UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

WILLIAM BASKERVILLE, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	: : : : : : : : : :	Civ. No. 13-5881 (PGS) **OPINION**

PETER G. SHERIDAN, U.S.D.J.

I. INTRODUCTION

Petitioner, William Baskerville, is proceeding with a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. On November 15, 2018, this Court denied most of petitioner's claims. However, this Court reserved judgment on a few claims. An evidentiary hearing took place on July 22, 2019 and July 23, 2019. The parties then submitted post-hearing briefs. In addition, as will be explained *infra*, petitioner raised additional claims in his post-hearing briefs that will be addressed in this opinion as well.

For the following reasons, this Court will deny petitioner relief on his remaining claims. However, a certificate of appealability will issue on one claim.

II. BACKGROUND

This Court discussed the factual background giving rise to this action at length in its November 15, 2018 opinion. Therefore, only a short recitation is required here.

Petitioner was charged with several federal drug offenses arising out of his involvement with an organization led by Hakeem Curry in November, 2003. The dug evidence against petitioner included information from a confidential informant, Kemo McCray. Several months

after petitioner was arrested on these drug charges, McCray was murdered on South Orange Avenue in Newark, New Jersey. Sometime later, additional charges against petitioner were brought arising from McCray's murder; they included conspiracy to murder a witness and conspiracy to retaliate against an informant.

Petitioner was first represented by Paul Bergrin upon his initial arrest in November, 2003. One of the key witnesses at petitioner's trial on the charges arising out of McCray's murder was Anthony Young. As this Court noted in its prior opinion:

> After petitioner's initial appearance on November 25, 2003, Bergrin and Curry spoke by phone. At that time, Bergrin told Curry that the name of the confidential informant against petitioner was "K-Mo." (*See* [T.T.][1] at p.4352) Young, who was present with Curry at the time of this call between Curry and Bergrin, came to the conclusion that the informant was "Kemo" and not "K-Mo" as stated by Bergrin, because Curry had repeated the name "K-Mo" after Bergrin told him it over the phone. (*See id.* at p.4352)
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> Several days after petitioner's arrest, a meeting among various associates of the Curry drug organization took place at Jamal Baskerville's house. (*See* T.T. p.4359) Curry, Rakeem Baskerville, Jamal Baskerville, McNeil, Young and Bergrin were present. (*See id.*) At this meeting, Bergrin told the group that petitioner would not get bail and that petitioner was facing life imprisonment. (*See id.* at p.4360) However, Bergrin told the group that if Kemo was not around to testify against petitioner, then there was no case, stating, "no Kemo, no case." (*See id.* p.4361)
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> After Bergrin left, the group remaining then discussed how to find Kemo McCray so that he would not testify against petitioner. (*See id.* at p.4362) Curry and Rakeem Baskerville agreed to pay $15,000 to either Young or McNeil to kill Kemo McCray. (*See id.* at p.4363)

(ECF 49 at p.2-3)

[1] T.T. refers to petitioner's criminal trial transcript.

Young ultimately confessed to investigators to shooting McCray. Young was a key witness at petitioner's trial. Petitioner was ultimately convicted by a jury on all counts. He was not given the death penalty.

The United States Court of Appeals for the Third Circuit affirmed on direct appeal. *See United States v. Baskerville*, 449 F. App'x 243 (3d Cir. 2011).

Subsequently, petitioner filed this § 2255 action. Petitioner's § 2255 filing had a plethora of claims. This Court disposed of most of those claims in a previous opinion. However, a few claims were reserved. First, this Court reserved judgment on petitioner's claim that his two trial attorneys were ineffective for failing to investigate/call as witnesses Hakeem Curry and petitioner's brother, Rakeem Baskerville.[2] Petitioner submitted affidavits from both Curry and Rakeem Baskerville in support of his claim. Hakeem Curry stated as follows in his declaration:

> Had Mr. Baskerville's attorney called me as a defense witness I would have testified under oath that I had no role in any sort of conspiracy to kill Deshawn McCray because of his status as an informant/witness against Mr. Baskerville.
>
> I would have further testified that Mr. Baskerville never communicated any desire to me that he wanted any harm to befall Deshawn McCray.
>
> I also would have testified that I never suggested in any way that anyone should harm Desahwn McCray, nor would I have condoned or entertained anyone else's desire to harm Deshawn McCray because of his status as an informant/witness against Mr. Baskerville.

(ECF 29 at p.82-83)

Rakeem Baskerville stated as follows in his affidavit:

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[2] Because this Court reserved judgment on this ineffective assistance of counsel claim, this Court also reserved judgment on petitioner's cumulative ineffective assistance of counsel claim. That claim will also be addressed *infra*.

> I would have testified that I had no involvement in, nor knowledge of, any plot, scheme, or conspiracy to kill McCray as alleged in the above-entitled cause and action.
>
> I would have testified that I did not attend, and have never attended, any meeting at Jamal Baskerville's home on 25 November 2003 with Diedra Baskerville, Jamal Baskerville, Hamid Baskerville, Jahmal McNeil, Hakim Currie, Anthony Young and Paul Bergrin as alleged in the above-entitled cause and action.
>
> I would have testified that I was not in Hakim Currie's vehicle on 25 November 2003 with Anthony Young and Hakim Currie when it is alleged that Paul Bergrin called Hakim Currie and gave him the name "K-Mo."
>
> I would have testified that I did not attend any meeting 4-10 days after William Baskerville's arrest where it is alleged that a meeting occurred between myself, Paul Bergrin, Hakim Currie, Anthony Young, Jahmal McNeil and Jamal Baskerville where it is further alleged that Paul Bergrin stated "no K-Mo, no case."
>
> I would have testified and refuted the allegation that I was involved in any aspect of the McCray murder and that any such testimony to that effect was false.
>
> I would have testified William Baskerville never communicated to me in any way that he wanted any act of violence carried out against McCray as alleged in the above-entitled cause and action.

(ECF 29 at p.85)

The government submitted declarations from both of petitioner's trial counsel, Kenneth Kayser, Esq. and Carl Herman, Esq. This Court noted as follows in its previous opinion:

> Mr. Kayser and Mr. Herman state in their declarations that they chose not to call Rakeem Baskerville because he had already been convicted and sentenced along with Hakeem Curry to life in prison for participating in a drug conspiracy in a separate criminal proceeding. (*See* ECF 16-1 at p.14; ECF 16-2 at p.16) According to them, Rakeem Baskerville would not have aided petitioner at his trial even if he would have waived his Fifth Amendment rights. According to petitioner's trial counsel, Rakeem Baskerville would have caused serious damage to the defense's ability to maintain credibility with the jury. (*See id.*)

(ECF 49 at p.30)

This Court ultimately ordered an evidentiary hearing on petitioner's claim that trial counsel was ineffective for failing to investigate/call as witnesses as trial Curry and Rakeem Baskerville. Thereafter, this Court granted the government's request to bifurcate the evidentiary hearing on this claim. This Court initially would only hear testimony regarding the first prong of the *Strickland*[3] test, namely whether trial counsel's performance fell below an objective standard of reasonableness. Only if petitioner met the first prong of the *Strickland* test would this Court then analyze whether petitioner was prejudiced. Subsequently, this Court heard from petitioner's two trial attorneys, as well as petitioner himself at the evidentiary hearing.

