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8
9 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,) **No. 09-0088-FVS**
11)
12 Plaintiff,) **UNITED STATES’ REPLY TO**
13 v.) **FREDERICKS’S RESPONSE TO U.S.**
14) **PROFFER**
15)
16 KARL F. THOMPSON JR.,)
Defendant.)

17 Plaintiff United States of America, through its Attorney Michael C. Ormsby, United
18 States Attorney (EDWA), and the undersigned counsel of the U.S. Department of Justice
19 (DOJ), respectfully submits this Reply to videographer Grant Fredericks’s *Privilege Log*
20 and *Proffer affidavits*. *ECFs 1008; 1009*.

21 **I. OVERVIEW**

22 The defense filed a motion for in camera review of forensic video analyst Grant
23 Fredericks’s “file,” which was contained on an electronic hard drive that Fredericks
24 produced at the time of his March 2, 2012, deposition. *ECF 930*. Defendants claimed
25 that it was their expectation that Fredericks’s entire expert file, in addition to his already
26 identified *Brady* evidence concerns, would be reviewed for any further possible *Brady*
27 evidence. *Id.* The United States responded, stating that Fredericks did not identify any

1 additional “file materials” during his post-conviction pre-deposition interview or his 184
2 page deposition that there were any additional *Brady* materials in his file, and that all
3 *Brady* materials he referenced were already identified and produced before, during and
4 once again after Fredericks’s deposition. *ECF 954*. Beginning March 30, 2012, the
5 United States filed its response materials to Defendant’s Motion for New Trial or for
6 Dismissal and Motion for Juror Interview. *See ECFs 925, 929, 947, and related filings*.
7 On April 16, 2012, in an extrajudicial (letter) communication to the Court, Fredericks’s
8 counsel Mr. Weatzel sought permission to file a non-party response to the United States’
9 Proffer opposing Defendant’s Amended Motion for New Trial or Dismissal. *See ECF*
10 *986 at 1*.

11 On April 30, 2012, the Court granted Fredericks’s request to provide a response to
12 the United States’ materials filed in opposition to Defendant’s amended new trial
13 motion. However, the Court denied Defendant’s motion for *in camera review* of
14 Fredericks’s electronic file materials. *ECF 994*. Instead, the Court directed Fredericks
15 and his counsel to perform a review of Fredericks’s remaining electronic file materials
16 and to identify any further alleged *Brady* evidence contained within the file. *Id.* The
17 Court further directed Fredericks and his counsel to provide the Court and the United
18 States, in an *ex parte* filing, with a discovery log listing and describing all alleged
19 exculpatory evidence in or among Fredericks’s electronic file materials. *Id.*

20 On May 18, 2012, Fredericks filed a 52 page *Proffer* outlining his response to the
21 United States materials opposing his and Defendant’s *Brady* allegations. Fredericks’s
22 counsel and also filed Fredericks’s *Privilege Log* which purportedly lists all alleged
23 exculpatory evidence in Fredericks’s file materials. *ECF 1007, 1010*. On May 25,
24 2012, the Court, after reviewing the nature of the Fredericks’s *Proffer* and *Privilege Log*
25 responses, indicated that it did not feel Fredericks’s filings violated any confidentiality
26 obligation and/or the United States work product privilege. As such, the Court indicated
27 that it was inclined to release the contents of Fredericks’s filings to defense counsel.

1 *ECF 1018*. The United States has no objection to the disclosure of these filings, but
2 does not waive any other work product and/or confidentiality rights in its file materials
3 prepared by Fredericks.

