

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	
)	CAUSE NO. CR 05-5828 FDB
Plaintiff,)	
v.)	DEFENDANT WATERS' MOTION
)	REQUESTING THAT THE COURT
BRIANA WATERS,)	CONDUCT A STATUS CONFERENCE
Defendant.)	
)	
)	
)	

Defendant Briana Waters respectfully requests that this Court conduct a status conference as soon as possible (if possible, the week of January 7, 2008) so that her attorneys can present two specific urgent and critical issues to the Court for prompt resolution. Both issues relate to an important prosecution witness, Jennifer Kolar. The first issue involves continuing egregious prosecutorial misconduct involving the suppression of crucial exculpatory evidence. The second issue relates to anticipated testimony by the attorney for Ms. Kolar, Michael Martin, as a witness for the prosecution.

It is respectfully submitted that Defendant Briana Waters' constitutional right to effective assistance of counsel will be severely compromised unless the Court hears counsel in open court regarding these matters as soon as possible. It is submitted that delaying resolution of these issues until the pre-trial conference that is schedule for January 25, 2008 will significantly impede counsels' ability to effectively represent Ms. Waters.

I. PROSECUTORIAL MISCONDUCT

Indisputable facts that are supported by documentary evidence demonstrate beyond any doubt that the prosecution in this case has committed and continues to commit extremely serious misconduct. That misconduct, which involves pervasive and ongoing suppression of very significant exculpatory evidence, is interfering with the ability of counsel for Ms. Waters to adequately prepare for the trial that is scheduled to begin February 4, 2008.

Since June 13, 2007, when we asked the Court by letter to conduct a conference regarding this matter, there have been new revelations and new disclosures by the prosecution. Specifically, on August 27, 2007 AUSA Bartlett, one of the prosecutors, filed a Declaration that proves conclusively that the prosecution has engaged in, and continues to engage in, extremely serious misconduct far beyond that which we were able to bring to the attention of the Court in our letter of June 13. The documents that have been disclosed since that date demonstrate not only concealment and suppression of highly exculpatory documents (past and present), but also the execution and filing of perjurious declarations by two FBI agents, and the filing of at least one false pleading by the prosecution.

The chronology of events (that is set forth below) undeniably proves our claim of ongoing prosecutorial misconduct, and we urgently request that the Court hear counsel and make findings regarding the misconduct and determine the appropriate remedy. The trial date is rapidly approaching, and the concealment of this critical evidence is impeding our ability to prepare the defense. The consequences of the prosecutorial misconduct are of such magnitude that delaying discussion and resolution of the issues until the pre-trial conference that is scheduled for January 25, 2008, a mere ten days prior to the beginning of the trial, will deprive Ms. Waters of Due Process of Law and her right to effective assistance of counsel.

Counsel point out that, despite several requests to be heard in oral argument regarding many of the approximately fifteen motions we have filed, the Court has never permitted any oral argument on any of our motions. Nor has the Court conducted a single proceeding in open court in the nearly two years that Court has presided over the case.

We do understand that judges do not necessarily approach cases in the same way, but we believe that Ms. Waters, a woman who is completely innocent of the charges (which are based upon an accusation by a desperate woman, Jennifer Kolar, who did not name Ms. Waters when she first provided the names of her accomplices to law enforcement officers), who has never been convicted of any crime, ever, anywhere, any time, who has a stable and wonderful family, including a daughter who is about to turn three in January, who is facing a mandatory minimum sentence of *thirty-five years in prison* if she is convicted in this case, who is accused of having participated in a crime that involved only property damage, is entitled to have the Court hear and assess her demonstrable claims of gross prosecutorial misconduct sufficiently in advance of the trial to permit her attorneys to prepare a proper defense to the charges. Counsel for Ms. Waters are extremely frustrated that we have not been permitted to appear before the Court to present these issues for resolution.

In the course of suppressing critical exculpatory evidence, and the cover-up of the suppression, the prosecution has prepared at least two false Reports of Interviews (FBI form 302), has fraudulently represented the false reports to be authentic, has engaged in numerous dishonest efforts to conceal the fraud, has filed two perjurious sworn Declarations, has written at least one dishonest letter to defense counsel, and has filed at least one false pleading. This misconduct constitutes the federal crimes of perjury and obstruction of justice, and has subverted Ms. Waters' constitutional right to counsel, to due process of law, and to a fair trial.

We recognize that these are very serious claims, but the proof of the claims is documented and it is manifest.

THE FACTS

The key facts that are known as of this date are as follows:

A number of people who were involved in what has become known as the Earth Liberation Front (ELF) were arrested on December 7, 2005, based upon an indictment in Eugene, Oregon. Briana Waters was not indicted in that case.