This Court also reserved judgment on petitioner's claim that there was a *Brady*[4] violation when the government did not disclose Roderick Boyd's F.B.I. 302 report to the defense at petitioner's trial. That report is dated June 17, 2004 and states as follows:

> On June 17, 2004, Roderick Boyd, a Federal inmate at Passaic County Jail, was interviewed by the undersigned agents [SO Henry Dillon & SA Shawn A. Manson] in the presence of his attorney . . . Boyd had requested to speak to the agents regarding information on Hakim Currie and Currie's associates.
>
> Boyd is currently incarcerated with Norman Sanders, Oscar Last Name Unknown, Jason Hannible, Alquadir Clark, Malik Latimore, Tahid Mitchell, Atif Ameen aka Sah. Norman Sanders' girlfriend, Paula, brought him a picture of Lachoy Walker, at the instruction of Hakim Currie, with further instruction to "Kill on Sight" or KOS because Walker is a snitch. The picture shows Walker standing alone in front of the Bellagio in Las Vegas two years ago at Currie's wedding.
>
> Phil, a drug dealer in the area of 30 Lenox Avenue, is bringing in money to Sanders, and Sanders distributes it to the rest of the crew. Sanders is in charge now that Curries has been moved to Monmouth County Jail.

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[3] *Strickland v. Washington*, 466 U.S. 668 (1984).
[4] *Brady v. Maryland*, 373 U.S. 83 (1963).

> Phil runs a large scale drug operation out the apartment building at 30 Lenox Avenue, East Orange. Phil, age approximately 27, originally from Avon Avenue, has six to eight "runners" who work for him around the clock selling heroin and crack cocaine. He stashes the drugs inside apartment 480. The apartment belongs to his girlfriend's mother, Teresa Last Name Unknown
>
> Boyd advised that Latimore and Sanders talk openly about killing a snitch on S. Orange and 19th Street, Newark. Latimore killed him, and is still waiting on getting paid from Currie for the job. Currie owes Latimore $37,000.
>
> Currie hired Paul Bergrin to represent the members of his crew. Currie is paying Bergrin directly, and Bergrin is conspiring with his associates to represent Currie's associated. Bergrin is calling the shots behind the scenes, and Currie is paying him in cash, under the table, in return.

(ECF 72-1 at p.7)

After the evidentiary hearing, the parties were permitted to file post-hearing briefs. In addition to arguing that he is entitled to relief based on the claims discussed above, petitioner also asserts other claims that the prosecution against him should be dismissed; more specifically (1) because of Manson's knowingly false testimony at petitioner's trial for failing to bring up the Boyd 302 report; (2) because of ongoing purported misrepresentations by the United States Attorney's Office; and (3) because the government failed to disclose prior to trial a call sheet prepared by Agent Manson in 2005 detailing calls arising from Curry's wiretapped phone.

III. DISCUSSION

A. Failure to Investigate/Call as Witnesses Hakeem Curry & Rakeem Baskerville

The Sixth Amendment guarantees effective assistance of counsel. To sustain such a claim, a petitioner first must show that considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688. In evaluating whether counsel was deficient, the "proper standard for attorney performance is that of

'reasonably effective assistance.'" *Jacobs v. Horn*, 395 F.3d 92, 102 (3d Cir. 2005). A petitioner asserting ineffective assistance must therefore show that counsel's representation "fell below an objective standard of reasonableness" under the circumstances. *Id.* The reasonableness of counsel's representation must be determined based on the particular facts of a petitioner's case, viewed as of the time of the challenged conduct of counsel. *Id.* In scrutinizing counsel's performance, courts "must be highly deferential . . . a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. This requires the court to "begin with the premise that, under the circumstances, the challenged action[s] might be considered sound trial strategy." *Cullen v. Pinholster*, 563 U.S. 170, 191 (2011). Courts are "required not simply to give [the] attorney[] the benefit of the doubt, but to affirmatively entertain the range of possible reasons [petitioner's] counsel may have had for proceeding as he did." *Branch v. Sweeney*, 758 F.3d 226, 235 (3d Cir. 2014). "[S]trategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

This Court must first resolve a factual dispute between petitioner and his trial counsel that arose during the evidentiary hearing. Mr. Herman testified that no one, not even petitioner, ever told him that Hakeem Curry and Rakeem Baskerville had information relevant to his defense. (*See* ECF 77 at p.72-73) Similarly, Mr. Kayser testified that if anyone had told him that a witness had helpful information, he would have sought to get that information. (*See id.* at 120) Comparatively, petitioner testified that he told his trial counsel that Rakeem Baskerville and Hakeem Curry would testify in his defense. (*See* ECF 78 at p.238; 253; 259-60)

Having had the ability to view and listen to both petitioner's trial counsel and petitioner during the July 2019 evidentiary hearing, this Court finds petitioner's trial counsel more credible on this point. Aside from having the luxury of viewing the witnesses testify in front of this Court, other evidence in this case also leads this Court to believe petitioner's trial counsel over petitioner on this issue. Indeed, on April 26, 2007, after the guilt-phase summations at petitioner's criminal trial, petitioner wrote to the presiding judge, Judge Pisano. (*See* ECF 29 at p.71-72) In that letter, petitioner specifically noted, "I am completely aware that I have the right to put own [sic] a defence [sic] which I invoked the right not to do so." (*See id.* at p.71) Despite complaining about some items about Mr. Kayser and Mr. Herman's defense in the letter, he stated that they were working hard, but that he wanted to state "just a few of the issues and concerns" he was having. (*See id.* at p.72) Petitioner's failure to indicate in this letter written contemporaneously with petitioner's trial that he had wanted his trial counsel to investigate and call as witnesses Rakeem Baskerville and Hakeem Curry, assists this Court in finding petitioner's trial counsel more credible than petitioner on whether he spoke to his trial counsel about these two witnesses. *Cf. United States v. DiTomasso*, 932 F.3d 58, 72 (2d Cir. 2019) ("The Court also find it significant that when DiTomasso made his first posttrial complaint about Ginsberg's performance, in his May 2016 letter to the court, he 'focused entirely on his view that an [Xbox] cannot do the things the trial witnesses said it did. That was the issue that he believed deprived him of a fair trial.' In that letter, DiTomasso 'did not raise' any semblance of 'his current claim that his lawyer was inept because he failed to call his [uncle] as a witness.'").