4 **II. FREDERICKS'S PRIVILEGE LOG**

5 Fredericks and his counsel were ordered to provide a list of all materials within his
6 electronic file that they felt was exculpatory. Fredericks filed a 9 page purported
7 affidavit wherein there is no further identification of any alleged *Brady* evidence.¹ *ECF*
8 *1008*. In fact, Fredericks goes on to summarize e-mails in this *Privilege Log* with
9 Special Agent Jangaard and/or AUSA Durkin that he contends refutes the suggestion
10 that he was an unreliable witness from the beginning of his involvement in the case. *Id.*,
11 *at 4; cf. ECF 956 at 12-16; 16-21, 38-64; 73-81*. Instead, Frederick rants over the
12 United States' showing of his unreliability as a witness and the disclosure of a half
13 dozen other Courts that have rejected and/or restricted his testimony, which adds nothing
14 material or new to Fredericks's and/or Defendant's claimed *Brady* violation allegation.
15 *See ECF 956, id., and FBI Special Agent Jangaard's Declaration filed herewith and*
16 *incorporated herein.*

17 Fredericks's purported "log" does not disclose and/or identify *any* additional
18 information in or among his materials that are alleged to contain exculpatory evidence.
19 Rather, Fredericks's *privilege log* merely reiterates and/or re-characterizes information
20 and allegations previously included in his purported December 16, 2011, declaration to
21

22 ¹ Both of Fredericks's pleadings, filed by his counsel Wetzell, are purported to be *affidavits*.
23 However, neither filing satisfies the affiant requirements and each contains incompetent and
24 inadmissible statements. Since Fredericks's pleadings do not satisfy affiant standards, and the
25 Court should treat them as such, the United States has not moved to strike substantive portions
26 of those pleadings that improperly contain speculation, conjecture, conclusory and impertinent
27 statements, as well as incompetent and inadmissible evidence. *See ECF 1007, 1008*.

1 the Court. Fredericks merely re-argues once that the government somehow
2 misrepresented his prior testimony, work product and opinions, all of which has already
3 been refuted. As such and as reflected in Fredericks's *Privilege Log* filing, there are no
4 further items or matters contained within Fredericks's hard drive that is allegedly *Brady*
5 (materially exculpatory) evidence, and no further disclosure is indicated or necessary.

6 It is well established that there is no duty under either the Constitution or the
7 Federal Rules of Criminal Procedure for the prosecution to make available to the defense
8 its entire case file and/or work product, or the work product of its investigators or
9 experts. *See U.S. v. Bagley*, 667, 675 (1985) (affirming rejection of proposed standard
10 requiring prosecution "to disclose evidence favorable to the accused, no matter how
11 insignificant, [since such an obligation] would impose an impossible burden on the
12 prosecutor and would undermine the interest in the finality of judgments." [sic]); *see*
13 *also United States v. Nobles*, 422 U.S. 225, (1975) (commenting on United States work
14 product protections); *U.S. v. Agurs*, 427 U.S. 97 (1976); and *Moore v. Illinois*, 408 U.S.
15 786, 795, (1972) ("no constitutional requirement that the prosecution make a complete
16 and detailed accounting to the defense" of its investigatory and prosecution work);
17 *United States v. Abonce-Barrera*, 257 F.3d 959, 969-70 (9th Cir. 2001) (declining
18 evidentiary hearing into potential *Brady* violation where defendant "offered nothing to
19 support his proposed fishing expedition" beyond conclusory assertions that hearing
20 might be helpful); *see also United States v. Cerna*, 2010 WL 2347406 at *2 (N.D. Cal.
21 2010) (unpublished opinion) ("Rule 16(a) (1)(G) does not require recitation of the
22 chapter and verse of the experts' opinions, bases and reasons."); *Giles v. Maryland*, 386
23 U.S. 66, 98 (1967) (convictions should not be reversed on failure "to communicate
24 preliminary, challenged, or speculative information.") (Justice Fortas, *id.*, in
25 concurrence). *United States v. Stevens*, 380 F.3d 1021, 1026 (7th Cir. 2004); *United*
26 *States v. Robison*, 19 Fed. App'x. 490, 494 (9th Cir. 2001) (voluntary disclosure of
27

1 expert's report is sufficient to satisfy Rule 16(a)(1)(G)'s summary disclosure
2 requirement).

