

FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,

v.

SIDNEY KATHERINE POWELL
ET AL.,
DEFENDANTS.

CASE NO. 23SC188947

JUDGE MCAFEE

**DEFENDANT SIDNEY KATHERINE POWELL'S
MOTION TO PRODUCE *BRADY* MATERIAL**

Sidney Powell is innocent of all charges alleged in the indictment. Because of this, the State necessarily has possession of significant evidence that exonerates her of all charges. To the extent Sidney Powell is named in Counts 1 and 32-37 of the indictment, the State has no evidence that her conduct was criminal or that there was an agreement between her and anyone else to commit a crime.

Contrary to widely publicized false statements in the media, Sidney Powell did not represent President Trump or the Trump campaign. She had no engagement agreement with either. She appears on no pleadings for Trump or the Campaign. She appeared in no courtrooms or hearings for Trump or the Campaign. She had no contact with most of her purported conspirators and did not agree with those she knew or spoke with. It cannot be disputed that Ms. Powell went her own way following the election, and she never reached an agreement on a course of action with any indicted or unindicted coconspirator.

Ms. Powell and a small team represented Constitutionally-selected Electors in four discrete lawsuits filed in Georgia, Michigan, Wisconsin, and Arizona—all of which were short-lived in their respective federal courts,¹ and ultimately, the Supreme Court denied petitions for writs of certiorari. If among the public there was confusion previously as to Ms. Powell’s role, it was irrefutable by November 22, 2020, when Mr. Giuliani and Ms. Ellis released an official statement that “Sidney Powell is practicing law on her own. She is not a member of the Trump Legal Team. She is also not a lawyer for the President in his personal capacity.”² Indeed, purported coconspirators publicly shunned and disparaged Ms. Powell. The State should certainly be in possession of phone logs, other communications, statements, notes, emails, and evidence that shows that Ms. Powell had no criminal intent and did not agree to any criminal course of conduct that would support any of the conspiracy charges—RICO or otherwise.

To the extent Ms. Powell was in communication with President Trump, Mark Meadows, or Rudy Giuliani, or any named or unnamed, indicted or unindicted coconspirator in November and December 2020, any substantive communications were limited to the dissemination and sharing of evidence filed in her lawsuits—

¹ The federal judge in Georgia granted a Temporary Order to preserve and secure the voting machines in several locations. *Pearson v. Kemp*, No. 1:20-cv-04809-TCB (N.D. Ga. 2020) at Dkt. 14.

² Kyle Cheney, *Trump campaign cuts Sidney Powell from president’s legal team*, POLITICO (Nov. 22, 2020, 8:50 PM EST), <https://www.politico.com/news/2020/11/22/trump-campaign-sidney-powell-legal-439357>.

including a DOJ/CISA finding regarding foreign interference in the election—and counsel to the President regarding his authority under Executive Order 13848. All those substantive communications, limited as they were, effectively ended by December 19, 2020.

Moreover, there are no communications of any kind between Ms. Powell and any of the alleged coconspirators or unindicted coconspirators that evince any agreement by Ms. Powell to have SullivanStrickler personnel to travel to Coffee County or to contract for their services for Coffee County—much less to do so for any illegal purpose. Indeed, there is no contract for SullivanStrickler for Coffee County—and there is no contract with SullivanStrickler actually signed by Powell.

I. PRODUCTION OF *BRADY* MATERIAL IS CRUCIAL TO THE DEFENSE.

The Fulton County District Attorney has a crushing 90% or higher conviction rate.³ It is virtually impossible to defend successfully when the might and power of a government entity focuses on the destruction of an individual, and the government holds all the cards. The rule of *Brady v. Maryland* requires the government to disclose evidence favorable to the defense and is probably the single most important underpinning of Due Process for a criminal defendant—yet it is observed often by

