

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

UNITED STATES	:	
	:	Criminal No. F-8237-02
v.	:	Honorable Ann O'Regan Keary
	:	Trial Date: April 22, 2004
L.T.	:	

**MOTION TO DISMISS THE INDICTMENT AND INCORPORATED
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

L.T., by and through undersigned counsel, respectfully moves this Honorable Court, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and his rights to due process of law, fundamental fairness and a fair trial, embodied in the Fifth and Sixth Amendments to the United States Constitution, and pursuant to D.C. Super. Ct. R. 16(d), to dismiss the indictment against him with prejudice.¹ In the lesser alternative, if the Court is unwilling to dismiss the indictment with prejudice, it should be dismissed without prejudice and the government should be required to re-indict the case, presenting to the grand jury the Brady witness who described someone other than Mr. T. as the shooter in this case, since that witness was known to the government on December 17, 2002, seven days before Mr. T. was even arrested. An evidentiary hearing is requested on this motion.

In support of this motion, counsel states the following:

1. Mr. T. is charged by indictment with one count of first-degree premeditated murder while armed, in violation of D.C. Code §§ 22-2101 and 4502, and one count of possession of a firearm during a crime of violence, in violation of D.C. Code § 22-4504(b). Trial is scheduled for April 22, 2004.

¹See United States v. Dollar, 25 F.Supp. 2d 1320 (N.D. Ala 1998) (dismissing indictment with

2. The homicide with which Mr. T. is charged occurred on November 25, 2002.

3. As disclosed to undersigned counsel on April 16, 2004, on December 17, 2002 Dammien Eugene Martin (PDID No. 518-753) was arrested and provided information to law enforcement agents regarding Sean Kelly's death indicating that he was an eyewitness to the homicide and providing a description of the shooter that decidedly did not match L.T.. This information was contained within the Metropolitan Police Department's Homicide jacket in Mr. T.'s case and that jacket contained both written notes as well as a taped interview with Mr. Martin, clearly items that fall within the ambit of Superior Court Criminal Rule 16(a)(1)(C) as material to the defense.

4. Mr. T. was arrested on December 23, 2002 and presented on the complaint in this case on December 24, 2002. The initial request for discovery in this case, was filed on January 10, 2003, at the time of Mr. T.'s detention hearing and was reiterated on March 31, 2003. The initial request included requests for exculpatory information pursuant to Brady v. Maryland as well as all Superior Court Criminal Rule 16 information to which Mr. T. was entitled. See Exhibit A (January 10, 2003, Notice of Filing) (appended hereto). All of these requests were memorialized in a "Rosser" letter dated January 9, 2003, and filed in the court jacket on January 10, 2003. Id. They were reiterated in a letter dated March 31, 2003, and filed in the court jacket on April 1, 2003.

5. A detention hearing was held in this case on January 27, 2003, and this Court ordered that Mr. T. be held without bond pursuant to D.C. Code §23-1325(a), in which status he has remained over the last sixteen months.

6. On April 2, 2003, the government provided limited documentary discovery but did not disclose any information about Mr. Martin's taped statement (or the documents memorializing the December 17 interview with him) in which he stated that he was an eyewitness to the decedent's shooting and described someone other than Mr. T. as being the shooter.

7. D.C. Super. Ct. Crim. R. 16 instructs the attorney for the government to provide discovery of items that fall within the ambit of Rule 16 "upon request of the defendant."

ARGUMENT

It is axiomatic that this Court is empowered to impose sanctions, including dismissal of the indictment, upon the government for its failure to provide timely discovery. SCR-Crim. 16(d). In Mr. T.'s case undersigned counsel made an initial discovery request on January 9, 2003, the day before the first date scheduled for Mr. T.'s detention hearing.² The government did not provide discovery in response to this discovery request. A further discovery request was made on March 31, 2003, and the government provided limited discovery a few days thereafter, but included no information about Mr. Martin's description of the shooter as someone other than Mr. T..

Brady compels the government to provide at the very least the names of Brady witnesses. Jackson v. United States, 329 A.2d 782, 788 (D.C. 1974). See also Catlett v. United States, 545 A.2d 1202, 1217 (D.C.1988) (citing with approval the trial court's order that the government turn over the names of "any eyewitness who knew [the accused] before the crime and failed to

² Ultimately, the detention hearing did not occur until January 27, 2003 when Mr. T.'s case was certified to this Court from the Honorable Patricia Broderick based upon her knowledge of the

identify [him] as a participant). The Court in Robinson v. United States, 797 A.2d 698, 709 (D.C. 2002), specifically noted that the request for the names and address of a witness whose testimony at trial was favorable had not been requested pursuant to Brady, but that if it had been, and if the witness were exculpatory, it would have been appropriate for the government to turn over the witnesses' identifying information. Robinson, 797 A. 2d at 709.

