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VIA FEDERAL EXPRESS

Robin C. Ashton, Counsel
Office of Professional Responsibility
United States Department of Justice
950 Pennsylvania Avenue, N.W., Suite 3266
Washington, DC 20530-0001

Re: *United States v. Aaron Swartz*
United States District Court, District of Massachusetts Crim No. 11-CR-10260 NMG

Dear Ms. Ashton,

We represented a young man named Aaron Swartz in a criminal case before the Honorable Nathaniel Gorton, United States District Judge for the District of Massachusetts, No. 11-CR-10260. Tragically, Mr. Swartz killed himself on January 11, 2013, only two weeks before a significant suppression hearing was scheduled to occur before Judge Gorton.

We write to bring to your attention certain information about the conduct of the lead prosecutor in Mr. Swartz's case, AUSA Stephen Heymann. We believe that AUSA Heymann's conduct over the course of the case raises two issues. ***First***, AUSA Heymann appears to have failed timely to disclose exculpatory evidence relevant to Mr. Swartz's pending motion to suppress. Indeed, evidence suggests AUSA Heymann may have misrepresented to the Court the extent of the federal government's involvement in the investigation into Mr. Swartz's conduct prior to the application for certain search warrants. ***Second***, AUSA Heymann appears to have abused his discretion when he attempted to coerce Mr. Swartz into foregoing his right to a trial by pleading guilty. Specifically, AUSA Heymann offered Mr. Swartz four to six months in prison for a guilty plea, while threatening to seek over seven years in prison if Mr. Swartz chose to go to trial. For both of these reasons, and on behalf of Mr. Swartz's family, we respectfully request that the Office of Professional Responsibility undertake an investigation of AUSA Heymann's conduct.

Professional Misconduct Related to Mr. Swartz's Motion to Suppress

All lawyers, as officers of the court, have a duty of candor that prohibits misleading the court as to material facts or law. *See, e.g., Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067-68

(7th Cir. 2000) ("Counsel have a continuing duty to inform the Court of any development which may conceivably affect the outcome of the litigation."); *La Salle Nat'l Bank v. First Conn. Holding Grp., LLC*, 287 F.3d 279, 293 (3d Cir. 2002) ("[A]n attorney must comport himself/herself with integrity and honesty when making representations regarding a matter in litigation."); *U.S. Dep't of Hous. & Urban Dev. v. Cost Control Mktg. & Sales Mgmt. of Va., Inc.*, 64 F.3d 920, 925 (4th Cir. 1995) ("We remind counsel that a lawyer's duty of candor to the court must always prevail in any conflict with the duty of zealous advocacy."). ABA Model Rule of Professional Conduct 3.3(a)(1) states that a "lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" *See also* Mass. R. Prof. C. 3.3(a)(1) ("A lawyer shall not knowingly make a false statement of material fact or law to a tribunal[.]"); Model R. Prof. C. 8.4(c) ("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]"). Prosecutors, as representatives of the state, have a special responsibility to uphold the duty of candor to the court. *See Berger v. United States*, 295 U.S. 78, 88 (1935); *Morales v. Portuondo*, 165 F. Supp. 2d 601, 612 (S.D.N.Y. 2001).

In addition, prosecutors have a responsibility to disclose to the defense all "evidence favorable to an accused . . . where the evidence is material to either guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that prosecutorial suppression of exculpatory evidence violates due process). This obligation attaches irrespective of the good or bad faith of the prosecutor. *Id.* *Brady* disclosure is "not a suggestion, but a constitutional and statutory obligation." *United States v. Duval*, 496 F.3d 64, 73 (1st Cir. 2007). The prosecutor's disclosure obligation is reflected in ABA Model Rule of Professional Conduct 3.8(d), which requires that a prosecutor "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 mitigates the offense." *See also* Mass. R. Prof. C. 3.8(d) (same). The Government also violates a defendant's right to due process where it "engages in 'deliberate deception'" by intentionally concealing evidence. *See Haley v. City of Boston*, 657 F.3d 39, 49 (1st Cir. 2011) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

