207] Within weeks of the election, Mr. Rawlings assumed the role of lead prosecutor, and the State promptly abandoned SLDA's positions and expressed an interest in amending the charges in the Original Information.[208] In December 9, 2014, Mr. Shurtleff consented to a limited waiver of a speedy trial—sixty days—to allow the State to amend the charges. The Amended Information was not filed until June 15, 2015, nearly a year after the Original Information.[209] In other words, the State made several strategic decisions that caused eleven months of delay.

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[204] *Id.*

[205] *Doggett*, 505 U.S. at 656 (discussing the spectrum of diligent prosecution, official negligence, and bad-faith delay).

[206] *Larson*, 627 F.3d at 1208 (internal quotation marks omitted).

[207] *Supra* SOF, ¶¶ 16-20.

[208] *Id.* ¶¶ 20-21.

[209] *Id.* ¶¶ 71.

These delays were compounded by the State's approach to discovery. In September 2014, Mr. Shurtleff made general and specific requests for *Brady* material.[210] The State responded by producing two hard drives, one of which was a jumbled mass of unsearchable information.[211] The State's failure to produce information in a useable form led to several follow-up requests. Eventually, the State filed its Motion to Compel on September 28, 2015, one year after Mr. Shurtleff's initial invocation of *Brady*.[212]

The State's recent efforts to comply with constitutional obligations have been admirable. Nevertheless, due in part to the United States' objections and Task Force's unwillingness to produce *Brady* material or to do so in a timely fashion, the State recently informed Mr. Shurtleff that (a) the State either received or would receive terabytes of additional data that would require extensive time to review, (b) the State could not guarantee it would obtain certain *Brady* material from the United States, and (c) audio recordings containing exculpatory or impeachment material were lost while in the possession of the United States or members of the Task Force.[213]

Trial is currently set for October 2016, and it is now certain, based on representations by the State, that considerable exculpatory discovery will not be produced and any discovery that the State may be able to produce will be untimely insofar as the State's delay will not leave adequate time to review terabytes of data. Even assuming that the State's behavior should be characterized as merely negligent, extensive delays in case development and the discovery

[210] *Supra* SOF, § VI.

[211] *Supra* SOF, ¶ 43.

[212] *Supra* SOF, ¶ 50.

[213] *See* Ex. A, § II.C (discussing State's representations).

production in this case weigh against the State "since the ultimate responsibility for such circumstances must rest with the government rather than the defendant."[214]

The State may argue that Mr. Shurtleff, at the outset of this case, filed pre-trial motions, as well as stipulated to continuances of an oral argument, several pretrial conferences, and the preliminary hearing.[215] Mr. Shurtleff does not dispute he agreed to limited continuances for the purpose of resolving discrete issues and moving the case forward.[216] On balance, however, the State, Task Force, and United States bear the primarily responsibility for the greatest periods of delay, which arose out of the State's charging decisions, the Task Force's handling of evidence, and the State's Motion to Compel. Accordingly, the Court should find that the second factor—reasons for delay—weighs against the State and in favor of dismissal.

C. Mr. Shurtleff has asserted his right to a speedy trial.

"The third factor is 'whether, in due course, the defendant asserted his right to a speedy trial."[217] Overall, Mr. Shurtleff has consistently sought an effective and efficient determination of his innocence to the State's allegations. Mr. Shurtleff agreed to a limited waiver of his right to

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[214] *Barker*, 407 U.S. at 531. If the Court concludes that the State attempted to delay the prosecution until after the November 2014 election, or that a member of the Task Force destroyed audio recordings in the court, that finding would circumstantially suggests the State deliberately or intentionally engaged in conduct in order to delay the trial, which would weigh heavily against the State. *See Doggett*, 505 U.S. at 656 (discussing diligent prosecution, official negligence, and bad-faith delay along a spectrum).

