No. 04-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

KENNETH M. CONLEY,

Petitioner-Appellee

v.

UNITED STATES OF AMERICA, et al.,

Respondent-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE UNITED STATES AS RESPONDENT-APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from the district court order granting defendant's 28 U.S.C. 2255 motion to vacate his judgment of conviction. The district court had jurisdiction under 28 U.S.C. 1331. On June 10, 1998, defendant Kenneth Conley was convicted of perjury before a grand jury and obstructing a grand jury investigation. On July 23, 1999, this Court affirmed Conley's conviction, *United States* v. *Conley*, 186 F.3d 7, 19-20 (1st Cir. 1999), and certiorari was denied on March 20, 2000, 529 U.S. 1017. After three attempts by Conley to vacate his conviction, the district court granted Conley's motion pursuant to 28 U.S.C. 2255 on August 18, 2004, in *Conley* v. *United States*, 332 F. Supp. 2d 302, 324-325 (D. Mass. 2004). The United States filed a timely Notice of Appeal on October 15,

2004. This Court has jurisdiction under 28 U.S.C. 1291 and 2253(a).

ISSUE PRESENTED

Whether the district court erred in setting aside Conley's conviction under 28 U.S.C. 2255 on the ground that the government failed to disclose one FBI internal memorandum in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

STATEMENT OF THE CASE

1. Indictment And Trial

On January 25, 1995, undercover Boston police officer Michael Cox was beaten by fellow officers during a night-time pursuit of a suspect. In April 1997, a federal grand jury began investigating the beating to discover which officers were involved and whether excessive force had been used. Kenneth Conley, one of the officers on the scene, testified before the grand jury on May 27, 1997, pursuant to a grant of immunity. He testified that his car was the fourth or fifth police car to arrive on the scene. Conley testified that he saw an African-American male wearing a brown jacket (suspect Robert Brown) run out of a Lexus toward a fence. Conley testified to the grand jury that he ran after Brown, and that he climbed the fence at the same spot where Brown had, within seconds of seeing Brown go over. Conley testified that he did not observe anyone else pursuing Brown, did not see anyone grab Brown's jacket or foot as Brown scaled the fence, and denied seeing anyone between himself and Brown in pursuit of Brown. Conley also denied seeing anyone beating Officer Cox.

On August 14, 1997, the grand jury returned a three-count indictment against

Conley. Count 1 charged that Conley committed perjury when he denied that he saw Cox chase Brown and touch Brown's leg as Brown scaled the fence. Count 2 charged that Conley committed perjury when he denied seeing anyone beat Cox. Count 3 charged that Conley obstructed and attempted to obstruct the grand jury investigation by giving false, misleading, and evasive testimony to the grand jury under oath.

At trial, the government presented, among other evidence, the testimony of Cox, Brown, and Richard Walker, a Boston police officer who also was on the scene. Cox testified that he was right behind Brown as he pursued Brown, and that when Brown's jacket caught at the top of the fence, Cox unsuccessfully reached for Brown to try to pull him back over the fence. Trial Transcript, Volume I (Trial Tr. I) at 77-78, 129-130 (Appendix (App.), Tab 11); Trial Tr. II at 14 (App., Tab 12). Cox testified that no one was between him and Brown at any time and that he was the officer immediately behind suspect Brown. Trial Tr. I at 85, 88 (App., Tab 11).

Brown and Walker, both called by the government, corroborated Cox's account. Brown testified that, as he ran toward the fence, he saw an African-American man wearing black clothing (Cox) running after him. Trial Tr. II at 94 (App., Tab 12). Brown testified that as he attempted to scale the fence, he ripped his jacket and felt someone touch his foot. Trial Tr. II at 95-96, 125 (App., Tab 12). After he scaled the fence, Brown said he fell down a hill and ran into a tree. Trial Tr. II at 97 (App., Tab 12). Brown said that he was momentarily dazed, and then looked back and saw an African-American man wearing a black hood (Cox)

climbing the fence. Trial Tr. II at 97 (App., Tab 12). Brown said he then saw an officer strike the African-American man from behind, and observed other officers begin to beat Cox. Trial Tr. II at 98-101 (App., Tab 12). Brown said that as he stood up to run, he made eye contact with a tall white officer (later identified as Conley) on the other side of the fence, standing next to the officers who were beating Cox. Trial Tr. II at 101-102 (App. 12). Brown said he then took off running down a hill, and Officer Conley eventually caught him at the bottom of the hill. Trial Tr. II at 102-103 (App. 12).

