

II.

The Eighth Circuit has echoed the principles protected and addressed in *Brady v. Maryland*, 373 U.S. 83 ... (1963). In *Nassar v. Sissel*, 792 F.2d 119, 121 (8th Cir. 1986), the Court held that evidence discovered, after the trial, of information known to the prosecution but unknown to the defense is a violation of due process. The Government's repeated pattern of trickling important information to the defense is disturbing. Additionally, contrary to the rule of law, the Government has tried to expand its case post-indictment beyond what is reasonable to prepare the instant indictment for trial. For example, use of a search warrant to avoid the protections afforded to defendant post indictment is akin to misusing grand jury or administration subpoena's to bolster a prosecution. The courts have held "it is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indictment for trial." See *United States v. Dardi*, 330 F.2d 316, 336 (2d. Cir.) *cert denied*, 379 US 845 (1964)(misuse grand jury subpoena); *United States v. Lazar*, 2005 US Dist Lexis 44213 (US Dist. Tenn. 2005) citing *United States v. La Salle Nat. Bank*, 437 US 298 (1978).

It is not implausible that the pace of the Government's production is indicative of an investigation that has yet to be fleshed-out. As such, Defendants are provided the information and evidence they are constitutionally entitled to only after the Government has decided what, if any significance the material has to them.

(Motion to Dismiss at 1-3)

II. DISCUSSION

In *Nassar v. Sissel*, 792 F.2d 119 (8th Cir. 1986), the court held that Nassar was not denied due process by the prosecutor's failure to disclose allegedly exculpatory evidence prior to trial. The court stated: "*Brady* does not require pretrial disclosure as long as ultimate disclosure is made before it is too late for the defendant to make use of any benefits of the evidence. Due process is satisfied." *Id.* at 121. Applying this test to the facts before the Court clearly demonstrates that defendants' right to due process has not been violated. The trial is scheduled to commence in July 2009. Defendants have ample time to make use of any evidence provided to them in December 2008.

With respect to defendants' second argument that use of a post-indictment search warrant is improper, defendants cite no authority for the proposition that a post-indictment search warrant is impermissible or improper. The cases cited by defendants do not deal with search warrants. Further, even if an improper search warrant was utilized (on which the Court has no evidence before it to so find), the appropriate remedy would appear to be suppression of evidence rather than dismissal of the case.

In conclusion, defendants argue that they "are provided the information and evidence they are constitutionally entitled to only after the Government has decided what, if any significance the material has to them." (Motion to Dismiss at 3) The Court sees this as an appropriate way for the Government to proceed as it is the Government's obligation in the first instance to determine whether information in its possession is Brady material which must be produced to defendants. While "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"¹ "the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial."²

III. CONCLUSION

Based on the foregoing, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order denying Defendants Troy Solomon and Delmon Johnson's Motion to Dismiss (doc #156).

¹United States v. Agurs, 427 U.S. 97, 108 (1976).

²United States v. Bagley, 473 U.S. 667, 675 (1985).