Several of the defendants in the Oregon case agreed to co-operate with the government's investigation of a number of arsons that were believed to have been committed by people associated with the ELF. It appears that the government investigators (the FBI) were given the name of Jennifer Kolar on December 7, 2005 or soon thereafter. Kolar was contacted by the FBI and within days and, facing the rest of her life in prison, she agreed to become a co-operating witness. She was not arrested, and she retained an attorney, Michael Martin of Seattle.

On December 16, 2005, having agreed to truthfully reveal all she knew, Ms. Kolar, accompanied by her attorney, made a proffer to AUSA Andrew Friedman and two FBI agents, (Ted Halla and Anthony Torres), at AUSA Friedman's office in Seattle. Ms. Kolar's proffer on that date was very significant because it marked the first time that a suspected perpetrator of the arson at the University of Washington in Seattle (UW) on 5/21/01 (the crime for which Briana Waters stands accused) was to provide information to law enforcement regarding this highly publicized crime. On 12/16/05, Kolar became the first perpetrator to confess to participation in the arson and to provide the names of her accomplices.

Needless to say, the two FBI agents and AUSA Friedman were extremely interested in hearing from Ms. Kolar the names of the people who had committed the crime. Law enforcement officials had been working for more than four years to try to identify the perpetrators, and none of the co-operating defendants in the Oregon case had

given the authorities definitive information as to who had committed the UW arson. The initial informant regarding ELF activities, Jake Ferguson, whose co-operation had led to the Oregon indictment and arrests, was unable to provide information as to who had committed the May 21, 2001 UW arson. Nothing Ms. Kolar said on 12/16/05 was more important than the identities of her accomplices in the UW arson to which she confessed on that date.

It is now undeniable that Ms. Kolar, when asked to name the participants in the arson, and after being informed by the participating law enforcement officials (and presumably by her attorney) that she was expected to provide truthful information, and that making false statements to federal investigators constituted a separate crime, told the prosecution team in that first interview on 12/16/05 that there were five perpetrators of the UW arson. She identified the five perpetrators as:

1. Herself
2. "Avalon" (William Rodgers)
3. "Capitol Hill Girl" (a woman who lived in Seattle and whose father was a butcher named "Horris". This woman is not Briana Waters. She is a woman named Susan Savoie).
4. The "punk" boyfriend of "Capitol Hill Girl"
5. "Crazy Dan".

We know that Kolar provided that information on 12/16/05 because AUSA Bartlett has stated in a Declaration executed 8/27/07 that Kolar confirmed this fact on 8/15/07 when she was interviewed by Mr. Bartlett. We also know that she named herself and the four other people as the perpetrators because of the indisputable evidence that is contained in handwritten notes of the 12/16/05 interview that were contemporaneously prepared by FBI agent Anthony Torres. Agent Torres, Agent Halla, and AUSA Friedman all took notes as Kolar spoke to them on 12/16/05 about the UW arson (as well as other matters). FBI regulations, needless to say, require that accurate and honest notes of interviews be taken and retained, and it is undeniable that Agent Torres' notes reflect what Kolar said on 12/16/05.

Two days after the interview, the agents prepared their typewritten Report of Interview, which is known as an FBI 302. The purpose of preparing such a form is, of course, to accurately memorialize what had taken place at the interview.

We have recently been informed by the prosecution and by Mr. Martin, Kolar's attorney, that about two weeks after the 12/16/05 interview Kolar claimed to have "remembered" that Briana Waters was present at the arson and that she was the

“lookout”. Whatever the truth may be regarding why Kolar chose to claim that she “remembered” two weeks later that Briana Waters was involved in the UW arson, it is clear that Briana Waters became a target of the investigation at that point. Particular documents that have been provided to us by the government demonstrate that surveillance and investigation of Ms. Waters began some time in January of 2006.

In February of 2006, Ms. Waters was contacted in person by FBI agents at her home in Berkeley, California. She was not arrested, and she was not questioned. She was advised by the FBI that she should retain an attorney and that it would be wise for her to agree to co-operate with the government. Soon thereafter, Ms. Waters retained Robert Bloom of Oakland, California as counsel, and within a few weeks Mr. Bloom asked Neil Fox of Seattle to be local counsel.

After several weeks of discussions between the prosecution and defense counsel, it became clear that Ms. Waters was not going to plead guilty, and that she was not going to agree to co-operate with the government. Ms. Waters had the courage to take this position despite the fact that she was made aware that she would be facing a mandatory minimum sentence of at least thirty-five years in prison if she were to be convicted in this case.

