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

REPLY BRIEF FOR THE UNITED STATES

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INTRODUCTION

Kenneth Conley's brief repeatedly states that the district court conducted an exhaustive review of the trial record – *e.g.*, emphasizing the court read the trial transcript from start to finish twice – and that the government has not challenged the district court's methodology, factual findings, analyses, and conclusions. Notwithstanding the fact that Conley devoted the majority of his brief to these points, the issue on appeal is whether the nondisclosed FBI memorandum containing Richard Walker's suggestion that "perhaps if he was hypnotised he might truly recall what was going on versus what he indicates was tunnel vision," (Government's Opening Brief (Government Br.), Addendum (Add.) B), differs substantially from Walker's grand jury testimony, which Conley possessed prior to

his trial. More specifically, because the only significant difference between the two documents is Walker's "hypnosis" reference in the FBI memorandum, this Court must decide if the word "hypnosis" alone renders the FBI memorandum material, and sufficiently different from Walker's grand jury testimony to be noncumulative impeachment evidence so as to warrant relief under 28 U.S.C. 2255. That, despite Conley's attempts to retry his case at this stage, is the sole question before this Court. And the answer is a resounding no.

ARGUMENT

I

THIS COURT MUST REVIEW DE NOVO THE DISTRICT COURT'S MATERIALITY DETERMINATION

At the outset, Conley contends that materiality of nondisclosed evidence is a mixed question of law and fact that is reviewed for clear error, and the fact-bound nature of such a determination requires this Court to defer to the district court's materiality finding. See Conley Br. 23. This assertion is simply incorrect.

This Court, when reviewing an appeal from an order under 28 U.S.C. 2255, examines legal conclusions de novo and findings of fact for clear error. *Ellis* v. *United States*, 313 F.3d 636, 641 (1st Cir. 2002), cert. denied, 540 U.S. 839 (2003). A district's court's conclusion as to the materiality of undisclosed evidence is, at its core, a legal question. To determine whether a *Brady* violation has occurred, a court must assess the undisclosed evidence in light of the evidence actually presented at trial to determine whether there is a "reasonable probability"

that disclosure would have caused a different result. Although highly fact-specific, this inquiry requires courts to apply a legal standard to the circumstances of a particular case. Accordingly, the materiality question is properly characterized as a "mixed question[] of fact and law." See *Thompson* v. *Keohane*, 516 U.S. 99, 110 (1995) (quoting *Townsend* v. *Sain*, 372 U.S. 293, 309 n.6 (1963)).

In many respects, calling such an inquiry a "'[m]ixed question' is something of a misnomer; once the raw facts are determined * * * deciding which legal label to apply to those facts is a normative decision – strictly speaking, a legal issue." *Bergersen* v. *Commissioner of Internal Revenue*, 109 F.3d 56, 61 (1st Cir. 1997). Yet, however one characterizes the inquiry, the district court's materiality finding must be reviewed de novo. See *Ellis*, 313 F.3d at 641. See also *United States* v. *Molina*, 75 F.3d 600, 602 (10th Cir.) (reviewing materiality of nondisclosed evidence de novo), cert. denied, 517 U.S. 1249 (1996); *United States* v. *Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (same), cert. denied, 504 U.S. 930 (1992); *United States* v. *Cuffie*, 80 F.3d 514, 517 (D.C. Cir. 1996) (reviewing district court's *Brady* determination de novo "because the materiality of *Brady* evidence [was] a question of law, and the *Brady* facts [were] undisputed").

This standard is consistent with this Court's review of other *Brady* claims. See, *e.g.*, *Moreno-Morales* v. *United States*, 334 F.3d 140, 145 (1st Cir. 2003). See also *Strickler* v. *Greene*, 527 U.S. 263, 289 (1999) (giving no deference to analysis by district court or court of appeals when examining petition in which

