

**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>Trial Date: (Continued from</b>
<b>L.T.</b>	:	<b>April 22, 2004)</b>

**SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF MOTION TO DISMISS THE INDICTMENT, OR  
ANTECEDENT TO A RULING ON THE MOTION,  
IN SUPPORT OF A REQUEST FOR AN EVIDENTIARY HEARING**

In many ways this is a run-of-the-mill case. A misdeed was committed, and the wrongdoers did their best to keep from being found out. When their actions were questioned, they denied any impropriety and pointed the finger at others. Eventually forced to own up, they did so only partially and grudgingly, minimiz[ing their] involvement in the . . . conduct and . . . not fully accept[ing] responsibility . . . . A run-of-the-mill case in many ways, but with a twist.

*United States v. Kojayan*, 8 F.3d 1315, 1316 (9th Cir. 1993).

As in *Kojayan*, the twist in this case is that the misdeed is the government's violation of its obligations under *Brady v. Maryland* to disclose material, exculpatory information to the defense in a timely fashion, and the wrongdoers are members of the United States Attorney's Office (USAO). When confronted by this Court at a hearing on April 22, 2004, about its failure to disclose the existence of some of the *Brady* evidence in Mr. T.'s case<sup>1</sup> – notes and tapes from a police interview on December 17, 2002, with an eyewitness who gave a detailed account of the crime but described someone other than Mr. T. as the shooter – the government denied having done anything improper; indeed, it tried to argue that the statement of this second, contradictory eyewitness in a one-eyewitness case was not *Brady* material at all. At the same time, the

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<sup>1</sup> The government could not be confronted at this hearing about the other *Brady* evidence in its possession, because its existence was not disclosed until the evening of April 26, 2004 – last night. See pp. 2-3 *infra*.

government tried to pass the buck and blame the Metropolitan Police Department (MPD) for the withholding of this evidence until six days prior to trial, by noting that it was “important” that this information had never been given to the USAO by the police. Tr. 4/22/04 at 25. But this fallback position proved less than persuasive to this Court – which recognized that the government is responsible for locating *Brady* evidence in police files, *id.* at 26<sup>2</sup> – and has since been demonstrated to be false, given the disclosure by the USAO after the hearing that the notes from Mr. Martin’s interview had, in fact, been in the possession of the United States Attorney’s Office all along.

The instant Motion to Dismiss is based on the government’s withholding of Dammien Martin’s exculpatory and material statement, made on December 17, 2002, but the scope of the government’s withholding of *Brady* evidence is expanding daily, and its last minute disclosures are continuing. Just last night, the government faxed this Court and undersigned counsel information about statements from four other witnesses – three the government names, the fourth the government refuses to identify for questionable “security” reasons,<sup>3</sup> *see* Ex. A (Fax from

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<sup>2</sup> Even the government was forced to concede that the statement was “known to the government as a whole.” Tr. 4/22/04 at 32.

<sup>3</sup> The government’s “security” concerns with respect to Mr. T. are bogus. This new witness is not implicating Mr. T. in the charged crime; he is a source of material, exculpatory information that Mr. T. was *not* the shooter. *See* Ex. A (Government’s Request for Forthwith Hearing Regarding Disclosure of Additional Information ¶ 2) (indicating that “Smurf” was the shooter). Similar illegitimate “security” concerns were raised in *United States v. Andrew Cooper*, *see* Ex. B (Sampling of Recent *Brady* Timing Abuses by the United States Attorney’s Office for the District of Columbia, revised 4/27/04) (government withheld name of *Brady* witness based on “security” concerns; later revealed that witness was one of the complainants). In *Cooper*, it turned out that the witness was named in the indictment, and the government acknowledged on appeal that the security concerns raised before the trial court had been illegitimate. Thus, there is no real basis for the government to withhold the identity of this witness from Mr. T.. If the government is truly worried that Smurf will learn that this unidentified witness has implicated Smurf in the shooting, the government need only tell defense counsel who Smurf is and ask for a protective order that precludes defense counsel from telling Smurf.