Ms. Waters was indicted¹ and after some weeks, the prosecution began to provide documents in discovery. Although we had been told (in a “reverse proffer” in which the prosecution informed Ms. Waters [and Attorney Bloom] what evidence they believed they had against her) that there were two women, Jennifer Kolar and Lacey Phillabaum, who had committed the UW arson and who were claiming that Ms. Waters had been involved, we received no meaningful discovery regarding these two women for several months.

In fact, the Government did not provide us with any 302's reflecting several Kolar and Phillabaum interviews until September 8, 2006 (nine months after Kolar's first proffer session that had taken place on 12/16/05), despite our many requests for the Kolar and Phillabaum 302's prior to that date.

When the prosecutors finally did provide Kolar 302s, they failed to provide the 302 for the critical December 16th proffer session. It was only when we noticed in a later 302 (supposedly memorializing a January 6, 2006 interview of Kolar) that there was a

¹Initially Ms. Waters was indicted in the Seattle Division of this Court, where the case was assigned to Judge Pechman. After it was clear that Ms. Waters was not going to agree to be a co-operating witness, the prosecutors made a decision to charge Ms. Waters by superceding an existing ELF indictment in the Tacoma Division of the Court. By doing so, the prosecution was able to assure that Judge Pechman would no longer be involved in Ms. Waters' case, and that Judge Burgess would preside over her case.

reference to a December 16th interview, that we became aware that the December 16th proffer had even taken place. Given the conduct of the prosecution prior to and subsequent to the failure to include the 12/16/05 document in the packet of Kolar 302's that was originally provided to us, there can be no doubt that the prosecution's failure to include that document in the initial Kolar packet was intentional (i.e., was not an oversight), and that the intent of the prosecution was to avoid disclosure of documents regarding the 12/16/05 interview unless and until we specifically requested them.

We immediately (in mid-September of 2006) asked the prosecutors to provide the 302 for the 12/16/05 proffer. They delayed for more than seven weeks before they disclosed what we now know to be a false version of the 302 (i.e., a version with false information that was created some time after the date that is noted on the document, 12/18/05). It took the government *seven weeks* to provide a particular 302 that supposedly had been typed many months previous. It was during this delay that the prosecution created the false 302 as a substitute for the original 302.

That fraudulent document was provided to counsel on November 1, 2006, more than ten months after the 12/16/05 interview. The reason the government delayed disclosure of the 302 for 12/16/05 is clear: The *authentic* document that was prepared on 12/18/05 (two days after the 12/16/05 interview of Kolar) contained information that was highly exculpatory as to Briana Waters (who had apparently become a target the first week in January of 2006). The authentic 302 listed the four accomplices who were named by Kolar on that date, and Briana Waters was not one of them. The names of the four accomplices that were provided by Kolar on that date were the ones that were written by Agent Torres in his notes wherein he wrote not only the four names, but also placed numbers next to the names.

The fraudulent 302 that was fabricated some time after Briana Waters became a target (and before it was disclosed to us on 11/1/06), indicates that Kolar had *supposedly* stated on 12/16/05 when asked to identify the perpetrators that they were:

- “Kolar, ‘Avalon’ and [a] few other individuals,”
- “‘Avalon’ and the others,”
- “‘Avalon’ and another male,”
- “someone,”
- “they”, and
- “everyone.”²

²These words appear on the fraudulent 302 that was given to us by the prosecution. We do not attach the document to this pleading because it may be that we are prohibited from publishing the document by order of this Court.

In fact, Kolar identified herself and four accomplices on 12/16/05. She did *not* say “others”, or “someone”, or “another male” in describing the accomplices. We repeat: the prosecution created a false document — a lie — a fraud— and provided it to the defense knowing that it was fraudulent.

We now have documentary proof that Kolar was not vague and evasive on 12/16/05, as would be indicated by the content of the fraudulent 302 that we were given on 11/1/06. We now have proof, *and the prosecution has admitted*, that Kolar was not vague and evasive as to the names of the perpetrators on 12/16/05. We have the handwritten notes made by Agent Torres (see below) and we have the 8/27/07 Declaration of AUSA Bartlett (see below) that demonstrate without any doubt whatsoever that Kolar named herself and four other specific people as the perpetrators of the UW arson (and that Briana Waters was not named on 12/16/05 by Kolar).

