UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

WILLAIM BASKERVILLE, Petitioner, v. UNITED STATES, Respondent.	)	Hon. Peter G. Sheridan, U.S.D.J. Civil No. 13-5881 (PGS)

SUPPLEMENTAL FILING IN SUPPORT OF PETITIONER'S CLAIM UNDER 28 U.S.C. §2255

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On the Brief:

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On behalf of petitioner Baskerville, I would like to thank the Court for this opportunity to submit a response to the government's filing of August 5, 2009.

BRADY ISSUE

As noted by this Court in its opinion of November 15, 2018, petitioner's claim of a Brady violation is founded on the government's failure to provide him with a copy of the FBI 302 report regarding the 2004 interview of Boyd. "A due process violation under Brady occurs if (1) the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) the prosecution withheld it; and (3) the defendant was prejudiced because the evidence was "material". Breakiron v. Horn, 642 F.3d 126, 133 (3rd Cir, 2011) Materiality requires a "reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different." Breakiron, citing Giglio v. US, 405 U.S. 150, 154 (1972) Similar holdings are found in Dennis v. Secretary of Penn Department of Corrections, 834 F.3d 263 (3rd Cir, 2016) and United States v. Lang, 2019 U.S. Dist, Lexis 65428 (3rd Cir, 2019)

Materiality for Brady purposes "is not a sufficiency of the evidence test" Dennis at 295, Lang Lexis 13-14, Juniper v. Zook, 876 F.3d 551 (4th Cir, 2017)

The government argues that the Boyd 302 would have been barred as inadmissible hearsay. However, the Supreme Court has never added a

fourth "admissibility" prong to Brady. See, Dennis at 306-311, Lunberry v. Hornbeck, 605 F.3d 754 (9th Cir, 2010), citing Chambers v. Mississippi, 410 U.S. 284 (1972), where the Supreme Court noted that the hearsay statement involved in the case were made under circumstances that provided assurance of their reliability: the confessions were made spontaneously, were self-incriminating and were made shortly after the murder. Lattimore made his statement to Boyd 3 months after McCray's murder and are corroborated by other evidence in the case. Specifically, the identification of Lattimore by Davis in photo array. Petitioner's case is directly analogous to the holding in Dennis.

CALL CHART

There is another document in petitioner's case that was suppressed by the government, which also raises Brady concerns.

This document is the telephone call log or call chart. (ECF 43, Exhibit 1A) The government also failed to produce this document prior to petitioner's trial. It was produced for the Bergrin 1 trial. The government initially asserted in its filings that the reason the list was not produced to petitioner prior to trial was that this document had not been created until Bergrin 1, well after petitioner's trial.

> "Further, it was not until after the Baskerville trial that Agent Brokos used the phone records to create a chart of the phone activity on November 25th."
>
> (ECF 16, pg 71)

This proved to be untrue as the document was dated January 6, 2005, approximately 2 years before petitioner's trial and 6 years before Bergrin 1.

Later, the government files a letter of explanation saying that the assertion as to the date the call chart was created was in error, a mistake made by a supervisor and not caught by the prosecuting attorneys. (ECF 47) The government's response is to strike-out the incorrect lines.

The call list was important to petitioner because it demonstrated that Rakeem was not in the car with Curry and himself when Bergrin called, as Young testified. The government explained this away by saying that Young was mistaken: it was actually petitioner's other brother Jamal.

Young's "mistake" about who was in the car with Curry was not a momentary lapse of memory. Young consistently claimed that Rakeem was in the car when Curry spoke to Bergrin. Young said this to Manson and testified to this at petitioner's trial. (TT 4350-4352) The government referred to this fact in their summation (TT 5713)

If trial counsel had the call list they could have shown that Young testified incorrectly as to who was in the car with Curry. If Young couldn't get that little detail correct, perhaps there was a reason. Maybe Young himself wasn't present.

Young's story was subsequently "fixed" for Bergrin 1, such that the person in the car with Curry became Jamal Baskerville,

not Rakeem Baskerville. It should be noted that Young was a long term friend of the Baskerville's. He knew both Rakeem and Jamal Baskerville since about 1992. (TT 4338) It is unlikely that he would have merely been "confused" if he had actually been with Curry in the car that day. If trial counsel had this information before trial, they would have been better positioned to challenge Young's stories.

