IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**CRIMINAL NO. CCB-96-046** **(Marvin J. Garbis)**
TRACEY AUSTIN	*	

* * * * * *

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL IN THE INTERESTS OF JUSTICE

The Defendant, Tracey Austin, through his attorneys, James K. Bredar, Federal Public Defender for the District of Maryland, and Kathryn R. Frey, Assistant Federal Public Defender, submits this Memorandum in support of his Motion for a New Trial in the Interests of Justice.

I. BACKGROUND

On May 1, 1996, a jury trial commenced on charges that Mr. Austin possessed a firearm and ammunition and was a convicted felon in violation of 18 U.S.C. § 922(g)(1). The only contested issue was whether Austin possessed the gun and ammunition.[1] On May 2, 1996, Austin was convicted on both charges and now may face a minimum of fifteen years incarceration.

At trial, the government presented two witnesses: Baltimore City Police Officers David Shields and Jacob Corbett. The government's theory was that during a traffic stop of a Ford Escort driven by Jeffrey Hammonds, Tracey Austin, a passenger, assaulted Officer Shields, resisted arrest,

[1] The parties stipulated that he was a prohibited person, that the gun and ammunition met the definitions of 18 U.S.C. §921(a)(3) and (17)(A) and that the gun and ammunition affected interstate commerce.

and provoked a struggle between himself and the officers during which a .38 caliber Eukaro revolver was retrieved from his waistband.

The defense intended to call Mr. Jeffrey Hammonds in support of its theory that the officers assaulted Austin, later recovered two guns during the search of the car, and charged Austin with possessing one of the guns in his waistband to immunize themselves from charges of police brutality; charges similar to those for which Officer Shields was under departmental investigation at the time of the incident and similar to the blame-shifting tactics he unsuccessfully used in that pending case.

A. The Jury was Deprived of Considering the Exculpatory, Material, and Otherwise Unavailable Testimony of Jeffrey Hammonds

Prior to trial Hammonds intended to testify. To the defense's surprise, Hammonds invoked his Fifth Amendment privilege against self-incrimination and did not testify. The jury convicted Austin on the uncontradicted testimony of the two Baltimore City Police Officers.

The jury was not furnished with Hammonds's testimony which was exculpatory, material, and unavailable from any other source. Had the jury heard from Hammonds, it probably would have acquitted Austin of both counts of the indictment. The interests of justice require a new trial so that a jury can evaluate the case in light of this critical evidence.

i. Proffer of Jeffrey Hammonds's Testimony[2]

Prior to trial, undersigned counsel and her investigator, Mr. Joseph Segreti, interviewed Mr.

[2] A full proffer is set forth in Mr. Segreti's signed and sworn affidavit. See Attachment 1.

Hammonds. Hammonds was the driver of the Ford Escort and was present during Austin's arrest.[3]

During the interview, Hammonds disclosed what he saw and what he knew. Hammonds was driving a Ford Escort which was pulled over by the police. Once the car stopped, Officer Corbett approached the driver side and Officer Shields approached the passenger side. Shields ordered Austin out of the car and then assaulted him for no apparent reason and without justification. Corbett also took part in the assault. Austin was thereafter handcuffed and arrested.

Prior to the traffic stop, Hammonds was on Vine Street. Hammonds saw Austin and offered him a ride; Austin accepted. Austin entered the car moments before the police signaled it to pull over.

Hammonds confessed that he owned both the Smith and Wesson and the Eukaro firearms.

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[3] Hammonds was charged with violations of State law arising from the same incident. Hammonds was charged in Criminal No. 95-61879 with the following: Count 1: transporting a handgun in a vehicle; Count 2: conspiring to possess CDS with intent to distribute; Count 3: possession with intent to distribute a CDS; Count 4: possession of CDS; Count 5: transporting a pistol after being convicted of a crime of violence; and Count 6: transporting a firearm while engaged in drug trafficking. He was also charged with reckless driving in MD Citation No. P035221.

On December 29, 1995, a motions hearing and bench trial commenced, the Honorable George Helinsky presiding. Kenneth Ravanell, Esq. represented Mr. Hammonds. Prior to trial, the State nolle prossed Counts 1, 2, 3, 5, and 6.

A motions hearing and bench trial commenced as to Count 4: possession of CDS, and Reckless Driving. The government presented one witness at the motions hearing: Officer Jacob Corbett. The court granted the defense motion to suppress evidence, finding a Fourth Amendment violation. The court found Hammonds Not Guilty of Reckless Driving.