³ This is one of the reasons, as federal Judge Jed Rakoff wrote, “Why Innocent People Plead Guilty.” Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/mutex.gmu.edu/articles/2014/11/20/why-innocent-people-plead-guilty/> (“How prevalent is the phenomenon of innocent people pleading guilty? The few criminologists who have thus far investigated the phenomenon estimate that the overall rate for convicted felons as a whole is between 2 percent and 8 percent. . . . let us suppose that it is even lower, say, no more than 1 percent. When you recall that, of the 2.2 million Americans in prison, over 2 million are there because of plea bargains, we are then talking about an estimated 20,000 persons, or more, who are in prison for crimes to which they pleaded guilty but did not in fact commit.”).

breach. *Brady v. Maryland*, 373 U.S. 83 (1963). While prosecutors routinely recite their full knowledge of and compliance with their *Brady* obligations, in truth, they often scoff at them and continue to play games to win convictions at all costs. That wrongful gamesmanship is even more destructive in high-profile, politically charged prosecutions in which “headline-grabbing prosecutors” make or break their futures by winning or losing. *Sorich v. United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1310, 173 L. Ed. 2d 645 (2009) (Scalia, J., dissenting). Meanwhile, the defense does not know what the defense does not know.

The *Brady* obligation extends to information that will support Ms. Powell’s defenses. *United States v. Bagley*, 473 U.S. 667, 676 (1985). In addition to numerous legal defenses, Ms. Powell has multiple factual defenses that require full production of *Brady* material immediately. She has demanded a speedy trial. No time can be wasted. Counsel is unable to identify any reason the State indicted Ms. Powell other than the undisputed fact that Defending the Republic Inc., a non-profit Ms. Powell founded, paid a bill from SullivanStrickler upon its threat to post information publicly online after its technicians apparently collected data from Coffee County machines upon the request of Mr. Jim Penrose and Coffee County officials. Ms. Powell did not request that trip; she did not even know of that trip—much less authorize it. Accordingly, she did not agree with anyone to undertake the collection of Coffee County data—even though it was done with permission of Coffee County officials—and the State has no evidence she conspired with anyone to violate any law.

Remarkably, Ms. Powell did not sign a contract with SullivanStrickler for the work executed in Coffee County—in fact, to Ms. Powell’s knowledge, there is no contract with SullivanStrickler for Coffee County. Meanwhile, SullivanStrickler personnel went to Coffee County and actually retrieved information on January 7, 2021, without even asking Ms. Powell. Notably, not one of the individuals who conducted the forensic imaging has been charged with any offense. The deals, no matter how informal, made with the thirty unindicted coconspirators are also *Brady* material the prosecution must produce. *State v. Thomas*, 311 Ga. 407, 413-14, 858 S.E.2d 52, 58-59 (2021) (offering to assist a witness with a felony charge is *Brady*).

Although it is obvious that the government’s discretion to pursue a prosecution is broad, it is not without constraint. *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996). It has often been repeated that “it is unconstitutional to administer the law ‘with an evil eye and an unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances.’” *U.S. v. Napper*, 574 F. Supp 1521, 1523 (D.D.C. 1983), quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886). Selective prosecution requires that a defendant show (1) he was singled out for prosecution from among others similarly situated, and (2) that his prosecution was motivated by a discriminatory purpose. *Armstrong*, 517 U.S. at 465 (1996); *U.S. v. Palfrey*, 499 F. Supp. 2d 34 (D.D.C. 2007). It is highly likely this is such a case, as Ms. Powell could not be further removed from the alleged conduct—even if the conduct of others was criminal. Meanwhile, the actual perpetrators of the purported unauthorized Coffee County intrusion have not been charged. In addition, there is

every indication this Indictment is unconstitutional as charged, criminalizes innocent conduct along with First Amendment protected speech and actions, and it is a purely political and rank abuse of power

There are also serious questions of prosecutorial misconduct, as there are reasons to believe the Ms. Willis's office coordinated with civil litigants and used civil proceedings in *Curling v. Raffensperger* to obtain testimony from, *inter alios*, the corporate representative of SullivanStrickler who was not present in Coffee County and could provide no evidence outside misleading records. The questioner framed questions very specifically to obtain answers that would create the appearance of wrongdoing by Powell. This enabled the prosecution to manufacture the impression it wanted to convey to the Grand Jury to indict Ms. Powell.

