

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

<b>UNITED STATES</b>	:	
	:	<b>Criminal No. F-8237-02</b>
<b>v.</b>	:	<b>Honorable Ann O'Regan Keary</b>
	:	<b>Status Hearing: July 30, 2004</b>
<b>L.T.</b>	:	

**MOTION FOR A REPORT ON THE GOVERNMENT'S EFFORTS TO COMPLY**  
**WITH ITS OBLIGATIONS UNDER *BRADY V. MARYLAND***

L.T., through undersigned counsel, pursuant to his rights under the Fifth and Sixth Amendments and Rule 57(b) of the Superior Court Rules of Criminal Procedure and this Court's inherent authority to regulate the proceedings before it and to uphold the Constitution, respectfully moves this Court for an order (1) requiring the prosecution to file a report on or before August 13, 2004 (four weeks prior to trial) detailing the efforts made in this case to comply with its "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *see also Brady v. Maryland*, 373 U.S. 383 (1963), and, (2) if questions about the government's *Brady* disclosures remain, permitting Mr. T. to request a pre-trial hearing to confirm that all favorable information to which he is entitled pursuant to *Brady* has been disclosed.

The trial in this case has been delayed almost five months because critical *Brady* information – information indicating that a third party was responsible for this crime and that Mr. T. is actually innocent – was not disclosed in a timely fashion prior to the already once rescheduled April 22 trial date. In order to prevent further delay and in order to ensure that, before Mr. T. stands trial, Mr. T. is provided with all the information

to which he is constitutionally entitled to defend himself, the government should be required to confirm that it has fulfilled its obligation to identify, locate and disclose all *Brady* information in its possession. Furthermore, making a complete record now of the government's efforts to identify, locate and disclose *Brady* information in Mr. T.'s case is also necessary so that the Court can determine in an efficient fashion what sort of sanction – *e.g.*, an adverse inference or some other jury instruction – is warranted at trial for the government's already-documented *Brady* violation.

In support of this motion, counsel states the following:

1. It is undisputed that the government in this case withheld, for over sixteen months until six days prior to an already rescheduled trial date,<sup>1</sup> information about a detailed eyewitness statement made to the police shortly after the charged shooting. Tr. 5/6/04 at 11-12 (Court observes that the facts concerning the government's *Brady* violation are "undisputed"). In this statement, the eyewitness, Damien Martin, gave a blow-by-blow account of the offense and identified a third party, not Mr. T., as the shooter.

2. At a status hearing on April 22, 2004, the government attempted to defend its failure to disclose this information about Mr. Martin's statement in a timely fashion prior to trial. Among other things, the government represented that the police had failed to keep track of the information in its files and had never given the prosecution any information about Mr. Martin's interview. Tr. 4/22/04 at 25-26. But this argument proved both legally, *see Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995), and factually

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<sup>1</sup> Mr. T.'s trial was originally scheduled for February 9, 2004, but was continued at the request of the government.

untenable once the government determined that this exculpatory information had been in its possession all along. *See* Letter from AUSA Friedman to the Honorable Ann O'Regan Keary and Santha Sonenberg, dated April 22.<sup>2</sup> The government also asserted that multiple AUSAs, including supervisors, had not been able to figure out that Mr. Martin's statement – which was recorded on two cassette tapes and memorialized in police notes – constituted *Brady* information until after the government reinterviewed Mr. Martin and obtained a perfunctory and fortuitous recantation in which he denied any direct knowledge of the crime about which he had been able to provide so much detail. Tr. 4/22/04 at 20-24.

3. Although the government knew that the purpose of the April 22 hearing was to address the sixteen-month suppression of Mr. Martin's statement, it failed to volunteer any information to this Court about the efforts made by the government between January 9, 2003 (the date of Mr. T.'s first *Brady* request) and April 16, 2004 (the date on which this information was finally disclosed) to identify and/or locate information responsive to defense counsel's requests. This Court repeatedly tried to elicit information from the government on this topic, but the Court's questions went unanswered. Tr. 4/22/04 at 22, 32-33.<sup>3</sup>

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<sup>2</sup> This letter was attached as Exhibit K to Mr. T.'s Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss the Indictment, dated April 27 (hereinafter "Supplemental Memorandum").