Having determined that petitioner did not tell his trial counsel about Rakeem Baskerville and Hakeem Curry, this Court now must determine whether trial counsel's failure to investigate them and call them as witnesses fell below an objective standard of reasonableness. As was

noted during the evidentiary hearing, Hakeem Curry and Rakeem Baskerville had obvious bias and credibility problems. Rakeem Baskerville was petitioner's brother and Hakeem Curry also had a familial relationship with petitioner. (*See* ECF 78 at p.258-59) Thus, both witnesses presumably would have been biased towards petitioner. *See Kelley v. Hendricks*, No. 03-4780, 2005 WL 2130023, at *6 (D.N.J. Aug. 31, 2005) ("Petitioner's mother may have been an unconvincing witness, or such a decision may have been dictated by a credibility question given a probable bias towards Petitioner. . . . such decisions fall under the strategic choices deference afforded counsel.") (citations omitted). Indeed, both Mr. Herman and Mr. Kayser noted the obvious biasness of Hakeem Curry and Rakeem Baskerville during the evidentiary hearing. (*See* ECF 77 at p.79 (Mr. Herman: "Well, Rakeem Baskerville was Will Baskerville's brother, so easily be dismissed by the jury as coming into help his brother who's facing serious federal charges, including the death penalty. Same thing with Hakeem Curry, who was either a family member or a close friend, so obviously they'd be subject to being undermined by those relationships."); *see also id.* at p.144-45 (Mr. Kayser noting credibility issues with Rakeem Baskerville and Hakeem Curry because they were related to petitioner))

Rakeem Baskerville and Hakeem Curry also had other credibility problems that Mr. Herman and Mr. Kayser were aware of. Most notably, Mr. Herman noted that both had been convicted of federal sentences and were serving life sentences. (*See* ECF 77 at p.79) These convictions could have been introduced to impeach their credibility under Federal Rule of Evidence 609. (*See id.*) Indeed, Mr. Kayser stated that Rakeem Baskerville and Hakeem Curry were fellow gang members with petitioner, and that their significant criminal records would have been exposed on cross-examination. (*See id.* at p.145) Additionally, Mr. Herman testified that there was concern for calling Hakeem Curry because the government could have impeached his

credibility with specific acts of violence. (*See id.* at p.79) Mr. Kayser testified similarly. (*See id.* at 145-46)

In addition to the obvious biasness and credibility problems of Rakeem Baskerville and Hakeem Curry, trial counsel stated other reasons for why investigating/calling them as witnesses would be problematic. First, Mr. Herman testified he thought it was extremely unlikely that Rakeem Baskerville and Hakeem Curry would have testified at petitioner's trial because they did not testify at their own trial as they had appeals pending. (*See* ECF 77 at 78); *see Roasrio v. United States*, No. 15-7174, 2016 WL 393542, at *5 (S.D.N.Y. Feb. 1, 2016) (conclusion that counsel's failure to call a witness was a tactical decision is buttressed by significant likelihood in light of pending state charges that witness would have invoked Fifth Amendment privilege) (citations omitted).

Upon finding that petitioner's trial counsel are more credible on the issue of what petitioner told counsel about Rakeem Baskerville and Hakeem Curry at the time and during his trial, coupled with the biasness and credibility problems described above and noted by petitioner's trial counsel, this Court finds that trial counsel's actions did not fall below an objective standard of reasonableness in not investigating/calling as witnesses Rakeem Baskerville and Hakeem Curry. Accordingly, petitioner is not entitled to relief on this claim.[5]

B. Cumulative Ineffective Assistance of Counsel

In the November 15, 2018 opinion, this Court reserved judgment on petitioner's cumulative ineffective assistance of counsel claim because this Court had not yet ruled on petitioner's claim that trial counsel was purportedly ineffective for failing to investigate/call as a

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[5] Because this Court finds that petitioner has failed to satisfy prong one of the *Strickland* analysis, it is unnecessary for this Court to reach and analyze prong two of the *Strickland* test, prejudice.

witness Hakeem Curry and/or Rakeem Baskerville. (*See* ECF 49 at p.69) Now that that claim has been decided, this Court can also now rule on petitioner's cumulative effect claim.

Errors that do not individually warrant federal habeas relief may sometimes do so when combined. *See Albrecht v. Horn*, 485 F.3d 103, 139 (3d Cir. 2007) (citing *Marshall v. Hendricks*, 307 F.3d 36, 94 (3d Cir. 2002)). In this case, considering all of petitioner's ineffective assistance of counsel claims decided in the November 15, 2018 opinion, along with the claims discussed *supra*, this Court finds that petitioner fails to demonstrate to a reasonable probability that the outcome of his proceedings would have been different. Indeed, as discussed in this and in the prior opinion, some of petitioner's claims do not involve deficient performance at all. Additionally, in light of the evidence presented in this case, petitioner fails to show that the outcome of the proceeding would have been different to a reasonable probability. Accordingly, the cumulative effect claim is denied.

C. Roderick Boyd 302 Report

Another remaining claim that was the subject of much debate during the evidentiary hearing is that the government committed a *Brady* violation by not disclosing Roderick Boyd's F.B.I. 302 report.[6]

A due process violation under *Brady* "occurs if: (1) the evidence at issue is favorable to the accused, because either it is 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 (3d Cir. 2011) (citations omitted). Materiality requires "a reasonable probability that, if the evidence had been disclosed, the result of the proceeding would have been different."

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[6] This Court noted in its November 15, 2018 opinion that the parties could address whether petitioner properly brought this *Brady* claim in this § 2255 proceeding. The government concedes that the merits of this claim can be reached as it relates back to the allegations of petitioner's original § 2255 filing.

Id. (citing *Giglio v. United States* 405 U.S. 150, 152 (1972)). '"[T]he materiality standard for *Brady* claims is met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"" *United States v. Johnson*, 628 F. App'x 124, 129 (3d Cir. 2015) (quoting *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (quoting *v. Whitley*, 514 U.S. 419, 435 (1995))).

i. Whether the Boyd 302 is favorable to the accused

Neither party contests the first element, namely that the Boyd 302 report would have been favorable to petitioner. Thus, this claim will turn on whether the Boyd 302 report was disclosed to the defense and/or whether it is material.

ii. Whether the Boyd 302 Report was Disclosed?

The parties contest whether the Boyd 302 report was disclosed to the defense at petitioner's trial. At the outset, this Court notes that the government cannot state with any degree of certainty whether the Boyd 302 report was in fact disclosed. Indeed, the government conceded that it does not have records of what individual reports were disclosed to defense during petitioner's trial in 2007. (*See* ECF 77 at p.10) While the government notes that it has a better tracking system in place now, that is of little help to this Court in this instance in helping to determine whether the Boyd 302 report was disclosed. Thus, this Court must look at the evidence and testimony produced to decide of whether petitioner has satisfied his burden that the Boyd 302 report was not disclosed.