Moreover the government's Brady obligations "encompass[] evidence known only to police investigators and not to the prosecutor." Strickler v. Greene, 527 U.S. 263, 280-01 (1999). See also Kyles v. Whitley, 514 U.S. 419, 438 n. 11 (1995). Indeed, in Strickler, the Supreme Court specifically recognized that prosecutorial pleas of "inadvertence" were beside the point because "the prosecutor is responsible for 'any favorable evidence known to others acting on the government's behalf in the case, including the police.'" 527 U.S. at 275 n. 12, quoting Kyles, 514 U.S. at 437.

It was not until six days before the April 22, 2004, trial date, and after the February 9, 2004, trial date was continued at the government's request, and after a hearing on the morning of April 16, 2004, relating to, *inter alia*, other Brady information sought on Mr. T.'s behalf, see April 13, 2004, Motion To Compel Pre-Trial Disclosure of Brady Information, that the government disclosed the existence of Mr. Martin, about whom it had had knowledge since before Mr. T. was even arrested. Moreover, strategically the government waited until approximately noon on April 16, 2004, after it had had the opportunity to meet with and speak with Mr. Martin, and secure a signed statement recanting his taped December 17, 2002, version of events, before it disclosed to Mr. T.'s counsel his existence, provided the notes regarding his December 17, 2002, interview, and disclosed the

decedent over whose case she had presided in the Family Division.

existence of the tape-recorded statement of Mr. Martin describing the shooter as someone other than L.T.. Thus, undersigned counsel was precluded from investigating this witness in the nearly year-and-a-half since Mr. T.'s arrest on December 24, 2002. Such a delay in disclosure is inexcusable and should result in dismissal of the charges against Mr. T..

In Berger v. United States, 295 U.S. 78 (1935), the unique position of a prosecutor in a criminal case:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. at 88.

The Court of Appeals in this jurisdiction has made it unmistakably clear that “the prosecution must disclose exculpatory material ‘at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure.’” Edelen v. United States, 627 A.2d 968, 971 (D.C. 1993), citing United States v. Pollard, 175 U.S.App. D.C. 227, 236, 534 F.2d 964, 973, *cert. denied*, 429 U.S. 924 (1976). See also Sterling v. United States, 691 A.2d 126, 134 (D.C. 1997) (“The government’s failure to disclose material evidence to the accused results in a deprivation of due process. . . .Therefore, the prosecution must disclose such material in time for the defense to use

the ‘favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pretrial disclosure.’”), citing Edelen; Curry v. United States, 658 A.2d 193 (D.C. 1995).

In this case, the government’s failure to disclose the information about Mr. Martin before indictment interfered with fully investigating Mr. T.’s case and has given the government the opportunity to speak with Mr. Martin and secure his recantation before disclosing his existence. This tactical hiding of an exculpatory witness offends all notions of fundamental fairness and due process. Regardless of the government’s opinion regarding the veracity of Mr. Martin’s December 17, 2002, information, as of that date, one week before L.T. was even arrested, the government possessed information that exculpated Mr. T..

Despite a request as early as January 9, 2003, for “any failures to provide the police or the government with information testified to at trial,” “any and all prior inconsistent, non-corroborative, or other witness statements which do not reflect the trial testimony,” and “any and all witnesses who do not fully corroborate the government’s case or who serve to impeach the government’s evidence,” the government failed to provide that information on any of the following dates:

December 24, 2002: Presentment

January 10, 2003: Detention hearing (continued)

January 16, 2003: Detention hearing (continued)

January 26, 2003: Detention hearing (continued)

January 27, 2003: Detention hearing

May 16, 2003: Felony status conference

September 8, 2003: Felony status conference

September 23, 2003: Arraignment

November 7, 2003: Status hearing

January 30, 2004: Status hearing on government’s motion to continue trial date of 2/14/04

April 16, 2004: Status hearing and argument on Brady motion filed April 13, 2004

The government also failed to provide the information in response to written requests of January and March, 2003. The government also failed to disclose the existence of Mr. Martin's December 2002 version of events on January 30, 2004, when it sought a continuance of the February 9, 2004, trial date. The government failed to disclose it on April 16, 2004, in open court during a hearing on Brady issues, all be they different Brady issues than witnesses whose version of events differed from their theory of prosecution. The government waited until after it had spoken to Mr. Martin at approximately 11:00 a.m. on April 16, 2004, and secured a signed recantation of his December 17, 2002, taped statement to disclose his existence to Mr. T.'s counsel. This Court must not countenance such blatant and appalling abrogation of the government's obligations under Brady.