<sup>3</sup> At the April 22, 2004 hearing, the Court twice asked the trial AUSA what efforts he had taken to search the government's files. On the first occasion, the trial AUSA simply did not answer the Court's question, but instead said that his supervisor would address this question:

Q: Once the *Brady* request [wa]s made[,] did you search the police detectives' files who were involved to look for exculpatory information?

4. At a subsequent status hearing on May 6, 2004, the government finally conceded that the suppression of Mr. Martin's exculpatory statement had been a "mistake[]." Tr. 5/6/04 at 4. But other than making vague statements that "things didn't happen" as they should have, *id.* at 4; *see also id.* ("there was one document which was in our files and should have been noticed and followed up on and was not"; "a document, perhaps more than one, but a document in particular was not tracked as it should have been"),<sup>4</sup> the government provided no explanation of what actions, if any, had been taken to comply with the mandate of *Brady* or why those actions had been inadequate. Moreover, although the government committed that it would "redouble . . . [its] efforts to make sure that this doesn't happen again in the future," *id.* at 6; *see also id.* at 9, the government likewise offered no specifics regarding what it would do going forward in Mr. T.'s case to ensure that that all *Brady* information was identified, located and disclosed.

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A: Your honor, you know, I'm not – I'll let Mr. Friedman speak with that [sic].

Tr. 4/22/04 at 22. When the supervisor did not volunteer any information on this point, the Court renewed its effort to get some sort of clarification from the trial AUSA of the efforts made to comply with the mandate of *Brady*. The Court asked if the trial AUSA would be willing to stipulate that he "really didn't do anything in terms of asking . . . police detectives" for *Brady* material. *Id.* at 32. The trial AUSA refused to so stipulate, but also failed to provide the Court with any responsive information. *Id.*

<sup>4</sup> By this point, it was apparent that there was more than "one document" that had not been disclosed. Apart from the notes and cassette tapes of Mr. Martin's interview, the government also disclosed, on the eve of the May 6, 2004 hearing, information about another statement in which a person called "Smurf" was identified as the shooter, as well as information about three other witnesses – earwitnesses to the shooting and eyewitnesses to the shooter's flight – who provided critical corroboration of Mr. Martin's exculpatory statement and identification of a third party as the shooter. *See Supplemental Memorandum at 2, n.3, & 12.*

5. At the May 6 hearing, this Court found that the government had violated its obligations under *Brady* by withholding information about Mr. Martin's exculpatory statement. Tr. 5/6/04 at 9-18. In order to provide defense counsel "the necessary time," *id.* at 15, to make use of the newly disclosed information in her representation of Mr. T., *see also id.* at 18, the Court had to reschedule the trial date. A new date was set for September 9, 2004. *Id.* at 20.

6. The Court declined to grant Mr. T.'s motion to dismiss the indictment on the ground that the "prejudice had been avoided because [the failure to disclose *Brady* information] was discovered prior to the trial." Tr. 5/6/04 at 14. But the Court indicated that Mr. T. would be permitted to present a request to the Court for a lesser sanction for the government's *Brady* violation. Tr. 5/6/04 at 19. The possible lesser remedy that was discussed at the May 6, 2004 status hearing was the preclusion of Mr. Martin's recantation. *Id.*<sup>5</sup>

7. At present, there is no record of the government's efforts to comply with its *Brady* obligations (1) between January 9, 2003 and April 16, 2004, (2) subsequent to April 16, or (3) subsequent to the Court's ruling on May 6.