During the evidentiary hearing, petitioner testified that he did not become aware of the Boyd 302 until 2011 (during Paul Bergrin's first trial), well after his trial has finished. (*See* ECF 78 at p.24) To further buttress his argument that the Boyd 302 was not disclosed, petitioner relies

on testimony from Mr. Kayser at the evidentiary hearing. In response to being asked whether having the Boyd 302 would have impacted his strategy, Mr. Kayser stated as follows:

> [I]t really wouldn't have mattered if Lattimore was the shooter, but it wouldn't have made any sense in connection with the admission that he was the shooter by Anthony Young. So, I just – I can't imagine – I probably would like to have talked to Roderick Boyd; I mean I think we certainly would have if we had that 302 we would have tried to interview him.

(ECF 77 at p.148)

The government counters petitioner's arguments by asserting that the record on whether the Boyd 302 was disclosed is equipoise. Thus, according to the government, petitioner has failed to meet his burden on this element. In support its equipoise argument, the government asserts as follows:

1. It is not surprising that petitioner's trial counsel would not recall the Boyd 302 report given that it was one page in boxes and boxes of documents.
2. Given that the Boyd 302 report would not have altered trial counsel's strategy, it is more likely than not that the document was produced but considered insignificant.
3. Because the government produced the Boyd 302 report in Paul Bergrin's 2011 and 2013 trials, it would make little sense that the government would have withheld it in petitioner's 2007 trial.

This Court does not find the government's arguments persuasive, but rather is persuaded that petitioner has met his burden on this element. As to the government's first argument, the government cannot have it both ways. The government touted the experience of petitioner's trial counsel in arguing that this Court should find them credible on petitioner's ineffective assistance of counsel claim discussed *supra*. However, by stating that trial counsel may have overlooked

the Boyd 302 report, the government, at least implicitly, is questioning the abilities of petitioner's trial counsel.

Furthermore, and most importantly, this Court finds Mr. Kayser's testimony during the evidentiary hearing that he would have sought to interview Mr. Boyd if he had a copy of the 302 report extremely persuasive.

Finally, the government's third argument fails to recognize that even a negligent failure to disclose the Boyd 302 report would satisfy this *Brady* element. The United States Supreme Court has stated the following:

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, *see Brady*, 373 U.S. at 87 . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Kyles v. Whitley, 514 U.S. 419, 437-48 (1995). Thus, this indicates that there can be a *Brady* violation even if there was no bad faith on the part of the prosecution. Indeed, courts have noted that in the criminal context there is no intent requirement to a successful *Brady* claim. *See Livingston v. Grewal*, No. 12-5450, 2018 WL 4251819, at *3 (D.N.J. Sept. 6, 2018) (noting were state conceded that it inadvertently suppressed evidence, that it met that part of the *Brady* test); *Buckheit v. Dennis*, No. 09-5000, 2010 WL 3751889, at *12 (N.D. Cal. Sept. 24, 2010) ("In the criminal context, there is no intent requirement to establish a *Brady* claim; whether non-disclosure was negligent or by design, it is the responsibility of the prosecutor.") (internal quotation marks and citations omitted).

Even an inadvertent withholding of a document can be enough under *Brady*. Accordingly, and principally relying on Mr. Kayser's statement at the evidentiary hearing that he

would have interviewed Boyd had he received the 302 report, this Court finds that petitioner has satisfied his burden to show that the Boyd 302 report was not disclosed by the government.

iii. Whether the Boyd 302 was material

This claim then turns on whether petitioner has satisfied the third element of the *Brady* test, namely whether the Boyd 302 report was material. Petitioner makes two principal arguments to support materiality; specifically (1) that it could have been used to impeach Manson's testimony at trial; and (2) that it could have led to the defense pursuing an alternative shooter strategy at trial. For the following reasons, this Court is unpersuaded by both arguments.

a. Impeachment of Manson

As noted by the Third Circuit:

> "The materiality of *Brady* depends almost entirely on the value of the evidence relative to the other evidence mustered by the state." *Rocha v. Thaler*, 619 F.3d 387, 396 (5th Cir. 2010) (internal quotation marks and citation omitted). Suppressed evidence that would be cumulative of other evidence or would be used to impeach testimony of a witness whose account is strongly corroborated is generally not considered material for *Brady* purposes. *Id.* at 396-97. Conversely, however, undisclosed evidence that would seriously undermine the testimony of a key witness may be considered material when it relates to an essential issue or the testimony lacks strong corroboration.

Johnson v. Folino, 705 F.3d 117, 129 (3d Cir. 2013). Additionally, inadmissible evidence can still be *Brady* material if it could lead to admissible evidence. *See Gibson v. Sec'y Pa. Dep't of Corr.*, 718 F. App'x 126, 131 (3d Cir. 2017) (citing *Dennis v. Sec'y Pa. Dep't of Corr.*, 834 F.3d 263, 309-10 (3d Cir. 2016) (en banc)).

The presumed importance within the Boyd 302 report is Boyd's statement that Lattimore told him that he had killed a snitch on S. Orange and 19th Streets. During trial, Manson testified as follows:

Q: By January of 2005, did you have some of these cooperators that we just talked about providing information on the William Baskerville case?
A: Yes, we did.
Q: But prior to January of 2005, did you have any lead as to who the shooter was in the case?
A: No, we did not.
Q: Let me just go back. In July of 2004, did you have any communication with Detective Sabur, lead homicide detective, regarding a possible suspect –
A: Yes.
Q: -- for the shooting?
A: I had spoken with Detective Sabur and passed onto Detective Sabur the name of Maleek Lattimore, who is an individual who is part of the William Baskerville/hakim Curry crew and is also known to be a hit man. [¶] I passed on his name to Detective Sabur and Detective Sabur then did a photo array with one of the witnesses from the homicide.
Q: Okay. And why did you give William Lattimore's name to Detective Sabur?
A: I gave him the name for two reasons. His physical description fit that of one we had received from one of the witnesses and also I had known William Lattimore to be a hit man for the Curry organization.
Q: But other than that, there was no other information?
A: No, there was no other information. It was a best guess on our part. . . .
Q: Agent, what was the result – by the way, the witness who was shown the photo of William Lattimore –
A: Yes.
Q: -- what was his name?
A: Mr. Johnnie Davis.
Q: Okay. What was the result of that name?
A: He was not able to make an identification.
Q: Did you go out and interview Mr. Lattimore after July of '04?
A: No, we did not.
Q: Did you arrest him?
A: No. We – this was not an issue at this stage, after he could not identify Lattimore.
Q: Okay.