[215] *See* SOF, § IX (summarizing procedural history). Courts are instructed to engage in an ad hoc, case-by-case review of speedy trial issues. *Barker*, 407 U.S. at 530. Courts have, at times, declined to weigh a defendant's request for a continuance or a stipulation against the government, depending on the facts of the underling case. *See, e.g.*, *State v. Hawkins*, 2016 UT App 9, ¶ 74, 366 P.3d 884; *Younge*, 2013 UT 71, ¶ 19.

[216] SOF, ¶¶ 67, 82.

[217] *Younge*, 2013 UT 71, ¶ 23 (quoting *Doggett*, 505 U.S. at 651).

a speedy trial on a single occasion, and the period which he waived was only sixty days.[218] Now, Mr. Shurtleff invokes his right to a speedy trial twenty three months after the case began and at least four months before trial. Accordingly, the third factor weighs in favor of dismissal.

D. The State's delay in producing evidence prejudiced Mr. Shurtleff.

When analyzing prejudice arising out of a violation of a speedy trial right, the Supreme Court considers several types of harm: "oppressive pretrial incarceration;" "anxiety and concern of the accused;" or "the possibility that the [accused's] defenses will be impaired by dimming memories and loss of exculpatory evidence."[219] The speedy trial right "serves to protect against" each of these different forms of prejudice.[220] The second and third weigh in favor of dismissal.

1. The first form of prejudice, pretrial incarceration, is not relevant.

Mr. Shurtleff sought and obtained pre-trial release. At the present moment, this form of prejudice is immaterial, but may become relevant if the State seeks detention.

2. Delays in the prosecution of this case have caused Mr. Shurtleff to experience significant anxiety and concern.

The Sixth Amendment is also intended to minimize the "anxiety and concern" arising out of pretrial delays.[221] Mr. Shurtleff experienced significant anxiety and concern due to the delay in resolving the allegations. The State's prosecution generated a deluge of media attention and news articles, many of which have perpetuated the material omissions and misleading statements

[218] *See State v. Walker*, 2009 WL 1423555, at *2, 2009 UT App 139.

[219] *Doggett*, 505 U.S. at 654 (bracket in original) (internal quotation marks omitted).

[220] *Younge*, 2013 UT 71, ¶ 25.

[221] *United States v. O'Dell*, 247 F.3d 655, 673 (6th Cir. 2001) (citing *Doggett*, 505 U.S. at 655-56).

contained in the State's Declaration of Probable Cause and Agent Nesbitt's warrant affidavits. As described in greater detail in his declaration, Mr. Shurtleff's personal health, family life, and relationships have been worn thin by unrelenting negative media attention, which will not cease until this case results in dismissal or a favorable verdict.[222]

Months of delay have also had a profound effect on Mr. Shurtleff's financial well-being, which in turn causes greater anxiety and concern about the presumptive trial date.[223] Due to the State's allegations, Mr. Shurtleff has been unable to maintain his employment with at least two employers and several clients, who terminated relationships with Mr. Shurtleff due to the onslaught of negative media attention and the State's pending case. On a monthly basis, Mr. Shurtleff struggles to cover the costs of his mortgage, provide food for his family, pay bills, and stave off creditors, who contact him almost daily. Mr. Shurtleff has expended his savings and his retirement. Many of his accounts have been referred for collection, and Mr. Shurtleff often cannot make his car payment. Mr. Shurtleff doubts he will be able to rehabilitate his name, restore his financial state of affairs, or find sufficient clients while this case remains pending—all of which only increases the anxiety and concern arising out of past and future delay.

Lastly, Mr. Shurtleff's anxiety and concern is heightened by the passage of time itself, which affects the substance of his defense, as discussed below.

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[222] Because it contains confidential medical information, Mr. Shurtleff respectfully requested leave to file a declaration describing the effects on his personal health under seal. Mr. Shurtleff intends to file his declaration as Exhibit D.

[223] *See generally* Ex. D (discussing severe effects of case on Mr. Shurtleff's financial affairs).

3. Delays in the prosecution of this case increase the possibility of Mr. Shurtleff's defense being impaired by dimming memories and lost evidence.