8. This record is needed to ensure that full *Brady* disclosure is made before trial and that thus the litigation of this case and the protection of Mr. T.'s Due Process rights are not further compromised. Mr. T. is hopeful that the government has, as it represented to the Court on May 6, learned from its mistakes in this case, but he is reluctant to rely on vague assurances that the government will comply with its *Brady*

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<sup>5</sup> Although the Court expressed concern about the allegations of the government's persistent *Brady* nonfeasance, the Court stated that its "role" was solely "to provid[e] a fair trial of this case." *Id.* at 16.

obligations going forward. The government has assured the Court that it operates pursuant to the “get the right guy” doctrine. Tr. 5/6/04 at 7. But assuming the government’s best intentions, it appears that, at least in Mr. T.’s case, this belief that the government only prosecutes when it “get[s] the right guy” precluded the government from identifying, locating, and disclosing information about multiple pieces of *Brady* information: Mr. Martin’s statement, another statement identifying a third party as the shooter, and the existence of three other eye and ear witnesses who corroborate key elements of Mr. Martin’s exculpatory statement. *See* n. 3 *supra*.

9. Furthermore, the fact that a new AUSA has assumed responsibility for prosecuting Mr. T.’s case is encouraging but is not dispositive of the government’s *Brady* compliance going forward; multiple AUSAs, including supervisors, participated in the decision to withhold Mr. Martin’s statement from the defense until April 16. (The government has never given any explanation for the belated production of the other *Brady* information.) The transfer of Mr. T.’s case to a new AUSA raises the question of what this prosecutor has done to familiarize himself with the government’s files and ensure that all *Brady* material has been disclosed and what assistance he has been provided in this endeavor by other AUSA’s in his office with knowledge of this case. To be clear, undersigned counsel has no reason to doubt the new trial AUSA’s efforts to comply with his *Brady* obligations and appreciates the fact that this prosecutor sent out a *Brady* disclosure letter on June 21, 2004, revealing the existence of yet another *Brady* witness. Nonetheless, in this case, where complete disclosure has proven so problematic, undersigned counsel believes a full accounting of the government’s efforts – past and present – to comply with its obligations under *Brady* is warranted in order to avert further

delays in the litigation of this case.

10. In addition, a pre-trial record of the government's efforts to comply with its *Brady* obligations is needed to facilitate the efficient determination of the appropriate sanction for the already documented *Brady* violations in this case. This Court cannot determine whether Mr. T. is entitled to a sanction, such as an adverse inference or some other jury instruction, without complete information about the cause(s) of the documented *Brady* violations in this case and about what efforts the government has taken to rectify problems in disclosure of *Brady* information to Mr. T. going forward.

11. If, as promised, the government has already taken a hard look at this case in the three months since the Court's ruling to ensure "that Mr. T. is not unfairly prosecuted for something that he didn't do," Tr. 5/6/04 at 9, Mr. T.'s request for such a report should not unduly burden the government, nor should it delay Mr. T.'s trial. To the contrary, it should ensure that, this time, Mr. T.'s trial proceeds as scheduled.

12. Accordingly, Mr. T. respectfully requests that this Court issue an order requiring the prosecution to file a report no later than four weeks before trial (August 13) detailing the efforts made in this case to comply with its *Brady* obligations. If after this report is filed, questions about the completeness of the government's search for and disclosure of *Brady* information remain, Mr. T. may then request a pre-trial hearing to confirm that all favorable information to which he is entitled pursuant to *Brady* has been disclosed.

## ARGUMENT

### POINT I

#### **THIS COURT HAS THE RIGHT AND THE RESPONSIBILITY TO REVIEW AND ASSESS THE SUFFICIENCY OF THE GOVERNMENT’S EFFORTS TO COMPLY WITH ITS *BRADY* OBLIGATIONS IN THIS CASE.**

The existence of the government’s obligation to look for *Brady* materials in the files of the prosecution team is clear cut: A prosecutor has a “duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.” *Kyles*, 514 U.S. at 437; *see also Brady*, 373 U.S. 383. This Court similarly has clear authority – under Rule 57(b) of the Superior Court Rules of Criminal Procedure and pursuant to its inherent authority to regulate the proceedings before it and to uphold the Constitution – to review and assess the sufficiency of the government’s efforts to comply with its *Brady* obligations particularly in this case.