Walker testified for the government, saying that as his car pulled up, he saw Cox, whom he knew, run out of his car in very close pursuit of suspect Brown. Walker said he saw Cox, who was about two seconds behind Brown when he reached for Brown at the fence, and then saw Brown drop down immediately to the other side of the fence. Trial Tr. II at 31-32, 76 (App., Tab 12). Walker said he then ran past the police cars and Lexus and through a hole in the fence down a hill, falling twice. Trial Tr. III at 191-192 (App., Tab 13). Walker said that when he got up and began running toward the right, he encountered two white officers. Trial Tr. II at 33-36 (App., Tab 12). The "tall officer" asked if Walker had a flashlight and Walker stated that he did not. Trial Tr. II at 36 (App., Tab 12). Walker said the tall officer then began running after the suspect, dropping his radio. Trial Tr. II at 37 (App., Tab 12). Walker picked up his radio and ran after him, and said the tall officer eventually caught Brown. Trial Tr. II at 37 (App., Tab 12). Although Walker testified that he could not identify the officer, he agreed with Conley's

counsel that the tall officer was approximately the same height and build as Conley. Trial Tr. II at 65 (App., Tab 12). The defense recalled Walker to reconfirm that Conley was the tall officer with whom Walker interacted at the bottom of the hill. Trial Tr. III at 182-185, 188-190 (App., Tab 13).

The government also read Conley's grand jury testimony into the record. Conley testified to the grand jury as follows:

> Q: All right. Now, officer Conley, when you were chasing [Brown] as he went over the fence, did you see another individual chasing him as well?
> A: No, I did not.
> Q: Did you see anyone else in plain clothes behind [Brown] as he went towards the fence?
> A: No, I did not.
> Q: Did you see, as he went on top of the fence or climbed the fence, another individual in plain clothes standing there, trying to grab him?
> A: No, I did not.
> Q: When you saw the suspect get to the top of the fence, did you see another individual in plain clothes grabbing part of his clothing –
> A: No, I did not.
> Q: – as he went over the fence?
> A: No, I did not.
> Q: So that didn't happen; is that correct? Because you saw the individual go over the fence?
> A: Yes, I seen [sic] the individual go over the fence.
> Q: And if these other things that I've been describing, a second – another plain clothes officer chasing him, and actually grabbing him as he went to the top of the fence, you would have seen that if it happened; is that your testimony?
> A: I think I would have seen that.
> Q: Well, was there anything that would have caused you not to see that? If you could see the suspect going over the fence, was there anything that would have caused you not to see a plain clothes individual chasing him?
> A: No.

Trial Tr. II at 235-236 (App., Tab 12). Conley further testified to the grand jury that

"within seconds of seeing [Brown] go over the fence," Trial Tr. III at 15 (App., Tab 13), he (Conley) climbed over the fence in "approximately the same location" that he observed Brown go over the fence, Trial Tr. II at 239 (App., Tab 12). He stated that he continued in pursuit, and apprehended and arrested Brown.

2. Verdict And First Appeal

On June 10, 1998, the jury found Conley guilty on Counts 1 and 3, but acquitted him of Count 2 (lying about not seeing the beating). On September 29, 1998, the district court sentenced Conley to 34 months' imprisonment. Conley appealed.

On July 23, 1999, this Court affirmed Conley's conviction and sentence, finding "ample circumstantial evidence" to support the conviction. *United States* v. *Conley*, 186 F.3d 7, 19-20 (1st Cir. 1999) (*Conley I*). The Court concluded that the testimony of Cox, Brown, and Walker "placed Cox at the exact same time at the exact same place where Conley claims to have climbed over the fence," and that Conley's testimony that he was close behind Brown but did *not* see Cox could not be reconciled with the testimony of Cox, Brown, and Walker. *Id*. at 20. By comparing Conley's testimony with the testimony of Cox, Brown, and Walker, this Court held, "the jury reasonably concluded that Conley lied when he stated that he did not observe Cox chasing the suspect." *Ibid*. The Supreme Court denied Conley's petition for a writ of certiorari on March 20, 2000. 529 U.S. 1017.

3. Collateral Attacks And Appeals

a. First Grant Of New Trial And Reversal On Appeal

On March 24, 2000, Conley filed a motion for a new trial based on four pieces of allegedly newly-discovered evidence, including a statement by Walker made to the Boston Police Department's Internal Affairs Division (IAD) that the Boston Police Department had not given to the United States Attorney. At the hearing on the motion, the district court ordered the government to produce in camera all of the Boston Police IAD files in its possession. Later, the court ordered the government to produce anything that the government might have had an obligation to disclose. The United States produced in camera all of the IAD files in its possession.

In addition to the IAD files, the government produced in camera an FBI memorandum that said Walker had initially agreed, and subsequently refused through counsel, to take a polygraph examination concerning his retraction of an earlier statement he had made to IAD about the incident. According to the FBI memorandum, Walker stated to the IAD that he saw a police officer trailing Cox as Cox pursued Brown. Walker explained to the FBI that while initially he had convinced himself that he saw someone behind Cox because he felt guilty that he did not see more, but that he had come to the realization that he really did not see anything or anyone behind Cox. The FBI memorandum also states that "Walker * * * suggested that perhaps if he was hypnotised he might truly recall what was going on versus what he indicates was tunnel vision." FBI memorandum, dated Apr. 9, 1997 (Addendum B).

