SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION — FELONY BRANCH

UNITED STATES, vs. **DWIGHT GRANDSON,**	No. F 5751-04 Hon. Rhonda Reid-Winston Motion Hearing: March 2, 2010

REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION PURSUANT TO D.C. CODE § 23-110 TO VACATE CONVICTION AND SENTENCE AND FOR A NEW TRIAL

In its Response to Defendant Dwight Grandson's D.C. Code § 23-110 motion the government concedes that the trial prosecutor violated the Due Process Clause of the Fifth Amendment by suppressing exculpatory evidence regarding Miracle Cowser, a key government witness.[1] Gov't Resp., 1 – 2. *Brady v. Maryland*, 383 U.S. 83 (1963). Nonetheless, it argues that the Court should find that Mr. Grandson is not entitled to a new trial because

> the two key witnesses in the case, Myra Cowser and Tecoyia Wood, who both identified the defendant as the person they witnessed murder the decedent, were not in any way influenced by an expectation of receiving reward money from the police. Thus, as to Myra Cowser and Tecoyia Wood, there was no failure to disclose exculpatory information…
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> Moreover, we submit that, even if the Court were to find that Miracle Cowser's undisclosed expectations somehow influenced the testimony of Myra Cowser and/or Tecoyia Wood, the Court should still have confidence in the jury's guilty verdicts on the First Degree Murder while Armed and related firearms counts. The eyewitness testimony of the two girls was supported by compelling corroborative evidence. Thus, even if the Court finds that the government failed to disclose information affecting the testimony of Myra Cowser and Ms. Wood, the defendant cannot show materiality under *Brady*.

Gov't Resp., 2, 25.

[1] In light of testimony in early 2009 in *United States v. Holliway & Adams*, F 5753-04 & F 5754-04, the government concedes as well that Mr. Grandson's conviction for obstruction of justice must be vacated because "[t]here is no substantial corroboration for Ms. Cowser's testimony that the defendant participated in the threatening behavior on his behalf by [Jerome] Holliway (his cousin) and [Danielle] Adams (his girlfriend), both of whom gave statements or testimony admitting their conduct." Gov't Resp., 3.

It became apparent at the Status Hearing February 22, 2010 that the government believes that Mr. Grandson is entitled to a new trial only if he can demonstrate that the trial testimony of Myra Cowser or Tecoyia Wood was influenced by the witness's independent expectation of a reward, or by Miracle Cowser's documented expectation of a reward.

The government engages in a lengthy discussion of the holding in *Brady* and its progeny, and the prosecutorial misconduct cases from which the *Brady* requirement evolved. Gov't Resp., 22 – 25. It states that this line of cases requires Mr. Grandson to show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 22 – 23 (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

But it goes astray by arguing that Mr. Grandson is entitled to a new trial only if he demonstrates that Miracle Cowser's expectation of a reward induced Myra Cowser or Tecoyia Wood to testify falsely

As the Supreme Court clearly stated in *Kyles v/ Whitley*, 514 U.S. 419, 434 (1995),

> a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant)…. *Bagley*'s touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Underlying the government's argument is the notion that if Miracle Cowser's testimony is excised and all of the other evidence is the same, there would be sufficient evidence for the jury to convict. Furthermore, according to the government, jurors would credit the testimony of Myra Cowser and Tecoyia Wood over that of Tommy McBride, Curtis Noland and Juan Newby, who described the shooter as shorter and heavier than Mr. Grandson and said Defendant was not the shooter.

In *Kyles, supra,* at 434 – 5, the Supreme Court said the *Bagley* materiality test

> is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict…. One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Contrary to the government's argument, this Court cannot focus only on the reward money or the prospect of receiving a reward to decide whether there is a reasonable probability of a different result. "The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *Kyles, supra*, 436.

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden…. [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached…. [W]hether the prosecutor succeeds or fails in meeting this obligation … the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 437 – 8. *See, also, Boyd v. United States*, 908 A.2d 39, 61 (D.C. 2006)(quoting *Monroe v. Angelone*, 323 F.3d 286, 302 (4th Cir. 2003)).

