

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division -- Felony Branch**

UNITED STATES OF AMERICA	:	
	:	Criminal Case No. 5147-03
	:	
v.	:	Judge Bayly
	:	
	:	Trial: December 8, 2004
RALPH JOHNSON	:	

**REPLY IN SUPPORT OF MR. JOHNSON’S MOTION TO SUPPRESS
IDENTIFICATION EVIDENCE AND TO COMPEL DISCLOSURE OF
EXCULPATORY INFORMATION**

The government’s already weak case against Mr. Johnson for murder just became weaker. Having abandoned any reliance on Witness 2’s identification – which was the product of demonstrably suggestive procedures – the government is down to one identifying witness, Witness 1, and no physical evidence.¹ It appears to have been the government’s hope that by forsaking any reliance on Witness 2, it could avert a

¹ The government has no physical evidence – no gun, no blood spatter, no DNA – connecting Mr. Johnson to the charged crime. Apparently desperate for something to bolster its disintegrating case, the government is now, fifteen months after it charged Mr. Johnson, scrambling to try to draw some sort of connection between Mr. Johnson and the scene of the crime with palm print analysis of some trash found on the street: for example, a Lay’s potato chip bag and a plastic pen top. See Government’s Motion for the Defendant to Submit Palm Prints, dated November 18, 2004.

The government has also just disclosed that it has a fourth witnesses, apparently a government cooperator, who claims to remember seeing someone identified as Mr. Johnson, putting a gun in the waistband of his pants on the day of the shooting. This purported identification was made in the United States Attorneys Office on September 29, 2004, thirteen months after the charged crime. This witness apparently was not an eyewitness to the crime. The government has had this information for two months, but despite counsel’s repeated requests for additional information about the identifications made in this case, the government just disclosed the existence of Witness 4 today (November 19, 2004), less than three weeks prior to trial. See Attached (letter from AUSA Blanche Bruce to Christopher McKee, faxed November 19, 2004 at 4:03 p.m.). Mr. Johnson respectfully requests that his motion to suppress be amended to include this belated and questionable identification, and that the hearing previously requested be expanded to consider the unreliability of Witness 4’s identification.

suppression hearing regarding the reliability of Witness 1's identification.² A hearing however, is still necessary because the government has refused to disclose basic information about Witness 1 (including Witness 1's name) and about the procedures used to elicit Witness 1's identification. Moreover, based on the minimal facts disclosed by the government Witness 1's identification is troublesome in a number of ways. Among other things, it was elicited eight days after viewing a startling, violent event while under the influence of alcohol, and it was the product of an identification procedure conducted by Detective Don Juan Monroe, a police officer with a known record of misconduct in gathering identification evidence. In short there are real issues of fact that must be resolved before this Court can rule on Mr. Johnson's arguments that Witness 1's identification must be suppressed either under Manson v. Braithwaite, 432 U.S. 98 (1968) or under a simple balancing of probity against prejudice. See Sheffield v. United States, 397 A.2d 963 (D.C. 1979).

In addition to a hearing, Mr. Johnson requires rulings from the Court on the inadmissibility of both Witness 1 and Witness 2's identifications either in the government's case in chief or as rebuttal evidence (assuming the government determines that it still wants to take this case to trial). Mr. Johnson also requires a ruling on his motion to compel the production of Brady information, a motion which the government has effectively ignored and which this Court should treat as conceded.

² This appears to be the thrust of the government's Opposition, however, the government concludes with a plea that this Court "grant the instant motion." Government's Opposition at 8. Of course, to the extent that the government purposefully requested that the Court grant Mr. Johnson's motion to suppress the identifications of Witness 1 and Witness 2, Mr. Johnson acknowledges that no hearing would be necessary.

I. Given The Government’s Implicit Concession That Witness 2’s Identification Of Mr. Johnson After A Suggestive Lineup Is Wholly Unreliable, Mr. Johnson Requests A Ruling Precluding The Government From Relying On This Unreliable Identification In Its Case-In-Chief Or In Rebuttal.

Acknowledging that it cannot defend the improper and suggestive procedures that were successfully used to elicit unreliable identification evidence from Witness 2 – a witness who had candidly disclosed soon after the shooting that she had not seen “enough of [the gunman’s] face to pick anyone” in an identification procedure³ – the government has now announced in its Opposition to Mr. Johnson’s motion to suppress identification evidence that it “does not intend to call W-2 as a witness at trial.” Government’s Response at 7. Although Mr. Johnson considers the government’s choice to strike Witness 2 from its witness list to be a wise one, the government’s concession does not go far enough to protect Mr. Johnson’s rights to due process. See U.S. Const. amend. V; Manson v. Braithwaite, 432 U.S. 98, 114 (1977); Neil v. Biggers, 409 U.S. 188, 192 (1972).