defendant claims a *Brady* violation); *Kyles* v. *Whitley*, 514 U.S. 419, 441-454 (1995); *United States* v. *Bagley*, 473 U.S. 667, 683-684 (1985). It also comports with this Court's review of other mixed questions of law and fact. See, *e.g.*, *Ridley* v. *Massachusetts Bay Transp. Auth.*, 390 F.3d 65, 75 (1st Cir. 2004) ("We engage in de novo review of * * * mixed questions of law and fact in First Amendment cases."); *Evicci* v. *Maloney*, 387 F.3d 37, 41 n.1 (1st Cir. 2004) ("Mixed questions of law and fact arising in section 2254 cases are ordinarily subject to de novo review.") (quoting *Scarpa* v. *DuBois*, 38 F.3d 1, 9 (1st Cir. 1994)), cert. denied, 2005 WL 636165 (Apr. 25, 2005)); *United States* v. *Pardue*, 385 F.3d 101, 104 (1st Cir. 2004) ("A determination regarding probable cause is reviewed de novo as it is a mixed question of law and fact."), cert. denied, 125 S. Ct. 1353 (2005); *United States* v. *Maguire*, 359 F.3d 71, 76 (1st Cir. 2004) ("Determinations of . . . reasonable suspicion, relevant to the constitutionality of law enforcement seizures and arrests under the Fourth Amendment, present mixed questions of law and fact which are reviewed de novo.") (quoting *United States* v. *Young*, 105 F.3d 1, 5 (1st Cir. 1997)).

Furthermore, de novo review tracks this Court's stated intention in the case at bar of having the district court conduct an independent review of the case following the remand and reassignment to a new judge. Indeed, in its en banc decision, this Court stated that it would be assisted by a "well-worked-out district court assessment *before the appellate court attempts its own evaluation*." *Conley* v. *United States*, 323 F.3d 7, 15 (1st Cir. 2003).

Conley asserts (Conley Br. 25 n.17) that he should not be disadvantaged as a result of this Court having remanded the case to a different district court judge at the urging of the government. This argument fails to recognize that this Court reassigned this matter to a different judge on remand in the interests of justice, not simply to benefit the government. This Court noted that, due to the unusual circumstances of this case, where the original district court judge assigned to this case had twice ordered a new trial and had both those decisions reversed or remanded "for errors of law antecedent to an assessment of the evidence," a third remand to that judge would place him in an awkward position, whereby his decision on remand would be suspect. *Conley*, 323 F.3d at 15. Indeed, this Court stated, "[i]f he ordered a new trial yet again, it might be thought that he was wedded to an outcome; if he altered his result, Conley might suppose that the judge had yielded to exhaustion or to a supposed message from this court." *Ibid.*[1]

In short, the Court should review the district court's materiality finding de novo.

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[1] Moreover, Judge Young is in no better position than this Court to determine what effect the undisclosed evidence would have had. See *Conley*, 323 F.3d at 23 (J. Torruella, dissenting) (finding remand of Conley's *Brady* claim to district court unnecessary). Judge Young did not preside over Conley's criminal trial. Judge Young also did he hold not an evidentiary hearing or develop the record; he merely read the record. Accordingly, there is simply no reason that this Court should defer to his materiality findings.

II

THE FBI MEMORANDUM IS CUMULATIVE IMPEACHMENT EVIDENCE THAT DOES NOT JUSTIFY RELIEF UNDER SECTION 2255

A. Walker's Off-Handed Reference To Hypnosis Does Not Substantially Distinguish The FBI Memorandum From Walker's Grand Jury Testimony

Try as he might, Conley cannot escape the conclusion that he had in his possession significant evidence – namely, Walker's grand jury testimony – with which to impeach Walker's recall ability at trial. Yet Conley consciously chose not to draw upon this material at trial. In an effort to avoid the repercussions of this tactical trial decision, Conley now seeks to cling to a single and ultimately insignificant difference between the FBI memorandum and Walker's grand jury testimony. Specifically, he claims that the FBI memorandum's reference to a suggestion by Walker that Walker might recall events with more clarity if hypnotized would have opened up critical new areas of cross-examination. Conley Br. 33-39. Although this argument resonated with the district court, see *Conley* v. *United States*, 332 F. Supp. 2d 302, 316 (D. Mass. 2004), it is simply unsupported by the record. In fact, Walker's off-handed comment regarding hypnosis revealed absolutely nothing about which Conley was not already aware.