Common sense and basic investigative techniques tell us that, if Kolar had been vague and evasive on 12/16/05 as is indicated in the fraudulent 302 (i.e., if she said “others” on 12/16/05), there is no doubt that her interviewers (AUSA Friedman and Agents Halla and Torres) would have told her and her lawyer that she can’t get away with such obfuscation, and that she was not living up to her agreement to provide honest information to the prosecution investigators. It is simply not feasible that they would let her get away with saying “others”, or “someone”, or “a few other individuals” as her accomplices. The government wanted names. She gave them names. But after Briana Waters became a target of the investigation, it was damaging to the prosecution’s case to reveal that Kolar had specifically identified four accomplices (and that Briana Waters was not among them). The prosecution decided to prepare a substitute 302 and further decided that they would make their best efforts to avoid providing us with the documentation of the 12/16/05 interview of Kolar. Corrupt as it is, that is exactly what took place, and the documentary evidence proves it.

After counsel reviewed the fraudulent 302, we requested handwritten notes of the agents, knowing that the 302 that had been provided to us was a fraud (because Kolar would never have been permitted to be so evasive regarding the identities of her accomplices). Kolar’s interrogators knew that she was no fool. She was a college graduate, a Ph.D. candidate, and a highly intelligent computer expert. There is no way she would “forget” the identities of the four people who committed the UW arson with her.

After a delay of several weeks, on approximately March 27, 2007, the prosecution turned over only the 12/16/05 notes of Agent Halla. Those notes (which are attached hereto as exhibit A [they are not covered by the Court’s Order]) indicate that Halla wrote

that Kolar implicated a person she described as “Capitol Hill Girl” in the UW arson. This person is mentioned three times in Halla’s notes. (See Bates Number 014004 of exhibit A)

Although Agent Halla’s notes are significant and standing alone demonstrate that the 302 that was provided to the defense on 11/1/06 was fraudulent, they are not as specific and detailed as Agent Torres’ notes. After we made a specific request, the prosecution finally disclosed the notes of Agent Torres, which demonstrate that Kolar undeniably identified herself and four specific accomplices in her 12/16/05 interview. Torres’ notes (attached hereto, exhibit B, page 11/13) prove conclusively that Kolar did not say “others” on 12/16/05 (as the typed 302 states), but that she provided specific identities of all her accomplices. As noted above, Agent Torres placed the numbers 1,2,3,4,5 next to the names he wrote in his notes. Briana Waters was not named by Kolar on 12/16/05.

Torres’ notes were not disclosed to us until May 2, 2007, some five weeks after Halla’s notes were disclosed. To illustrate the lengths to which the prosecutors have gone to deceive us and to gain unfair tactical advantage, Torres’ notes were actually sent via fax to counsels’ offices by the prosecutors on 5/2/07 at a time when they knew we were en route to a settlement conference in this case with Judge Martinez. They knew that, as a result, we definitely would not have knowledge at the settlement conference of the powerful exculpatory information that is contained in the Torres notes. The prosecutors (Friedman and Bartlett) said not a word to us about the Torres notes as we all waited together for several minutes for Judge Martinez to enter the courtroom. Their misconduct is consistent, it is pervasive, and it is clearly intentional.

It is only the disclosure of the Torres notes (more than sixteen months after the notes were made) that made us aware of the fact that Ms. Kolar had identified five specific perpetrators (Briana Waters not being among them) in her very first interview with the prosecution as a co-operating witness who had agreed to tell the truth.

Throughout the course of frequent interaction regarding discovery and other matters between Ms. Waters’ attorneys and the AUSA’s, (which began at the end of February of 2006), never was it disclosed that Ms. Kolar had failed to implicate Ms. Waters in her first interview until we finally received the fraudulent Kolar 302 regarding the December 16, 2005, interview (nine months after the 12/16/05 interview). And we did not learn that Kolar had identified specific people other than Ms. Waters until we received the handwritten notes of Agents Halla and Torres *more than fifteen months after the interview*. In fact, the Government always took the position that Ms. Kolar was one of two solid witnesses who had consistently and unwaveringly claimed that Ms. Waters was

involved in the UW arson.

As to the four people who were named by Kolar on December 16, 2005, William Rodgers had already been arrested, but “Capitol Hill Girl,” her “punk” boyfriend, and “Crazy Dan” were presumably still at large, and their whereabouts were unknown. Federal (and local) law enforcement officials were undoubtedly very interested in identifying and tracking down these three people to question and/or arrest them.

Obviously, an important event in the process of identifying and apprehending suspects is the preparation of an accurate and complete Report of Interview (the FBI 302 form) to provide critical information to all FBI agents (and other law enforcement officials) everywhere to facilitate the investigation (and, of course, to accurately memorialize what took place at the interview).