(T.T. p.3888-89)

Petitioner makes much of Manson's failure to include information gleaned from the Boyd 302 report as an additional reason for discovering Lattimore as a potential suspect in the killing

of Kemo McCray. However, as Manson's trial testimony above indicates, Lattimore was readily discussed and passed along to the detectives investigating the murder as a possible suspect. Furthermore, and perhaps more importantly to analyzing this argument, Manson was not the main witness who supplied evidence linking petitioner to the murder of McCray. *See United States v. Spinelli*, 551 F.3d 159, 165 (2d Cir. 2008) ("Impeaching information is more likely to be deemed material 'if the witness whose testimony is attacked supplied the only evidence linking the defendant [ ] to the crime.'") (quoting *United States v. Wong*, 78 F.3d 73, 78 (2d Cir. 1996)). Indeed, as this Court noted in summarizing the background of petitioner's trial in its November 15, 2018 opinion, key witnesses implicating petitioner in the murder of McCray included, but were not limited to, Young's testimony regarding petitioner's conversations with Jamal McNeil as well as testimony from comments petitioner had made to other incarcerated persons such as Troy Bell, Eric Dock and Eddie Williams.

Considered in totality, had the defense impeached Manson with her failure to include the Boyd 302 as an additional reason for passing along Lattimore's name to the murder investigators, this Court does not find that it would have seriously undermined the testimony of Manson to make the Boyd 302 material under this impeachment theory.

b. Alternative Trial Strategy

Petitioner's additional argument for materiality is as follows: "[h]aving the Boyd 302 could have changed the entire approach to Baskerville's defense. Rather than deciding that they could not argue that Young was not the shooter, they could have taken Young on directly, challenging everything he said." (ECF 70 at p.12) The government asserts that the Boyd 302 is not material because petitioner has failed to show that the "blame Lattimore" strategy" would

have borne fruit. (ECF 72 at 35) The government asserts that the Boyd 302 report is "triple hearsay" and petitioner has failed to show how it could have led to material admissible evidence.

At the outset, this Court reiterates that inadmissible evidence can be material if it could have led to the discovery of admissible evidence. *Dennis*, 834 F.3d at 310 (*citing Johnson*, 7-5 F.3d at 130)). Thus, while this Court agrees with the government's position that the Boyd 302 report itself may have been inadmissible at petitioner's trial because it is triple hearsay (Manson's report indicating what Lattimore had told Boyd about killing a snitch), that does not, and in fact, cannot end this Court's materiality inquiry under applicable legal precedent. Rather, this Court must be mindful that the overarching test is *materiality*, not admissibility.

At trial, Young's testimony indicated that Bergrin called Curry on the day of petitioner's arrest after speaking to petitioner to tell Curry that the confidential informant against petitioner was Kemo.[7] (*See* T.T. at p.4352) Indeed, Richard Hosten testified at trial that he overheard petitioner mention the name of Kemo to whomever he was speaking to over the telephone on the day of his arrest. (*See id.* at p.4286) Other witnesses besides Young implicated petitioner in the conspiracy to murder Kemo McCray. Indeed, as this Court noted in its prior opinion:

> Petitioner had had discussions with other inmates about McCray both before and after McCray's murder. Indeed, Troy Bell, another prisoner, stated that petitioner told him at one point that, "all I know, my informant could be dead. He said, my dudes is looking for him to put a bullet in his melon, but they can't find him." (See id. at p.5060) Bell also stated that petitioner told him he knew who his informant was, that he told this information to his brother Rakeern Baskerville, and that he told him to "handle it." (See id. at p.5067) Eric Dock, another prisoner, similarly stated that petitioner told him that his brother was out there looking for his informant and that they were "trying to put a hole in his melon." (See id. at p.5263) Subsequent to McCray's murder, petitioner told one of his fellow prisoners, Eddie Williams, that he would have been a fool to tell the F.B.I. he had the murder done, even though he did. (See id. at p.4753)

[7] Bergrin told Curry at the time that the informant was K-Mo.

(ECF 49 at p.4)

Because Lattimore's statement to Boyd within the 302 report is hearsay, the report itself would not have been admissible for the truth of the matter asserted therein (i.e., that Lattimore killed a snitch). Thus, petitioner has the burden of demonstrating how the disclosure of the Boyd 302 report prior to his trial would have led to material exculpatory evidence. *See DeCologero v. United States*, 802 F.3d 155, 164 (1st Cir. 2015). Petitioner argues that having the Boyd 302 available to trial counsel would have changed the way that Johnny Davis' identification was understood by counsel and that trial counsel could have taken Young on directly, challenging everything he said.

Petitioner has not submitted evidence to support his arguments. For example, he has not provided an affidavit from Lattimore or any other evidence that Lattimore would have been available at trial and that he would have testified in accordance to what he purportedly told Boyd. Further, he makes no representation that after he became aware of the Boyd 302 report that he made any attempt to contact or locate Lattimore, nor does he contend Lattimore would have refused to cooperate with him if he had contacted him.

Additionally, even if Lattimore's statements to Boyd could have been admissible as statements against penal interest under Federal Rule of Evidence 804(b)(3)(B), the declarant must be unavailable as a witness for that hearsay exception to apply. Petitioner made no showing that Lattimore would have been unavailable at trial. Additionally, even if he was, petitioner made no showing that he attempted to contact or locate Boyd after discovering the 302 report.

This Court finds that the United States Court of Appeals decision in *DeCologero* is persuasive authority for finding that petitioner failed to meet his burden of materiality on this claim. In that case, petitioners brought a *Brady* claim arguing that a *Brady* violation occurred

when two FBI reports were not disclosed that purportedly contained exculpatory evidence. Ultimately, the First Circuit held that no *Brady* violation occurred because the reports were not material. The Court noted the evidence that implicated the petitioners in the murder at the outset. Then, it noted how the information contained in the reports was hearsay, and that petitioner had failed to show how it would have led to admissible material exculpatory evidence. *See DeCologero*, 802 F.3d at 164-65.

Like *DeCologero*, there was evidence besides Young's testimony produced at trial that implicated petitioner in the conspiracy to murder McCray as indicated above. Thus, as indicated previously, this would potentially lessen the impact of using the report as impeachment evidence against Young (indeed, as indicated above, the Boyd 302 report itself was inadmissible hearsay). Furthermore, petitioner failed to show how the Boyd 302 report would have led to admissible material exculpatory evidence.

A few other points related to this issue deserve attention. Petitioner also argued that the Boyd 302 report was material because it could have changed the entire approach to his defense. This argument though is belied by the testimony of his trial counsel during the July, 2019 evidentiary hearing. Indeed, Mr. Herman testified as follows at that hearing:

> Q: Roderick Boyd, one of the issues Mr. Baskerville has raised in the Government's alleged failure to turn over a 302 documenting an interview with Roderick Boyd. You're aware of that; correct?
> A: Yes.
> Q: Sir, could you turn to tab 16 in your binder, which is a copy of that 302.
> A: Okay.
> Q: Do you recall ever having seen this, sir? (Witness reviewing.)
> A: Actually, I don't, no.
> Q: I'll summarize it, sir, and Mr. Throckmorton has already done so, but according to the 302: Boyd was incarcerated with Curry organization member Malik Lattimore and overheard Lattimore take credit for a hit on an informant that occurred on South Orange

> Avenue. [¶] Fair summary of part of the information that's in this document?
> A: I believe so, yeah.
> Q: And would having that information in or before 2007 affected your trial strategy in any way?
> A: No.
> Q: Why not, sir?
> A: Well, our – it would seem – given the fact that Anthony Young would come to court and swear under oath that he killed Kemo, there didn't seem to be any productive strategy other than to go with that.