Indeed, Conley could have easily relied on the grand jury testimony to impeach Walker about his (Walker's) inconsistent statements as to who he saw (or did not see) in the chase on Woodruff Way.[2] Walker explicitly acknowledged

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[2] For that matter, had Conley wanted to make it an issue at trial – and it

(continued...)

before the grand jury that he felt he should have seen more when Cox was chasing Brown towards the fence "because things [we]re happening directly in front of" him, but he "was focused on chasing this guy towards the fence." Walker Grand Jury Transcript at 55 (App., Tab 5). He even described his sense of "guilt" for not recalling more about the incident. *Id.* at 54. These statements are virtually identical to the comment in the FBI memorandum in which Walker is described as having "convinced himself that he saw someone running behind Cox" and in which he observed that "perhaps if he was hypnotised he might truly recall what was going on versus what he indicates was tunnel vision." Government Br., Add. B. Although Conley engages in much rhetoric about the independent importance of the hypnosis line (Conley Br. 35-36), Walker's sense of the ideal method for him to recall events accurately is of course not the point at all. Rather, the significance of the FBI memorandum -- according to Conley himself -- is that it alerted him to the availability of impeachment evidence to be used against Walker. At the time of trial, however, Conley already had a wealth of evidence that he could have drawn upon to impeach Walker about Walker's ability to recall Cox's pursuit of suspect Robert Brown towards the fence. Under these circumstances, the fact that a piece of additional evidence existed of which Conley was not aware

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[2](...continued)
clearly was not in his interest to do so – he could have further attacked Walker's ability to recall events that evening by highlighting Walker's extremely vague recollection as to the identify of the officer he encountered at the bottom of the hill.

does not amount to a *Brady* violation. See *Moreno-Morales* v. *United States*, 334 F.3d 140, 148 (1st Cir. 2003) (holding that the "unavailability of cumulative evidence does not deprive the defendant of due process" for *Brady* purposes) (quoting *United States* v. *Sanchez*, 917 F.2d 607, 618 (1st Cir. 1990)); *Zeigler* v. *Callahan*, 659 F.2d 254, 266 (1st Cir. 1981) (noting that cumulative evidence is not material if defense had opportunity to impeach the witness by other means).

Conley, echoing the district court, also attempts to distinguish the FBI memorandum and the grand jury testimony the same way the district court did in its opinion: by maintaining that the memorandum could have been used *only* to impeach Walker's recall ability, while the grand jury testimony could have been used *only* to impeach him for bias. 332 F. Supp. 2d at 318; Conley Br. at 37-38. But as the government emphasized in its opening brief, neither Conley nor the district court adequately explain the distinction between impeachment based on "bias" versus impeachment based on "ability to recall"; such a slim and unexplained reed is hardly a sufficient basis to throw out a jury verdict.

B. Cox And Brown Corroborated Walker's Testimony At Trial

Aside from being cumulative impeachment evidence, the FBI memorandum likewise does not warrant a new trial because Walker's testimony was corroborated by both Cox and Brown. 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). At trial, Cox and Brown provided ample evidence concerning the timing of Cox's

pursuit of Brown at the fence that contradicted Conley's grand jury testimony. See Government Br. 3-4.

Moreover, Conley's statement that "Walker was the *only* witness whose view of Mr. Brown's flight approximated the view of Mr. Conley" (Conley Br. 32), is both untrue (because Walker's version did not approximate Conley's) and, in any event, entirely irrelevant. As an initial matter, Walker testified at trial that he saw Cox chasing about three feet behind the suspect, moving to the right. Trial Tr. II at 31-32 (App., Tab 11); that version hardly comports with the story advanced by Conley. Furthermore, the testimony of both Cox and Brown corroborates Walker's core testimony regarding Cox's chase of Brown to the fence. For example, Cox testified that he was right behind Brown as he pursued Brown, Trial Tr. I at 77-78 (App., Tab 11); that he reached for Brown at the fence and unsuccessfully tried to pull Brown down from the fence, Trial Tr. I at 129-130 (App., Tab 11), Trial Tr. II at 14 (App., Tab 12); and that no one was between him and Brown at the time, including when Brown was scaling the fence, and that he was the officer immediately behind Brown, Trial Tr. I at 85, 88 (App., Tab 11). Brown also testified that an African-American man wearing black clothing (Cox) ran after him as he was running toward the fence, Trial Tr. II at 94 (App., Tab 12), and that he felt someone touch his foot as he attempted to scale the fence, Trial Tr. II at 95-96, 125 (App., Tab 12). In the direct appeal, this Court found all of this