In the instant case, we now know that FBI Agents Torres and Halla made handwritten notes of what Ms. Kolar said on December 16, 2005, and based on the memories and the notes, *some version of* a 302 was prepared two days after the interview, on 12/18/2005 (The 302 indicates, “Date of transcription 12/18/2005”).

This document is the only 302 regarding the 12/16/05 Kolar interview that we have ever seen. As noted above, it is a fraudulent document that was created after Briana Waters became a target, and the original 302 that was prepared two days after the interview has been suppressed, *and is being suppressed even as the Court reads this motion.*

The 302 that was provided to us on 11/1/06 *cannot have been the 302 that was prepared two days after the interview.* It is a fraudulent document that was substituted for the actual 302 that was prepared two days after the interview. The substitution took place at some point after the prosecution decided to target Briana Waters.

It is important to note that our claim is not that there was a delay in providing critical exculpatory information. Our position is that there has been serious fraudulent misconduct involving the creation of false documents, providing that false document to us and representing it to be authentic, and the continuing suppression of critical exculpatory material and information. Our further claim is that, as a result of the misconduct, including the ongoing suppression of exculpatory documents, it is not possible to effectively prepare a defense for Ms. Waters.

We have made every effort to try to get this matter resolved. We have sought supervised access to the FBI computer to locate earlier versions of the relevant 302's, but

that request has been denied.³ We have asked permission to depose or in some other way question the two FBI agents regarding the facts relating to the 12/16/05 interview of Kolar. That request has been denied.

THE EVENTS OF AUGUST, 2007

The prosecutorial fraud reached new depths in August of 2007. The government filed a Declaration that was executed and filed by AUSA Bartlett on 8/27/07 that reveals the following sequence of events:

*On August 15, 2007, AUSA Bartlett spoke in person with Kolar. It is not known by us at this time whether anyone else was present during that conversation. In response to Mr. Bartlett's questioning, Kolar informed Bartlett that she recalled that on 12/16/05 at the first proffer session, she identified herself, Rodgers, Capital Hill Girl, the punk boyfriend, and Crazy Dan as the perpetrators of the UW arson;

* On August 16, 2007, Agent Halla executed a Declaration wherein he swore under oath (in direct contradiction to what Kolar had said *the day before*) that Kolar was only certain at her 12/16/05 interview that she and Rodgers had committed the UW arson;

*On August 17, 2007, Agent Torres executed a Declaration wherein he swore under oath (in language that was almost identical to Halla's Declaration) that in the 12/16/05 interview Kolar was only certain that she and Rodgers had committed the UW arson. Neither the Torres Declaration nor the Halla Declaration addresses the fact that Torres' handwritten notes make clear that Kolar did on 12/16/05 identify the three other people as participants in the arson. Nor does either Declaration address the question of why the 302 that was given to us on 11/1/06 *did not even mention* the three other names that are set forth in the Torres notes;

*On August 17, AUSA Bartlett filed a pleading (in response to a defense motion) in which he, like the two agents, claimed that the agents believed that Kolar definitively identified only herself and Rodgers as having been involved in the UW arson. As we learned ten days later (when Bartlett filed his 8/27/07 Declaration), Bartlett filed this pleading two days after interviewing Kolar on 8/15/07 and discussing the 12/16/05 interview with her on that date;

*Between the date AUSA Bartlett filed the pleading on 8/17/07 and ten days later, 8/27/07, some event took place, or some soul-searching by Mr. Bartlett took effect. On

³We have recently consulted with a retired and highly regarded FBI agent who has informed us that, unless there has been tampering, the FBI computer will have a copy of the original version of any 302 that was created.

8/27/07, Mr. Bartlett filed a Declaration with the Court in which he revealed that on 8/15/07 (twelve days earlier) he had spoken to Kolar and she confirmed that on 12/16/05 she had definitively identified herself and the four other specific people as the perpetrators of the UW arson whose names are written in Torres' notes.⁴

The 8/27/07 Bartlett Declaration proves that the 8/16/07 Declaration of Halla, the 8/17/07 Declaration of Torres, and Bartlett's 8/17/07 pleading (*all of which were prepared and executed after the 8/15/07 statement by Kolar*) are false (and in the case of the two Declarations, are perjurious).⁵

The Bartlett Declaration and the Torres notes prove beyond any doubt that the 302 that we were given on 11/1/06 is a fraudulent document that was prepared for the purpose of concealing highly exculpatory information from Ms. Waters. Assuming the integrity of the FBI computer, an examination of the serialized documents in the FBI computer would reveal the fraud. We have requested supervised access to the FBI computer. That request has been denied. As noted above, we have requested the right to depose the FBI agents. That request has been denied.