(ECF 77 at p.82-83) Mr. Kayser similarly testified as follows during the evidentiary hearing:

> Q: Now, with respect to the Roderick Boyd 302, you reviewed it in preparation for this hearing?
> A: Yes.
> Q: And you have no specific memory of receiving it, you don't whether you got it or didn't get it.
> A: Correct.
> Q: Because you got voluminous copies of 302s, DEA-7s –
> A: It would be one page in boxes and boxes and boxes of paper and I – you know, I don't remember it.
> Q: Reading it now, would that have impacted your strategy one way or the other?
> A: No.
> Q: Why not?
> A: Because again, it – it really wouldn't have mattered if Lattimore was the shooter, but it wouldn't have made any sense in connection with the admission that he was the shooter by Anthony Young. So, I just – I can't imagine – I probably would like to have talked to Roderick Boyd; I mean I think we certainly would have if we had that 302 we would have tried to interview him. But I don't see how it would have changed our strategy in it of itself.
> Q: Because again it would have not furthered – you had what you needed from Anthony Young.
> A: Correct.

(*Id.* at 147-48) Thus, contrary to petitioner's argument raised in his post-hearing briefs, disclosure of the Boyd 302 would most likely have not changed trial counsel's trial strategy.

Finally, this was not a case in which Lattimore was necessary an unknown person without the Boyd 302 report. Indeed, Manson's testimony indicated that Lattimore's name was

given to investigators as a potential suspect. Lattimore was then included in a photo array with Johnny Davis. Detective Sabur testified at trial that Johnny Davis could not make a positive identification. Indeed, the following testimony occurred during Detective Sabur's direct testimony:

> Q: Did Newark Police Department take steps to figure out who the perpetrators of the murder were?
> A: Yes, we did.
> Q: All right. [¶] Were you successful at all?
> A: No, we were not.
> Q: At some point, did the F.B.I. provide you information about a man named William Lattimore?
> A: Yes.
> MR. KAYSER: Objection, Judge.
> THE COURT: Sustained.
> Q: Detective, did the Newark Police Department at any point conduct an identification procedure with one of the eye witnesses, either Mr. Davis or Mr. Williams?
> A: Yes.
> Q: Which one, if you recall?
> A: I believe it was Mr. Davis.
> Q: And what type of procedure was done?
> A: I believe photographs were shown to Mr. Davis in an effort to try to identify the individual or individuals who were responsible for the shooting death of Mr. McCray?
> Q: Was that done sometime in July of 2004?
> A: Yes.
> Q: Among the photographs, was there a man named William Lattimore?
> A: I believe so.
> Q: And do you know why Mr. Lattimore was shown, among other photographs, to Mr. Davis, where the information came from to put Mr. Lattimore in that?
> A: Based on information that was provided to us by Agent Shawn Manson and the F.B.I., photographs were developed of Mr. Lattimore and individuals that he connected himself with.
> Q: Now, did Mr. Davis, to your knowledge, pick anyone out of the photos, one of which contained Mr. Lattimore's photo?
> A: I believe he did, yes.
> Q: Okay. [¶] Was that a positive I.D.?
> A: No, it wasn't.
> Q: Okay. [¶] Can you just explain – first, what did Mr. Davis – did he recognized anyone in the photos?

A: Yes, he did.
Q: Okay. [¶] Who was it he recognized?
A: I believe it was Mr. William Lattimore?
Q: And tell the jury why that was not a positive identification.
A: That wasn't a positive identification because Mr. Davis said that Mr. Lattimore resembled the person that shot his stepson. He had the same features of him, but he couldn't be 100 percent sure that Mr. Lattimore was, in fact, the person.
Q: Did you, based on that identification, make an arrest of Mr. Lattimore?
A: No, we did not.
Q: Did you even go speak to Mr. Lattimore?
A: No, we did not.
Q: So that was insufficient to take any further action, that identification?
A: That's correct.

(T.T. at p.3364-66) Thus, Lattimore was an individual that was part of the overall investigation into the murder of Kemo McCray.

Petitioner has not shown how the government's failure to turn over the Boyd 302 report was material. Accordingly, this *Brady* claim is denied.

D. Manson's Testimony

In his post-hearing brief, petitioner asserts that the prosecution against him should be dismissed due to the knowingly false testimony by Manson at his trial. When asked at trial why Manson gave Lattimore's name to Detective Sabur, she stated that he fit the physical description from one of the eyewitnesses, and because she knew him to be a hitman for the Curry organization. (*See* T.T. at p.3888) When then asked whether there was any other information as to why she gave Lattimore's name to the investigators, Manson testified that "there was no other information" and it "was a best guess on our part." (*See id.*) Seizing on this, petitioner claims he is entitled to relief because this constituted the government knowingly permitting perjured testimony on the part of Manson because she did not disclose the Boyd 302 report.

As this Court noted in its prior opinion:

> "A State violates the Fourteenth Amendment's due process guarantee when it knowingly presents or fails to correct false testimony in a criminal proceeding." *See Haskell v. Superintendent Greene SCI*, 866 F.3d 139, 145-46 (3d Cir. 2017) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Giglio v. United States*, 405 U.S. 150, 153 (1972); *Lambert v. Blackwell*, 387 F.3d 210, 242 (3d Cir. 2004)). "[T]he [Supreme] Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976), *holding modified by United States v. Bagley*, 473 U.S. 667 (1985). Accordingly, in order to state a claim, petitioner must show that the witness: (1) committed perjury; (2) the government knew or should have known of this perjury; (3) the testimony went uncorrected; and (4) there is any reasonable likelihood that the false testimony could have affected the verdict. *See Lambert*, 387 F.3d at 242-43. It is important to note, however, that "[d]iscrepancy is not enough to prove perjury. There are many reasons testimony may be inconsistent; perjury is only one possible reason." *Id.* at 249. "That some testimony may be inconsistent with that given in the first trial does not by itself constitute perjury." *See United States v. Mangiardi*, 173 F. Supp. 2d 292, 307 (M.D. Pa. 2001) (citing *United States v. Thompson*, 117 F.3d 1033, 1035 (7th Cir. 1997); *United States v. Arnold*, Nos. 99-cv-5564, Crim. 95-153-01, 2000 WL 288242, at *4 (E.D. Pa. Mar. 2000)); *see also Tapia v. Tansey*, 926 F.2d 1554, 1563 (10th Cir. 1991) ("Contradictions and changes in witness's testimony alone do not constitute perjury and do not create an inference, let alone prove, that the prosecution knowingly presented perjured testimony.") (cited approvingly in *United States v. Stadmauer*, 620 F.3d 238, 269 (3d Cir. 2010)).