On June 27, 2000, the district court ordered a new trial. Without identifying the basis for its decision, the court found that the government withheld evidence from defense counsel. The court stated that it was not finding that Conley had been prejudiced under the applicable standard for assessing motions based on newly-discovered evidence, but rather that "in the unique circumstances of this case" it was within the court's discretion to order a new trial "in the interests of justice." *United States* v. *Conley*, 103 F. Supp. 2d 45, 58 (D. Mass. 2000).

The government appealed and, on May 11, 2001, this Court reversed the district court's order. *United States* v. *Conley*, 249 F.3d 38, 47 (1st Cir. 2001) (*Conley II*). This Court held that the district court applied the wrong standard in ordering a new trial when it failed to determine whether the "newly discovered evidence" was material or prejudicial to Conley's defense, as required by *Brady* and *United States* v. *Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980). 249 F.3d at 46. This Court held that a new trial was not warranted because it could only construe the district court's finding that "prejudice could not be determined based upon a consideration of the evidence as a whole under the applicable legal standard," as a conclusion that the three pieces of "newly discovered evidence" did not satisfy the element of prejudice. *Id.* at 46.

b. Second Grant Of New Trial And Reversal On Appeal

On May 18, 2001, Conley filed a Motion to Set Aside Conviction, pursuant to 28 U.S.C. 2255 (App., Tab 3). His motion asserted generally that the newly-discovered evidence concerning Cox, Brown, and Walker was *Brady* material, and

that the government's failure to disclose those materials hindered his cross-examination of witnesses and deprived him of a fair trial. The government opposed, arguing, *inter alia*, that Conley may not collaterally relitigate issues that were squarely decided by this Court on direct appeal.

On September 18, 2001, the district court ordered a new trial based on the nondisclosure of Walker's IAD statement. *Conley* v. *United States*, 164 F. Supp. 2d 216, 221-222 (D. Mass. 2001). The court found, without any elaboration, that this evidence prejudiced Conley's defense by making a "material difference in the defense strategy, including cross-examination." *Id*. at 222.

Again, the government appealed and, in a split decision, this Court reversed, holding that the district court's order granting a new trial based on newly-discovered evidence violates the law of the case. This Court stated that the district court had previously considered, and this Court had earlier rejected, the identical evidence as grounds for a new trial.

This Court then granted rehearing en banc, vacating the panel opinion. Upon rehearing en banc, the Court held that law of the case was inapplicable because it did not in its earlier opinion properly examine whether the newly-discovered evidence violated *Brady*. *Conley* v. *United States*, 323 F.3d 7, 13 (1st Cir. 2003) (*Conley III*). A majority of the en banc Court stated that its 2001 decision that found that *Brady* had not been violated incorrectly interpreted the district court's 2000 opinion. The en banc Court held that because the district court's subsequent grant of habeas relief was based on the same newly-discovered evidence, the district

court had necessarily deemed the newly-discovered evidence prejudicial. *Id*. at 12-13. This Court remanded the matter to allow the district court to examine the *Brady* claim, and ordered that it be reassigned to a different district court judge. *Id*. at 16.

Two judges dissented. Both deemed remand unnecessary because, they stated, this Court could have conducted its own *Brady* analysis and would have found that the Walker evidence does not "undermine[] confidence in the outcome of Conley's trial." *Conley III*, 323 F.3d at 31 (Torruella, J., joined by Bownes, J., dissenting).

4. Current Order Dismissing Charges Against Conley

On remand, this case was reassigned to Chief Judge Young.[1] In his new request for dismissal or a new trial, Conley alleged that there were eight items that were *Brady* material: (1) the transcript of Walker's IAD statement; (2) Brown's indictment for drug offenses pursuant to a joint federal-state investigation; (3) an FBI memorandum concerning an internal FBI request for authority to polygraph Walker and Walker's remark about undergoing hypnosis; (4) Walker's Form 26 Report regarding the incident; (5) a memorandum regarding the incident written by Boston Police Lieutenant Kevin D. Foley; (6) Walker's Unit Incident History log, a computerized contemporaneous log generated by the police dispatcher summarizing

[1] Judge Young had presided over Cox's civil trial, and over a separate lawsuit by Conley's partner against the police department for wrongly disciplining him for asserting his Fifth Amendment right in the Cox investigation. See *Dwan* v. *City of Boston*, 329 F.3d 275 (1st Cir. 2003) (reversing district court's judgment for plaintiff).

Walker's activities the night of the incident; (7) booking reports for the four shooting suspects, including Brown; and (8) forty Form 26 reports prepared by other officers in connection with the incident. The court conducted a status conference and heard argument on Conley's Section 2255 motion on July 23, 2003. Section 2255 Motion Hearing Tr. (App., Tab 4).

