

1. A telephone conversation between [REDACTED] which took place the day before the Governor's arrest, on December 8, 2008, [REDACTED].
2. A telephone call from [REDACTED] [REDACTED] which took place around the time of the Governor's arrest.

Both calls support Blagojevich's innocent intent with regard to the Senate seat appointment and both are discoverable and potential *Brady* material². Disclosure of these two calls is mandatory and necessary for Blagojevich to present his defense and his innocent intent to forge a political deal with Illinois House Speaker Michael Madigan in exchange for the Senate seat appointment.

II. FACTUAL BACKGROUND

In late November and early December of 2008, Governor Blagojevich had the responsibility to appoint a United States Senator to fill the Senate seat that was being vacated by President-elect Obama.

During this time, Governor Blagojevich was being asked by prominent leaders of the Democratic Party in Washington, D.C to appoint a qualified Democrat who could also win re-election in 2010.³ The Democratic Party leaders in

² *Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.")

³ On June 29, 2010, Tom Balanoff testified on direct examination by the government that President-elect Obama called him on November 3, 2008, and said, "Tom, I want to talk to you with regards to the Senate seat... there's two criteria I have for the next senator: One, that they'd be good for the citizens and the people of Illinois, and, two, that they be able to

D.C. were fearful that the Governor might appoint a qualified person to the Senate seat to satisfy his political base without considering that person's re-election chances in 2010. Governor Blagojevich was also told by leading Democratic U.S. Senators that they were not in favor of the appointment of Congressman Jesse Jackson, Jr. to the seat. John Harris testified at trial⁴ that "[Senator Robert] Menendez, [Democratic Senate Majority Leader Harry] Reid, [Senator Richard] Durbin were not enthusiastic about the possibility of Jesse Jackson, Jr., being appointed."

The following conversation⁵ between Blagojevich and Harris also illustrates Blagojevich's intent to make the Lisa Madigan deal with the support of Democratic Party leaders:

BLAGOJEVICH

I already told Menendez what I wanted. I served with him in Congress. He said he'd be willing to get involved if, if it was helpful. I said if I am going to piss off a black community and I'm, uh, and I gotta send her, and it's repugnant to me personally to do something like that, I want, I want a public works program. I want healthcare here. And I don't want raising taxes on people. They, you know, they do that, I'll hold my nose and do it. But I don't know if they'll do it. And it may, it may come down to you guys (UI) enlisting you guys and try to make that deal happen. He said he'd do it.

be reelected." Also, Harris testified on June 29, 2010, that he discussed with Rahm Emanuel whether or not Jesse Jackson, Jr. "was capable of winning reelection to the seat."

⁴ John Harris testimony, June 29, 2010.

⁵ Home Phone Session 1349, December 4, 2008. This call was played in open court on June 29, 2008 during the cross-examination of John Harris, outside of the presence of the jury.

Speaker enacting into law certain legislation that the Governor believed would help the people of Illinois⁶.

There were three fundamental pieces of legislation that the Governor wanted enacted into law in return for the appointment of Attorney General Lisa Madigan to the Senate seat⁷:

- (1) A public works bill commonly known as the Capital Bill which would create 500,000 jobs in Illinois;
- (2) An expansion of affordable, comprehensive health care benefits to uninsured Illinoisans; and
- (3) A promise in writing not to raise the state income tax increase on the people of Illinois.

Governor Blagojevich believed this would be a good political deal because he would enact legislation that would benefit the people of Illinois *and* the Democratic Party would get a qualified candidate for the Senate who would win re-election. However, the Governor realized that he, on his own, could not effectively conclude this political deal.

⁶ On July 12, 2010 Deputy Governor Bob Greenlee testified that “there was a list of the things that he (Blagojevich) wanted to request” from Madigan “in exchange for” appointing his daughter. On June 29, 2010 John Harris testified that “the Governor spoke in terms of a legislative package, legislation that would be passed, and certain commitments made in addition to legislation that was passed that the Governor would attempt to negotiate with Speaker Madigan. Those discussions occurred with me both in recorded calls and as well as unrecorded calls.”

⁷ On July 12, 2010, Bob Greenlee testified that Blagojevich told Deputy Governor Bob Greenlee to prepare a list of benefits to the State of Illinois that could be negotiated as part of the Madigan deal. This list was introduced at trial on July 12, 2008 as Defense Exhibit No. 25.

Because of the strained relationship between the Governor and Speaker Madigan, Governor Blagojevich believed he had to enlist the help of prominent third party Democrats to negotiate this political bargain. In order to get the D.C. Democratic Party leaders fully vested in this political deal, Governor Blagojevich's nuanced strategy required these Democratic Party leaders to have a credible belief that if the Madigan deal didn't happen, the Governor might appoint Congressman Jackson, Jr. or Senate President Emil Jones.

