

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Felony Branch

UNITED STATES OF AMERICA,
v.

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:
: **Criminal No. F 5751-04**
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: **Closed Case**

DWIGHT GRANDSON,

Defendant.

: **Judge Rhonda Reid Winston**
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ORDER

Before the Court are two (2) issues that were raised by the parties at the February 22, 2010 status hearing: 1) the appropriate standard for the Court to apply in determining the defendant’s request to vacate his conviction and sentence and for a new trial pursuant to D.C. Code § 23-110, and 2) the scope of the evidence that will be considered at the March 2, 2010 hearing to determine whether the appropriate standard has been met.

Although in his initial Motion the Defendant acknowledges the standard as whether there was a reasonable probability that the outcome of the trial would have been different if any of the wrongfully withheld evidence had been admitted, in his reply to the Government’s Opposition to his § 23-110 motion, the defendant argues that the standard to be applied is of a prospective nature in that the Court must decide whether, considering the *Brady* evidence withheld from the previous trial, the case would result in the same outcome if re-tried in the future. Therefore, he suggests, the Court is not bound by the record of the trial in this case. Based on that understanding, when the defense calls Myra Cowser, her grandmother, and Police Officers Smith and Fulton – all government witnesses from the previous trial – he contends he is entitled to examine them not only about the expectation of a reward by Miracle Cowser and the influence said expectation

may have had on Myra Cowser and Tecoya Wood, but also about the facts of the case and other matters tending to show the unreliability of the Government's witnesses at the trial.

The Government contends that the Court may only consider the effect that the withheld evidence would have had on the evidence introduced at the previous trial. Based on that standard, the Government argues that the testimony regarding the prospective strength or weakness of the government's case in a retrial should be disallowed. Rather, according to the government, the Court must confine the evidence at the hearing to the effect that disclosure of the withheld evidence from the previous trial *would have had*, on the trial's outcome.

LAW

The standard for determining whether a defendant is entitled to a new trial pursuant to D.C. Code § 23-110 is whether “. . . the net effect of the evidence withheld by the state in [the previous] case raises a *reasonable probability* that its disclosure would have produced a different result . . .”. *Kyles v. Whitley*, 514 U.S. 419, 421 (1995), *emphasis added*. It is petitioner's burden to show that in light of all the evidence, including that untainted by the *Brady* violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt. *Id.* at 460.

In reversing *Kyles*' conviction, the Court considered the withheld *Brady* evidence and discussed the manner in which competent counsel could have used that evidence at the trial, had it been disclosed.¹ *Id.* at Part IV. The Court ordered a new trial based on its

¹ The *Kyles* Court considered the inconsistent statement of Smallwood, a government witness, taken at the scene, immediately following the crime, but never disclosed to the defense. *Kyles*, 514 U.S. at 442. Although Smallwood's credibility was undermined on cross examination when he was impeached with inconsistent statements of which the defense was aware, the Court considered the manner in which the

determination that disclosure of the withheld evidence “would have made a different result reasonably probable.” *Id.* at 441. However, while it is clear from *Kyles* that in reaching its determination, the Court may consider inconsistencies in the trial testimony and other weaknesses in the Government’s case when taken together with the wrongfully withheld evidence, it is clear that the Court is limited to considering the evidence that is already in the record.² Nothing in *Kyles* suggests that the Court must or can consider the potential outcomes of a new trial in deciding a motion for a new trial pursuant to D.C. Code § 23-110. Rather, the Court must look backwards and determine whether there is a reasonable probability that the previous trial would have had a different outcome but for the prosecution’s unlawful failure to disclose evidence.

Accordingly, it is hereby

ORDERED that the standard that the Court will apply at the hearing is whether disclosure to counsel of the *Brady* evidence that was suppressed would have made a different result reasonably probable; it is further

ORDERED that the testimony of Myra Cowser, her grandmother, and Police Officers Smith and Fulton will be allowed and the scope of their testimony shall be consistent with the issue as framed above.

defense *could* have used the additional inconsistent statement had it been disclosed. The Court found that the impeachment that occurred “chipped away” at his credibility; however, the first statement would have provided the opportunity for an “assault”. The manner in which the withheld evidence *could* have been used in the trial was important to the Court’s finding that disclosure would have made a different outcome a reasonable probability.

² Although the Court is limited to considering the evidence in the record, the *Kyles* Court considered the entire universe of possible uses of the wrongfully withheld evidence. *Id.* at 445-46. The Court discussed evidence of inconsistent statements made by the government’s key informant and suggested that even if the defense had not called the witness who made the statements, they could have used the statements to challenge the police officers who investigated the case about their knowledge of the case, the reliability of their investigation, and the serious possibilities that their investigation was unsound. *Kyles*, 514 U.S. at 446.

SO ORDERED.

Date

RHONDA REID WINSTON
Associate Judge

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