After reviewing all of the materials, the district court held that the FBI memorandum was the *only* withheld document that justified habeas relief. *Conley* v. *United States*, 332 F. Supp. 2d 302, 315-320, 324 (D. Mass. 2004). The district court found that Walker's remark, reported in the FBI memorandum, about hypnosis to enhance his recall ability was strong evidence that would have been helpful for Conley. *Id*. at 316. The court held that this evidence differed from Walker's grand jury testimony, which Conley's counsel possessed at trial, as the grand jury testimony provided grounds for impeaching Walker based only on *bias*, which would necessarily require Walker to explain his friendship with Cox. As a result, the court stated, such testimony could generate sympathy among the jury for Cox. However, according to the court, the FBI memorandum could have been used to impeach Walker only on his *ability to recall*, thereby avoiding the creation of any sympathy for Cox. *Id.* at 315-316, 318. Moreover, the court also surmised that Conley's trial counsel could have used the FBI memorandum to impeach Walker's ability to recall *the sequence of events at the fence*, thereby enabling Conley to continue to rely on Walker's testimony that he saw Conley at the bottom of the hill. *Id*. at 318-319.

Aside from the FBI memorandum, the court also said Brown's booking report

could have been used to impeach Brown's trial testimony "that he 'split [his] tooth in half' when he ran into a tree after jumping the fence," because the report did not indicate that Brown was visibly injured at the time of booking. 332 F. Supp. 2d at 320. Nonetheless, the court held that "[s]tanding alone, * * * this Court would not grant the writ due to the nondisclosure of this evidence." *Ibid*. The court further found that failure to disclose the other six of the eight items "does not amount to much." *Ibid*.

Based on the foregoing, the court concluded that Conley did not receive a fair trial. The court dismissed all charges against Conley unless the government moved for retrial by October 18, 2004. 332 F. Supp. 2d at 324-325. [2]

STATEMENT OF THE FACTS

In the early morning hours of January 25, 1995, after a homicide at a Boston restaurant, several police cruisers pursued four African-American male suspects who fled the scene in a Lexus. The chase ended when the suspects drove down a dead end street. One of the suspects, Robert Brown, ran out of the Lexus toward a fence on his right about twenty feet away. Brown was wearing a brown leather jacket. The first police car in pursuit stopped to the left of the Lexus. Undercover officer Michael Cox, who is also African American, ran after Brown. Cox was dressed in plain clothes and was wearing jeans, a black hooded sweatshirt, and a

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[2] Following the district court's denial of the government's motion to stay its proceedings pending this appeal, the government indicated to the court that it is impractical to decide whether a retrial is appropriate at this time and that the government will make that determination upon resolution of this appeal.

black down jacket. Cox said that as Brown climbed the fence, Cox touched Brown's foot briefly trying to grab him before Brown made it over the top.

Cox said that as he was preparing to climb the fence in immediate pursuit of Brown, he was struck from behind with a blunt object by police officers who apparently mistook him for a suspect. Once Cox was on the ground, the officers began beating and kicking Cox repeatedly in the head, back, face, and mouth. Cox then heard an officer shout "Stop, he's a cop" and the officers fled. No one came to Cox's aid. Bleeding and seriously injured, Cox eventually was taken in an ambulance to a hospital for treatment.

Officer Conley, as described at pp. 2-6, *supra*, was one of the officers on the scene.

STANDARD OF REVIEW

In 28 U.S.C. 2255 cases, the Court reviews the district court's legal conclusions de novo and its findings of fact for clear error. See *Ellis* v. *United States*, 313 F.3d 636, 641 (1st Cir. 2002), cert. denied, 540 U.S. 839 (2003). Whether the elements of a *Brady* violation have been established is a question of law that is reviewed de novo. *Gilday* v. *Callahan*, 59 F.3d 257, 269 (1st Cir. 1995), cert. denied, 516 U.S. 1175 (1996).

SUMMARY OF ARGUMENT

To be entitled to relief under *Brady*, a defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). In this case, even if all the materials identified by Conley had been disclosed to him before trial, there is simply no reasonable probability that the result of the proceedings would have been different.

The FBI memorandum is merely cumulative of Walker's grand jury testimony, a copy of which Conley had before trial, and therefore is not material for *Brady* purposes. The district court concluded that the FBI memorandum was material because it could have been used to challenge Walker *on his ability to recall,* whereas Walker's grand jury testimony could have been used to impeach Walker *only as to bias*. This conclusion is incorrect. Walker's grand jury testimony concerning his belief about what he saw is nearly identical to that in the FBI memorandum; thus, both statements could have been used to impeach Walker regarding his recall ability *and* his bias. In addition, contrary to the finding of the district court, Conley could have impeached Walker with his grand jury testimony *without* focusing on what motivated Walker to change his story.

In addition, impeaching Walker would have been imprudent and was contrary to the defense Conley employed at trial. Further, even if Conley had used the memorandum to impeach Walker's memory and perception, that impeachment

would have had little effect as Walker's testimony was corroborated by both Cox and Brown and, therefore, was not necessary for Conley's conviction.

Brown's booking report is also immaterial. That report could have been used, as the district court noted, to impeach Brown's testimony that he split his tooth after jumping the fence. But this report is cumulative of Walker's trial testimony, which Conley relied upon to impeach Brown, that he did not notice any blood on Brown or see that Brown was missing a tooth.

As the district court correctly held, none of the remaining six pieces of evidence relied on by Conley supports granting habeas relief. This Court should reverse the district court and reinstate Conley's conviction.