(ECF 49 at p.81-82) As noted by the Third Circuit, "[p]resenting false testimony cuts to the core of a defendant's right to due process. It thus makes sense that 'the materiality standard for false testimony is lower, more favorable to the defendant, and hostile to the prosecution as compared to the standard for a general *Brady* withholding violation." *Haskell*, 866 F.3d at 152 (citing *United States v. Clay*, 720 F.3d 1021, 1026 (8th Cir. 2013)).

This Court declines to address the first three elements of this claim because petitioner has failed to show that there was *any* reasonable likelihood that Manson's testimony on this issue

could have affected the verdict. This is not a case where the jury was unaware of Lattimore's potential involvement in the murder of Kemo McCray. Indeed, the jury heard testimony from Manson that she turned over Lattimore's name to the investigators. The investigators then did a photo lineup with Johnny Davis that included Lattimore's photo. Detective Sabur testified at petitioner's trial regarding what transpired at this photo lineup as recited *supra*. That photo lineup did not result in a positive identification of Lattimore as the shooter, only that he resembled the shooter. (*See also* T.T. at p.4478 (Davis testifying that he was only thirty percent sure that the person he selected was the shooter)) Furthermore, as this Court noted, the Boyd 302 report itself was triple hearsay. Accordingly, this Court finds petitioner has failed to show to any reasonable likelihood that Manson's failure to include the Boyd 302 in her testimony could have affected the verdict. Thus, petitioner is not entitled to relief on this claim.

E. Preparation of Trial Counsel's Declarations

In support of the government's response to petitioner's § 2255 filing, they included declarations from petitioner's trial counsel, Mr. Herman and Mr. Kayser. Petitioner argues that he is entitled to relief because the government committed a fraud on the court by the way these declarations were prepared and submitted by the government.

A fraud on the court requires the party with the burden to show: (1) an intentional fraud; (2) by an officer of the court; (3) which is directed at the court itself; and (4) that in fact deceives the court. *See Herring v. United States*, 424 F.3d 384, 386 (3d Cir. 2005). "Courts have found fraud on the court only where there has been the most egregious conduct involving a corruption of the judicial process. Examples of such conduct are bribery of judges, employment of counsel to 'influence' the court, bribery of the jury, and involvement of an attorney (an officer of the

court) in the perpetration of the fraud." *Cavilier Cloths, Inc. v. Major Coat Co.*, No. 89-3325, 1995 WL 314511, at *7 (E.D. Pa. May 18, 2005).

Petitioner fails to show that he is entitled to relief on this claim. Mr. Kayser detailed how the declarations came about as follows:

> Q: Do you know what that is?
> A: That's an affidavit that was prepared by the Government, modified by me and signed by me and returned to the Government at some point.
> Q: Really? It was prepared by the government?
> A: Well, the initial – year, I didn't – I have – I had no recollection of all of these facts and details at the time. We – as I recall we were called down to the U.S. Attorney's Office, I say we I was, and Carl [Herman] was there; I don't remember if I knew at the time he was going to be there. And you know, there was an indication that there was a 2255 action, and they wanted to talk to us about the case and prepare affidavits, and so they did that. [¶] We talked about the case; I don't remember how long we were there, it was I think at least a couple few hours. And I think we had also read – may have read something submitted by Mr. Baskerville. I don't recall what that was exactly but that's my recollection. And then I received a draft which I made my modifications to and sent it back.
> Q: And did you ever sit with Mr. Herman to review or prepare this document?
> A: No, no.
> Q: And do you have any recollection of any changes you made to it?
> A: I made a lot of changes to this document. I don't remember specifically what changes I made; there was language I didn't agree with. You know, at the end of the day I felt fairly comfortable signing it because it was consistent with my then recollection of what had happened[.]

(ECF 77 at p.100-01)

Both Mr. Herman and Mr. Kayser testified that the declarations were true and accurate to the best of their belief. (*See id.* at p.65; 124). Indeed, Mr. Kayser noted that if there were any lies in his declaration, he would not have signed it. (*See id.* at 124) Based on the testimony of the two

attorneys, this Court finds petitioner has failed to show that a fraud on the court occurred. Therefore, petitioner is not entitled to relief on this claim.

F. Call Chart

In his post-hearing reply brief, petitioner also argues that the government committed a *Brady* violation when it failed to produce a telephone call list prepared by Manson in 2005. Besides any possible procedural barrier that may exist with bringing this claim in in a post-hearing reply brief, this Court finds that the claim fails on the merits.

Petitioner argues that 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." (ECF 81 at p.4) However, as this Court noted in its prior opinion (albeit in deciding a different claim), "the importance of this testimony is not who was sitting in the passenger seat, but the substance of the phone call between Bergrin and Curry is what was material." (ECF 49 at 101) Accordingly, this Court finds that petitioner has failed to show *Brady* materiality on this claim.[8]

G. Outstanding Motion to Expand the Record

After this matter was fully briefed, but before this Court ruled on the bulk of petitioner's § 2555 claims, petitioner filed a motion to expand the record to include newly discovered evidence. (*See* ECF 40) As this Court noted in its November 15, 2018 opinion, the motion to expand the record includes the following:

1. A letter from Charles Madison addressed to Lawrence Lustberg, Esq. dated January 17, 2014. (*See* ECF 40 at p.10-12)

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[8] It is worth noting as the government notes that as well that the wiretaps in connection with the investigation of Hakeem Curry were turned over to the defense. (*See* Supp. Decl. Herman ECF 34 Ex. 6) Thus, petitioner had at his disposal the exact information that Manson used to create the call list. This would of course include the call from Curry to Rakeem Baskerville immediately after Bergrin phone Curry.

2. A transcript of an interview of Hassan Miller. (*See id.* at p.14-50)
3. A certification from Michael McMahon. (*See id.* at p.52-53)
4. A filed preparation checklist regarding the murder of Kemo McCray (*See id.* at p.59-63)
5. Various police reports. (*See id.* at 65-73)

The government filed its response in opposition to this motion to expand the record on December 19, 2018. (*See* ECF 55).

For the following reasons, this Court will grant the motion to expand the record. However, the claims that are included within the motion to expand the record will be denied on the merits.

i. *Hassan Miller Interview*

Petitioner seeks to add a 2013 interview of Hassan Miller that was conducted by Bergrin's investigators. According to petitioner, Miller states in this interview that Anthony Young lied about being involved in the murder of McCray. The government asserts that petitioner's attempt to expand the record with this information is both untimely and fails on the merits.

> Newly discovered evidence can only warrant a new trial under § 2255 if the following five requirements are satisfied:
>
> > (1) The Evidence must be in fact newly discovered, i.e., discovered since trial;
> > (2) Facts must be alleged from which the court may infer diligence on the part of the movant;
> > (3) The evidence relied on must not be merely cumulative or impeaching;
> > (4) It must be material to the issues involved; and
> > (5) It must be such, and of such nature, as that, on a new trial the newly discovered evidence would probably produce an acquittal.