AUSA Klein to the Honorable Ann O'Regan Keary and Santha Sonenberg, dated April 26, 2004 at 5:56 p.m.) (Government's Request for Forthwith Hearing Regarding Disclosure of Additional Information at n. 1) – who provide critical corroboration of Mr. Martin's December 17, 2002, statement and of his identification of someone other than Mr. T. as the shooter. *See* Ex. A. With respect to the new, unnamed witness, the government seems to be at it again – it has withheld *Brady* information until beyond the last minute, and now, in an effort to gain strategic advantage, it “intends to interview” this witness before defense counsel is even notified of this witness' identity, so that it can “fix” any problems that this witness' account of the crime might pose for the government's theory of the case.<sup>4</sup>

The Court could easily grant Mr. T. the relief he seeks – dismissal of the indictment with prejudice – on the record as it now stands. Granted, the USAO has not yet settled on its official excuse for the now-multiple *Brady* violations that have been revealed, and a number of questions have yet to be answered, including:

- In a weak, one-eyewitness case, with no physical or forensic evidence, how could the government lose track of a statement by a second eyewitness giving a comprehensive account of the crime and a detailed description of the shooter, especially when this statement does not conform with the government's pre-existing theory of the case?
- Why was Mr. Martin's December 12, 2002 statement only found on April 9, 2004, 16 months after its creation, 14 months after defense counsel's first *Brady* request, two months after the first continued trial date, and just 13 days prior to trial?

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<sup>4</sup> It cannot be overemphasized that just two weeks ago, none of this *Brady* material – the statements by these four witnesses or the statement of Dammien Martin on December 17, 2002 – was known to undersigned counsel, and that these additional four witnesses were just disclosed to counsel last night. Undersigned counsel are making every effort to get a handle on the facts, and to be as accurate as possible in their presentation, but the government's late-breaking disclosures complicate this task enormously.

- What, if anything, did anyone at the USAO do to look for responsive material to defense counsel's multiple *Brady* requests prior to April 9, 2004?
- How could multiple supervisors at the USAO possibly have come to the conclusion that, in a one-eyewitness case, Mr. Martin's eyewitness account identifying someone other than Mr. T. as the shooter was not *Brady* evidence and therefore did not have to be immediately disclosed after it was belatedly "found" in the lead detective's file?
- How is it that the government is just now locating even more *Brady* material that has never been disclosed to this Court or produced to defense counsel?

Nonetheless, the admissions and contradictory statements that the government has already made in its pleadings and before this Court unquestionably establish that Mr. T.'s Due Process rights have been violated, and that this violation was the product of the USAO's reckless disregard for, if not willful defiance of, the mandate of *Brady*. Dismissal is accordingly warranted on the current record.

If, however, this Court determines that the record of the government's misconduct in Mr. T.'s case is not, as yet, a sufficient basis to dismiss the indictment against Mr. T., it must grant his request for an evidentiary hearing on the government's misconduct prior to ruling on Mr. T.'s Motion. Only by putting the relevant witnesses implicated in the multiple *Brady* violations in this case on the stand and subjecting them to the penalty of perjury will this Court be able to determine the real parameters of the government's misconduct in Mr. T.'s case. Moreover, although the government tried to argue at the April 22 hearing before this Court that this case was "an extreme aberration," Tr. 4/22/04 at 26, there is ample evidence to the contrary, which Mr. T. should be permitted to put before this Court. Indeed, as demonstrated by the sampling of cases originally attached to Mr. T.'s Reply – whose size has doubled since Mr. T.'s previous filing as more examples of the government's recent *Brady* violations have come to Mr. T.'s attention, *see* Ex. B, there appears to be an accepted policy or practice at the United States

Attorney's office (1) to presume that nothing is sufficiently exculpatory and/or material to be *Brady*, and (2) if evidence is deemed *Brady* material, to withhold that evidence for as long as possible.<sup>5</sup> Mr. T. is confident that the additional evidence set forth at a hearing on the government's *Brady* abuses in his own and other cases will provide the Court with an unassailable justification for dismissal of his indictment with prejudice.