ARGUMENT

To obtain a new trial based on a claim that the prosecution withheld evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), the defendant must establish that (1) the evidence at issue is favorable to the accused; (2) the evidence was suppressed by the prosecution; and (3) the defendant was prejudiced by the suppression.[3] See *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999); *United States* v. *Josleyn*, 206 F.3d 144, 151 (1st Cir. 2000). Prejudice is established only if there is "a reasonable probability that, had the evidence been disclosed to the defense, the result

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[3] The district court found that "the government concede[d] that it had a duty to turn over the information and documents" to Conley. *Conley* v. *United States*, 332 F. Supp. 2d 302, 312 (D. Mass. 2004). Thus, the court focused on whether the undisclosed information and documents were material, *i.e.*, whether Conley was prejudiced by the failure to disclose. As a result, the discussion *supra* focuses on this same question.

of the proceeding would have been different." See *Strickler*, 527 U.S. at 280 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). When the government has failed to turn over multiple items, materiality is determined based on their collective value. *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995).

"[I]mpeachment evidence that is merely cumulative or collateral is insufficient to establish prejudice under *Brady*." *United States* v. *García-Torres*, 341 F.3d 61, 70 (1st Cir. 2003) (quoting *Conley* v. *United States*, 323 F.3d 7, 30 (1st Cir. 2003) (Torruella, J., dissenting) (*Conley III*)), cert. denied, 540 U.S. 1202 (2004); *Moreno-Morales* v. *United States*, 334 F.3d 140, 148 (1st Cir. 2003) (no *Brady* violation if undisclosed evidence is cumulative).

The FBI memorandum was "minor and cumulative." Indeed, considered collectively, the undisclosed evidence at issue here is immaterial. Most of the undisclosed material is not particularly favorable to Conley, and to the extent that some of the material is favorable, it is cumulative of other evidence that Conley had at trial.

A. The FBI Memorandum

The district court granted habeas relief to Conley based solely on an April 9, 1997, FBI memorandum, which was an internal FBI request for authority to polygraph Walker regarding the inconsistencies in his statements regarding the incident. *Conley* v. *United States*, 332 F. Supp. 2d 302, 324 (D. Mass. 2004) ("[W]ere it not for the FBI memorandum, this Court would have denied the writ, even considering the variety of undisclosed items taken together."). The district court

found "that the wrongful withholding of the FBI memorandum with its significant data bearing on Walker's inability to recall crucial events so undermines confidence in the jury's verdict as to constitute 'material' evidence." *Id*. at 319. This finding is clearly incorrect.

The FBI memorandum that the district court relied upon in granting the habeas petition was merely cumulative of Walker's grand jury testimony, which Conley's counsel possessed at trial. Furthermore, Walker's testimony at trial was corroborated by both Cox and Brown, and therefore not essential to Conley's conviction. Thus, contrary to the district court's conclusion, despite the withholding of the FBI memorandum, Conley has not shown that he received anything but a fair trial.

1. The Impeachment Evidence In The FBI Memorandum Is Merely Cumulative Of Other Evidence That Conley Possessed

First, the impeachment evidence in the FBI memorandum is merely cumulative of other evidence that Conley possessed and, therefore, is not material for *Brady* purposes. Walker admitted in his grand jury testimony – a transcript of which Conley's trial counsel possessed before trial – that he had made inconsistent statements about seeing a figure behind Cox in an interview with Internal Affairs. In explaining the discrepancy, Walker testified:

> At the time of the interview with Internal Affairs, * * * I started feeling guilty, like I should have seen more than what really happened. Okay? I sat there, and I'm conjuring up pictures of what he was asking me and what I should have seen. Like I said, I felt guilty not seeing more than what I saw and I should have, but my attention was focused on chasing this guy towards the fence. Okay? [The Internal Affairs interviewer] asked the question, "Did I see anyone," or whatever the question was, and I was sitting there saying that from where I was, maybe I should

> have seen someone, and I told him, "Yes, I did." That's the reason for my answer.
>
> * * *
>
> Like I said, I should have seen, things are happening directly in front of you, and you're sitting there saying, there are four people in this room, but I only saw two. It shouldn't be that way. I should have seen all four people. It was right in front of me.

Richard Walker Grand Jury Transcript at 54-55 (App., Tab 5).

The FBI memorandum contains a virtually identical admission by Walker. In the FBI memorandum, Walker, when confronted "about the inconsistency between his present belief and his prior statements [in an Internal Affairs interview], * * * explained that because of his friendship with Cox, he must have 'convinced himself that he actually saw someone or something' [behind Cox as Cox was pursuing Brown] when in fact he did not." *Conley*, 323 F.3d at 28 (Torruella, J., dissenting). Thus, in both statements, Walker said that, contrary to his previous statements in the Internal Affairs interview, he now believed that he did not see anyone running behind Cox *and* that he previously stated that he did see someone running behind Cox either because of his friendship with Cox or because he felt guilty for not seeing more. See Walker Grand Jury Transcript at 54-55 (App., Tab 5); FBI memorandum, dated April 9, 1997 (Addendum B).