II. UNDER *BRADY V. MARYLAND*, THE STATE MUST PRODUCE ALL EXCULPATORY EVIDENCE, ESPECIALLY FROM ANY INDICTED OR UNIDICTED ALLEGED COCONSPIRATOR.

A. The Government's Obligation Under *Brady v. Maryland*, 373 U.S. 83 (1963) Is Serious and Continuing.

Brady v. Maryland, 373 U.S. 83, 87 (1963), requires the prosecution to disclose to the defendant all evidence favorable to him and material to guilt or punishment. Although "favorable evidence" may not encompass all evidence that might possibly inure to the defendant's benefit, it does include all exculpatory evidence and evidence that could be used for impeachment of a witness. See *Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006); *United States v. Irwin*, 661 F.2d 1063, 1068 (5th Cir. 1981). In addition to the evidence collected by the prosecution itself, the prosecution must disclose to the defendant exculpatory or impeachment evidence obtained by

other government agencies and available to the prosecution for its use. The prosecution “is deemed to have knowledge of information readily available to it and the failure to provide that information when requested is a violation of the *Brady* rule.” *Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) (citing *United States v. Auten*, 632 F.2d 478 (5th Cir. 1980)).

The prosecutors’ obligation to obtain and produce *Brady* material is an affirmative one. Prosecutors “ha[ve] a duty to learn of any favorable evidence known to [] others acting on the government’s behalf.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). The duty to disclose belongs to the government as a whole, not just to the prosecuting attorney. *Martinez v. Wainwright*, 621 F.2d 184, 187 n.4 (5th Cir. 1980). The *Brady* rule “would be thwarted if a prosecutor were free to ignore specific requests for material information obtainable by the prosecutor from a related governmental entity, though unobtainable by the defense.” *Martinez*, 621 F.2d at 187.

Prosecutors also have an ethical obligation to produce exculpatory evidence. *See generally* the Georgia Rules of Prof. Conduct, Rule 3.8, Special Responsibilities of a Prosecutor—which states in part:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

* * *

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense;

Significantly, unlike the constitutional rule set out in *Brady v. Maryland*, the applicable ethical rule in the Georgia, like that in the District of Columbia, contains—by design—no “materiality” requirement; see *In re Kline*, 113 A.3d 202, 210 (D.C. 2015); see RPC Rule 3.8(d). Under *Brady*, prosecutors have an “affirmative duty to disclose evidence favorable to a defendant.” *Kyles*, 514 U.S. at 432. That duty is broad and automatic. It applies equally to “exculpatory and impeachment evidence.” *Id.* at 433. Further, it applies “regardless of request” by the defendant. *Ibid.* This obligation exists because of “the special role played by the American prosecutor in the search for truth in criminal trials.” *Strickler v. Greene*, 527 U.S. 263, 281 (1999). The prosecutor is not just another advocate. Rather, he or she represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all,” and he or she shares its “interest...not that it shall win a case, but that justice shall be done.” *Id.* (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). Where the government withholds favorable evidence, the Supreme Court has said, the prosecutor abandons that role and assumes “the role of an architect of a proceeding that does not comport with the standards of justice.” *Brady*, 373 U.S. at 87-88; *Kyles*, 514 U.S. at 433.

B. The Charges Against Ms. Powell are Without Merit.

Ms. Powell has been charged with a RICO conspiracy and six counts of conspiracy to commit election fraud and computer trespass related crimes on January 7, 2020, when members of SullivanStrickler LLC were invited to Coffee County to forensically image the voting equipment. Indictment Counts 1, and 32-37. The State alleges that the RICO “enterprise constituted an ongoing organization whose

members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise.” Even if this were true as to any other Defendant, it is not true as to Ms. Powell. She had no part in an “ongoing organization” or “a continuing unit,” and she had no agreement with any alleged

Each of the Coffee County related crimes alleged in Counts 32-37 depend on essentially the following allegation:

SIDNEY KATHERINE POWELL entered into a contract with Sullivan Strickler LLC in Fulton County, Georgia, delivered a payment to Sullivan Strickler LLC in Fulton County, Georgia, and caused employees of Sullivan Strickler LLC to travel from Fulton County, Georgia, to Coffee County, Georgia, for the purpose of willfully tampering with said electronic ballot markers and tabulating machines, which were overt acts to effect the object of the conspiracy (*See* Indictment, Count 32).