### **POINT I**

**IN THIS WEAK, ONE-EYEWITNESS CASE, THE EXISTENCE OF A STATEMENT BY A SECOND EYEWITNESS PROVIDING A COMPREHENSIVE ACCOUNT OF THE CRIME AND A DETAILED DESCRIPTION OF THE SHOOTER THAT DOES NOT MATCH MR. T. IS UNQUESTIONABLY MATERIAL, EXCULPATORY EVIDENCE THAT SHOULD HAVE BEEN PROMPTLY DISCLOSED UNDER *BRADY V. MARYLAND*.**

In an effort to excuse its failure to disclose Mr. Martin's *Brady* material to Mr. T. at any point in 2003, or even on April 9, 2004, when AUSA Klein purportedly "found" it, the government now appears to be trying to paint this as an extremely difficult case, where reasonable people could disagree about whether or not Mr. Martin's statement was, in fact, *Brady* evidence. Before this Court, the government represented that they had been confronted with "cryptic" notes that could be "interpret[ed] . . . either way," and that the multiple Assistant United States Attorneys (AUSAs) who examined this material saw this as a "borderline situation." Tr. 4/22/04 at 21, 23; *see also id.* at 20 ("in our mind it was open"). For this reason, AUSA Klein asserted that the government "needed to speak to" Mr. Martin before it could figure out if his statement was *Brady* material that had to be disclosed. *Id.* at 23.

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<sup>5</sup> Mr. T.'s case introduces a third element into this policy – that is, to attempt to "fix" any *Brady* evidence before it is belatedly disclosed.

This new argument – which is inconsistent with the government’s initial argument in its Opposition to Mr. T.’s Motion to Dismiss that disclosure of this acknowledged *Brady* evidence six days prior to trial was timely, *see* Gov’t Opp. ¶ 6; *see* also Tr. 4/22/04 at 20 (this Court notes the inconsistency in the government’s arguments) – further demonstrates the government’s total disregard for its *Brady* obligations. Simply stated, if, in this one-eyewitness case, a statement by a second eyewitness, giving a comprehensive account of the crime and a detailed description of the shooter that did not match Mr. T., is not material, exculpatory information within the meaning of *Brady*, then nothing is ever *Brady* material. Furthermore, the government’s assertion that multiple AUSA’s only realized that Mr. Martin’s identification of the shooter was “definitely *Brady*” after they had obtained a recantation from Mr. Martin, Tr. 4/22/04 at 22, defies common sense and is beyond belief.

**A. Mr. Martin’s December 17, 2002, Statement Provides A Comprehensive Account Of The Crime And A Three-Dimensional Portrait Of The Shooter.**

What constitutes *Brady* evidence must, of course, be examined in context. In this case, the government has charged Mr. T. with first-degree murder for a shooting at 200 K Street, S.W., that took place on November 25, 2002. In the investigation that followed the crime in late November 2002 and early December 2002, the government apparently latched on to Mr. T. as a suspect. The government’s evidence against Mr. T. was slim; the investigation turned up no physical evidence implicating him – no gun was recovered, and no fingerprints or other forensic evidence connected him to the crime. All the government had was one eyewitness who identified Mr. T. as the shooter and a possible motive, namely the fact that Mr. T. had been carjacked by the decedent the day before the shooting. *See* Ex. C (PD 163 Form and PD 252 Form), Ex. D (Affidavit in Support of an Arrest Warrant, dated December 19, 2002, signed by

AUSA Friedman) & Ex. E (Affidavit in Support for a Search Warrant, dated December 19, 2002, signed by AUSA Friedman).