3 Since neither Fredericks nor his counsel have identified any further alleged *Brady*
4 material within Fredericks's file, all alleged *Brady* evidence in Fredericks's file has now
5 been disclosed and no further disclosures are indicated or necessary. *Bagley, id.*

6 **III. FREDERICKS'S PROFFER**

7 Fredericks's purported *Proffer affidavit* again contains hyperbole and, just like
8 he did in his deposition, an ever evolving torture of *semantics* to try to draw distinctions
9 between Fredericks's pre-conviction written and testimonial statements versus the
10 statements and testimony that he raised more than two years after he was first provided
11 with a copy of the United States' Rule 16 summary that he now claims is so offensive,
12 even though this claim was only raised after the Defendant was convicted. *ECF 1009.*

13 For instance, Fredericks complains that he never provided any *signed statement*
14 to the DOJ before trial, so therefore he cannot be held to have supported the proposition
15 that the video tape does contain images of human and baton motions that are consistent
16 with a baton strike (sans impact), which movements occurred almost immediately after
17 Defendant first engaged Mr. Zehm, which is exactly the testimony provided by the
18 Defendant and the civilian witnesses in this case. *ECF 956 at 21-27.* However,
19 Fredericks cannot credibly argue he is not bound by his sworn testimony in front of the
20 Grand Jury, wherein he testified that the security video does indeed show the baton,
21 baton motion, and physical movements (i.e., including the baton being held above
22 Defendant's head) in a manner that are consistent with two early baton strikes,
23 including an overhand, vertical baton strike at approximately 18:26:14 and 18:26:16.
24 *See ECF 956 at 37-71; see also Special Agent Jangaard's Declaration filed herewith*
25 *and incorporated herein.* Fredericks does, in fact, agree that Defendant's "movements"
26 at 18:26:14 and 26:16 are "consistent with baton strike motions," just as long as the
27 term "strike" does not presuppose the video shows any actual impact. *ECF 956, id.*

1 Fredericks also complains that while he has testified 100 times as a video forensic
 2 expert that the DOJ has identified a half-dozen cases where his testimony has either been
 3 rejected outright or has been significantly restricted by the Court. *ECF 956 at 16-21;*
 4 *74-78.* However, at the time of the United States’ January and March filings, a Westlaw
 5 search of Fredericks’s name only revealed approximately a dozen cases in which he was
 6 involved. A *Google* search revealed some additional media reports on cases, some of
 7 which are discussed in the United States’ Proffer, but certainly not the “hundreds” of
 8 other cases that Fredericks's claims are out there.

9 With respect to Fredericks’s assertion that the FBI has in some way attempted to
 10 intimidate him, this likewise not supported by the facts in this case. *See FBI Special*
 11 *Agent Lisa Jangaard’s Declaration, id.* While Special Agent Jangaard did contact the
 12 FBI’s National Laboratory in January to inquire about Fredericks’s teaching status, these
 13 contacts were made long before Fredericks’s March 2, 2012, deposition and were not
 14 made to intimidate him before his deposition. *Id.* In fact, these contacts were only
 15 initiated after the United States learned of reports that Fredericks had been previously
 16 accused of overstating his “teaching” association with the University of Indianapolis
 17 (i.e., it was reported that Fredericks falsely claimed to be an adjunct professor at the
 18 Indianapolis university, when in fact he is not a staff member of the University).

19 Notably, Fredericks also did not address all of the discrepancies reflected in his
 20 various statements and his grand jury testimony, as the chart below demonstrates:

GF Declaration – 12/16/11	Fredericks’s Grand Jury Testimony – 5/13/09
“I had discussed with the Government that no video evidence exists to support that a baton strike was delivered by Officer Thompson prior to the Zip Trip video image with the	A: The officer moves toward Mr. Zehm and at 18:26:13 the officer is between the two aisles and Mr. Zehm has backed up and they’re facing each other. * * * * * As [Thompson] moves forward we can’t see his arms at this point. We can see his height. Go to the next image and the officer is in a downward motion, so he has changed height from one

1 timestamp of 18:26:37.”
 2 Decl. at 2.
 3 “During the August 3, 2007
 4 meeting, and in subsequent
 5 meetings, I articulated my
 6 opinion that the first visual
 7 evidence of the baton being
 8 swung by Officer
 9 Thompson, and possibly
 10 coming into contact with
 11 Mr. Zehm, was at 18:26:37.
 12 In its Rule 16a disclosure,
 13 the Government has stated
 14 that my opinion is that
 15 Officer Thompson struck
 16 Mr. Zehm thirteen seconds
 17 prior to 18:26:37. I do not
 18 support that opinion.”
 19 Decl. at 4.