The government has to date escaped responsibility and sanctions for the gross fraud that they have committed, and continue to commit. The evidence of fraud is clear, and we need the intervention of the Court and the participation of the Court to fully explore the facts regarding our claims. What has taken place is an outrage. The principled and compelling writings of the highly respected Judge Bazelon, as applied to the instant situation, teach us that the nature of misconduct committed by the prosecution team

⁴Regarding the motive of Mr. Bartlett for preparing the 8/27/07 Declaration, a noble explanation would be that the conscience and/or religious beliefs of Mr. Bartlett motivated him to provide the Declaration despite the fact that the Declaration completely undermines his position and that of the two FBI agents. A more sinister explanation would be that Mr. Bartlett realized at some point between 8/17/07 and 8/27/07 that he could not rely upon Ms. Kolar and/or her attorney to keep the Kolar statement of 8/15/07 a secret, and that he decided to cut his losses lest the 8/15/07 conversation between himself and Kolar be revealed during the trial.

⁵On 11/13/07, some weeks after reviewing the Bartlett Declaration, we wrote to Mr. Bartlett (the letter is attached hereto as exhibit C). We thanked him for his candor in revealing the 8/15/07 statement by Kolar, and we asked him to reconsider our request that the case be dismissed. We also pointed out that his office now faced a conflict in that it is the function of the office to investigate federal crimes, including (at least) the perjury that we believe has taken place in the Declarations of the agents, and the obstruction of justice that he himself has engaged in. We urged him to also consider whether, given the obvious conflict, the case should be prosecuted by DOJ personnel not associated with his office. On 11/20/07, Mr. Bartlett wrote a letter rejecting our suggestions (letter attached, exhibit D).

deprives the government of the moral authority to prosecute this case. If the Courts of the United States of America fail to objectively evaluate these kinds of issues, if the Court chooses to look the other way, we will all have lost, not just Briana Waters.

FURTHER MISCONDUCT

It also appears that the FBI agents and the prosecutors engaged in the same kind of misconduct (alteration of documents) regarding a different interview of Kolar that took place on February 4, 2006.

The prosecution claims that the alleged perpetrators, including Briana Waters, Lacey Phillabaum, and Jennifer Kolar were together for several hours on the night of May 20, 2001, into the early morning hours of May 21, 2001. The prosecution also claims that all the perpetrators attended various planning meetings together in Olympia, Washington, during the weeks prior to the arson.

The handwritten notes of Agent Halla reveal that Kolar made a particular statement on 2/4/06 that demonstrates conclusively that Briana Waters was not involved in the UW arson. The notes show that Kolar told the agents on 2/4/06 that Kolar “doesn’t remember [seeing] Briana [Waters] and Lacy [sic] together” (So indicated in Agent Halla’s handwritten notes memorializing the February 4, 2006 interview with Kolar, attached as exhibit E, see Bates number 01461).

If Waters and Phillabaum were not together, and if Phillabaum was one of the perpetrators (as she admits), Briana Waters *could not have been involved in the arson or in any planning meetings* because Waters could not have been at any of the relevant events if Kolar did not see her together with Phillabaum.

Two days after the February 4, 2006, interview of Kolar, an FBI 302 was prepared regarding that interview. After a delay of some six months, the prosecution provided us with what is clearly a doctored version of the 302 which purports to indicate what Kolar said on 2/4/06. The 302 that was given to us *omitted the critical exculpatory statement that was made by Kolar that she did not remember seeing Briana and Lacey together*, as the handwritten notes indicate. Instead the version of the 302 that we were given was altered by Agent Halla to say that, “Kolar did not recall Briana and Lacey being close friends”.

Yet again, the FBI prepared a fraudulent 302. On *some* date after the 2/4/06 interview (we do not know the date, but the FBI computer would reveal the date) the prosecution prepared a 302 that omitted the dispositive statement by Kolar that she did not recall seeing Briana and Lacey *together*. Instead, they fraudulently substituted the false entry that Kolar said that she did not recall Briana and Lacey being close friends.

The prosecution understood that Briana Waters could not have been involved in the UW arson if she was not together with Phillabaum. So they lied. They prepared yet another fraudulent document. That is gross misconduct, and it is obstruction of justice. Concealment of the original 302 for the 2/4/06 interview is also obstruction of justice, and it continues today.

