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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA	)	
	)	No. CR 05-333-BR
v.	)	
	)	GOVERNMENT’S RESPONSE TO
DAVID BACON,	)	DEFENDANT’S MOTION
	)	FOR NEW TRIAL
Defendant.	)	

The United States of America, by Karin J. Immergut, United States Attorney for the District of Oregon, and Thomas H. Edmonds, Assistant United States Attorney, hereby responds to defendant’s motion for new trial.

**CASE STATUS**

On October 20, 2006, a jury convicted defendant David Bacon of all six counts presented, five counts of unlawfully and willfully selling a firearm to a resident of a state different than Mr. Bacon’s, and a single count of knowingly making a false statement in connection with the transfer of a firearm. Defendant filed his motion for new trial on October 26, 2006.

## INTRODUCTION

In his motion for new trial, defendant makes a number of factual and legal allegations, all of which are baseless when one examines the facts and applies the law.

Defendant makes three separate allegations, which he contends constitute violations of *Brady v. Maryland*, 373 U.S. 83 (1963), warranting a new trial. Defendant also alleges an improper closing argument by the government. The government hereby addresses these claims below.

## ARGUMENT

### I. DEFENDANT'S *BRADY* CLAIMS




Defendant alleges three separate violations of *Brady v. Maryland*, which he asserts warrant a new trial. Defendant fails to cite to any standard for analyzing his arguments.

To prevail on a *Brady* claim, a defendant “must show that ‘(1) the evidence was exculpatory or impeaching; (2) it should have been, but was not produced; and (3) the suppressed evidence was material to his guilt or punishment.’” *United States v. Jernigan*, 451 F.3d 1027, 1030 (9th Cir. 2006) (citing to *United States v. Ogles*, 406 F.3d 586, 591 (9th Cir. 2005)).

As to all three of defendant's claims in this motion, he fails to make the requisite showing because he can point to no failure of production by the government, or he fails to show the evidence as exculpatory or impeaching. Indeed, the record supports that discovery of all of the evidence he points to was provided by the government, and that defendant took advantage of that evidence in the presentation of his case before the jury.

#### A. The Starbucks Receipt.


Defendant concedes that he was provided with the Starbucks receipt and that it was

admitted as evidence, through his own stipulation that it was found in the living room of the Bacon residence on September 1, 2005. *See* Defendant's motion at page 2. The attached affidavit of Thomas H. Edmonds provides a basis for the record in this case to be clear about the disclosure of this receipt and the circumstances. What the remaining record shows is that it was not until David Bacon testified that an alibi for the morning hours of July 24, 2005, was ever disclosed or asserted to the government.  to the point of defendant's testimony, only the cell phone records had been disclosed by the defendant, with no explanation as to their meaning. As the affidavit makes clear, in response to the defendant's testimony, Agent McNall examined the voluminous number of documents and objects seized in this case for evidence that would bear upon defendant's claims. It was upon that inspection that Agent McNall found and identified the Starbucks receipt and brought it to government counsel's attention. The record will bear out that disclosure to defendant was timely and immediate after its discovery and occurred with time for defendant to offer it as evidence in his case-in-chief.  The fact that defendant chose to present the evidence upon disclosure in the manner that he did was completely within his control. No objection by defendant was made at the time of its disclosure and, indeed, defendant stipulated to its method of offering before the jury. 

Furthermore, the piece of evidence at issue, the Starbucks receipt, before defendant testified, fell as a matter of discovery under FED. R. CRIM. P. 16(a)(1)(E), relating to "Documents and Objects." That rule says:

Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (I) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the

defendant. 

There was a significant and lengthy period from the time of defendant's arraignment until his jury trial. During that period of time, as the attached affidavit bears out, defense counsel and defendant requested opportunity to inspect government's evidence. That request was immediately complied with and, in fact, defense counsel and defendant spent time at the Bureau of Alcohol, Tobacco, Firearms and Explosives offices inspecting evidence in this case. Thus, there was no discovery violation in this case and there was disclosure of the item when its exculpatory nature came to light after defendant's testimony.  The government's actions in disclosure were fully and completely attendant to the requirements of *Brady*.<sup>1</sup>

This piece of evidence fails to meet the showing required under *Jernigan* and this court should deny defendant's motion for new trial.