20 “In two written reports and
 21 in each of the multiple
 22 demonstrative exhibits that
 23 I provided to the
 24 Department of Justice, I did
 25 not infer or state that
 26 Officer Thompson struck
 27 Mr. Zehm with his baton
 prior to 18:26:37. I had
 multiple discussions with
 the U.S. Attorney’s Office
 regarding the possibility of
 earlier baton strikes and I
 made it clear that my
 opinion was that the video
 does not show any earlier
 strikes.” Decl. at 4.

“The video does not show

position to another position. And if we just look to the front of
 his head there is a dark line. I’ll back it up for a moment. That line
 goes away. When we come in here there is a dark object that is –
 something there is causing that line to occur, so there’s – it’s
 consistent with a baton.

* * * * *

And I’ll go forward another image. **The officer has moved down.
 I’ll go back and forth. Back, the officer is now lower in the
 image than he was as he came around the corner.**

Q: Okay. Mr. Fredericks, as a trained officer and having
 experience in law enforcement, have you had occasion to receive
 instruction on the use of a baton?

A: Yes.

Q: **And is the movement that we’re seeing here and as you
 have described, is that consistent with the movement of a
 forward overhand baton strike?**

A: **It is.**

GJ at 30:5-31:13 (emphasis added).

A: I’ll go forward two images and a third image, and here
 again is a line at 18:26:16. And this is consistent again with the
 baton that we saw earlier. It’s not in any of the previous images, so
 this is being held by the officer. **And it’s basically perpendicular
 to the ground.**

Q: Okay.

A: **Or parallel to the ground, parallel.**

Q: **In an overhand position, correct?**

A: **Yes.**

* * * * *

**We see some movement as we move into that position. This is
 the officer’s head. The officer is down lower than he was in the
 previous images.** So we’re going to see some motion where I’m
 pointing in the next image when we come into it. And this is some
 shadowing. There’s – we lose contact with them from 18:26:16, in
 this particular view, and we can see some activity here, and it’s
 difficult to say exactly what it is from this position.

GJ at 32:7-33:1 (emphasis added).

Q: And we know from reviewing Camera Angle No. 1 that **the
 baton is caught after the first baton strike, and it’s caught in an
 upward strike position with forward movement by Officer
 Thompson at approximately 18:26:15; is that correct?**