The district court found that the FBI memorandum differed significantly from Walker's grand jury testimony solely because it included a suggestion by Walker that "perhaps if he was hypnotised he might truly recall what was going on versus

what he indicates was tunnel vision."[4] According to the court, the "hypnosis statement" portion of the FBI document was material, as Conley's defense counsel could have used this comment to impeach Walker *only on his ability to recall*, whereas Walker's grand jury testimony could have been used to impeach Walker *only as to bias*. *Conley*, 332 F. Supp. 2d at 318. This conclusion is erroneous.

First, Walker's statement regarding hypnosis reveals nothing new. As noted above, Conley's counsel at trial was already aware from Walker's grand jury testimony that Walker had given inconsistent statements regarding the incident and that he believed he should have seen more; thus, Conley was already aware that Walker had questioned his first version of what occurred at the fence. Walker's suggestion that "perhaps if he was hypnotised he might truly recall what was going on" is merely additional evidence that Conley could have used to argue that Walker had a poor memory of that night.

Second, contrary to the district court's finding, both statements could have could have been used to impeach Walker for his ability to recall and for bias. Both statements mention that, contrary to his previous statements, he now believes that he did not see anyone running behind Brown, which goes to ability to recall. Both also mention that Walker previously stated that he did see someone behind Cox either

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[4] The FBI memorandum also differed from Walker's grand jury testimony as it referred to Walker's agreement, and then refusal, to take a polygraph. However, the district court did not rely on this difference noting that it was "highly unlikely that polygraph results" would have been admitted as evidence. *Conley*, 332 F. Supp. 2d at 319 n.16.

because he felt guilty (grand jury) or because of his friendship with Cox (FBI memorandum), which go to bias.

Third, Conley could have impeached Walker with his grand jury testimony *without* focusing on what motivated Walker to change his story; Conley could have argued that the mere fact that Walker *could* "conjur[e] up pictures" of what he "should have seen" demonstrated that Walker's perception and memory were suspect. Thus, the FBI memorandum would have provided little, if any, additional evidence to challenge Walker's perception and recall of the facts surrounding the beating of Cox.

Moreover, this is a distinction without a difference. There is no question that both pieces of evidence could have been used to impeach Walker's testimony at trial. Whether Walker made inconsistent statements because he could not recall the events of that evening, or because he was biased toward Cox, does not alter the fact that the defense could have used the grand jury testimony to undercut Walker's testimony at trial, but chose not to do so.

The defense chose not to do so because impeaching Walker was not in Conley's best interest and was contrary to the strategy his defense counsel employed at trial. Conley needed Walker's testimony about seeing a person resembling Conley at the bottom of the hill to show that Conley did not see the officers beat Cox, thereby rebutting allegations that he committed perjury when he testified that he had not seen the beating (Count 2). See *Conley III*, 323 F.3d at 27-28, 31 (Torruella, J., dissenting). Indeed in closing arguments, Conley's counsel relied on this exact testimony by Walker to accomplish this very thing. Trial Tr. IV at 48-50 (App., Tab

14).

Thus, defense counsel made a strategic decision not to use the grand jury testimony to impeach Walker's testimony. In fact, Conley's counsel objected at trial when the government sought to bring up the discrepancy between Walker's statements in the IAD interview and subsequent statements he made about whether he saw someone behind Cox. Trial Tr. II at 51-52 (App., Tab 12). This strategy was not only reasonable in light of the charges at trial, but it was successful as well since Conley was acquitted of Count 2. Tellingly, neither Conley's trial counsel, who represented Conley through *Conley II*, nor his current attorneys in the habeas proceedings, have ever articulated a distinction between using the FBI memorandum to impeach Walker's recall ability and using Walker's grand jury testimony to impeach him for bias.

In addition, the district court's contention that the FBI memorandum somehow could have been used to impeach only part of Walker's testimony (the statement that he saw Cox behind Brown) but not another (the testimony about seeing a person resembling Conley at the bottom of the hill) is implausible. As discussed above, undercutting Walker's testimony about his ability to recall any part of the incident in question would have seriously undermined Conley's defense at trial and posed a real risk that the jury would have rejected Walker's account altogether.

Moreover, had Conley's counsel presented the evidence about the grand jury statement or the FBI memorandum at trial, the government then could have introduced its own impeachment evidence, including testimony that Walker believed

that a different officer, and not Conley, arrested Brown. *Conley III*, 323 F.3d at 31 (Torruella, J., dissenting). As noted above, this evidence would have undercut Walker's testimony regarding what took place at the bottom of the hill, thereby leaving Conley vulnerable to conviction for Count 2.

At bottom, the impeachment evidence in the FBI memorandum was "merely cumulative" of other impeachment evidence that Conley possessed and, therefore, is "insufficient to establish prejudice under *Brady*." *Conley III*, 323 F.3d at 30 (Torruella, J., dissenting). See also *Ziegler* v. *Callahan*, 659 F.2d 254, 266 (1st Cir. 1981) (noting that cumulative evidence is not usually material if defense had opportunity to impeach witness by other means).