On the afternoon of December 8, 2008, Blagojevich and Congressman Jackson met in person, in a pre-scheduled meeting at which John Harris was also present⁸. In Congressman Jackson's interview with the FBI, [REDACTED] [REDACTED]⁹. Harris testified at trial that neither Blagojevich nor Jackson said anything about campaign contributions being offered in exchange for a Senate seat appointment¹⁰. According to Harris' trial testimony, at the meeting, Jackson primarily presented documentation on why Jackson believed he would be a good choice for Senator.¹¹

It's important to underscore that the Governor believed that if the Democratic Party leaders thought Congressman Jackson, or someone else who they didn't want, would be appointed, then the Democratic Party leaders would be motivated to help broker the political deal between Governor Blagojevich and Speaker Madigan.

⁸ John Harris testimony, June 29, 2010.

⁹ [REDACTED]

¹⁰ John Harris testimony, June 29, 2010.

¹¹ Id.

The Governor's political maneuvering is revealed in a telephone call between Governor Blagojevich and Deputy Governor Bob Greenlee, introduced at trial by the government¹², where Governor Blagojevich tells Greenlee:

“Okay, now listen. Now listen to me. You don't know what's going on here. So you gotta be careful. Don't be talking too much... I mean your contradicting me here, your, you know. Eh, uh...it's a repugnant idea, but I need to leverage that Jesse Jr. with these [f'in] national people... To get the deal for Lisa... I want these national Democrats and Obama... to [f'in] feel holy [f-], it's gonna be Jesse Jr. if we don't [f'in] get this Lisa thing done.”

After the Presidential election, Governor Blagojevich realized that Congressman Rahm Emanuel, the designated Chief of Staff to President-Elect Barack Obama, could be the most effective intermediary to broker the Madigan deal.

Rahm Emanuel's name surfaces several times in this Motion. Blagojevich makes absolutely no assertion that Rahm Emanuel was ever involved in, or aware of, any wrongdoing, criminal or otherwise.

A portion of a recorded telephone conversation between [REDACTED]

[REDACTED] elucidates the Governor's belief [REDACTED]

[REDACTED]:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

¹² Government Exhibit Tab 92 (emphasis added).

¹³ [REDACTED].

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Governor's political strategy to enlist the help of Rahm Emanuel was unfolding, as the missing [REDACTED] December 8th call would show.

The December 8, 2008 telephone call [REDACTED] [REDACTED] underscores the Governor's innocence and further illustrates the political deal that was in motion. But the call is missing.

III. MISSING TELEPHONE CALL BETWEEN [REDACTED]

In an October 2, 2010 article, the *Chicago Tribune* reported¹⁴ that "[t]he Tribune has learned that Harris told investigators Emanuel agreed to be the 'go-between' on the Madigan deal."

¹⁴ John Chase and Jeff Coen, *Chicago Tribune*, "Blagojevich issue casts shadow on Emanuel," October 2, 2010.

A public report issued by the Obama Administration on December 23, 2008, found that “[b]etween the time Mr. Emanuel decided to accept the position of Chief of Staff in the White House and December 8, 2008, Mr. Emanuel had about four telephone conversations with John Harris, Chief of Staff to the Governor, on the subject of the Senate seat.”

The evidence provided to the Defense shows these four calls took place on the following days:

1. [REDACTED]
[REDACTED]
2. [REDACTED]
[REDACTED]
3. [REDACTED]
[REDACTED]
4. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

The first three phone calls were recorded and disclosed to Blagojevich.

The following are the pertinent sections of the calls which were recorded between [REDACTED] regarding the Lisa Madigan appointment:

Call #1:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Call #2:

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Call #3:

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The fourth and final phone call is the call that is mysteriously missing. The Government never turned over this pivotal recording, nor a transcript of this call, and never disclosed to Blagojevich why that call was missing.

This December 8, 2008 missing call contains exculpatory evidence that proves that Governor Blagojevich never intended to “sell” the Senate seat to Congressman Jackson, or anyone else. The existence or contents of that phone call were never affirmatively disclosed to Blagojevich. However, through piecing together multiple documents after the first trial, Blagojevich uncovered the fact that the December 8th phone call between [REDACTED] took place.

This final December 8, 2008 phone call between [REDACTED] [REDACTED], took place less than 24 hours before the Governor’s arrest.