Lacking the above meaningful information with which to challenge Young, and given the fact that Young had pled guilty to the murder of McCray, trial counsel never developed any plan to mount a defense to the murder charge. Rather trial counsel concentrated on avoiding the death penalty. The important Boyd 302 and the call chart having been suppressed by the government made this the only viable defense option.

PERJURY STANDARD

In Haskell v. Superintendent Green, SCI, 866 F.3d 139, 148 (3rd Cir, 2017) the court held that the witness's false testimony at his trial violated his Fourteenth Amendment right to due process. There the witness committed perjury and the prosecuting authority knew or should have known that the testimony was false, the false testimony was not corrected and there was a reasonable likelihood that the perjured testimony could have affected the judgment of the jury.

Like the suppression of evidence, presentation of perjured testimony also violates Brady. . . . In fact, the Brady rule has its roots in a series of cases dealing with convictions based on the prosecutions knowing use of perjured testimony. [R]equiring relief when "a judge has grave doubt about whether an error" "had substantial and injurious effect or influence upon the jury." Haskell

The government's response brief did not address the first two prongs of Brady: specifically (1) the evidence at issue is favorable to the accused, because it is either exculpatory or impeaching; (2) the prosecution withheld it. Rather they focus on prong 3, "materiality". Their materiality claim is shown to be without merit based on the evidence in the record. The suppressed evidence would have been material.

The Boyd 302 was favorable to the defendant because it was impeaching. Manson knew about the Boyd 302, indeed she had either written it or co-wrote it. Her testimony at petitioner's trial makes no reference to that report. In fact, Manson directly denies under oath that she had any further information linking Lattimore to the murder of McCray. We know that was not true. We know that the information she received from Boyd was her reason to have Sabur show Lattimore's photo to Davis. She did not tell Sabur to prepare the photo array for presentation to show Davis until she had the Boyd information. (Govt. Appendix @ 265)

After Manson testified in petitioner's trial about her two reasons for giving Lattimore's name to Sabur, she was asked the

following specific question by AUSA Frazer: "But other than that, there was no other information?" Manson responds "No, there was no other information. It was a best guess on our part." (TT 3387-3389)

Manson restates her false testimony when cross-examined by defense counsel Carl Herman when she was asked "[w]ell, that's all you had to go on?" and she responds "[T]hat's all I had, yes." (TT 4009)

In its reply brief the government posits that Manson's failure to tell the jury that Lattimore had taken credit for the McCray murder "was, at worst, an innocent mis-recollection." (ECF 72 at 22) Further, the government offers that defense counsel could have asked Manson "Didn't you have information that Lattimore had taken credit for the McCray murder?" Manson would have undoubtedly answered "yes." The government goes on to assert that this would have been such a minor point to cross her on that it would have made no difference to the outcome of the trial. (ECF 72 at 22) This assertion discounts what use an experienced trial attorney could have made of an FBI agent failing to disclose such basic information, that that same agent had herself previously developed.

This is inconsistent with the government's position wherein AUSA Minish told this Court that "Brokos' (Manson's) testimony matches the contents of the FBI 302 report.

> "A review of the FBI 302 report reveals that the information it contains was entirely cumulative of information addressed during Baskerville's trial. The FBI 302 report describes that Boyd provided information to the FBI regarding a murder possibly committed by Malik Lattimore, about which Agent Brokos testified.

> Baskerville's claim that the FBI 302 report somehow would have provided an impeachment of Brokos is also incorrect since Brokos's testimony matches the content of the FBI 302 report.
> (ECF 34 at 7)

The government cited to the trial record (TT 3887-3888) as if Manson's testimony did actually match the 302. This Court put this false assertion to rest in its opinion. (ECF 49 at 87)

The government continued to attempt to mislead the Court at the July 22, 2019 hearing when they suggested to Mr. Kayser that

AUSA: "So until Anthony Young testified before the jury about him taking responsibility for the murder, there was no evidence of that, correct? It was an opening statement."

Kayser: "I don't recall if we had any – I don't recall a discovery with respect to Anthony Young, I don't know if we had – –."

AUSA: "Let me make it clearer if I can, sir. In front of the jury, not that you had."

Kayser: "No, no; in front of the jury correct."