AUSA Heymann appears to have violated the above-described professional responsibilities through his conduct in response to Mr. Swartz's motion to suppress, which was filed October 5, 2012. *See* Attachment 1 (Dkt. 63). Mr. Swartz's motion, filed with the assistance of prior counsel, argued that the Secret Service's search and seizure of his laptop, hard drive, and USB drive was unreasonable under the Fourth Amendment, because the Secret Service delayed thirty-four days after the items' seizure before applying for a warrant to search them. *See id.*[1] Accordingly, the motion argued, all fruits of the searches of the electronic devices should be suppressed. *Id.*

[1] As explained in the motion, the items were seized on January 6, 2011, the day that Mr. Swartz was arrested, but the first warrant for their search was not obtained until February 9, 2011. *Id.* at 1-2.

The Government filed a response to Mr. Swartz's motion to suppress on November 16, 2012. *See* Attachment 2 (Dkt. 81). AUSA Heymann argued that the search of the laptop, hard drive, and USB drive was not unreasonable, in part, because the Secret Service was not the entity that seized the equipment:

> The Secret Service did not seize his laptop, hard drive, or USB drive on January 6, 2011: the Cambridge Police Department did. Nor did the Secret Service possess this equipment before obtaining the warrants: the Cambridge Police Department did. Thus, the United States did not affect Swartz's possessory interests in his equipment until it executed warrants. . . . Swartz cannot simply morph allegations that local police held evidence too long in a local prosecution into a claim that federal law enforcement officers did so in a subsequent federal case.

Id. at 52-53. AUSA Heymann therefore argued to the Court that neither he nor the Secret Service ("federal law enforcement officers") held any responsibility for the delay between the seizure and search of Mr. Swartz's electronic devices, because they did not "seize" the equipment or "possess" it "before obtaining the warrants."

We filed a reply in support of Mr. Swartz's motion to suppress on December 3, 2012. *See* Attachment 3 (Dkt. 87). We reacted with great skepticism and some incredulity to the assertions in the Government's response briefing:

> The Government remarkably suggests the Secret Service cannot be held responsible for its lackadaisical attitude toward seeking a search warrant because the Cambridge Police Department, not the Secret Service, was in possession of the computer equipment during the thirty-four day delay. . . . Here, the Secret Service was plainly in charge of the investigation at MIT. It is absurd to suggest that it had no control over the seized computer equipment when its investigation directly resulted in that equipment being kept in the possession of the Cambridge Police. *See* Dkt. 68, Ex. 31 (report states that Secret Service Agent Pickett apprehended and handcuffed Swartz); Dkt. 68, Ex. 15 (report states that Pickett examined ACER laptop before turning it over in evidence bag to MIT Police).

Id. at 7.

On December 14, 2012, eleven days after Mr. Swartz's reply brief had been filed, Judge Gorton held a status conference to consider, among other issues, whether to hold an evidentiary hearing on Mr. Swartz's pending motions to suppress and dismiss. The status conference had been requested by AUSA Heymann. He contended that no evidentiary hearing was necessary, as the motions to suppress should be denied without a hearing. After argument by the parties, the Court ordered that an evidentiary hearing be held on January 25, 2013. *See* Attachment 4 (Dkt 98). ***After the status conference was adjourned***, AUSA Heymann approached undersigned counsel and, for the first time, disclosed an email sent to AUSA Heymann by the lead Secret Service Agent on the case, Michael Pickett. *See* Attachment 5 (Dkt. 103, Ex. A). The email

was dated January 7, 2011, the day after Mr. Swartz's arrest and the seizure of the electronic items at issue in the motion to suppress. *See id.* In the email, Pickett stated that he was "prepared to take custody of the laptop anytime" after it was processed for fingerprints by the Cambridge Police on January 7, "or whenever you [Heymann] feel is appropriate." *Id.* Pickett also explicitly recognized the need for a warrant before searching the items. *See id.* ("As far as I know no one has sought a warrant for the examination of the computer, the cell phone that was on his person or the 8gb flash drive that was in his backpack.").