An entirely new avenue of investigation opened up for the government on December 17, 2002, when the police interviewed Dammien Martin. In a lengthy interview recorded on two cassette tapes, Mr. Martin gave a comprehensive account of the crime and a detailed description of the shooter. *See* Ex. F (Transcript of Interview with Damian Martin<sup>6</sup> on December 17, 2002).<sup>7</sup> The problem for the government was that Mr. Martin identified someone other than its chosen suspect – Mr. T. – as the culprit.

Mr. Martin told the police that on the afternoon of November 25, 2002, he was out shooting dice “on the top of K Street.” Ex. F at 42, 50.<sup>8</sup> Mr. Martin apparently identified his location on a map and specified that he was on K Street “on top of the alley right here.” *Id.* at 50. Around two o’clock in the afternoon, *id.* at 51, Mr. Martin saw a brand new, four-door white Camry with a paper tag in the window pull up. *Id.* at 48-51.

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<sup>6</sup> Mr. Martin’s first name is alternately spelled Dammien, Damien, and Damian throughout government records.

<sup>7</sup> Mr. T. will submit a copy of the tapes to the Court if the Court wishes to review them.

<sup>8</sup> What immediately becomes clear from a review of the transcript of Mr. Martin’s interview is that the police, presumably eager to bolster what they knew was a weak case, were intensely interested in obtaining additional information about the November 25 shooting from Mr. Martin. Although Mr. Martin was initially hesitant to acknowledge that he was an eyewitness, the police pressed him repeatedly to tell them what he knew about the shooting. *See* Ex. F at 33 (“You sure that’s all you know . . . You don’t know nothing else?”), 38 (telling Mr. Martin his account of what he “heard” about the crime was just “hearsay”); 40 (telling Mr. Martin that he had just gotten off the phone with homicide and that “they don’t want to waste their time”); *see also id.* at 21-26, 30-33. The police’s confidence that Mr. Martin had information to give them was not misplaced; although Mr. Martin initially gave a description of the crime that he said he had gotten from friends, he eventually slipped up when giving his account and revealed that he too was present at the scene. *Id.* at 23 (“But when *we* turned around . . . he was already dead”) (emphasis added).

Mr. Martin said that he watched the shooter walk over to the decedent and his companion, a man Mr. Martin identified by the name “Smurf.” Ex. F at 51. The shooter gave Smurf a handshake. *Id.* at 51, 56. Then, while he was “up close,” he “turned around,” “pulled [a gun] out of his pocket,” *id.* at 51, 56-57, and shot the decedent “in broad daylight.” *Id.* at 51; *see also id.* at 57 (identifying the gun as some sort of “black” “autom[at]ic”). After the decedent fell to the ground, *id.* at 57, the shooter “stood overtop of him,” and “shot him a couple of more times in the head.” *Id.* at 51, 57 (specifying that the shooter shot the decedent “three or four” more times). Mr. Martin specifically described the sound of the gun shots: “He [the shooter] pulled it [the gun] out. Everybody was like, oh, shit. Boom. Then down. Boom, boom, boom.” *Id.* at 58. Mr. Martin said that he then saw the shooter “[g]et[] back in the car and roll[] off.” *Id.* at 51. After the shooting, Mr. Martin said that “everybody” including himself “just ran.” *Id.* at 51-52. Mr. Martin said that he came back to the scene “a little later” and the decedent’s body was still “on the ground.” *Id.* at 52.

Mr. Martin emphasized that the decedent was shot “right in front of [him],” Ex. F at 50, and he apparently identified the location of the shooting on a map, *id.* at 50 (“he got killed on this side right here.” “Right here?” “Yeah he got killed right here.”). Accordingly, he was able to give a detailed description of the shooter, who he knew from the neighborhood, which turned out to be quite distinctive. The shooter was “tall, probably a little darker than [me] with long plaits,” was “probably about 6’1,” and was “skinny,” “probably about 150 something.” *Id.* at 46. The shooter also “walk[ed] funny.” *Id.* at 47. Mr. Martin explained that it looked as if the shooter had previously been shot in the leg, because he “walk[ed] funny with a lean with it.” *Id.* The shooter was not in Martin’s “age group.” *Id.* at 49. Martin was 22; the shooter was a few

years older, about 25 or 26. *Id.* at 47, 49. On the day of the shooting, the shooter was wearing “blue jeans and a black hoodie like mine.” *Id.* at 46-47.