<p>1 that Mr. Zehm was struck 2 by the baton prior to 3 18:26:37.” Decl. at 5. 4 5</p>	<p>A: Yes. There’s a number of images that show the baton in the air at that time, yes. Q: And now we’re looking at . . . Mr. Zehm at 18:26:16, as you just articulated his back and he’s actually losing elevation and going to the ground? A: Yes. GJ at 38:19-39:4 (emphasis added). So what we’re looking at is from 18:26:13 to 18:26:14. This is their – they start this far apart where Mr. Zehm has just turned around. The Officer is approaching to 18:26:11, where the Officer is making that forward downward motion with the baton in the air. GJ at 48:2-48:7 (emphasis added).</p>
<p>6 7 8 9 10 “I explained that images 11 that display the effects of 12 motion blur may not 13 reliably depict movement 14 and force. I explained to 15 Mr. Durkin that motion blur 16 may be relied upon to 17 interpret that an object is in 18 motion, but not necessarily 19 the direction, speed, nor 20 force of the motion.” Decl. 21 at 3. 22 23 24 25 26</p>	<p>A: We still see an illumination of the object in [Thompson’s] hand, which would be consistent with a taser. He’s – most of his body is blocked from view, and we see at 18:26:38 his right hand has come up. And I’m going to play it backwards and then forward for a moment so you’ll see the action. And he’s got the baton in his hand, and it’s moving quickly. It’s moving so quickly that it’s called motion blur, so the object is not really visible because it’s moving too quickly for the system to record it, but there’s some blur caused by that. So we can interpret that it’s moving quickly. Q: Okay. And is that movement, once again, with the direction in the sequence consistent with the delivery of a baton strike? A: It’s consistent with a swing of a baton, which would be consistent with a baton strike, yes. * * * * * And I’ll just go backwards. This is the image we just looked at, at [18:]26:37 with [Thompson’s] right arm in the air. And makes a swinging motion with his right arm downward. And then at 18:26:38 we have the baton in his right hand and in the air, and I’m just on an angle and I’m drawing it with my cursor. And then the next image at 18:26:38, the baton is not visible so his arm is moved downward. Q: Consistent with a baton strike motion? A: It is, yes. GJ at 42:7-44:6 (emphasis added).</p>
<p>27 “During the August 3, 2007</p>	<p>As [Thompson] moves forward we can’t see his arms at this point.</p>

<p>1 meeting, I also disagreed 2 with Mr. Durkin’s 3 identification of an area 4 within the image at 5 18:26:14 that Mr. Durkin 6 stated was a baton being 7 swung at and striking Mr. 8 Zehm. The object that Mr. 9 Durkin believed was the 10 baton was actually a digital 11 compression artifact 12 (digital video error) 13 contrasted against the west 14 window of the Zip Trip. 15 Decl. at 3.</p>	<p>We can see his height. Go to the next image and the officer is in a downward motion, so he has changed height from one position to another position. And if we just look to the front of his head there is a dark line. I’ll back it up for a moment. That line goes away. When we come in here there is a dark object that is – something there is causing that line to occur, so there’s – it’s consistent with a baton. We don’t have enough resolution to see it, but it’s inside the building and it’s consistent with the baton. GJ at 30:12-30:22 (emphasis added).</p> <hr/> <p>I’ll go forward two images and a third image, and here again is a line at 18:26:16. And this is consistent again with the baton that we saw earlier. GJ at 32:7-32:9 (emphasis added).</p>
<p>11 “I described to Mr. Durkin 12 that the baton is not visible 13 on the video for the thirteen 14 images between 18:26:11 15 (2nd image of that second) 16 and 18:26:15 (1st image of 17 that second).” Decl. at 3</p>	<p>The officer moves toward Mr. Zehm and at 18:26:13 the officer is between the two aisles and Mr. Zehm has backed up and they’re facing each other.</p> <p style="text-align: center;">* * * * *</p> <p>As [Thompson] moves forward we can’t see his arms at this point. We can see his height. Go to the next image and the officer is in a downward motion, so he has changed height from one position to another position. And if we just look to the front of his head there is a dark line. I’ll back it up for a moment. That line goes away. When we come in here there is a dark object that is – something there is causing that line to occur, so there’s – it’s consistent with a baton. [at 18:26:14] [sic] GJ at 30:5-30:20 (emphasis added).</p> <hr/> <p>Q: And we know from reviewing Camera Angle No. 1 that the baton is caught after the first baton strike, and it’s caught in an upward strike position with forward movement by Officer Thompson at approximately 18:26:15; is that correct?</p> <p>A: Yes. There’s a number of images that show the baton in the air at that time, yes. GJ at 38:19-38:25 (emphasis added).</p>

24 Cf. ECF 911-1 and 956 at 12-63; see also ECF 950 (SA Jangaard Declaration).

25 In addition, Fredericks’s most recent “*affidavits*” once again substantively
26 contradict the very video stills that Fredericks prepared for the United States to support
27

1 the “Baton – Taser Motion” exhibit that the United States offered and which was
 2 admitted, without objection, at trial. *See Fredericks prepared Ex. 010 (video stills*
 3 *support baton (strike) motions below, U.S. admitted Trial Exhibit #356; and ECF 954,*
 4 *964.*