There are at least two problems present here: 1) the AUSA suggests to the witness an incorrect recitation of the record. By the time Young testified, both Sabur and Manson (Brokos) had testified, telling the jury that Young had pled guilty to killing McCray; and 2) Kayser's inability to recall details from petitioner's the trial, now actually over 12 years later is not surprising. However, his willingness to adopt incorrect facts postulated by the government highlights the impropriety of the government prepared declarations for defense counsel, as will be discussed below.

The government asserts "the record shows that Agent Manson simply did not recall one of the reasons she viewed Lattimore as a potential suspect when she testified in 2007." (ECF 72 at 23)

Petitioner suggests that this assertion is a lie. The record does not "show that Agent Manson simply did not recall". The record offers no insight into why Manson failed to mention one of the reasons she viewed Lattimore as a potential suspect when she testified. All that the record shows is that she failed to mention the most important reason to show Lattimore's picture to Davis: Lattimore had confessed to the murder. The Boyd 302 was the motivation to explore Lattimore as the shooter. Despite Manson's assertion that Lattimore fit the description of the shooter and was a known hitman for the Curry-Baskerville organization, she didn't request the presentation of a photo array that included Lattimore's picture until after the Boyd 302.

The government offers us the footnoted factoid that Manson was on maternity leave at the time she testified in Baskerville's trial. We can only guess why the government offers that information. Perhaps this fact is offered as an explanation as to why Manson "forgot" such an important development as the Boyd 302. (ECF 72 at 23)

This "maternity leave" explanation by the government would have us believe that Manson just "walked into the courtroom, sat down and started to testify". This is entirely contrary to what we all know about how the United States Attorney's Office

functions. We would have to accept that these experienced prosecuting attorneys did not meet with Manson and prepare her for her testimony. We know that is not true.

Additionally, the explanation that Manson "simply did not recall one of the reasons" is inconsistent with the government's assertion that Manson could not offer the Boyd 302 as it was impermissible hearsay. (ECF 72 at 27)

As to the Boyd 302 being suppressed, the government never denies that they had the 302. They had the 302 when Manson testified in 2007. The government never attempted during Manson's testimony to correct her as to why she requested the photo array with Lattimore's picture. When she testified repeatedly that "That was all I had." The government had an obligation to ensure that Manson's testimony actually was "The truth, the whole truth and nothing but the truth." This was not done.

Manson also testified in Bergrin's first and second trial. In both of those trials she at least acknowledged that she passed-on the information contained in the Boyd 302 to the Newark police. In Bergrin 1, she testified that she had received information about Lattimore from a source and provided that information to the Newark police, although she did not name the source or state the information she had received from that source. Specifically, that Lattimore had taken credit for the murder of McCray. In Bergrin 1, Manson was not required during her direct testimony to withholding Boyd's name. Rather, Manson

merely stated that she received information from a "source". Interestingly, prior to her testifying about Lattimore, Manson had testified on direct-examination, telling the Bergrin 1 jury the names of two informants (Shelton Leveret and Curtis Jordan) who had also provided her with names of potential shooters of McCray, early in the investigation. One must ask why she chose to handle this information differently. (G App 261-264)

AGENT MANSON'S LIES

Manson testified that she gave Lattimore's name to Newark police officer Sabur for two reasons. "His physical description fit that of one we had received from one of the witnesses and I also had known Lattimore to be a hit man for the Curry-Baskerville organization."

"But other than that, there was no other information?"

"No, there was no other information. It was a best guess on our part." (ECF 49 at 85))

During her testimony, Manson makes no mention of the reported confession to the murder by Lattimore contained in the Boyd 302.

Manson later testifies that Lattimore's photo was shown to Johnnie Davis and that he was not able to make an identification.

This is also not true. Davis picked out Lattimore from the photo array and said he looked like the shooter. Davis was sufficiently confident as to the shooter looking like the photo (#5) that he did not ask to see any photos from that array again. (Exhibit P-8, page 5)

The effort to refute any identification of anyone other than Young as the shooter, including Lattimore, is found in the government's summation wherein AUSA Frazer tells the jury that Davis did not see the shooter. (TT 5737) A fair read of the evidence indicates that Davis did see the shooter, gave a pretty good description and picked him out of the photo array.