interlocking testimony "significant" and "credible."[3] *United States* v. *Conley*, 186 F.3d 7, 19-20 (1st Cir. 1999), cert. denied, 529 U.S. 1017 (2000).

This case is very similar to *United States* v. *García-Torres*, 341 F.3d 61, 71 (1st Cir. 2003), cert. denied, 540 U.S. 1202 (2004), in which this Court found there was no *Brady* violation where corroborating testimony exists and the impeachment value of the nondisclosed evidence was "minimal." In *García-Torres*, defendants, who were convicted for involvement in a drug distribution network responsible for two murders, alleged that the government improperly withheld a sworn statement by a Puerto Rican police officer that he was involved in the kidnapping and murder of the two individuals on behalf of a drug dealer who was not related to the defendants. *Id*. at 68-69. The defendants asserted that the police officer had provided the crucial evidence linking them to the murders and support for the government's argument of a conspiracy to eliminate a rival drug distribution network; thus, they argued, they could have used the sworn statement to impeach the government's key witness about the murders to undermine the conspiracy claim. *Id*. at 67, 71. This Court rejected the defendants' argument, noting that numerous other witnesses testified about defendants' drug distribution network and conspiracy, and defendants had exploited other opportunities to impeach the government's key witness at trial. *Id*. at 70-71.

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[3] It is incredibly improbable that Cox, Brown, and Walker were all mistaken about this corroborative part of their testimony, or that they collectively concocted it.

Based on the "weak evidentiary value" of the sworn statement, "and the substantial other evidence of the [defendants'] involvement in the conspiracy," this Court concluded that nondisclosure of the sworn statement did not undermine confidence in the verdict. *Id*. at 71.

Unable to rebut the fact that Cox's and Brown's testimony corroborated Walker's testimony regarding the events that took place at the fence, Conley asserts that "[e]ven cumulative impeachment evidence can be material when it 'goes to the very heart' of a witness's testimony, * * * or 'changes the tenor' of that testimony." Conley Br. 28 (citation omitted). The law in this circuit, however, is to the contrary. In *United States* v. *Sepulveda*, this Court held that the nondisclosed evidence was not material because other witnesses provided corroborating testimony about the drug transactions at issue in that case. 15 F.3d 1216, 1221 (1st Cir. 1993), cert. denied, 512 U.S. 1223 (1994); accord *Strickler*, 527 U.S. at 293-294. In particular, this Court rejected defendants' argument that two witnesses would have provided a "critical link" in the evidence showing a conspiracy where several other witnesses testified at trial as to the same evidence. *Sepulveda*, 15 F.3d at 1221. The Court noted that the "'critical link' argument [was] inventive but not persuasive." *Ibid.*

Conley also argues (Conley Br. 6, 33) that the Court should discount the testimony of Cox and Brown because Cox had recall problems and Brown lacked credibility. The jury, however, obviously found Cox and Brown credible despite defense counsel's repeated attempts during cross-examination to challenge Cox's

ability to recall the events of that night, Trial Tr. I at 102-103, 107-109, 117-125, 129 (App., Tab 11),[4] and Brown's credibility, Trial Tr. II at 130, 145-154 (App., Tab 12). Thus, no basis exists for discounting the import of Cox and Brown's testimonies at this late date.