We were surprised to learn of the existence of an email that demonstrated that the Secret Service both had effective control over Mr. Swartz's electronic devices and knew it needed to obtain a search warrant as of January 7, 2011, especially in light of AUSA Heymann's representation that they had neither "seized" nor "possessed" it. The email made clear that the Secret Service had control over these items of evidence and were able to search them whenever AUSA Heymann desired. This evidence contradicted the Government's representation to the Court that federal law enforcement could not be held responsible for the delay between the items' seizure and their search. The email confirmed what we had previously suspected: that AUSA Heymann and Agent Pickett directed and controlled the investigation of Mr. Swartz from the time of Mr. Swartz's arrest on January 6, 2011. The email also confirmed to us for the first time that AUSA Heymann's involvement in the case had commenced very early in the investigation and that Agent Pickett was following AUSA Heymann's orders on the search and seizure issue.

On December 18, 2012, we wrote to AUSA Heymann to express our concern that the Government had yet to produce all materials relevant to Mr. Swartz's pending motions to dismiss and suppress. *See* Attachment 6 (December 18 emails). Additionally, we requested AUSA Heymann's consent to file a short supplemental pleading including the newly disclosed document. *See id.* AUSA Heymann's reply stated that our "characterization [was] inaccurate and unfair" but did not respond to the request regarding a supplemental pleading. *Id.*

On January 3, 2013, we followed up again to request AUSA Heymann's assent to file the pleading and attached the draft supplemental pleading to the email request. *See* Attachment 7 (January 3, 2013 emails). Again, AUSA Heymann avoided the question, instead stating in his reply that "the accusation of prosecutorial misconduct contained in your proposed pleading is both inaccurate and unfair." *Id.* We found AUSA Heymann's defensive view of our supplemental pleading as an accusation of "prosecutorial misconduct" revealing. As we noted in our reply to Heymann, there was "no such accusation" in that document; we were merely attempting to supplement the record with a relevant document that had not previously been disclosed to us. *Id.*

We moved for, and were granted, permission to supplement the record before the district court with the belatedly-disclosed email. *See* Attachment 5 (Dkt. 103). The Government also moved for, and was granted, permission to respond to our supplemental filing. *See* Attachment 8 (Dkt. 104). In that response, AUSA Heymann argued that the email was not belatedly disclosed, because he had not discovered the email until a second review of the documents relevant to the seizure of evidence in the case. *See id.*

Meanwhile, on December 21, 2012, AUSA Heymann produced yet another, much larger set of documents relevant to Mr. Swartz's motion to suppress. This voluminous, disorganized production consisted of hundreds of previously-undisclosed emails, as well as hundreds of other documents, including undisclosed investigative reports, photographs, spreadsheets, and screen captures. Many of the newly-disclosed emails and reports further illustrated that the Secret Service was in control of investigating Mr. Swartz, and that AUSA Heymann was himself involved in the investigation even before Mr. Swartz was arrested on January 6, 2011. *See, e.g.*,

Upon review of the December 21 discovery, it became apparent to us that AUSA Heymann was well aware of the details of the Secret Service's investigation of Mr. Swartz's case from its inception. This made AUSA Heymann's misrepresentation about the Secret Service's involvement in the seizure of Mr. Swartz's electronic devices all the more troubling, because the misrepresentation could not have been made accidentally. Rather, because the December 21 documents had never before been disclosed to the defense, Mr. Swartz and his attorneys did not have the opportunity to consider and argue their relevance in Mr. Swartz's motions to suppress, which had been filed months prior to the disclosure.