Because this Court is sitting as a trial court, and is not reviewing a failure to disclose Brady material after the fact of a conviction, the Court need not engage in hypothesizing about the effect of eleventh-hour Brady disclosures after a conviction. Moreover, unless there are meaningful consequences to the Office of the United States Attorney for such flagrant, outrageous and late disclosure of Brady information, the government will have no incentive to provide exculpatory information when the government learns of it as is required by law. United States v. Starusko, 729 F.2d 256, 261-265 (3rd Cir. 1984) (discussing trial courts' role in monitoring the conduct of prosecutors who "play games with both . . . [trial] courts and defense counsel, unmindful of their ethical obligations as 'ministers of justice'"), cited in Curry, *supra*, 658 A.2d at 197. As such, dismissal of the indictment, under Superior Court Criminal Rule 16(d), for the government's failure to provide documents and tangible evidence, *i.e.*, the notes of the December 17, 2002, interview

with Mr. Martin and the tape recording of his statements on that day, as documents and tangible evidence “material to” the defense, see SCR-Cr. 16(a)(1)(C), would have a deterrent effect against future transgressions by the Office of the United States Attorney. Lesser sanctions would amount to nothing more than judicial “slaps on the wrist” and would not provide any incentive for the government to comply with their constitutional obligations in future cases. See United States v. Serubo, 604 F.2d 807, 817-18 (3rd Cir. 1979) (“dismissal may be virtually the only effective way to encourage compliance with ethical standards . . .”). Mr. T.’s constitutional right to due process also compels dismissal of the indictment. Indeed, in Curry v. United States, 658 A.2d 193 (D.C. 1995) the Court of Appeals for the District of Columbia stated:

Brady is not a discovery rule but a rule of fairness and minimum prosecutorial obligation. Effective compliance with the prosecution’s responsibilities under Brady is necessary to ensure the effective administration of the criminal justice system . . . [A] prosecutor’s timely disclosure obligation with respect to Brady material cannot be overemphasized, and the practice of delayed production must be disapproved and discouraged. . . [D]elay may imperil a defendant’s right to a fair trial, and a conscientious prosecutor will not countenance it.

658 A.2d at 197 (citations omitted).

The government’s nearly eighteen-month delay in disclosing Mr. Martin’s existence while Mr. T. remained held without bond for almost a year-and-a-half and until the government strategically had secured a signed recantation of the exculpatory statement must not go unpunished. See Curry, 658 A.2d at 197 (“Delay in apprising defense counsel of the existence of [a Brady] witness . . . may render eventual belated disclosure ineffectual”). In this case, the belated disclosure is ineffectual because the government waited until it had secured a recantation of the exculpatory statement to disclose it to Mr. T.’s counsel.

If this Court is unwilling to dismiss the indictment with prejudice, at the very least it should dismiss the indictment and require that the government re-indict the case presenting Mr. Martin's testimony (or hearsay testimony by way of the officers who interviewed him on December 17, 2002, and the tape of his interview on that date) to the grand jury. Had the government presented Mr. Martin's testimony (or other evidence regarding the version of events he provided on December 17) to the grand jury before indicting Mr. T., no recantation by Mr. Martin would have existed since that did not occur until April 16, 2004. By requiring the government to re-indict Mr. T. and presenting Mr. Martin's versions of events (including his December 17, 2002 version), the Court can at the very least restore the *status quo ante* to what should have been done by the government *ab initio*. The American Bar Association Standards³ clearly states that prosecutors should present exculpatory evidence to the grand jury.

WHEREFORE, for the foregoing reasons and any others that appear to the Court, Mr. T., through undersigned counsel, respectfully requests that this Honorable Court dismiss the indictment in this case with prejudice.

Dated: April 19, 2004

³ American Bar Association Standards for Criminal Justice, The Prosecution Function, (3d d. 1993), Standard 3-3.6(b)("[n]o prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense").

Respectfully submitted,

Santha Sonenberg (D.C. Bar No. 376-188)
On Behalf of L.T.
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 824-2308

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Motion To Dismiss The Indictment and the Incorporated Memorandum of Points and Authorities in Support Thereof was served by hand (and by telecopier at (202) 307-2022) on Assistant United States Attorney Douglas Klein, United States Attorney's Office, 555 Fourth Street, Washington, D.C., on this 19th day of April, 2004.

Santha Sonenberg

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

UNITED STATES	:	
	:	Criminal No. F-8237-02
v.	:	Honorable Ann O'Regan Keary
	:	Trial Date: February 9, 2004
L.T.	:	

ORDER

This matter having come before the Court on L.T.'s Motion To Dismiss The Indictment and the Incorporated Memorandum of Points and Authorities in Support Thereof, filed herein on April 19, 2004, and good cause having been shown, it is this _____ day of April 2004, **HEREBY ORDERED** that the Motion is **GRANTED** and that the indictment against mr. T. is dismissed with prejudice.

Copies To:

Santha Sonenberg
Public Defender Service
633 Indiana Avenue, N.W.
Washington, D.C. 20004
FAX: (202) 824-2437

Douglas Klein
Office of the United States Attorney
555 Fourth Street, N.W.
Washington, D.C. 20001
FAX: (202) 307-2022

Ann O'Regan Keary
Associate Judge
D.C. Superior Court