Should this case go to trial, the government should be foreclosed not only from calling Witness 2 to the stand, but also from presenting any evidence at trial regarding Witness 2’s now-concededly unreliable identification. This ruling would preclude any other government witness from referencing Witness 2’s now-admittedly unreliable identification. It would also preclude the government from presenting evidence regarding this discredited identification as part of the government’s rebuttal case, in response to an

³ See App. Q to Mr. Johnson’s Supplemental Memorandum of Points and Authorities in Support of a Motion to Suppress Identification Evidence and to Compel Disclosure of Exculpatory Information (Letter from AUSA Blanche Bruce to Chris McKee and Vida Johnson, dated October 13, 2004) (W-2 photo viewing sheet enclosure).

argument by Mr. Johnson that the government’s case turns solely on the identification of one, problematic eyewitness, Witness 1.

II. A Hearing Must Be Held In Order To Resolve Whether Witness 1’s Identification Must Be Suppressed As A Product Of Suggestive Procedures Or As An Identification That Is Simply So Suspect That Its Probity Is Outweighed By Its Prejudicial Effect.

The government’s case now almost entirely turns on the reliability of the identification elicited from Witness 1 eight days after the shooting. The government conclusorily asserts that procedures used to elicit Witness 1’s identification were not “impressively suggestive [sic],” Government’s Opposition at 4, and that Witness 1’s identification in this case “was . . . reliable.” *Id.* at 5. Of course, these are conclusions that only this Court can make after reviewing all the relevant facts – facts which the government continues to withhold from the Court and Mr. Johnson.⁴

Notably, the government asserts that Mr. Johnson “cannot point to any evidence the Detective Monroe, [the Detective who elicited the identification from Witness 1] did anything improper to corrupt W-1’s identification procedure.” Government’s Opposition at 6. This is not only incorrect (at the very least, it appears that Detective Monroe did not conduct a sequential, double blind photo identification, procedural deficiencies which increase the likelihood that this identification was tainted⁵), but also, the government

⁴ Witness 4 apparently was not an eyewitness to the charged crime, but if the government intends to rely on Witness 4 in an effort to prop up its collapsing case, the Court will also require more information about Witness 4 and the procedures used to elicit his/her identification in order to evaluate the reliability of that identification under Manson and the rules of evidence.

⁵ Mr. Johnson discussed the relevant research and best practices in his initial motion and his supplemental pleading. See Motion to Suppress Identification Testimony and Request for a Pre-Trial Hearing in Advance of Trial at 3-7, 10-14, and Supplemental Memorandum of Points and Authorities in Support of a Motion to Suppress Identification Evidence and to Compel Disclosure of Exculpatory Information at 5-8. The government

glosses over the fact that it is in sole possession of all the relevant information regarding this identification procedure and that it has refused Mr. Johnson's multiple requests to provide detailed information about how this procedure was conducted. (Indeed, the government did not disclose to Mr. Johnson Detective Monroe's prior misconduct in gathering eyewitness identification evidence, and it is only due to fortuity that counsel learned of this misfeasance.)

Moreover, even based on the government's incomplete disclosures, Witness 1's identification is troublesome for a number of reasons which must be probed at a hearing in order to resolve Mr. Johnson's arguments that, under Manson and under a simple balancing of probity against prejudice, Witness 1's identification must be suppressed. Apart from questions about Detective Don Juan Monroe and the procedures employed to elicit Witness 1's identification, the reliability and thus the probity of Witness 1's identification appears to be quite low. The government has disclosed that Witness 1 was under the influence of alcohol at the time of the shooting and only viewed the gunman for "a matter of second" in the context of a startling, violent event in which Witness 1's attention appeared to be focused on the "black handgun" used by the shooter.⁶

nowhere responds to this research, but instead, without reference to any authority, asserts that "the likelihood of irreparable identification is virtually nonexistent." Government Opposition at 6.

⁶ Although the government tries to argue that Witness 1's "observation . . . [of the gunman] was made against a backdrop of circumstances that a witness is not likely to forget," Government's Opposition at 6, scientific research demonstrates that all of these facts increase the likelihood that Witness 1's identification is inherently unreliable.

Moreover, other questions about Witness 1's opportunity to view, relationship with the police and relationship to Mr. Johnson remain.⁷

III. Mr. Johnson's Motion to Compel Brady Information Should Be Treated As Conceded, And The Government Should Be Ordered To Produce Any And All Brady Information In Its Possession.