Several federal district judges across the United States, including Judge Paul Friedman in the U.S. District Court for the District of Columbia, have found that the *Bagley* materiality test explained in *Kyles* and *Strickler v. Greene*, 527 U.S. 263 (1999), is a test applied by appellate courts viewing the record of a case in hindsight. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005). He said

> it is not the appropriate one for prosecutors to apply during the pretrial discovery phase. The only question before (and even during) trial is whether the evidence at issue may be "favorable to the accused"; if so, it must be disclosed without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.

Id. (quoting *United States v. Sudikoff*, 36 F.Supp. 2d 1196, 1198 – 9 (C.D. Cal. 1999); citing *United States v. Acosta*, 357 F.Supp. 2d 1228, 1233 (D. Nev. 2005); *United States v. Carter* 313 F. Supp. 2d 921, 924 – 5 (E.D. Wisc. 2004)). The error in using the *Bagley* materiality test

> at this stage of the proceedings … is that it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, in their wisdom, conclude that it would not make a difference to the outcome of the trial. Most prosecutors are neither neutral … nor prescient, and any such judgment necessarily is speculative on so many matters that simply are unknown and unknowable before trial begins…
>
> The prosecutor cannot be permitted to look at the case pretrial through the end of the telescope an appellate court would use post-trial. Thus, the government must always produce any potentially exculpatory or otherwise favorable evidence without regard to how the withholding of such evidence might be viewed — with the benefit of hindsight — as affecting the outcome of the trial.

Id.

The D.C. Court of Appeals held in *Boyd, supra*, at 908 A.2d 59, that it is bound by the Supreme Court's holdings in *Bagley*, *Kyles* and *Strickler*, "[w]hatever appeal" Judge Friedman's "position may have to … some other courts." Nonetheless, it said, Judge Friedman "expressed the view, a persuasive one in our opinion, that the materiality requirement should not apply at the time that the prosecutor is evaluating evidence before or during trial…." *Id.* at 61 n. 32.

Although the *Boyd* Court did not adopt Judge Friedman's analysis it held that

> [m]ateriality is an issue at the time that the prosecutor makes a determination regarding what he must disclose to the defense. … [E]ven as a constitutional matter, the trial court must take into account the reality that the prosecutor has no crystal ball, and must review the exercise of prosecutorial discretion accordingly. In light of the defendant's Fifth Amendment right to due process, as well as his Sixth Amendment right to the effective assistance of counsel, the prosecutor must make the materiality determination, as of the time when the decision is made, with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense.
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> In arguable cases, the prosecutor should provide the potentially exculpatory information to the defense or, at the very least, make it available to the trial court for *in camera* inspection. Further, when the issue appears to be a close one, the trial court should insist upon reviewing such material, and should direct disclosure to the defense if, considering (to the extent possible) the anticipated course of the trial, there is a reasonable probability that disclosure may affect the outcome. All such rulings must be made in full recognition of the reality that "*Brady* is not a discovery rule but a rule of fairness and minimum prosecutorial obligation," and that "compliance with the prosecution's responsibilities under *Brady* is necessary to ensure the effective administration of the criminal justice system."

Id. at 61 (citations omitted). Quoting the opinion of a federal judge in Virginia, the Panel said,

> the most effective mechanism for enforcing the due process rights of criminal defendants and avoiding the needless expenditure of judicial resources is to require strict compliance with the demands of *Brady* — irrespective of materiality — in the first instance:
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> > In this instance, the prosecutor's suppression of impeachment evidence turned out not to be material. But, that was fortuitous. And, it is not the office of the prosecutor to gamble with the materiality factor when he becomes aware of impeachment evidence. On this occasion, the consequence of the prosecutor's conduct was protraction of this litigation, the expenditure of funds for counsel to explore the issue, and the consumption of limited judicial resources to resolve the issues needlessly created by the conduct at issue. Those consequences were utterly unnecessary.
> >
> > One would hope that this prosecutor, and all others, would learn from experiences such as this one. But, the most effective assurance that *Brady* will be fulfilled in state prosecutions lies in the full enforcement of its command by the state courts which have the power to order compliance with *Brady* and to discipline those who do not take its commands seriously.