5 **Baton/Taser Motion Reference Grid**

	CAMERA 1		CAMERA 2		CAMERA 4	
MOTION	TIME	SLIDE #	TIME	SLIDE #	TIME	SLIDE #
Baton 1	18:26:14	68				
Baton 1	18:26:14	69				
Baton 1	18:26:14	70				
Baton 2	18:26:16	74				
Baton 2	18:26:16	75				
Baton 2	18:26:16	76				
Baton 3	18:26:37	148	18:26:36	184	18:26:37	85
Baton 3	18:26:37	149	18:26:37	185	18:26:37	86
Baton 3	18:26:37	150	18:26:37	186	18:26:37	87
Baton 4	18:26:37	151	18:26:37	187	18:26:37	88
Baton 4	18:26:38	152	18:26:38	188	18:26:38	89
Baton 4	18:26:38	153	18:26:38	189	18:26:38	90
Baton 5	18:26:40	161				
Baton 5	18:26:40	162				
Baton 5	18:26:41	163				
Baton 6	18:26:42	168				
Baton 6	18:26:42	169				
Baton 6	18:26:43	170				
Baton 7	18:27:22	308	18:27:22	344		
Baton 7	18:27:22	309	18:27:22	345		
Baton 8	18:27:23	311	18:27:23	347		
Baton 8	18:27:23	312	18:27:23	348		
Baton 9	18:27:24	315	18:27:24	351		
Baton 9	18:27:24	316	18:27:24	352		
Baton 10	18:27:25	318	18:27:25	354		
Baton 10	18:27:25	319	18:27:25	355		

1	Baton 11	18:27:26	321	18:27:26	357		
2	Baton 11	18:27:26	322	18:27:26	358		
3	Baton 12	18:27:28	329	18:27:28	365		
4	Baton 12	18:27:28	330	18:27:28	366		
5	Baton 13	18:27:29	333	18:27:29	369		
6	Baton 13	18:27:29	334	18:27:29	370		
7	Taser 1	18:26:31- 18:26:36	130-145			18:26:34- 18:26:36	78-84

8 Notwithstanding Fredericks's hyperbole, he does acknowledge that his real
9 substantive complaint is that the video "does not show that Officer Thompson struck Mr.
10 Zehm in the head with the baton" at 18:26:14 or 18:26:16. *ECF 1009 at 50:20 – 21*.
11 Again, it has never been the United States position that the video alone actually "shows"
12 impact. Just as Fredericks acknowledges, he's "just the video man" and can't tell what
13 occurred "off camera," the trier of fact here had multiple citizen eye-witnesses and the
14 Defendant himself testify, in a generally consistent manner, as to what happened during
15 the initial confrontation (i.e., Defendant ran into the store, drew his baton, ran up on
16 Zehm with baton in a ready strike position; promptly confronted Zehm; quickly
17 perceived a threat, and rapidly delivered two alleged preemptory baton strikes at Zehm).

18 **IV. LAW & DISCUSSION**

19 To establish a *Brady* violation, a defendant must show that "[t]he evidence at issue
20 [is] favorable to the accused, either because it is exculpatory, or because it is
21 impeaching; that evidence [was] suppressed by the State, either willfully or
22 inadvertently; and [that] prejudice ... ensued." *United States v. Price*, 566 F.3d 900, 907
23 (9th Cir. 2009) (quoting *Strickler v. Greene*, 527 U.S. 263 (1999)) (internal quotations
24 omitted). The Defendant must also prove that the clearly exculpatory evidence was
25 suppressed and not otherwise available to the Defendant. "Suppressed evidence . . . is
26 material only if there is a reasonable probability that, had the evidence been disclosed to
27 the defense, the result of the proceeding would have been different." *United States v.*

1 *Wilkes*, 662 F.3d 524, 535 (9th Cir. 2011). Stated differently, a reasonable probability of
2 prejudice exists only where the “suppression of evidence undermines confidence in the
3 outcome of the trial.” *Id.*; *see also Strickler*, 527 U.S. at 281 (“[T]here is never a real
4 ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable
5 probability that the suppressed evidence would have produced a different verdict.”); *see*
6 *also Giles v. Maryland*, 386 U.S. 66, 98 (1967) (convictions should not be reversed on
7 failure “to communicate preliminary, challenged, or speculative information.”) (Justice
8 Fortas, *id.*, in concurrence).