Courtroom procedures for the most part are dictated by statute and court rules, as well as by constitutional requirements; but, in addition, the trial court has inherent authority, unless otherwise specifically precluded, to control the conduct of the proceedings before it, in order to ensure that . . . all parties are treated fairly, and that justice is done.

*Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. 1994); *see also In Re Jam J.*, 825 A.2d 902, 917 (D.C. 2003) (quoting *Hicks-Bey*). Moreover, as a guardian of the Constitution, *Powell v. Alabama*, 287 U.S. 45, 52 (1932), this Court has a responsibility to ensure the fairness of Mr. T.’s trial, which encompasses a responsibility to ensure that the government has fulfilled its *Brady* obligations to identify, locate and disclose all evidence favorable to the defense in its possession.

**1. Rule 57(b) and this Court's inherent power provide this Court with ample authority to grant the requested relief.**

Rule 57(b) gives this Court broad power to regulate the proceedings before it and to “cope with the complexities and contingencies inherent in the adversary process.” *Jordan v. United States*, 633 A.2d 373, 376 (D.C. 1993) (quoting *Geders v. United States*, 425 U.S. 80, 86-87 (1976)). Specifically, Rule 57(b) provides that “when there is no controlling law,” that the trial court “may regulate practice in any manner consistent with applicable law and these Rules.” *See also Yeager v. Greene*, 502 A.2d 980, 985 (D.C. 1985) (“The Superior Court Rules of Criminal Procedure expressly give discretion to the trial court to promulgate rules regarding courtroom procedures ‘in any lawful manner’ where no other rule or statute specifically prohibits such a practice or provides for a contrary practice to be implemented.”)<sup>6</sup> Given that there is no rule or statute prohibiting the oversight of the government’s *Brady* disclosure – to the contrary, such oversight is compelled when the Court is made aware that *Brady* obligations are not being met, *see infra* – this Court may rely on its powers under Rule 57(b) to grant the relief requested in this case.<sup>7</sup>

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<sup>6</sup> The Court in *Yeager* also observed that the comparable federal rule could be relied upon for guidance in interpreting the scope of the D.C. rule. *See* 502 A.2d at 986 n.12. The Court further explained that the drafters of the federal rule “specifically intended [Rule 57(b)] to give trial courts considerable discretion in implementing procedures relating to the conduct of jury trials.” *Id.* (citing Fed. R. Crim. P. 57 Advisory Committee Note).

<sup>7</sup> Rule 16 cannot be construed as any impediment to an exercise of this Court’s inherent authority in this case. Even with respect to judicial oversight of discovery, Rule 16 is not a “general limitation on the trial court’s broad discretion as to evidentiary questions at trial.” *United States v. Nobles*, 422 U.S. 225, 236 (1975). But, of course, disclosure mandated by *Brady* is not a rule of discovery and is not addressed by Rule 16. *See Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (“*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation . . . [that] is necessary to ensure the effective administration of the criminal justice system”) (internal quotations and citation omitted); *see also Boone v. United States*, 769 A.2d 811, 821 (D.C. 2001) (rejecting

Apart from Rule 57(b), this Court, of course, has inherent power to both to ensure the “fundamental fairness” of criminal proceedings and to promote “administrative efficiency.” See *United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975); see also *United States v. Edelin*, 134 F. Supp. 2d 45, 48 (D.D.C. 2001) (trial court has inherent judicial power to provide procedures necessary for “just and efficient resolution” of judicial proceedings); *In Re Jam J.*, 825 A.2d at 917 (trial court has inherent authority to “control the conduct of the proceedings before it,” “to ensure that . . . all parties are treated fairly, and [to see] that justice is done”); *Hicks-Bey*, 649 A.2d at 575 (same); *Oesby v. United States*, 398 A.2d 1, 10 (D.C. 1977) (“recogniz[ing] that a trial judge is accorded broad discretion in supervising trial proceedings”).