B. Steven Bacon's July 24, 2005, 4473 Forms.

Defendant says: "If the government has the page of Steve Bacon's July 24, 2005, 4473 forms that contained his thumbprints and it did not provide them to the jury or the defense, that too constitutes a *Brady* violation." Defendant's motion at page 2. This is a spurious claim. Government's Exhibit 13, one of the three 4473 forms written out by David Bacon on July 24, 2005, for his brother, was admitted into evidence by stipulation before the trial began at the pretrial conference on October 16, 2006, and went to the jury during its deliberations, and clearly contained thumbprints. This is a baseless allegation, and suggests that defense counsel did not

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<sup>1</sup> Defendant also asserts: "If, in fact, the Starbucks receipt was found in David Bacon's vehicle and not his home on September 1, 2005, that too would have been exculpatory." Defendant's motion at page 2. There, he simply hypothesizes a *Brady* claim, with no basis in fact.

simply look at the exhibits. The allegation fails to meet any of the steps analyzed in a *Brady* claim under *Jernigan*, and does not warrant a new trial.

C. Tracing of the Ruger 9mm Sold to Agent Ben Zieseemer on May 1, 2005.

Defendant alleges that “the lack of tracing or the failure to produce the results of the tracing [of the Ruger pistol sold to Agent Zieseemer on May 1, 2005] constitute an independent *Brady* violation.” (Defendant’s motion at page 3). This, too, is a completely baseless allegation. Defendant received discovery, relating to the May 1, 2005, transaction in the form of a firearms trace summary completed by Bernard Tuerler on May 2, 2005. That record was part of ATF report #8, which defendant received at the outset of his case after arraignment. This trace summary indicates that the firearm traced to neither Osinski or Bacon, but to an individual by the name of Robert William James and a purchase date of October 5, 2000. Furthermore, this aspect of the evidence was adduced by defendant during cross-examination of Special Agent McNall during the jury trial.

Moreover, the tracing evidence is irrelevant and immaterial to the issue of who sold the firearm in this uncharged incident. The jury heard an audio tape of the transaction and the oral, sworn testimony of Agent Zieseemer that defendant Bacon consummated the sale in the exchange of the firearm for cash. It is ironic that defendant contends the tracing or origins of a firearm are indicative of the seller’s identity. Four of the five firearms that defendant Bacon sold to Agent Zieseemer traced, as a matter of paper trail, to Steven Bacon.

Again, defendant’s allegation fails to meet any one of the three prongs of the test for a *Brady* claim under *Jernigan*.

Based on the foregoing arguments, defendant’s motion for a new trial, referencing

violations of *Brady v. Maryland*, should be denied.

**II. DEFENDANT’S CLAIM CONCERNING IMPROPER ARGUMENT.**

Defendant contends the following:

As the government knew from its execution of its search warrants, two people lived at 30838 Southeast Riverside Way, Unit 2, Eagle Creek, Oregon on July 24, 2005. One of those persons, David Bacon, frequently left his home to conduct business. The other person, Beverly Bacon, was ill and left her home infrequently. In light of the information known to the government, its rebuttal argument was disingenuous.

In making such an assertion, defendant does not substantiate the facts he alleges, for example, that “Beverly Bacon was ill and left her home infrequently.” Furthermore, defendant does not substantiate how or if the government would have known those facts. The argument is particularly baseless when one considers that the defendant offered evidence in his case-in-chief, through Steven Bacon’s testimony, that Steven Bacon spent time at the Eagle Creek home, declared it his residence, and testified that he kept his firearms and other personal items at the home. In light of all the facts, it was fair comment and fair argument by the government that (1) the receipt itself did not identify itself with any particular individual and (2) that the jury could have no way of knowing whose receipt this was based on its location in a common area of the home, where other people besides defendant lived. Arguments that present fair inferences for the jury that can be drawn from the evidence do not rise to the level of any basis for a new trial. The court should deny defendant’s motion.

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**CONCLUSION**

For the foregoing reasons, this court should deny defendant's motion for new trial.

DATED this 3rd day of November, 2006.

Respectfully submitted,

KARIN J. IMMERGUT  
United States Attorney

/s/ Thomas H. Edmonds  
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