Further, after the agents prepared the false 302, the prosecutors delayed disclosure for some six months before they provided us with a document that they had to know was false. They knew so because the 302 did not contain the critical statement that was contained in the handwritten notes that Kolar did not recall seeing Briana and Lacey together [which would, of course include not seeing Briana Waters at the UW arson and at the meetings that allegedly took place prior to the arson]. Needless to say, the FBI agents who were working hand in hand with the AUSA's would certainly have shared with the prosecutors the fact that Kolar had said that she did not recall seeing Briana and Lacey together.

Once again, we did not become aware of the fraud until the handwritten notes were finally disclosed to us more than a year after they were written, and after we had made a number of requests for them.

OTHER ACTS OF DISHONESTY

As to Agent Halla's integrity, there is another ELF/ALF case in the Western District of Washington, United States v. Christopher McIntosh, CR 05-133 Z (WDWA) that also involves AUSA Friedman and Agent Halla working together, in which Agent Halla blatantly lied to a probation officer who was preparing a pre-sentence report. Halla told the officer that Mr. McIntosh had indicated at a proffer session that he would "do the same thing again", when in fact Mr. McIntosh's lawyer had intervened at that proffer session and would not let Mr. McIntosh answer that question. According to the transcript of the sentencing hearing in that case (which happened to take place the same day as the Kolar proffer in this case, 12/16/05), AUSA Friedman characterized Halla's lie as a "mistake".

As to AUSA Friedman's credibility, there was another ELF/ALF case in the Western District of Washington, United States v. Allison Watson, CR 04-066 P, in which governmental misconduct again seems to have taken place, also involving AUSA Friedman. In that case, Mr. Friedman was accused by defense counsel of using the grand jury to harass an animal rights' activist who was suspected of participating in arsons and animal releases. (Ms. Watson is an unindicted co-conspirator in the instant case.)

The defense accused the Government of setting a "perjury trap" for Ms. Watson

by calling her before a grand jury for the purpose of setting up a prosecution for perjury. When Ms. Watson's attorneys attempted to obtain the grand jury transcripts of the several colloquies that took place between the prosecutors and the grand jurors outside the presence of the witnesses, they discovered that the United States Attorney's Office had destroyed most of those transcripts. One transcript remained, though, which revealed AUSA Friedman's interactions with the grand jurors in that ALF/ELF case, and this transcript confirmed the claims of Ms. Watson's attorneys that AUSA Friedman had denigrated Ms. Watson to the grand jurors and that he began talking about a perjury prosecution even before Ms. Watson was immunized.

When District Court Judge Marsha Pechman in Seattle indicated that she wished to hold an evidentiary hearing at which AUSA Mark Bartlett or another representative of the United States Attorney's Office could testify under oath about the destruction of the records, the Government instead agreed to reduce a series of felony charges to a single misdemeanor count of contempt of court (for which Ms. Watson ultimately received probation), and, most extraordinarily, agreed not to prosecute her for any crime (including arson) based upon evidence in the Government's possession and agreed not to subpoena her regarding any pending investigation.⁶ We point out that this is the same Judge Pechman to whom the original indictment of Ms. Waters was assigned until the same prosecutors, Mr. Friedman and Mr. Bartlett, chose to terminate her involvement in Ms. Waters' case by indicting Ms. Waters in the Tacoma Division of this Court (for a crime that had been committed [by others] in the Seattle Division of this Court).

FURTHER MISCONDUCT

There is still further prosecutorial misconduct in this case:

*When Agent Halla testified before the grand jury that indicted Ms. Waters in 2006, both he and AUSA Friedman chose not to inform the grand jury that Kolar had initially failed to identify Ms. Waters as a perpetrator. Nor did they inform the grand jury that Kolar had identified the four other perpetrators, not including Ms. Waters. Both Agent Halla and AUSA Friedman knew what Kolar had said on December 16, 2005 because both of them were present at and participating in the interview/proffer. Yet neither one of them provided the grand jury with this critical and highly exculpatory

⁶Judge Pechman was perplexed by the Government's reluctance to allow for depositions of staff from the U.S. Attorneys' office. She asked, "Why is it you would want to stop a probe that could ultimately be favorable to you as if it simply was a negligent act, rather than a reckless act?" It is respectfully submitted that the question answers itself.

information. This is a dishonest prosecution.

*Further, we asked the prosecutors, Mr. Friedman and Mr. Bartlett, to instruct Agent Halla and all other law enforcement officers who were involved in this matter not to attempt to tamper with their computers, and we also asked them to seize and preserve Agent Halla's computer as evidence. *See* exhibit F (our letter dated 4/3/07, page 3). After another delay of seven weeks, on May 25, 2007, they finally responded to these requests in a letter (exhibit G, page 2) in which the prosecutors, in the face of Torres' handwritten notes, stated that the agents were not clear that Ms. Kolar had really identified "Capitol Hill Girl," her "punk" boyfriend, and "Crazy Dan" as being involved in the arson.