IV. RECORDED TELEPHONE CALLS DEMONSTRATE BLAGOJEVICH’S INNOCENT INTENT TO ‘CARRY OUT’ THE MADIGAN DEAL.

The aforementioned [REDACTED] call illuminates the advancement of Blagojevich’s legal, political plan. Further context elucidates the importance of this [REDACTED] missing call:

On [REDACTED]. On the call,
[REDACTED]
[REDACTED]. ([REDACTED]
[REDACTED]):

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

On [REDACTED], Governor Blagojevich instructed Deputy Governor Bob Greenlee to make a list of things to get from Speaker Madigan in exchange for appointing his daughter Lisa Madigan Senator ([REDACTED]):

[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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On [REDACTED]

[REDACTED] ([REDACTED]):

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

This all culminated in a conversation between Blagojevich and Deputy Governor Bob Greenlee, which was the final Blagojevich call recorded by the government, the night before the arrest, December 8, 2008 at [REDACTED]¹⁵ In this final Blagojevich call, Blagojevich relays to Deputy Governor Bob Greenlee the information he (Blagojevich) received from Harris regarding Emanuel's willingness to talk to Speaker Madigan. This call, which took place the evening before the Governor's arrest, was recorded and labeled "[REDACTED]" by the FBI¹⁶, but was not

¹⁵ [REDACTED]

¹⁶ [REDACTED]

played by the government at the first trial. In fact, the government objected to Blagojevich introducing this call into evidence to show Deputy Governor Bob Greenlee's knowledge of the advancement of the Madigan deal.

In argument for the introduction of this call to impeach Deputy Governor Greenlee on cross-examination, defense counsel Aaron Goldstein argued in open court:¹⁷

Mr. Greenlee testified on direct examination, in fact Mr. Schar asked him, between December 4th and December 9th had any progress been made in the Lisa Madigan play. And Mr. Greenlee said no. So I'm asking him what his knowledge base is as to this play, quote/unquote, being done. And he [Greenlee] had a specific conversation with Governor Blagojevich right before December 8th – on December 8th in which Governor Blagojevich is indicating how things were moving and that Rahm Emanuel was coming in to be an emissary on this. And Robert Greenlee says good, I get your play, that's great. So that clearly impeaches him as to say I knew nothing, nothing was moving, he then goes ahead to say he understood it, he told him.

The discussion between Blagojevich and Greenlee was as follows

([REDACTED]):

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷ Greenlee Testimony on July 12, 2010 (emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

This missing December 8th call between [REDACTED] corroborates the defense's contentions. A roadblock in the Madigan deal was, always, who would approach Speaker Madigan. Upon [REDACTED] [REDACTED], this became a trigger to move the Madigan deal forward. Hence, this phone call is critical to Blagojevich's defense.

In all, Blagojevich spoke [REDACTED] [REDACTED] regarding making the Madigan deal, including: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

18

19

V. THE F.B.I. ACKNOWLEDGED THE IMPORTANCE OF THE MISSING DECEMBER 8TH CALL.

The missing December 8th call between [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. However, despite the wiretaps on Harris' office and cell phone and the fact that multiple other calls between [REDACTED] were intercepted – and turned over to the defense in discovery²⁰ – this important December 8th call has never been disclosed.

The FBI agents monitoring the calls on December 8, 2008, heard Blagojevich relay to Deputy Governor Greenlee his (Blagojevich's) conversation with Harris from that afternoon. The agents labeled the call "[REDACTED]" and noted²¹:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

(emphasis added).

Prosecutors objected to this call being admitted in court during the first trial and to defense questions regarding the call.²²

²⁰ [REDACTED]

²¹ [REDACTED]

²² See Greenlee Testimony on July 12, 2010.

VI. MISSING [REDACTED]
TELEPHONE CALL

A second critical piece of evidence was not disclosed to the defense prior to the first trial – a telephone call from [REDACTED]. This call is also integral to this case. A FBI 302 Report in part references the existence of this call.

This 302 Report states:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

([REDACTED]). [REDACTED]
[REDACTED]
[REDACTED]

The fact that the [REDACTED] called [REDACTED] presumably within 24-hours of the mysteriously missing [REDACTED] call wherein [REDACTED] [REDACTED], could contain important impeachment evidence to which the defense has a right of discovery. This undisclosed evidence goes to the heart of the case.

VII. THE TWO CALLS ARE NECESSARY TO THE DEFENSE OF BLAGOJEVICH

Blagojevich's conversations regarding the Senate seat appointment were constant and repetitive in the days and weeks leading up to his arrest. These conversations demonstrate that Blagojevich had innocent intent with regard to the Senate appointment, contrary to the government's allegations. The missing call between [REDACTED] clearly casts a light upon these conversations and demonstrates the innocent intent of Blagojevich. The political play in motion (stopped by the arrest of Blagojevich) was to appoint Lisa Madigan, in exchange for a political deal with Speaker Madigan to ensure beneficial legislation for the State of Illinois. The [REDACTED] call, which took place the day before Blagojevich's arrest strongly supports that the political play (elevating Jackson to enlist the Washington, D.C. Democratic leaders to broker the Lisa Madigan appointment) was working. The missing [REDACTED] call casts all of the other evidence in a different light. It gives rise to reasonable doubt. Also, this Court's rulings (on cross-examination objections and defense-submitted recordings) would have been different. Moreover, the failure of the government to disclose this call, and the failure to reference this fact to the jury or the Court should raise the suspicion of this Court. Exacerbating the issue is the aforementioned peculiar call from [REDACTED]

[REDACTED]

VIII. LAW

Discovery of the full substance and content of these calls should be ordered. The Supreme Court has stated that “[d]iscovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony.” *Taylor v. Illinois*, 484 U.S. 400, 411-412, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The drafters of Federal Rule 16 regarding discovery noted that broad discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea, by minimizing the undesirable effect of surprise at the trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence. *See*, Committee Note to 1975 Amendment to Rule 16.