Boyd, supra, at 62 – 3 (quoting *Schmitt v. True*, 387 F.Supp. 2d 622, 656 (E.D. Va. 2005)).

In Mr. Grandson's case, there can be no question that when the trial prosecutor deliberately withheld Miracle Cowser's expectation of a reward, Myra Cowser's videotaped statement and grand jury transcript, and McBride's grand jury transcript, the exculpatory evidence they contained was highly material to Mr. Grandson's defense. This Court should conclude that when the prosecutor made those decisions he knew or should have known that, but for his actions, the outcome of Mr. Grandson's trial would have been different.

THERE IS A REASONABLE PROBABILITY OF A DIFFERENT RESULT

As in *Kyles*, the government's case against Mr. Grandson now rests almost entirely on testimony by Myra Cowser and Tecoyia Wood. As the government notes, jurors could infer some corroboration from testimony of Margo Frye, Jamise Liberty and Diane Scott.

Mr. Grandson's § 23-110 motion asserted that in a new trial the Court would not admit Scott's testimony about seeing him in possession of a pistol several days before the homicide. Motion, 11, 19 n. 11. In response, the government offers no theory on which that testimony would be admissible. It merely assumes admissibility and claims Scott's testimony is

"compelling corroborative evidence" supporting the young girls' accounts of the shooting. Gov't Resp., 14, 31 – 2.

According to the government the "compelling corroborative evidence" includes "the observation by a neighborhood resident, Margo Frye, of the defendant running from the shooting scene immediately after the shots were fired." *Id.* at 32. Frye admitted that she smoked crack cocaine, but denied having done so that day. Tr. 5/19/06, 80 – 81. But her bias was evident. She had known the decedent for about 15 years and said he was "like an uncle" to her. *Id.* at 61. Earlier September 7, 2004, the decedent gave her $2 to buy juice for her children. *Id.* at 81. Of Mr. Grandson she told the grand jury, "I never liked him because he's too disrespectful." Frye GJ, 14.

Frye said she did not see the shooting, but was close enough that she reached the decedent as he was taking his last breath. Tr. 5/19/06, 78. She saw Mr. Grandson and several other people running away from the shooting scene. *Id.* at 88. She said Defendant wore a scarf tied around his head and had some blood on his face, but that he was not wearing or carrying a mask and did not have a gun. *Id.* at 90 – 92.

Frye's testimony corroborates testimony of Tecoyia Wood, McBride and Curtis Noland, and the statement of Juan Newby that the decedent beat Mr. Grandson down shortly before the shooting. But, because she arrived on the scene so quickly, it conflicts with both girls' testimony because Mr. Grandson would not have had time to dispose of the mask and gun before Frye saw him fleeing. This is particularly true of Myra Cowser's testimony because she claimed Defendant fled behind the rec center and hid the gun and mask in the woods. Myra Cowser GJ, 22.

Another piece of "compelling corroborative evidence" the government cites is "the testimony by Jamise Liberty, the defendant's brother's girlfriend, that the defendant suddenly appeared at his mother's home just after the shooting, was upset, and sought a ride to flee D.C." Gov't Opp. 32. That the decedent beat Mr. Grandson severely is clear from testimony of several witnesses, and having been beaten it would have been natural for Defendant to be upset. But the government's claim that he was fleeing when he went to his mother's home

and asked Liberty for a ride to his father's residence in Maryland is a stretch. Frye told the grand jury Mr. Grandson was selling marijuana on Ainger place the morning after the homicide. Frye GJ, 13. Miracle and Myra Cowser testified that Mr. Grandson returned to Ainger place September 8 and they saw him several times before his arrest September 11. If Mr. Grandson committed the murder in view of numerous neighborhood residents who recognized him, then fled to Maryland to avoid capture, it is difficult to imagine why he would return hours later to resume his marijuana dealing business as though nothing had happened.

