IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7488
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT GEORGE MCWILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. CR-C92-31-01

March 18, 1993

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Robert George McWilliams appeals his jury conviction for conspiracy to possess with intent to distribute marijuana. McWilliams contends that the Government withheld from the defense the existence of its agreement with a co-conspirator, Joseph Soto, to recommend a downward departure from Soto's sentence under the Sentencing Guidelines. See Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Under Brady, the

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

prosecution's suppression of requested evidence favorable to an accused violates due process where the evidence is material to either guilt or punishment, irrespective of the good or bad faith of the prosecution. Id. at 87. Both impeachment evidence and exculpatory evidence fall within the Brady rule as evidence favorable to the accused. United States v. Johnson, 872 F.2d 612, 619 (5th Cir. 1989). "Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." United States v. Bagley, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) (internal quotations omitted). Where the Government makes a tardy disclosure, "the inquiry is whether the defendant was prejudiced . . . . If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been." United States v. McKinney, 758 F.2d 1036, 1050 (5th Cir. 1985).

McWilliams knew of the agreement before the Government rested and could have recalled Soto for further cross-examination. The jury was advised of the agreement and was instructed by the district court regarding its significance. McWilliams has failed to demonstrate that the Government suppressed the agreement and that the Government's conduct affected the outcome of the trial.

AFFIRMED.