The *Brady* material requested specifically below will defeat these charges.

C. Specific Brady Demands.

On August 30, 2023, Ms. Powell’s counsel sent a letter to the State which articulated its formal *Brady* requests. On September 12, 2023, Ms. Powell’s counsel circulated an email setting forth additional *Brady* requests. To this day, Ms. Powell has not received any of the documents requested.

Accordingly, Ms. Powell again requests production of the following specific evidence necessary to her defense, and supplements the list as follows:

1. All notes including raw notes of all interviews of Jim Penrose, Doug Logan, Jeff Lindberg, Cathy Latham, Misty Martin (by any name), Scott Hall, Paul Maggio, any employee or contractor of SullivanStrickler LLC, and any person known by the prosecution to have been in the Coffee County Elections Office on January 6-9, 2021.

2. All evidence by and between coconspirators—named or unnamed—and other witnesses that Ms. Powell disagreed with others or others disagreed with her, that she was excluded from meetings, conversations, disparaged by alleged coconspirators, and ignored or distanced by them throughout the time of the alleged “conspiracy.”
3. All testimony, statements, or notes of any kind by any agent or prosecutor, or person working with them, by any purported witness, coconspirator, or unindicted coconspirator, about Sidney Powell.
4. All information obtained regarding Sidney Powell from witnesses, testimony, statements, text messages, or records of any kind obtained or created in the *Curling v. Raffensperger*, No. 1:17-cv-02989 (N.D. GA).
5. All communications of any kind between agents of the District Attorney’s office, including prosecutors themselves, and any attorneys or parties in the federal case *Curling v. Raffensperger*, No. 1:17-cv-02989, (N.D. GA), regarding Sidney Powell, Coffee County, SullivanStrickler, or the events of January 6-9, 2021, in Coffee County alleged in the Indictment.
6. All documentation, notes, communications between any agent, employee, or contractor of Sullivan and Strickler and any indicted or unindicted coconspirator, including telephone records and all messaging apps.
7. All statements of any indicted or unindicted coconspirator or any witness that mention Sidney Powell.
8. All documents regarding SullivanStrickler or Coffee County that bear any signature of Sidney Powell, completed in her name, or are purported to bear a signature of Sidney Powell.
9. Any contract or “release” or “chain of custody” documents for information to be retrieved from Coffee County, Georgia, to Jim Penrose, Paul Maggio, any representative of Sullivan and Strickler, or any named or unnamed indicted or unindicted coconspirator.
10. Any letter, request, or invitation of any kind issued by any official of Coffee County for a forensic review or investigation of the voting equipment and records of Coffee County following the 2020 presidential election.

11. The names and contact information of all alleged coconspirators—indicted or unindicted.
12. The cell phone records, text messages, and messaging apps showing communications with Sidney Powell of any and all co-conspirators—named or unnamed, indicted or unindicted—for the dates of the alleged conspiracies.
13. All recordings, notes, emails, communications of any kind between Sidney Powell and any indicted or unindicted co-conspirator during the dates of the purported conspiracies.
14. All releases obtained by SullivanStrickler or chain of custody documents for the firm’s investigation and handling of the records of any county listed in the indictment.
15. SullivanStrickler’s standard release and chain of custody forms.
16. All evidence that the State contends “inculpates” Sidney Powell in the conspiracies alleged in Counts 1, and 32-37.
17. All statements of any witness or interview notes reflecting that Sidney Powell was not contacted or communicated with in any way regarding the retrieval of information from Coffee County prior to Sullivan and Strickler taking possession of that information.
18. Any evidence of any nature that Sidney Powell agreed or even knew in advance of January 7, 2021, that any technicians of SullivanStrickler were going to Coffee County to conduct a forensic investigation of the machines.
19. Any evidence that Sidney Powell contracted with Sullivan and Strickler or anyone else to conduct a forensic review of voting machines in Coffee County.
20. All video *with audio* taken in Coffee County regarding the events alleged in the indictment.
21. All statements or raw notes of interviews or emails of any witness that claimed they sent any information from the voting machines in Coffee County to Sidney Powell.
22. All statements, raw notes, recordings, writings, or communications of any kind that persons in the County offices of Coffee County Elections gave