The guns were inside the car before Austin entered the car. Hammonds never told Austin he had the guns in the car, never discussed guns with Austin, never showed Austin either gun, never saw Austin touch or observe either gun, nor did he see Austin with any gun. See Attachment 1, paragraph 1d.

ii. Hammonds's Invocation of His Fifth Amendment Privilege

During the initial interview with Hammonds, after hearing him tell what he saw and what he knew, undersigned counsel alerted him that he may have a Fifth Amendment privilege. However, she explained she could not advise him on whether or not to waive or invoke the privilege.

Hammonds was previously represented by Kenneth Ravenell, Esq.. See supra, fn. 3. Undersigned counsel was in contact with Mr. Ravenell. Counsel sought to have Mr. Ravenell visit with Hammonds to review his Fifth Amendment privilege, but Hammonds declined the opportunity. Hammonds acknowledged his rights and was certain that he would testify. Undersigned counsel advised Mr. Ravenell about communications with Hammonds, about his pending testimony, and provided him with the date and place of the trial.

Hammonds was subpoenaed by the defense. A writ of habeas corpus was issued by the Court to transport Hammonds to the trial. Both the subpoena and writ were issued under seal. On May 1, 1996, before the lunch break, government counsel learned of Hammonds's presence and intention to testify. During the lunch break, government counsel contacted Ms. Jerri Payton, Esq., Assistant State Public Defender, who represented Hammonds on an outstanding, unrelated case in Baltimore County and advised her that Hammonds was in the federal courthouse on a defense subpoena and

might testify to matters which could lead to federal or other criminal charges.[4] Undersigned counsel also spoke with Ms. Payton.

In response to the government's call, Ms. Payton spoke with Hammonds and strenuously advised him to invoke his Fifth Amendment privilege. Upon learning that Hammonds might invoke his privilege, the defense requested that Hammonds be granted immunity. The request was denied.

Hammonds took the stand outside of the jury's presence. The Court asked whether he intended to testify or invoke his Fifth Amendment privilege. At first he did not respond. After a prolonged hesitation during which Hammonds appeared to be distressed, Ms. Payton asked to speak with her client. After speaking with Ms. Payton, and after a second delay during which Hammonds still appeared upset, he invoked his Fifth Amendment privilege.

II. LEGAL FRAMEWORK

A. Mr. Austin's Only Remedy is a Conditional Grant of this Motion or an Order Holding this Motion Sub Curia

A conditional grant of this Motion or an order to hold the Motion sub curia is necessary so that this Court can retain jurisdiction to consider this Motion for a New Trial under the "interests of justice" standard. Though Rule 33 provides two avenues for a new trial, "interests of justice" and "newly discovered evidence,"[5] the "interests of justice" standard is Austin's only remedy.

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[4] Mr. Hammonds was charged by the State on November 16, 1995 and was tried on December 29, 1995. See supra fn. 3. Austin was charged by the State on November 16, 1995 and was indicted by the Federal Grand Jury in early February 1996. It appears neither the State nor the Federal government had any real interest in prosecuting Mr. Hammonds.

[5] A motion under Rule 33 may be granted if filed within two years of the final judgment and based on "newly discovered evidence." United States v. Chavis, 880 F.2d 788 (4th Cir.

An "interests of justice" motion must be filed within 7 days of verdict. The time limits of Rule 33 are jurisdictional. The court only retains jurisdiction to extend the seven day period within the seven day period. FRCP 33 ("shall be made within 7 days after verdict . . . or within such further time as the court may fix during the 7-day period"); United States v. McKenna, 791 F. Supp 1101 (E.D. La. 1992), aff'd, 980 F.2d 1443 (5th Cir. 1992). The standard for a motion for a new trial in the interests of justice is broader than the standard for newly discovered evidence. United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974), cert. denied, 420 U.S. 991 (1975).

In this case, the defendant has complied with the time requirements of Rule 33's "interests of justice" standard. On May 2, 1996, the jury returned guilty verdicts. On May 6, 1996, a Motion for a Continuance to extend the seven day period until June 3, 1996 was filed and granted.