The government says "the voice message the decedent left as he was being shot, corroborating the testimony that the decedent was making a cell phone call when the defendant shot him," is another piece of "compelling corroborative evidence." Gov't Resp., 31. The recording corroborates that McBride was an eyewitness. But regarding the shooting itself, the tape corroborates nothing more than the decedent was making a call on Adams's cordless phone when he was shot, a fact to which government and defense witnesses testified. Nothing on the tape indicates who shot the decedent.

What is noteworthy is that the trial prosecutor attempted to suppress the recording of the telephone call, and did not disclose it until March 2006, 18 months after the homicide, three months after defense counsel specifically requested it, and only because D.C. Crim. R. 16(a)(1)(c) required disclosure of evidence to be used in the government's case-in-chief.

Although McBride testified in the grand jury a year before trial that Mr. Grandson carried a .25 caliber pistol, not a .45 caliber pistol like the murder weapon, the prosecutor withheld the transcript until this Court ordered him to disclose it on the last day of the trial.[2] He not only prevented defense counsel from using that exculpatory evidence to the greatest effect; he

[2] McBride's testimony to the grand jury that Mr. Grandson was not the shooter clearly was exculpatory, but the trial prosecutor treated the transcript as Jencks material and withheld it because the government did not call McBride as a witness.

prevented the Court from being fully-informed before ruling that Scott's testimony was admissible.

Without Miracle Cowser's testimony that Myra came to her immediately after the homicide to report what she had seen, no other witness corroborates Myra's claim that she was an eyewitness. In fact, government and defense witnesses agreed that Myra Cowser was not playing double-dutch with Adams's daughters, Vangie and Dionne, when the shooting occurred. Furthermore, inconsistencies in Myra's testimony and videotaped statement, and discrepancies between her versions of events and accounts of other witnesses, provide ample reason to doubt her veracity. In deciding whether there is a reasonable probability of a different result the Court should not assume the government will call Myra Cowser as a witness, and if it does, the Court should assume that she will be impeached with evidence which was unknown to trial counsel in 2006.

Finally, with its concession that Miracle Cowser expected a reward and, based on testimony in the 2009 hearing in codefendants' cases, that it lacks sufficient evidence to support Mr. Grandson's obstruction of justice conviction, the government has lost a powerful piece of evidence on which it relied to obtain the murder conviction. As Defendant discussed at length in his § 23-110 motion, to demonstrate consciousness of guilt regarding the murder the trial prosecutor emphasized Miracle Cowser's claims that between September 8 and 11, 2004 Mr. Grandson threatened her. Motion, 24 – 5, 27 – 8.

In its response the government neither disputes Defendant's analysis nor explains how it would make up this deficit. It merely asserts that Tecoyia Wood's and Myra Cowser's testimony, with some corroboration from other witnesses, would carry the day.

In short, the government's case was not overwhelming in 2006 and is much weaker now. If the trial prosecutor had lived up to his *Brady* obligations from 2004 to 2006 Miracle Cowser's credibility would have been destroyed during cross-examination.

Armed with exculpatory evidence the trial prosecutor suppressed totally or withheld until the middle of trial, in a new trial defense counsel will be able to present a much stronger defense.

Furthermore, the Court should assume that if it grants a new trial the government will not call Miracle Cowser as a witness.

CONCLUSION

For the reasons stated in Mr. Grandson's D.C. Code § 23-110 motion and above, and any others that may appear after the hearing, the Court must conclude that there is a reasonable probability that the outcome of the 2006 trial would have been different if the trial prosecutor had lived up to his *Brady* obligations. Therefore, the Court should vacate Mr. Grandson's conviction and order a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S Becker, counsel for Dwight Grandson, certify that on February 24, 2010 I served a true copy of the attached Reply to Government's Response to Defendant's Motion Pursuant to D.C. Code 23-110 To Vacate Conviction and Sentence and for a New Trial by first-class mail on the person(s) listed below.

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