permission to Sullivan and Strickler and/or other technicians to enter the premises and obtain information from the electronic ballot markers, tabulating machines, and any other equipment in Coffee County's Elections & Registration office.

23. All agreements, suggestions, promises, written or unwritten, the prosecution has made with conspirators—named or unnamed, indicted or unindicted—to provide evidence in any form against Sidney Powell.
24. All evidence that SullivanStrickler employees or contractors actually obtained data that is the subject of Counts 32-37, and to whom and when they transmitted it to anyone—including *not* providing it to Sidney Powell.
25. All evidence, statements, documents or communications of any kind that SullivanStrickler were entrusted by State Officials in the Coffee County Elections Office to possess official ballots outside the polling place of Coffee County GA, and that said ballots were collected in readily legible form.
26. All evidence that Sidney Powell signed a contract with SullivanStrickler LLC in Fulton County Georgia.
27. All evidence that Sidney Powell delivered a payment to SullivanStrickler in Fulton County.
28. All evidence that Misty Martin a/k/a Misty Hampton a/k/a Emily Misty Hayes was an “officer charged by law with the care of ballots.”
29. All evidence that SullivanStrickler and all present in the Coffee County Elections Office on January 7, 2021, believed that they had authority to access the voting equipment.
30. All information proving that the information SullivanStrickler obtained from Coffee County was provided to Sidney Powell and was readily legible.
31. All communications between any employee or agent of the District Attorney's office for Fulton County and any employee or agent of Dominion Voting Systems, including but not limited to all mentions of Sidney Powell and Coffee County.
32. All evidence that Sidney Powell did not know of activities of alleged coconspirators or intended to commit any crime in violation of Georgia law.

33. Any and all reporting, evidence, documents, communications or other information from the Georgia Bureau of Investigation's ("GBI") investigation into the alleged conduct in Coffee County, Georgia in January of 2020.
34. Any and all evidence regarding a written letter of invitation from Coffee County officials, leadership or representatives to Katherine Freiss, Rudolph Giuliani, or others, granting authorization to examine voting machines.
35. Any and all testimony, emails, documents, texts messaging and other evidence that attorney Katherine Freiss was in direct contact with members of the Coffee County Board of Electors, received written correspondence from a member of the Coffee County Board of Electors authorizing a forensic examination of the Coffee County voting machines, and forwarded that written correspondence to Sullivan Strickler requesting that Sullivan Strickler perform the forensic examination in Coffee County, Georgia.
36. Any and all records or productions from Eric Cheney, Misty Hampton, Wendell Stone, Ernestine Thomas-Clark, Jill Riddlehoover, C.T. Peavey, Matthew McCollough or any other individual affiliated with the Coffee County Elections Board and/or election operations, to the Georgia Secretary of State from November 2020 to present.
37. All records reflecting the Grand Jury testimony of Eric Hirschmann, Eric Cheney, Misty Hampton, Wendell Stone, Ernestine Thomas-Clark, Jill Riddlehoover, C.T. Peavey, Matthew McCollough or any other individual affiliated with the Coffee County Elections Board and/or election operations.