The Boyd 302 would have lent significant support to Davis' identification of Lattimore in the photo array and supported the defense theory that the jury couldn't trust Young (TT 5857-5860)

The Boyd 302 would have been immensely important as a mechanism to impeach Manson. The government argues that Manson was not that important a witness, as there were jailhouse snitches who testified.

Manson was the highly respectable glue that held the government's witnesses together. The government's position ignores the fact that an FBI agent is given a great deal of credibility by a jury. Finding ways to soften-up that aura of credibility would be essential in taking the government's case apart. Any credibility issue raised about Manson would have been vital to the defense and damaging to the government's case.

The Boyd 302, makes it clear that Manson testified falsely.

JOHNNIE DAVIS

The government asserts that Davis was unable to identify Lattimore when shown the photo array. The government does not

specify what they mean by "identify". What we do know is that Davis picked-out Lattimore's photo and said that the picture looked like the shooter. Lattimore was the person identified in the Boyd 302

Equally compelling is the fact that Young does not fit the description of the shooter given by Davis.1

KENNETH KAYSER

As Kenneth Kayser testified on July 22, 2019, had he been given the Boyd 302 he would certainly have tried to interview him (HT-148/9) and might have had to change his approach. (HT-150/2) Kayser testified that had he known about the Boyd 302 he would have tried to "find out whatever else he knew might be helpful." (HT-157/16) Kayser did not interview Boyd. This is because he did not have the Boyd 302. Kayser continued that "[t]here was a suggestion that the shooter had long dreadlocks. Anthony Yong clearly did not have long dreadlocks. And that was a very distinctive feature that somebody would remember." (HT-107/13)

The indicia of reliability of Davis description of the shooter and his subsequent selection of Lattimore's picture, when combined with the Boyd 302 identifying Lattimore as having taken credit for the murder becomes not only material but compelling. This also makes Carl Herman's testimony suggesting that Lattimore could have been lying (HT-91/2) Juniper & Dennis, Lang

Having the Boyd 302 prior to trial would have presented a number of important avenues of examination for the defense, either before trial in investigation or during trial in cross-examination.

This 302 would have given powerful support to a different shooter theory. A theory that the defense was unwilling to pursue because they thought "it would be crazy" to suggest that someone other than Young was the shooter. Even though trial counsel thought it was crazy, they spent considerable time highlighting inconsistencies in Young's testimony.

These likely results are not disputed by the government.

FAILURE TO INVESTIGATE

The government accepts that "No doubt, defense counsel did not know in April 2007, precisely what Curry and Rakeem would have said. . . they reasonably could have assumed . . ." That seems like exactly what counsel did. They "assumed". Since they made no effort to identify what the witnesses might have said, they were stuck with their assumptions. Unfortunately, Petitioner was also stuck with their assumptions.

CURRY CALLS

Had trial counsel reviewed the Curry calls, they would have been able to show that the entire basis for the theory that the Curry organization ordered the killing of McCray was defective. Despite the government seeking to discount the value of the

calls, they offer important insight into the rationale of Curry and associates. In one call on 12/4/03, Bergrin tells Curry he can get petitioner 13 years. This is the reality with which Curry was dealing on 12/4/03. The likelihood that Curry would have ordered a murder if he believed that petitioner was facing life in prison is far greater than the likelihood of a murder to avoid a 13 year sentence.

Additionally, we know that McCray had co-operated against many people prior to petitioner. It is as possible that someone other than Curry was the instigator of the killing.

DETAILS ONLY SHOOTER WOULD KNOW

The government argues that Young must have been the shooter because he knew things only the shooter would know. What do we actually know?

YOUNG SAYS

- Young says he approached McCray and Davis from the front, passing them face-to-face;

OTHER WITNESSES SAY

- Davis says the shooter came up from behind;

YOUNG SAYS

- Young said he passed Davis and McCray as they walked side-by-side. He said he reached past Davis, grabbed McCray as he (Young) passed Davis;

WE KNOW

- To do this Young would have to have been very close to Davis;
- It is unlikely that passing so close, Davis would not have noticed Young;

YOUNG SAYS

- Young describes there being a cigarette under McCray's body as he lay in the crosswalk. (ECF 72, page 26) How would he know this? He didn't move the body. Was he provided that information by law enforcement?