"Of these forms of prejudice, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system."[224] In *Dodgett v. United States*, the Supreme Court recognized the accused will rarely be able to demonstrate this last form with specificity, in part because of "time's erosion of exculpatory evidence and testimony."[225] For this reason, "excessively delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."[226]

Given the sweeping nature of the allegations, the passage of time inevitably will affect witnesses' memories and Mr. Shurtleff's defense. The State's case, which appears to be based predominantly on witness recollections, is based on events that occurred between 2007 and 2012.[227] At trial, Mr. Shurtleff will need to call dozens of individuals to testify about highly contextualized events that occurred nearly a decade ago.[228] The longer the delay, the more likely

[224] *Doggett*, 505 U.S. at 654 (internal quotation marks omitted).

[225] *Doggett*, 505 U.S. at 655.

[226] *Id.* 655-56 (observing presumptive prejudice "cannot alone carry a Sixth Amendment claim," but was nevertheless "part of the mix of relevant facts, and its importance increases with the length of delay").

[227] *Supra* SOF, § III (describing Amended Information); Ex. A, § I.A (discussing scope of investigation); *see generally* Ex. B (containing reference to events as early as 2005 and illustrating State's heavy reliance on hearsay statements and interviews).

[228] These events include, but are not limited to, (a) Mr. Shurtleff's participation as a confidential informant on behalf of FBI-Utah in an investigation involving Mr. Jenson, (b) Mr. Jenson's prior financial dealings dating back to 2005, which are the source of his plea in 2008, (c) allegations of improper relationships dating back to 2007, and (d) the conduct of current and former members of the Attorney General's Office, dating back to previous administrations. Witnesses will include Mr. Jenson, Mr. Lawson, Mr. Donner, Mr. Swallow, Mr. Torgensen, Mr. McBride, Mr. Elie, Mr. Eborn, Mr. Bell, Ms. Bell, Mr. Crossley, Mr. Farr, and Judge Barlow. *Supra* SOF, §§

a witness will be unable to recall certain exculpatory facts, and more likely that the witness will (more dangerously) inaccurately remember details or be forced to rely on media reports to fill in gaps of knowledge.[229] While courts caution against considering pre-charging delay as part of a speedy trial analysis,[230] it remains undisputed that the longer this case continues, the more faded already faded memories become, and the more harmful the prejudice to Mr. Shurtleff.

E. Conclusion

The United States Constitution and Utah Constitution guarantee the right to speedy trial, which not only serves to minimize the prejudice to the accused, who is presumed to be innocent, but also promotes the fairness of the proceeding. The State's investigation and prosecution of this case has prejudiced Mr. Shurtleff. This prejudice, in turn, will only become more exacerbated by the State's recent acquisition of evidence and material from the United States, as well as the Task Force's development of a new set of investigative files nearly two year after the filing of the Original Information. To remedy these prejudicial delays, Mr. Shurtleff asks the Court to find there has been "unreasonable or unconstitutional delay in bringing" Mr. Shurtleff to trial and dismiss the Amended Information.[231]

II, III (describing initial charges). Indeed, the search warrant affidavits illustrate the nuanced nature of the State's allegations, and the fact that the State's case will rest primarily on witness recollection of conversations and interactions some of which date back more than a decade.

[229] *See* Steven B. Duke et al., *A Picture's Worth A Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1, 5 (2007) (discussing risk of error arising out of eyewitness and conversational memory).

[230] *Compare Doggett*, 505 U.S. at 657, *with United States v. MacDonald*, 456 U.S. 1, 7 (1982) ("Any undue delay after charges are dismissed, like any delay before charges are filed, must be scrutinized under the Due Process Clause, not the Speedy Trial Clause.").

[231] Utah R. Crim. P. 25(b).

CONCLUSION

To ensure the fundamental fairness of this proceeding and protect the due process and constitutional rights of the accused, Mr. Shurtleff requests, for all the reasons stated above, that the Court dismiss the Amended Information with prejudice.

DATED this 24th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 24th day of June 2016, a copy of the foregoing was filed and served via electronic notification on the following:

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