United States v. Optiz, No. 18-1505, 2018 WL 3559177, at *3 (E.D. Pa. July 24, 2018) (quoting *United States v. Williams*, 166 F. Supp.2d 286, 309 (E.D. Pa. 2001) (citing *Gov't of Virgin Islands v. Lima*, 744 F.2d 1245, 1250 (3d Cir. 1985))); *see also United States v. Cook*, No. 18-06, 2018 WL 3213308, at *6 (D. Minn. June 29, 2018) (citing *English v. United States*, 998 F.2d 609, 611 (8th Cir. 1993)); *Lloyd v. United States*, No. 03-813, 2005 WL 2009890, at *15 (D.N.J. Aug. 16, 2005).

Petitioner fails to show that this evidence would entitle him to relief. First, the statements Miller makes amount to impeachment evidence of Young. As indicated above, in this circumstance, such impeachment evidence is insufficient to warrant granting petitioner relief. Furthermore, this Court notes that Miller's interview is simply that, an interview. Miller has not sworn to any of the statements he made to Bergrin's investigators in the context of his 2013 interview. As this Court noted (albeit in the slightly different context of analyzing petitioner's ineffective assistance of counsel claims), such unsworn statements submitted by petitioner also do not warrant granting him relief. (*See* ECF 49 at p.24-25)

Petitioner also alludes to *Brady* in the context of this claim. Petitioner cannot show that the government withheld the Miller interview since it occurred in 2013, well after petitioner's criminal proceedings were complete. Therefore, petitioner is not entitled to relief based on what he provided this Court in the Hassan Miller interview.

ii. *Charles Madison Letter*

Petitioner next seeks to add to the record a letter from Charles Madison addressed to Lawrence Lustberg, Esq. from January, 2014. Mr. Lustberg was Bergrin's standby counsel during his criminal proceedings which took place years after petitioner was convicted and

sentenced. In this letter, Madison claims to have had a conversation with Anthony Young in 2005 in which Young stated to him that he did not shoot Kemo McCray.

If this Court were to construe this as a *Brady* claim, petitioner fails to show that the government failed to disclose it. Indeed, this is a letter from a person that addressed it to Paul Bergrin's standby counsel, not something that presumably would have been within the government's documents. Furthermore, the letter is from 2014, well after petitioner's trial.

Additionally, to the extent it could be construed as petitioner's attempt to bring a newly discovered evidence claim, it only amounts to impeachment evidence against Young's testimony at petitioner's trial. This Court finds it is then insufficient to warrant granting petitioner relief for this reason as well.

iii. *Shawn McPhall Information*

Petitioner also submits information related to Shawn McPhall in his motion to expand the record. The information includes a certification from Michael McMahon that was included within the post-trial filings in Bergrin's criminal action. Additionally, it includes various police reports.

Michael McMahon' certification is dated June 26, 2016 and states as follows:

1. I am a Private Investigator licensed in the states of New York and New Jersey.
2. I am a retired New York Police Department Detective and I have participated in hundreds of arrests and investigations throughout my career.
3. On June 26, 2016, I interviewed Shawn McPhall a/k/a Maurice a/k/a Mike Cassidy.
4. McPhall told him that he was coming out of a store at the time of the Kemo murder and heard gunshots. He saw a guy (Kemo McCray) lying on the ground.
5. A few days after the murder, McPhall stated he arrested as he was leaving Sand Pit Bar and questioned by police about the Kemo murder.

6. McPhall claimed the police were trying to force him to identify who the shooter was and they were trying to "take advantage of him."
7. McPhall said he was charged with Aggravated Assault, but the charge was thrown out one month later.

(ECF 40 at p.56)

Petitioner also attached several police reports dated March 6, 2004 that appear to give context to McPhall's aggravated assault arrest mentioned in McMahon's certification. (*See* ECF 40 at p.59-73) In one report, Charles Spruill indicated to police that an unknown actor approached Mr. Spruill on the corner of S. Orange Avenue and S. 19th street. The police report indicates that Mr. Spruill told investigators that the unknown actor went up to him and stated "ain't you the motherfucker that was with him the other day", which was in reference to the deceased person. (*See id.* at p.66) The unknown actor then pulled a gun out which caused Mr. Spruill to flee. Subsequently, the unknown actor was positively identified by Mr. Spruill as Shawn McPhall. (*See id.* at p.67) Mr. Spruill also told the police that he was not a witness to the shooting of Kemo McCray as he was locked up in county at the time. (*See id.* at p.69)

Petitioner may be attempting to bring both a *Brady* claim and a newly discovered evidence claim by submitting these materials to this Court. As to *Brady*, petitioner fails to show that he is entitled to relief. This Court fails to see how the police reports are favorable to petitioner. They relate to a purported assault that occurred a few days after Kemo McCray's death. They are neither exculpatory nor are they impeaching. Furthermore, this Court fails to see how the police reports meet the materiality standard as defined by *Brady* and its progeny.

With respect to a newly discovered evidence claim, this Court fails to see how McMahon's certification, and the information McPhall provides therein would entitle petitioner to relief in this case. The certification only indicates that McPhall saw Kemo McCray's body on

the ground after the murder. It gives no indication that McPhall saw the shooter or that he could identify him. Upon considering the entirety of McPhall's statements to McMahon (even omitting potential hearsay pitfalls), this Court fails to see how this evidence would have probably produced an acquittal. Accordingly, petitioner is not entitled to relief on this claim as well.

H. Motion to Relocate Client

Prior to the evidentiary hearing, petitioner's appointed counsel filed a motion to relocate petitioner closer to counsel's office. (*See* ECF 67) As petitioner and his appointed counsel were able to meet and confer prior to the evidentiary hearing, this Court denies the motion at this point in the proceedings as now unnecessary.

I. Certificate of Appealability

Pursuant to 28 U.S.C. § 2253(c), unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken from a final order in a proceeding under 28 U.S.C. § 2255. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citation omitted). In this case, with one exception, this Court will not grant a certificate of appealability on the claims discussed and analyzed in this opinion. However, this Court will grant a certificate of appealability on petitioner's *Brady* claim as it relates to Boyd's 302 report because this Court finds that jurists could conclude that this issue is adequate to deserve encouragement to proceed further.

IV. CONCLUSION

For the following reasons, petitioner's counsel's motion to relocate petitioner is denied. Petitioner's motion to expand the record (ECF 40) is granted. However, the claims contained therein along with the remaining claims in this action are denied. A certificate of appealability shall not issue on the claims discussed in this opinion except for petitioner's *Brady* claim related to the Boyd 302 report. An appropriate order will be entered.

DATED: 10/3/19

PETER G. SHERIDAN
United States District Judge