In this instance, both justifications for the exercise of inherent authority – ensuring fairness and promoting efficiency – are implicated; indeed, “the latter help[s] to effectuate the former.” *Holmes*, 343 A.2d at 277. By ordering the government to file a report detailing its efforts to comply with its obligations under *Brady*, the Court can ensure that the government has done all that it should do under the circumstances of this case to fulfill its duties under *Brady* to learn of and disclose all information favorable to the defense. See *Kyles*, 514 U.S. at 437-38. It thereby can ensure that Mr. T.’s Due Process rights and right to the effective assistance of counsel are protected. In so doing, it will substantially lessen the possibility that additional *Brady* information will come to light during or after trial, thus disrupting trial proceedings, or, if Mr. T. is convicted, necessitating the commencement of post-conviction proceedings. Cf. *Boyd v. United States*, 586 A.2d 670, 675 (D.C. 1991) (ascertaining validity of waiver of right to testify

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argument that *Brady* disclosure can be regulated by *Jencks* Act).

pre-trial allows “trial judge [to] address concerns at a time when problems can be rectified before the community’s resources are expended on a trial”); *Monroe v. United States*, 398 A.2d 811, 818 (D.C. 1978) (inquiry into adequacy of assistance pre-trial gives the trial court the “opportunity to take steps to eliminate any deficiencies in the representation of counsel before the resources have been invested in a full-blown trial”).

The requirement that the government report to the court or proffer evidence justifying its actions at a hearing is hardly a novel procedure. Trial courts exercise their inherent authority to demand information from litigants all the time, and the Supreme Court and the D.C. Court of Appeals have repeatedly endorsed this exercise of power particularly where, as here, no privilege militating against disclosure can conceivably exist. *See, e.g., Nobles*, 422 U.S. at 231 (“Decisions of this Court repeatedly have recognized the federal judiciary’s inherent power to require the prosecution to produce” discovery); *Holmes*, 343 A.2d at 276-77 (trial court has inherent authority to order prosecution to disclose names of witnesses not otherwise required by rules of criminal procedure); *cf. United States v. Jones*, 438 A.2d 444, 446 (D.C. 1981) (rejecting trial court’s inherent power to order pre-trial disclosure in context of resolving a severance motion and distinguishing from power to order disclosure “to aid the defendant in the preparation and presentation of his defense,” a situation that has “constitutional dimensions”); *Bowman v. United States*, 412 A.2d 10, 12 (D.C. 1980) (trial court’s authority to compel discovery in criminal cases, stemming from, among other things, the Supreme Court’s decision in *Brady*, did not encompass power to order defense counsel to disclose his theory of the case pre-trial).

But even if the imposition of a reporting requirement were in some way innovative, it would still be within this Court's power. The exercise of a trial court's inherent authority to mandate "innovative trial procedures . . . [is] acceptable as long as the[se procedures] are administered carefully and meet the requirements of due process." *Hicks-Bay*, 649 A.2d at 575 (internal quotation and citation omitted). The proposed report is not contrary to Due Process; it is in furtherance of it. It simply allows the Court to verify the government's compliance with its "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles*, 514 U.S. at 437.

**2. *This Court's role as a guardian of the Constitution provides further foundation to grant this motion.***

Rule 57(b) and this Court's inherent powers are mechanisms for this Court to fulfill its constitutionally mandated function "to see that . . . [the defendant is] denied no necessary incident of a fair trial." *Powell*, 287 U.S. at 52. At stake here are Mr. T.'s rights to Due Process and the effective assistance of counsel. It is well- established that a trial court has the power to authorize an inquiry in order to ensure that a defendant's Fifth and Sixth Amendment rights are not being violated.

The incomplete disclosure of *Brady* information prior to trial in Mr. T.'s case threatens both his right to Due Process and his right to the effective assistance of counsel. "[D]elay[ed disclosure of *Brady* information] may imperil a defendant's right to a fair trial." *Curry v. United States*, 658 A.2d 193, 197-98 (D.C. 1995) (internal quotations and citations omitted); *see also United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985) (prosecutor has a duty "to assist the defense in making its case" "to ensure that a miscarriage of justice does not occur"). One of the reasons suppression or delayed