D. The State's Disclosures must be Complete and Fulsome.

As the Supreme Court has recognized, an incomplete *Brady* response could "represent[] to the defense that the evidence does not exist" and cause it "to make pretrial and trial decisions on the basis of this assumption." *United States v. Bagley*, 473 U.S. 667, 682-83 (1985). The State may not shift the burden to defense counsel to find exculpatory evidence. "A rule . . . declaring 'prosecutor may hide, defendant may seek' is not tenable in a system constitutionally bound to accord defendants due

process.” *Banks v. Dretke*, 540 U.S. 668, 696 (2004). *Brady* exists to protect the accused “from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.” *Kyles v. Whitley*, 514 U.S. 419, 440 (1995).

E. *Brady* Disclosures must be Prompt.

Brady and Due Process are diminished unless information is disclosed promptly with plenty of time for the Defendant to make use of it effectively in the preparation of and presentation of his case—including to find additional witnesses and prepare a defense. *United States v. Quinn*, 537 F. Supp. 2d 99, 105, 108 (D.D.C. 2008) (government failed to disclose its chief witness most likely lying about defendant’s conduct). The government’s failure caused the defendant to be “misled and left with the incorrect perception that he alone doubted [the witness’s] credibility.” *Quinn*, 537 F.Supp. at 109-10.

Exculpatory and impeaching evidence must be disclosed in time for a defendant to use in *preparing* his defense. In *United States v. Pasha*, the court slammed the government for suppressing important exculpatory evidence from a witness for eight months, until the eve of trial. 797 F.3d 1122, 1133 (D.C. Cir 2015). “[I]mpeachment evidence . . . as well as exculpatory evidence falls within the Brady rule.” *In re Sealed Case No. 99-3096 (Brady obligations)*, 185 F.3d 887, 892 (D.C. Cir. 1999) (quoting *Bagley*, 473 U.S. at 676). This is because “evidence that impeaches the [government’s witnesses] is almost invariably ‘favorable’ to the accused, because by making the government’s case less credible it enhances the defendant’s” case. *In re*

Sealed Case, 185 F.3d at 893. When impeachment evidence is exculpatory, as noted in *Giglio* and *Bagley*, it is *Brady* like any other. *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003). For example, *Brady* requires the state to tell the defendant or his lawyers about a \$500 payment to a witness who implicated the defendant in a murder. *Schofield v. Palmer*, 279 Ga. 848, 851, 621 S.E.2d 726, 730-31 (2005) (reversing conviction for *Brady* violation). *Brady* requires the prosecution to disclose an immunity agreement with its witness. *Byrd v. Owen*, 272 Ga. 807, 807–08, 536 S.E.2d 736, 736–37 (2000).

Brady requires the state to produce “audiotapes containing exculpatory witness statements” and the defendant’s “own statement to police during investigation of the crimes.” *Walker v. Johnson*, 282 Ga. 168, 168–69, 646 S.E.2d 44, 45 (2007). Accordingly, Powell has requested the audio and video tapes of all the activities at the Coffee County Elections office on January 7, 2021. It is expected that the audio of that day will be completely exculpatory of Ms. Powell who was neither there nor aware of its occurrence.

Prosecutors “ha[ve] a duty to learn of any favorable evidence known to [] others acting on the government’s behalf.” *Kyles v. Whitley*, 514 U.S. 419, 437 (1995). In this case, the prosecutors or their representatives were present at many—or receiving information from—depositions in the *Curling* case. The prosecutors here should be required to produce all exculpatory evidence that exists in the *Curling* case. Given the prosecutors’ presence during and use of depositions from the *Curling* case to indict this case, this should include attorneys and investigators for the plaintiffs and other

parties in *Curling* who have been cooperating with the District Attorney's office on this case.

CONCLUSION

For these reasons, Ms. Powell requests that this Court order the prosecutors to produce all evidence requested herein within ten days.

Dated this 27th Day of September 2023.

Respectfully submitted,

/s/ Brian T. Rafferty

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CERTIFICATE OF SERVICE

I hereby certify the above styled MOTION TO PRODUCE *BRADY* MATERIAL has been served, this day, by electronic mail. These documents have been served by the Fulton County electronic filing system upon all parties.

Dated this 27th day of September 2023.

/s/ Brian T. Rafferty
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