This brief summary explains why we believe that AUSA Heymann's actions violated both his *Brady* obligations and his duty of candor to the Court. AUSA Heymann was personally familiar with the involvement of federal law enforcement in and control over the investigation of Mr. Swartz. Consequently, his suggestion that the Secret Service lacked responsibility in the seizure, retention, and delay in searching Mr. Swartz's electronic devices could only have been an intentional misrepresentation to the Court. AUSA Heymann's involvement in the details of the investigation from January 6, 2011 onwards made him intimately familiar with the fact that Agent Pickett personally seized the devices on January 6 and could have applied for a warrant to search Mr. Swartz's devices at any time on that day or thereafter. AUSA Heymann made no attempt to correct his misrepresentation at the December 14 status conference before the Court, even while he had in his possession (but failed to disclose until after the hearing) at least one of many emails which disproved his earlier claims, and even with the knowledge that the Court might not grant an evidentiary hearing on Mr. Swartz's motions.

Moreover, AUSA Heymann certainly could and should have disclosed the December 14 and 21 documents prior to the filing of Mr. Swartz's motions to suppress and dismiss. Given that the December disclosures consisted largely of AUSA Heymann's personal emails, he cannot credibly claim ignorance as to their existence or contents. It strains credulity for AUSA Heymann to have argued that he did not notice or remember the emails until his second search

through the Government files for *Brady* materials. By delaying the disclosure of relevant documents, AUSA Heymann hindered Mr. Swartz's ability to argue for the suppression of illegally-obtained evidence. Even after Mr. Swartz filed his motions to suppress and dismiss, a point at which Mr. Swartz's legal arguments must have been clear to AUSA Heymann, AUSA Heymann did not disclose relevant exculpatory email correspondence. He delayed until after Mr. Swartz's reply briefing was filed and after the parties appeared before the Court on December 14, likely hoping that if no hearing were ordered, he would never have to disclose the evidence which contradicted his representations to the Court.

Professional Misconduct Related to Plea Bargaining

AUSA Heymann's attempts to coerce Mr. Swartz into waiving his right to a trial also constituted overreach and an abuse of prosecutorial discretion. The US Attorneys' Manual Section 9-27.400 instructs that "[p]lea bargaining, both charge bargaining and sentence bargaining, must honestly reflect the totality and seriousness of the defendant's conduct and any departure to which the prosecutor is agreeing, and must be accomplished through appropriate guideline provisions." The commentary to the Sentencing Guidelines further explains:

> A defendant who enters a plea of guilty in a timely manner will enhance the likelihood of his receiving a reduction in offense level under §3E1.1 (Acceptance of Responsibility). Further reduction in offense level (or sentence) due to a plea agreement will tend to undermine the sentencing guidelines.

U.S. Sentencing Guidelines Manual § 6B1.2, cmt.

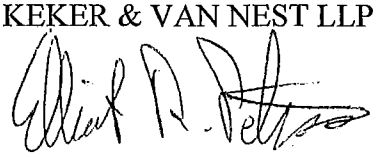
AUSA Heymann's plea offer to Mr. Swartz completely disregarded these maxims. He offered to recommend that Mr. Swartz serve four to six months in prison if Mr. Swartz agreed to plead guilty to thirteen felony offenses. But if Mr. Swartz chose to exercise his right to a jury trial, and was found guilty of those very same offenses, AUSA Heymann threatened that he would seek for Mr. Swartz to serve seven years in prison. Mr. Swartz, who had no prior record and was only twenty-six years old, naturally felt extreme pressure to waive his rights and accept the plea bargain. The difference between an offer of four months and a threat of seven years went far beyond the minimal reduction in sentence that should properly have applied for "acceptance of responsibility" under the Sentencing Guidelines. AUSA Heymann's extreme offer was an inappropriate effort to coerce a plea that went beyond the appropriate bounds of prosecutorial conduct.

For the reasons explained above, we believe that a thorough investigation by the Office of Professional Responsibility into AUSA Heymann's professional conduct in the course of prosecuting the case against Aaron Swartz is appropriate.

Thank you for your consideration. We welcome any further inquiry about the details of the case.

Respectfully submitted,

KEKER & VAN NEST LLP



Elliot R. Peters
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Enclosures

ERP:at/aap