The government is required to disclose the requested information to the defense pursuant to its obligations under *Brady v. Maryland* and its progeny. *See, Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”). Nondisclosure of this requested discovery violates Blagojevich’s due process rights under the Fifth and Fourteenth Amendments. A

fair trial is impossible without the disclosure of this evidence which impacts the entire defense, as well as impeaches the testimony of government witnesses.²³

Fundamental fairness is at the heart of this request and the request comports with the Supreme Court's rulings on *Brady* and its progeny. *See, United States v. Bagley*, 473 U.S. 667, 675, 105 S. Ct. 3375 (1985) (purpose is not to replace adversarial system but to ensure government's interest that justice is achieved); *United States v. Agurs*, 427 U.S. 97, 107, 96 S. Ct. 2392 (1976) (this issue does not involve "the scope of discovery" under Rules but involves "the defendant's right to a fair trial").

This evidence is discoverable because it is "both favorable to the accused and 'material either to guilt or to punishment.'" *See, United States v. Bagley*, 473 U.S. 667, 674 (1985); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kyles v. Whitley*, 514 U.S. 419, 433-434 (1995) (where the court reiterated the holding from *Bagley* that "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different'"). Additionally, the Supreme Court has included impeachment evidence within the *Brady* rule. *See, Giglio v. United States*, 405 U.S. 105, 154-55 (1972).

Further, "if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." *Agurs*, 427 U.S. at 112.

²³ For example, Deputy Governor Bob Greenlee testified he "was not aware of any" progress made in terms of implementing the Madigan deal. (Robert Greenlee testimony on July 8, 2010).

Not only is the sought-after discovery exculpatory to Blagojevich and corroborates his innocent intent at all times relevant to the Senate seat appointment, it provides impeachment evidence. Indeed, “when the ‘reliability of a given witness may well be determinative of guilt or innocence,’ nondisclosure of evidence affecting credibility falls within [the *Brady*] rule.” *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Napue v. Illinois*, 360 U.S. 264, 269 (1959). This evidence is relevant to the jury’s assessment of credibility and is material.

The Supreme Court has ruled that if the government fails to disclose information that might be helpful in conducting cross-examination, that failure to disclose amounts a constitutional violation when it deprives the defendant of a fair trial. *United States v. Bagley*, 473 U.S. at 678. In this case, Blagojevich was deprived a fair trial at the first trial based on the government’s nondisclosure of this evidence – a second trial without this discovery would similarly result in the deprivation of a fair trial.

Moreover, this omission may rise to the level of presenting perjured testimony. This Court could find that the omissions of the facts surrounding [REDACTED] allowed for government witnesses to present perjured testimony before the jury. The presentation of perjured testimony in the first trial was “fundamentally unfair” and the government should not be permitted to repeat the same error at the retrial.

IX. REQUEST

At the first trial, both the government and the defense raised the issue of the Madigan deal. The government claimed that the Madigan deal was a 'stalking horse.' The Governor has always maintained that the Madigan deal was being strategically pursued, but was thwarted by his arrest.

These two undisclosed telephone calls are inextricably linked, and are necessary to the defense of Rod Blagojevich. Although U.S. Attorney Patrick Fitzgerald stated at a sensational news conference that the Governor was arrested to stop a "crime spree," Fitzgerald knew, or should have known, that this was not true.

Disclosure of the December 8th [REDACTED] call is necessary and required by *Brady* and its progeny. The Governor also has a right to be made aware of the contents of the other phone call made by [REDACTED]. Blagojevich has a right to discover what was said in this other call, the purpose of the call, and when the call took place.

X. ALTERNATIVE REQUEST FOR AN EVIDENTIARY HEARING

The government has told Blagojevich that it has turned over to the defense everything it has. If there was no preservation of either of these calls (the recording of the [REDACTED] call or a memorialization of the [REDACTED] call), Blagojevich requests an evidentiary hearing so he can discover the contents of these calls and why the content of these telephone calls are not available.

WHEREFORE, Rod Blagojevich prays that this Court grant this request for disclosure or in the alternative, request for an evidentiary hearing.

Respectfully Submitted,

/s/ Lauren Kaeseberg

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