Undersigned counsel spoke with Ms. Payton, counsel for Hammonds on the outstanding

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1989). Chavis requires that the evidence be (1) newly discovered; (2) discovered with due diligence; (3) not merely cumulative or impeaching; (4) material to the issues; and (5) would probably result in an acquittal at a new trial. 880 F.2d 793.

Many courts have held that newly discovered evidence does not include evidence that was discovered before trial but does not become available until after trial. United States v. Theodosopoulos, 48 F.3d 1438 (7th Cir. 1995), cert. denied, 116 S.Ct. 191 (1995); Stern v. United States, 219 F.2d 263 (4th Cir. 1955). Under the reasoning of these cases, Hammonds's testimony would not be "newly discovered" and would not survive the Chavis test. Therefore, in this case, Austin's only remedy is under the "interests of justice" standard.

Defendant does not concede that he would not meet prong one. Moreover, if necessary, the defendant would challenge the constitutionality of the rule which deems evidence such as Hammonds's testimony not newly discovered. However, that issue is not material to this motion.

Baltimore County charge. It is anticipated that Hammonds will waive his Fifth Amendment privilege pertaining to Austin's case after adjudication, including judgment and sentencing, which will hopefully be resolved by August 15, 1996.[6] Hammonds is currently focused on his Baltimore County case. He is particularly concerned about the penalties he faces in the county and about governmental revenge stemming from Austin's case which might affect his outstanding case. Therefore, he will not become available until after full adjudication of his county case.

The "interests of justice" standard of Rule 33 is the only avenue which will lead to a full development of the facts in this case at a new trial. Therefore, it is imperative that this Court preserve Austin's right to seek a new trial under the "interests of justice" standard of Rule 33.

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[6] On May 6, 1996, the defense believed Hammonds's testimony would be available by June 3. Hammonds's outstanding Baltimore County matter, Case No. 96Cr0867, was originally scheduled for trial on May 15, 1996, but has been continued until July 15, 1996.

B. The Interests of Justice Standard

A motion may be granted in the "interests of justice." F.R.C.P. 33; United States v. Mitchell, 602 F.2d 636 (4th Cir. 1979) (a hearing was required where the new evidence "infused a doubt into the finding of [defendant's] guilt"); see Benton v. United States, 188 F.2d 625 (D.C. 1951) (new trial ordered where new evidence "vari[ed] substantially from that given by the [government witness], upon which the conviction rest[ed] almost entirely"); United States v. Patterson, 41 F.3d 577 (10th Cir. 1994)(district court granted new trial and circuit court affirmed where "jury was clearly expected to hear testimony from [the absent witness], and his failure to testify created a situation which could be prejudicial to the defendant"); see also United States v. Schartner, 285 F. Supp. 193 (E.D. Pa 1967) (district court granted new trial in interests of justice). When previously unavailable, exculpatory, and material evidence becomes available after trial, the "interests of justice" are served when a new trial is granted so that all facts and circumstances can be presented to a jury for its consideration.

In United States v. Mitchell, 602 F.2d 636, the Fourth Circuit ordered a hearing on a new trial motion where the new evidence "infused a doubt into the finding of appellant's guilt." Id. at 637. At trial the alleged victim and the defendant testified to conflicting stories concerning defendant's intent and knowledge. The jury convicted the defendant. Six days later, a witness came forward and in effect confessed that he was guilty of the charge for which the defendant was convicted. The witness spoke with defense counsel but refused to sign an affidavit, recognizing that what he told defense counsel might incriminate him.

Defense counsel filed a motion for a new trial in the interests of justice and attached an affidavit signed by counsel containing what they learned from the witness. The district court denied

the motion. The Fourth Circuit reversed and remanded for a hearing on the motion so that the witness could be brought before the court and it could evaluate the witness's testimony because the affidavit on its face "squarely and gravely infused a doubt" into the conviction. Id. at 636.

In Benton v. United States, 188 F.2d 625, the Court reversed the district court's denial of a new trial and granted a new trial where the new "evidence varie[d] substantially from that given by the [government witness], upon which the conviction rest[ed] almost entirely." Id. at 627. In Benton, the defendant was convicted of taking indecent liberties with a child. The child and the defendant testified. After the trial, the child's mother revealed that she did not believe her daughter and offered evidence contrary to her daughter's testimony. In granting the new trial the court reasoned that "a fair trial require[d] that the mother's testimony be made available to the jury." Id. Further, the interests of justice required a "fair trial" where the new witness's testimony "could be heard and considered along with that of the others called to testify." Id.