*Furthermore, Mr. Friedman and Mr. Bartlett admitted in their May 25 letter that the 302 reporting the December 16th proffer was not actually prepared on December 18, 2005 (as is indicated on the face of the 302 itself). Rather, they attempt to leave themselves and the agents some "wobble room", stating that there were in fact "a number of drafts" and "Agents Halla and Torres ultimately finalized the report by early February 2006, and it was 'serialized,' that is, entered into the case file, on February 9, 2006."

We believe that this chronology of delay and deception supports the conclusion that the entire prosecution team participated in the misconduct and the coverup that took place and continues in this investigation.

II. THE ANTICIPATED TESTIMONY OF KOLAR'S ATTORNEY

Counsel for Ms. Waters have been informed that the prosecution may call Michael Martin, attorney for Jennifer Kolar, as a witness at the trial. Calling Mr. Martin will necessarily implicate questions regarding waiver of attorney-client privilege and the Federal Rules of Evidence, Rule 502.

We have been asked to consider stipulating to Mr. Martin's testimony, but we are unable to consider doing so unless and until we are informed as to what his testimony is expected to be. If we are to consider any stipulation, we also need to be made aware of the facts that relate to the subject matter of his testimony. We have not been able to ascertain many of those facts from Mr. Martin because he has not been authorized by his client, Jennifer Kolar, to speak with us regarding the facts. We are at an impasse.

There are important issues regarding Mr. Martin's testimony that must be addressed prior to the pre-trial conference that is scheduled for January 25, 2008. These issues include whether Mr. Martin should be permitted to testify at all, whether agreeing to testify constitutes a waiver of Ms. Kolar's attorney-client privilege, hearsay issues, and other matters.

Mr. Martin could be an important witness, and we need time to prepare to cross-

examine him. We cannot prepare until we know more than we know now about his testimony, and until after we know the ground rules regarding both his direct testimony and cross-examination.

It is urgent that the Court address these issues as soon as possible.

CONCLUSION

We have made every effort to give the prosecution the opportunity to resolve the misconduct issues without full public disclosure of their egregious misconduct (which includes criminal acts), but the prosecutors have rejected our efforts. Our obligation to our client, to the Court, and to the legal profession require that we pursue and seek dismissal of the indictment and/or other sanctions for the gross misconduct that has taken place and that continues to take place.

Briana Waters is innocent, and, it is respectfully submitted that in this case where the evidence of misconduct is so clear and compelling, we believe that the Court has a special responsibility to look into our claims as soon as possible and as thoroughly as necessary to ascertain the facts even if it may lead to a finding by the Court that there has been sanctionable misconduct.

It is submitted that the consequences of the misconduct cannot be resolved by the rationale that the defense now has been provided with sufficient information to enable us to cross-examine Kolar. Impeachment of Kolar is one issue, but another major issue is the integrity of the investigation. Conduct of the investigation is always relevant. An accused is always entitled to demonstrate to a jury that the investigation was flawed and was unfair (See *Kyles v Whitley*, 514 U.S. 419, 446 [1995]), including the ongoing suppression of the original 302's that were prepared by the FBI.

What has taken place in the investigation and the prosecution of this case is extreme corruption that undermines the integrity of the Courts of the United States of America, as well as depriving Briana Waters of her constitutional rights. This case is about to proceed to trial at a moment in the history of this nation when the American people are appalled at the outrageous conduct of the executive branch of the United States government. It remains to be seen whether this conduct is going to be reined in by the judiciary.

The President and the Department of Justice have been subject to severe criticism, and with good reason. Indeed, Mr. McKay, the former United States Attorney for this District is one of those who was replaced by this Administration during the pendency of this case. The events that are described herein have actually taken place, and documents that have been generated by the government ineluctably prove the misconduct that is

alleged. Our claims are not some fantasy created by zealous defense attorneys. They are real, they are documented, and they are serious. It is respectfully submitted that appropriate and prompt resolution of these issues is critical for Ms. Waters and for the integrity of the federal judiciary as well.

We are mindful of the fact that judges would prefer not to have to deal with these kinds of conflicts. But the conflict is not our fault. This prosecution is corrupt, and our role is to represent our client. In doing so, we were able to catch the government with their hands in the cookie jar. We are only asking the Court to examine the facts and to expedite the process by conducting a status conference as soon as possible, hopefully the week of January 7, 2008 on whatever day is convenient for the Court.

Respectfully submitted,