The only thing Mr. Martin could not give the police was the shooter’s name. Ex. F at 56. Mr. Martin explained that, although he had seen the shooter “a thousand and one” times “hustl[ing]” around “H[owison] and 203”, *id.* at 43-46, *see also id.* at 55, he had never spoken to him. *Id.* at 44, 55. Mr. Martin also noted to the police that Smurf, the decedent’s companion, had to know the shooter, because the shooter had shaken Smurf’s hand: “Man, he gave him a handshake. He know who the dude is. Gave him a handshake. He know who the dude is. He know who the dude is. He know. I know he know for a hundred percent. I know he know.” *Id.* at 55-57. Finally, Mr. Martin assured the police more than once that, even though he did not know the shooter’s name, he was “positive” that he could pick out the shooter out of a photo array:<sup>9</sup>

Q: So, if you were shown a picture[,] you would be able to pick him out?  
A: I would be – yeah.  
Q: As the dude that shot him?  
A: Yeah.  
Q: You’re sure?  
A: I’m positive.  
Q: You’re not wasting no time?  
A: No.  
Q: And you’re not lying either, because –  
A: No.  
Q: He[the homicide detective]’ll be able to tell whether or not you’re lying.  
A: I ain’t lying. You can put me on a lie detector. I ain’t lying.  
Q: Because he – I mean, if you are you’re just wasting everyone’s time . . . .  
Instead of helping the investigation, you’re [hurting] it.  
A: I know.  
Q: Now don’t get me wrong. People tell us all kinds of stuff, just to get out,  
you know what I mean?

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<sup>9</sup> It is unclear whether the government did, in fact, show Mr. Martin a photo array including Mr. T.’s photograph. Undersigned counsel respectfully requests that the Court inquire whether such an identification procedure was conducted.

A: Well, this ain't all kinds of stuff.

*Id.* at 44.<sup>10</sup>

**B. The Government's Assertion That Mr. Martin's Description Of The Shooter As Someone Other Than Mr. T. Was Not Immediately Identifiable As Obviously Exculpatory Or Material Within The Meaning Of *Brady* Is Incredible.**

The government has now argued that, between December 2002 and April 16, 2004, it was not clear that Mr. Martin's statement was either exculpatory or material within the meaning of *Brady*. This argument is nothing less than frivolous. Indeed, both AUSA Klein's assertion that the "majority" of Mr. Martin's statement was "inculpatory," Gov't Opp. ¶ 6, and AUSA Friedman's assertion that the statement was not clearly exculpatory because "three if not four descriptive points about who the shooter was . . . actually fit the defendant," are outright misrepresentations. Tr. 4/22/04 at 20, 25. Likewise, it is beyond belief that the exculpatory nature and/or materiality of Mr. Martin's December 17, 2002, statement only became clear after he recanted his description of the shooter.

To begin with, Mr. Martin's statement is, and always has been, clearly exculpatory on its face as to Mr. T.. In an effort to dispute this point, the government seeks to reduce Mr. Martin's three-dimensional portrait of the shooter to "descriptive points," that are added up to reach a threshold sum – e.g., three out of five points means a "match." Tr. 4/22/04 at 20, 25. This is absurd. But even if such a rubric were useful, it is unclear what "points" of Mr. Martin's description "actually fit" Mr. T. – as represented by AUSA Friedman, *id.* at 20 – other than the

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<sup>10</sup> The government's notes from this interview track Mr. Martin's account of the shooting and description of the shooter, albeit in a condensed form. See Ex. G (Government Notes from December 17, 2002, Interview of Dammien Martin).