In United States v. Patterson, 41 F.3d 577, the defendant was charged with and convicted of possession of a firearm found in his master bedroom. His wife testified that she bought the gun with her brother-in-law and that she was keeping it in her bedroom until her brother-in-law could buy her out. The defense anticipated that the brother-in-law would testify to the same facts, however, he was absent due to unforeseen circumstances. The jury was anticipating the brother-in-law's testimony based on defense counsel's comments during voir dire and opening statement. The new trial motion contained an affidavit signed by the brother-in-law. The district court granted the motion because the "jury clearly expected to hear testimony from [the absent witness], and his failure to testify created a situation which could be prejudicial to the defendant." Id. at 579. The government appealed and the Tenth Circuit affirmed.

An application of the standards from these cases and from the rule to the present case requires a new trial in the interests of justice.

i. The interests of justice require a new trial in this case.

The defense expected Hammonds to testify and therefore built its entire defense on that foundation. There were two primary components to the defense, each was inextricably linked to the other and standing alone neither had force: first, Hammonds owned the guns which were inside the car, he never gave Austin the guns, never spoke to Austin about the guns, and never saw Austin with a gun; second, Hammonds saw the officers assault Austin, and Shields had a history of assaultive behavior which resulted in disciplinary, civil and criminal actions[7] against him.

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[7] Officer Shields admitted that on April 11, 1996 he was found guilty of using excessive force at a disciplinary trial board, was sentenced to twelve days suspended without pay, received a severe letter of reprimand, and a letter recommending termination upon future misconduct. An internal investigation of this matter was pending on November 16, 1995, when Austin was arrested on these charges. He also admitted that in connection with this finding, he filed charges against the victim, Kevin Davis. He admitted filing charges five days after Kevin Davis filed charges of brutality against him. He admitted testifying against Mr. Davis at a trial. He advised that Mr. Davis was found not guilty after a bench trial. He acknowledged that criminal charges were filed against him by Mr. Davis. He acknowledged a pending civil lawsuit for monetary damages filed by Mr. Davis. He also testified that the other officers who were present were subjected to an investigation and were also sued civilly for monetary damages.

Shields admitted that in 1992 he was criminally convicted of battery. He admitted that internal affairs conducted an interview and found him guilty of battery and assault with his service weapon. As a result, he was fired from the Baltimore City Police Department in 1992. In 1993 he appealed his criminal conviction. The state nolle prossed the charge. He reapplied to be a police officer and was accepted.

As in Patterson, 41 F.3d at 579, in this case the jury "clearly expected to hear testimony from [Hammonds], and his failure to testify created a situation which could be prejudicial to [Austin]." In her first oral presentation to the jury, during voir dire, defense counsel advised the jury that they may hear from Jeffrey Hammonds. Again, in opening statement, the defense implied the jury would hear from a witness who would tell them the Eukaro was retrieved from inside the car and not from Austin's waistband. The jury expected to hear testimony that Officer Shields ordered Austin out of the car, grabbed him and, accompanied by Officer Corbett, assaulted him. During opening statement, counsel disclosed that there was not just one but were two guns; cross-examination included questions pertaining to both guns which were inside the car driven by Hammonds. Cross-examination delved into Hammonds's activities, location during the incident, and his charges. Overall, Hammonds's involvement in the events of November 16, 1995 was central to the defense. The jury expected the defense to present a case; when it did not, Austin suffered the negative inference.

As a result of Hammonds's failure to testify, in closing statement, the defense theory shifted from the affirmative theory that the charges were a cover-up of the assault, as presented in opening argument, to the passive theory that the government failed to prove its case beyond a reasonable doubt based on the conflicts in testimony and the officers' credibility. Without the link to Hammonds's testimony, conflicts were given little weight and credibility was hardly diminished.

The theme of the government's closing argument capitalized on Hammonds's invocation of his Fifth Amendment right. Its theme was an attack on the defense for its failure to present evidence of an assault, evidence which the defense argued formed the basis of the officers' motive to lie about the gun. Repeated remarks about the lack of any evidence that Shields and Corbett assaulted Austin

improperly and unconstitutionally shifted the burden of proof to the defense.[8] The government sought to and did profit from the prejudice Austin suffered from Hammonds's invocation.