The government fails to provide a meaningful response to Mr. Johnson's Motion to Compel the Disclosure of Exculpatory Information. Among other things, Mr. Johnson has repeatedly requested the names and addresses of Witness 2 and Witness 3, both of whom are Brady witnesses by virtue of their inability to identify Mr. Johnson as the gunman in this case. The government has refused to provide any identifying information for Witness 2, and has provided a name with a bogus address for Witness 3. Furthermore, the government continues to withhold the identity of Witness 1 and his/her relationship to Mr. Johnson, even though disclosure of this information would also be required under Brady if such relationship raises any issue of bias. See Banks v. Dredke, 124 S. Ct. 1256 (2004); Kyles v. Whitley, 514 U.S. 419 (1995). Finally, the government has just today revealed the existence of Witness 4 – who appears to be a government cooperator, given the fact that he made a purported identification of Mr. Johnson in the United States Attorneys Office in the presence of his counsel and two detectives – but has failed to provide any information about the nature of Witness 4's formal or informal

⁷ For example, the government has disclosed that Witness 1 purportedly “knew defendant Johnson and the area he hung out in Southeast, Washington, D.C. before the shooting.” But more information is needed in order for the Court to resolve the instant motion. If Witness 1 knew of Mr. Johnson as no more than a passing acquaintance, such a fact might give rise to a psychological phenomenon known as unconscious transference. Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal §4-10 (3d. ed. 1997). By contrast, if Witness 1's purports to have a closer relationship with Mr. Johnson, such a relationship would clearly raise issues of bias.

cooperation agreement with the government. This information is also Brady. See Banks, 124 S. Ct. 1256; Bagley, 473 U.S. 667.

In the face of these and other requests, the government states only that it has no obligation to provide impeachment information to Mr. Johnson prior to trial. Government Opposition at 8. The government misses the point. The information sought by Mr. Johnson constitutes or may lead to substantive evidence that Mr. Johnson was not the gunman. Cf. App. E to Mr. Johnson’s Motion to Suppress Identification Testimony and Request for a Pre-Trial Hearing in Advance of Trial (Transcript of Preliminary Hearing, pp. 36-37) (Court notes that Witness 2 and Witness 3 “hurt” the government’s case and the prosecutor states that she does not “disagree with that whatsoever.”)

Moreover, the government’s argument that revealing the names of these witnesses would somehow “jeopardiz[e] the government’s criminal prosecution” is absurd. Government Opposition at 8. The government has already stated that it has no intention of calling two of these witnesses, Witness 2 and Witness 3, to the stand at trial. In any event, to the extent that the government is suggesting that disclosure of any of these witnesses names or addresses raises some sort of security concern, Mr. Johnson cannot be the source given that these witnesses will provide Mr. Johnson with information that will assist his defense.

Finally, the government’s sweeping attempt to categorize Mr. Johnson’s Brady information as Giglio as a justification for strategically continuing to withhold this information fails as a matter of law. All Brady information – which includes Giglio, see United States v. Bagley, 473 U.S. 667, 676 (1985) – must be disclosed by the government as such a time as to allow the defense to use the favorable material

effectively in the preparation and presentation of its case.” Edelen v. United States, 627 A.2d 968, 970 (D.C. 1993) (emphasis added; internal citations and quotations omitted); Curry v. United States, 658 A.2d 193, 197-98 (D.C. 1995) (the importance of timely disclosure “cannot be overemphasized . . . [because] delay may imperil a defendant’s right to a fair trial.”) (internal quotations and citations omitted). As a representative of the sovereign “whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done,” Berger v. United States, 295 U.S. 78, 88 (1935), the government has no business strategically withholding exculpatory information. Rather, the prosecutor in every case has a duty “to assist the defense in making its case.” United States v. Bagley, 473 U.S. 667, 675 & n.6 (1985); see also Curry, 658 A.2d at 197 (duty to disclose exculpatory information is “a rule of fairness and minimum prosecutorial obligation [that] is necessary to ensure the effective administration of the criminal justice system”).

CONCLUSION

For all of the reasons stated above and for the reasons set forth in his initial Motion and Supplemental Memorandum of Points and Authorities, Mr. Johnson respectfully requests that this Court GRANT his request for an evidentiary hearing and grant this Motion to suppress and/or preclude the eyewitness identification in this case, and GRANT his motion to compel the disclosure of exculpatory information in the government’s possession.

Dated: November 19, 2004

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Reply in Support of Mr. Johnson's Motion to Suppress and Motion to Compel has been sent by facsimile to the Felony Section of the Office of the United States Attorney, Assistant United States Attorney, Blanche Bruce, 555 Fourth Street, N.W., Washington, D.C., 20530, on this the 18th day of November, 2004.

J. Christopher McKee