9 Here, all of Fredericks’s evolving opinions were disclosed. Fredericks’s *affidavits*
10 do not address the substantial discovery disclosures the United States provided in this
11 case. To the extent alleged alternative explanations are claimed to have existed, they
12 were only provided to the DOJ post-conviction. Further, these alleged alternative
13 explanations are not material since no one has claimed, including the Defendant, that his
14 motions are anything but preemptive baton strikes at Zehm. Also, Fredericks’s *affidavits*
15 speak nothing to the issue of prejudice.

16 To require disclosure under *Brady*, as further defined in *Agurs*, evidentiary
17 material must be of material and clear “exculpatory character” and likewise “clearly
18 supportive of a claim of innocence,” 427 U.S. at 107. In the end, Fredericks’s alleged
19 “video testimony” is patently equivocal and is therefore not “exculpatory” under *Brady*.
20 *See Muhammad*, 575 U.S. at 367-68 (“inconclusive language” in an allegedly suppressed
21 FBI report “cannot be considered exculpatory”); *United States v. Brown*, 595 F.3d 498,
22 513 (3d Cir. 2010) (no *Brady* violation occurred where newly-produced statements
23 “were, at best, neutral as to [the defendant’s] guilt or innocence and [therefore] not
24 exculpatory”); *Morris v. Ylst*, 447 F.3d 735, 740 (9th Cir. 2006) (alleged suppressed
25 letter implicating two additional participants in homicide was “at best, minimally
26 exculpatory” because “[t]he letter does not suggest that [the additional participants], *but*
27 *not Petitioner*, struck [the victim]”) (emphasis added); *see also Herrera v. Davis*, 54

1 Fed. App'x. 861, 863 (7th Cir. 2002) (unpublished); *Jones v. Conway*, 442 F. Supp.2d
2 113, 128 (S.D.N.Y. 2006).

3 Based on the foregoing, the United States respectfully requests the Court to now
4 conclude the parties' five month investigation/discovery entanglement with Fredericks's
5 ever changing post-conviction *Brady* allegations, and deny any further discovery and/or
6 briefing on the matter. The United States respectfully requests that sufficient evidence
7 has already been provided to the Court for it to logically conclude that Defendant (and
8 Fredericks) cannot support a *Brady* violation here, since there was no suppression (i.e.,
9 all of Fredericks's materials in the possession of the United States were disclosed,
10 including Fredericks's September 2007 report where he states that there were no baton
11 strikes at Zehm other than images he noted in his report); the alleged evidence is not
12 exculpatory and is contradicted by the Defendant and citizen witnesses (and Fredericks's
13 prior sworn testimony); and there can be no showing of prejudice in light of the totality
14 of other incriminating evidence. Therefore, the present *Brady* allegations should be
15 rejected and denied.

16 RESPECTFULLY SUBMITTED this 6th day of June 2012.

17 MICHAEL C. ORMSBY
18 United States Attorney (EDWA)

19 *s/ Aine Ahmed*
20 Aine Ahmed
21 Timothy M. Durkin
22 Assistant United States Attorneys
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Certificate of ECF and/or Mailing

I hereby certify that on the date of the filing of this document with the Clerk of the Court using the CM/ECF System that the Clerk’s ECF system will send notification of such filing to all counsel and/or I hereby certify that I have arranged for mailing by United States Postal Service and/or arranged other delivery of the document the following day to non-CM/ECF participant(s):

Carl Oreskovich, Esq.

And to the following non-ECF participants: N/A

s/ Aine Ahmed
Aine Ahmed, AUSA