2. Even If Conley Had Used The FBI Memorandum To Impeach Walker's Memory And Perception, That Impeachment Would Have Had Little, If Any, Effect

Further, even if Conley had used the FBI memorandum to impeach Walker's memory and perception, that impeachment would have had little, if any, effect. First, pointing out Walker's inconsistent statements about whether someone was behind Cox would not have directly undermined Walker's testimony that he saw Cox pursuing Brown; Walker never deviated on this point. Trial Tr. II at 31-32, 76 (App., Tab 12). See also *Conley III*, 323 F.3d at 31 (Torruella, J., dissenting) (statement does "not undercut Walker's testimony * * * that he saw Cox chasing Brown to the fence and that as Brown scaled the fence, Cox tried to reach for him").

Second, Walker's testimony was corroborated by both Cox and Brown. Like Walker, Trial Tr. II at 76 (App., Tab 12), Cox and Brown both testified that Cox

was right behind Brown at the fence. Trial Tr. I at 77 (App., Tab 11) (Cox); Trial Tr. II at 95-97, 125 (App., Tab 12) (Brown). Cox testified that he saw Brown exit Brown's car. Trial Tr. I at 75-76 (App., Tab 11). Cox stated that he then immediately chased after Brown to the fence, reached for Brown, and tried to pull Brown down by grabbing Brown's jacket and at his foot; however, Cox said, Brown made it to the top and jumped over the fence. Trial Tr. I at 75-78, 124, 129 (App., Tab 11); Trial Tr. II at 14 (App., Tab 12). Similarly, Brown testified that he ran toward the fence after exiting his car, that he saw an African-American man in plain clothes running after him, and Brown's jacket ripped and he felt someone touch his foot just before he scaled the fence. Trial Tr. II at 92-96 (App., Tab 12).

Thus, both Cox's and Brown's testimonies place them at the fence at the same time that Conley testified before the grand jury that he chased after Brown. As a result, their corroboration would have rehabilitated Walker's credibility. See *United States* v. *Rivera Rangel*, 396 F.3d 476, 482 (1st Cir. 2005) (stating that cumulative evidence does not support finding a *Brady* violation); see also *Blackmon* v. *Johnson*, 145 F.3d 205, 209 n.9 (5th Cir. 1998), cert. denied, 526 U.S. 1021 (1999); cf. *United States* v. *Martinez-Medina*, 279 F.3d 105, 126 (1st Cir.) (impeachment evidence can merit a new trial if it "is highly impeaching or when the witness' testimony is uncorroborated and essential to the conviction"), cert. denied, 537 U.S. 921 (2002).

Third, Brown's and Cox's testimony provided sufficient evidence for the jury

to convict Conley, even without Walker's testimony.[5] Indeed, on direct appeal, this Court found this interlocking evidence both significant and credible. *United States* v. *Conley*, 186 F.3d 7, 19-20 (1st Cir. 1999). As a result, the information contained in the FBI memorandum was not prejudicial.[6] See *Strickler* v. *Greene*, 527 U.S. 263, 293-294 (1999) (nondisclosure of impeachment evidence did not violate *Brady* where other witnesses provided corroborating evidence in support of conviction); *United States* v. *Sepulveda*, 15 F.3d 1216, 1221 (1st Cir. 1993) (nondisclosed evidence was not material because other witnesses provided corroborating testimony about the drug transactions at issue in that case), cert. denied, 512 U.S. 1223 (1994).

B. The Booking Report

Although the district court held that nondisclosure of Brown's booking report alone does not support granting habeas relief, it noted that "failure to disclose this evidence * * * tend[s] to reinforce and confirm the propriety of this Court's holding based on the FBI memorandum." *Conley*, 332 F. Supp. 2d at 320. The booking

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[5] The district court's alleged "[h]oles in the [t]rial [t]estimony," *Conley*, 332 F. Supp. 2d at 324, relate entirely to incidents after Brown went over the fence and therefore are irrelevant to the evidence supporting the counts on which Conley was convicted.

[6] To the extent that Conley, before the district court, questioned the jury's reliance on Cox's and Brown's testimonies, the time to challenge that was on direct appeal, not on the hearing on a possible *Brady* violation. The Supreme Court has made clear that determining materiality under Brady is "*not* a sufficiency of evidence test," and therefore cannot be used to collaterally challenge every aspect of the underlying trial. *Kyles*, 514 U.S. at 434 (emphasis added). Accordingly, this Court, as the district court aptly stated, "ought not engage in a 'sufficiency of the evidence' redux under the guise of a *Brady* analysis." *Conley*, 332 F. Supp. 2d at 315.

report, prepared by the booking officer at the time of Brown's arrest, states that there were no visible injuries on Brown. See Brown Booking Report at 1 (Addendum C). According to the district court, Conley could have used this evidence to impeach Brown because Brown testified at trial that, after he jumped the fence, he ran into a tree and split his tooth. *Conley*, 332 F. Supp. 2d at 320.