The force with which the government argued the lack of evidence produced by the defense underscores the injustice of this conviction and the need for a new trial where all of the evidence will be presented. Regardless of the propriety of its closing argument, the message distorts the truth: that there was evidence of an assault which would have formed a tangible motive for the officers to lie, especially in light of the pending and past disciplinary, civil, and criminal actions taken against Officer Shields. All of the evidence was not brought to light; evidence which the jury expected to hear. Consequently, Austin was convicted and now may serve at least fifteen years.

A fair trial requires witnesses testimony to be "heard and considered along with that of others called to testify," especially where the "evidence varies substanially from that given by [government witnesses], upon which the conviction rests almost entirely." Benton, at 627. Here, government witnesses Shields and Corbett testified that after the Ford Escort was stopped, and after Shields approached the passenger door, Austin attempted to flee, assaulted Shields, and a struggle ensued during which the Eukaro revolver was retrieved from Austin's waistband. There was conflicting testimony about the sequence of events during the struggle, about which of the two guns was retrieved from Austin, and about from where and when the other gun was retrieved. Shields's pattern of violent behavior and consequential disciplinary sanctions, which bore on both Officers' biases and

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[8] Though the burden-shifting is not an issue for this Court to decide, it is an important factor in assessing the interests of justice because it is an example of how the suppression of Mr. Hammonds's testimony was further distorted in closing argument.

motives to lie, were exposed. However, without the Hammonds component, the conflicts and credibility questions were without force.

Hammonds's testimony would make significant the contradictions between the officers. Without the cement of Hammonds's testimony, standing alone, the contradictions could be (and likely were) viewed as innocent mistakes; however, when viewed in conjunction with Hammonds's testimony, the contradictions are better understood to be the natural consequence of a fabrication. Hammonds's contrary testimony likely would have caused the jury to scrupulously assess the officers' contradictions and would have given it a reasonable doubt about their testimony.

In addition, Hammonds's testimony most likely would have meaningfully diminished the officers' credibility by establishing a real and direct motive for the officers to lie, and by drawing out their biases and personal interests in the outcome of the case. Hammonds's testimony would have crystallized Shields's bias; he would be fired if again found guilty of excessive force. It also would have exposed Corbett's bias; he likely knew that Shields's recent disciplinary action resulted in investigation of other officers who were present and in civil charges against those officers, and because he worked with Shields, he would want to protect a fellow police officer. Without Hammonds's testimony, the officers' credibility pertaining to the events of November 16, 1995, remained in tact.

Hammonds's proffered testimony casts substantial doubt on the propriety of the conviction in this case. The attached affidavit "squarely and gravely infuse[s] a doubt into the finding of [Austin's] guilt." Mitchell, 602 F.2d at 636. His testimony probably would have been the difference between conviction and acquittal. What Jeffrey Hammonds saw and knew provides a haunting testimonial of the events of November 16, 1995; it cannot go untold.

III. SUMMARY

Jeffrey Hammonds would have testified to matters which directly contradict the government witnesses' testimony on the only issue in the case: whether Austin possessed the .38 Eukaro revolver in his waistband on November 16, 1995. His testimony would have been exculpatory and material. It was material to the issue of possession and exculpates Austin of the charges for which he has been convicted and faces a minimum of fifteen years. It was unavailable from any other source: only Hammonds knows who owned the guns and where they were prior to Austin entering the car and during his short ride. If Hammonds's testimony was presented to a jury, it would probably lead to acquittal.

Based on undersigned counsel's interviews of Hammonds, his demeanor on the stand when he invoked the Fifth Amendment, and counsel's conversations with his attorney, Ms. Payton, the defendant anticipates that Hammonds's testimony will be come available on or around August 15, 1996. In light of the testimony during the trial, argument and representations by the parties' counsel, and the attached affidavit setting forth Hammonds's potential testimony, the defendant submits that there exists sufficient grounds to order the requested relief that this motion be conditionally granted upon the availability of Hammonds's testimony on or around August 15, 1996, or alternatively, that the Court hold the motion sub curia until August 15, 1996, or any other relief as the Court deems appropriate. Counsel also requests leave to supplement the Motion with additional information and affidavits when Hammonds becomes available.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Memorandum in Support of Motion for New Trial in the Interests of Justice was hand-delivered this 3rd day of June, 1996, to John F. Purcell, Assistant U.S. Attorney, 604 U.S. Courthouse, 101 W. Lombard Street, Baltimore, Maryland 21201.

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