YOUNG SAYS

- Young says that Rakeem drove-up in the getaway car just as he (Young) was shooting McCray;

OTHER WITNESSES SAY

- Davis said that the getaway car was parked along the curb, by the mailbox on 19th street. That the car was there when they walked by on their way to and from the bodega on 20th Street where they went for lunch; (P-6)
- Webb-Williams similarly said that the get-away car was parked along the curb in front of the bar; (Same location as Davis described) (P-7)

YOUNG SAYS

- Young says he was wearing a Yankees cap, a blue fleece jacket, with the collar up and jeans; (TT 4394-4395)

OTHER WITNESSES SAY

- Davis says the shooter had shoulder length dreadlocks;

- Davis makes no mention of a ball cap;
- Webb-Williams says that the shooter was wearing khaki pants; (TT 4496 & P-7)

YOUNG SAYS

- Young says he jumped over McCray's body and got into the getaway car. As Young described the event, he was behind McCray and closer to the curb, with the getaway car stopped in the street, it would have been ahead of him, with McCray's body between him and the car;

OTHER WITNESSES SAY

- Davis said that the shooter went "back" toward the car, jumped in and was driven away. This "going back" is consistent only with the getaway car being parked along the curb in front of the bar, rather than in the street as Young said. (TT 4470)
- Similarly, Webb-Williams says the shooter turned back and got into car. (P-7)

YOUNG SAYS

- Young describes the building where McCray and Davis are working. He said that there was a dumpster in front of the building. (TT 4387)

OTHER WITNESSES SAY

- Davis said that the dumpster was on the side of the building. (TT-4466)

None of these particular facts alone demonstrate that Young was lying. However, put together, all of these discrepancies form a solid basis to effectively challenge his credibility. If trial counsel had enough details with which to challenge Young, saying he was not the shooter and was, in fact, lying to get a good deal seems less and less crazy.

Lastly, one cannot rely on Young's statement that he learned about the name of the informant during the call between Curry and Bergrin. The Name of informant was widely known since November 30, 2004, more than a month and a half before Young went to the FBI the first time. (ECF 29, Exhibit E)

DECLARATIONS BY TRIAL COUNSEL

The government admits in FN 10 (ECF 72, page 34) that they prepared the declarations after debriefing them for more than one hour and sent the declarations to counsel for their review. This in no way alleviates the government's highly "skewed" process for identifying exactly what trial counsel actually recalled.

The government notes that it is now 12 years after the trial and recollections may well fade. Clearly it is true: recollections fadse. However, the declarations were made not 12 years after the trial but 7 years after the trial: still a significant amount of time, suggesting that caution would be appropriate when obtaining recollections.

Surely, written recollections of trial counsel are appropriate. However, the government preparing counsel's recollections is highly inappropriate. Such a process gets us not closer to an actual recollection but closer to what the government wants that recollection to be.

The government tells us that they debriefed trial counsel for more than one hour (ECF 72, pg 34, FN 10) Kayser noted that he met with the government and co-counsel for "at least a couple few hours." (HT-100/17)

No experienced investigator, seeking actual recollections, would interview witnesses together; they would be interviewed separately to obtain each witnesses' actual and independent recollection.

Mr. Kayser testified that "I had no recollection of all of these facts and details at the time." (HT 100/8) "Did I have a specific recollection of every detail in here? Absolutely not." If trial counsel did not recall all of the details in the declarations, what exactly are those declarations? They are not what they purport to be.

Unfortunately, this Court was placed in the position of relying upon these declarations in reaching portions of its opinion on petitioner's 2255 motion.

Given the circumstances under which these declarations were produced and the clear testimony of trial counsel that they did

not write or even understand portions, these declarations should be given the weight they deserve, none.

CONCLUSION

No one wants to say the government has played fast and loose with the facts. The duty of a prosecuting authority is so serious, one cannot accept such a casual approach to important facts as being our reality. More to the point, such a reality is unacceptable. There seems to have been a remarkable casualness in how the government approached the details of petitioner's case. It is often in the details where truth and dishonesty are separated.

For the foregoing reasons, the fairness of Petitioner's trial and conviction become substantially unreliable. Petitioner should be afforded an out-right dismissal of the [homicide/all] charges against him or at the minimum a new trial.

Respectfully submitted,

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