However, this report is cumulative of Walker's trial testimony, which Conley already relied upon at trial to impeach Brown. At trial, Walker stated in cross-examination that he did not notice any blood on Brown or any missing tooth when he went to the police station to make an identification, Trial Tr. II at 69, 72 (App., Tab 12), and defense counsel referred to this testimony in his closing argument, Trial Tr. IV at 55 (App., Tab 14). Thus, this evidence was not prejudicial.

Moreover, this "impeachment" evidence is irrelevant to the central point of Brown's testimony: corroborating Cox's and Walker's testimonies that Cox was immediately behind Brown at the fence and reached for Brown at the fence. Such tangential evidence cannot be the basis of a *Brady* violation. See *Martinez-Medina*, 279 F.3d at 127 (holding that "weak impeachment evidence on an issue tangential to the conviction is not sufficient to warrant the drastic remedy of a new trial").[7]

C. Remaining Six Documents

As the district court concluded, the remaining evidence is clearly immaterial

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[7] Contrary to the district court's statement that the government did not address the booking report in its briefs (*Conley*, 332 F. Supp. 2d at 320), the government's reply brief argued that this evidence was cumulative and unenlightening for the reasons stated here.unenlightening for the reasons stated

and, therefore, does not constitute *Brady* material. *Conley*, 332 F. Supp. 2d at 320-322. See *id*. at 320 ("The remaining evidence that the government failed to disclose does not amount to much [and] [c]onsideration of this evidence does not make this Court any more disposed to issue the writ of habeas corpus than it would have been absent such consideration.").

Walker's First IAD Testimony (App., Tab 6): In Walker's interview with Internal Affairs, he identified someone other than Conley as the officer at the bottom of the hill. That statement would not have helped Conley, however, because (1) the government did not argue that Walker could identify Conley as the officer he saw, (2) Conley already had evidence that Walker could not identify Conley as the officer, and (3) Walker recanted that initial identification when he later saw the individual he had tentatively identified. 332 F. Supp. 2d at 320.

Walker's Form 26 Report (App., Tab 7): With regard to Walker's Form 26 Report, Conley argued that the absence from the report of the details of the story that Walker later told to Internal Affairs could have been used to impeach Walker; however, the district court found that the report was not meant to provide a comprehensive account, and that factual finding is not clearly erroneous. 332 F. Supp. 2d at 321-322.

Foley Memorandum (App., Tab 8): As for the Foley memorandum, Conley argued that the memorandum, which reported that Officer Ryan saw Cox as he was

returning to his vehicle, could have been used to impeach Walker because he testified that he saw Officer Ryan at the bottom of the hill. 332 F. Supp. 2d at 322. But these two accounts are not necessarily inconsistent – Officer Ryan may have climbed the hill and seen Cox – and, in any event, Walker consistently maintained that he was not sure whom he saw at the bottom of the hill.

Walker's Unit Incident History Log (App., Tab 9): Conley argued that Walker's Unit Incident History Log could have been used to impeach Walker because it was inconsistent with the dispatchers log. But, as the district court found, these inconsistencies were minor and immaterial and would not have harmed Walker's credibility. 332 F. Supp. 2d at 322.

Other Form 26 Reports (App., Tab 10): As to the other Form 26 reports, Conley argued that he could have pointed out the lack of detail in those reports to illustrate that his detailed Form 26 report was more accurate. But the district court found that Conley already had a number of other, less detailed, Form 26 reports; thus, additional Form 26 reports would have been cumulative. 332 F. Supp. 2d at 322.

Joint Federal-State Investigation Of Brown, Trial Tr. II at 148-154 (App., Tab 12): As to the nondisclosure of the fact that Brown was being investigated by the state and federal officials, Conley argued that this fact would have undercut the government's argument that, because the Boston police had retaliated against Brown by filing drug charges, Brown had no motive to testify falsely to incriminate Conley (which might have led to more lenient treatment of Brown). According to Conley, the fact that the federal government was involved in the investigation would

have indicated that the charges were not trumped up. But the government's theory at trial was not that Brown in fact was the victim of retaliation, but that he believed that he was subject to retaliation; nothing shows that Brown was aware of federal involvement. 332 F. Supp. 2d at 320-321.

* * *

In sum, the evidence at issue was "minor and cumulative," and nearly all of the information it provided was already known by Conley at trial. *Conley III*, 323 F.3d at 31 (Torruella, J., dissenting). There is simply no "reasonable probability that, had the evidence been disclosed to [Conley], the result of the proceeding would have been different." See *Strickler*, 527 U.S. at 280 (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985)). Thus, nondisclosure of this evidence does not undermine confidence in the verdict and warrant habeas relief. Indeed, two judges on this Court made that exact assessment in the last appeal. *Conley III*, 323 F.3d at 31 (Torruella, J., dissenting).

CONCLUSION

This Court should reverse the district court's order granting relief pursuant to 28 U.S.C. 2255.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Date: February 25, 2005

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2005, two copies of the BRIEF FOR THE UNITED STATES AS RESPONDENT-APPELLANT and a diskette containing the brief were served by first-class mail, postage prepaid, on:

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