C. The Court Should Reject Conley's Request To Retry His Case At This Stage

Conley attempts to obfuscate the only question before this Court – *i.e.*, whether the government's failure to disclose a document containing potential impeachment information undermined confidence in the verdict -- by arguing that the district court found that the circumstantial evidence that led to Conley's conviction was weak and that Walker was the key witness. Conley Br. 31-32. But the *Brady* analysis does not entail a retrying of the case. Nor did this Court, in affirming Conley's conviction on direct appeal, deem the circumstantial evidence weak, or Walker's testimony particularly crucial. To the contrary, this Court found:

> At trial, the government presented ample circumstantial evidence from which a rational jury could conclude that Conley's statements were false beyond a reasonable doubt. By comparing Conley's testimony about the timing and location of his actions with the testimony of Cox, Walker, and Brown, the jury reasonably concluded that Conley lied when he stated that he did not observe Cox chasing the suspect. Conley testified that upon arrival at the scene, he

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[4] The district court's observations that Cox was a "sympathetic victim," and that "a confrontational cross[-]examination of Cox was not indicated and manifestly would have been improper," is unsupported by the record. *Conley*, 332 F. Supp. 2d at 315. In fact, at trial, defense counsel in no way shied away from a vigorous cross-examination, spending more time cross-examining Cox than any other witness and frequently emphasizing Cox's prior inconsistent statements.

> observed Brown exit from the passenger side of the Lexus, run to the right, and climb over the fence. Most significantly, Conley testified that "within seconds of seeing [the suspect] go over" the fence he scaled the fence at the same location. *Both Cox and Walker placed Cox at the exact same time at the exact same place where Conley claims to have climbed over the fence.* According to their testimony . . . Cox was "right behind" Brown, approximately three feet behind him, as Brown approached the fence. When Brown reached the fence, Cox was even closer. At that point, Cox was close enough to make contact with Brown and attempt to pull him back over the fence. *Brown corroborated this version of events* when he testified that a black man wearing a "black hoody" was behind him as he ran toward the fence and had just started to come over the fence after him when he observed the black man being struck on the head by a police officer. *Brown confirmed that the person behind him was close enough to make contact with his foot as he scaled the fence.* Conley's testimony that he scaled the fence "within seconds" of seeing Brown go over the fence, and that he scaled the fence in the same location as Brown does not square with the testimony of *Cox, Walker, and Brown*. Conley's version of the events provides for no reasonable gap in time during which he could have missed observing Cox at the fence. Indeed, Conley concedes that if the *Cox/Walker/Brown version* is true, he would have seen Cox at the fence. *In reaching its verdict, the jury apparently found the Cox/Brown/Walker version more credible.*

United States v. *Conley*, 249 F.3d 38, 42 (1st Cir. 2001) (quoting *Conley*, 186 F.3d at 19-20) (emphases added).

As this Court recognized, Walker's testimony was hardly the "linchpin" for the jury's guilty verdict that Conley makes it out to be. The testimony of Cox and Brown was at least as crucial as Walker's, because Cox and Brown were describing what actually happened to them at the fence, as opposed to Walker's mere eye-witness account of the events.[5] To the extent that Conley questions the

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[5] Contrary to Conley's assertion (Conley Br. 33), the fact that the jury (continued...)

jury's reliance on Cox and Brown's testimonies, the time to challenge that was long ago, in the direct appeal. *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995) (determining materiality under *Brady* is "*not* a sufficiency of evidence test") (emphasis added).

Because an allegation of a *Brady* violation cannot be used to collaterally challenge every aspect of the underlying trial, *Kyles*, 514 U.S. at 434-435, this Court should also reject Conley's request (Conley Br. 42-48) that it revisit his complaints about other aspects of the criminal trial that are unrelated to his *Brady* claims.[6] The district court properly declined to follow this approach, 332 F. Supp. 2d at 313-315 (stating that it "ought not engage in a 'sufficiency of the evidence' redux under the guise of a *Brady* analysis"), and made no findings.

* * *

In sum, a jury's determination should not be upset merely because a defendant can posit some use, productive or not, of subsequently-discovered evidence. As this Court has stated:

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[5](...continued)
acquitted Conley on Count 2 of the indictment does not mean that Walker was the center of the government's case on Count 1. The jury's not guilty verdict on Count 2 could mean simply that it did not credit that part of Brown's testimony in which he stated that he saw Conley watch the beating of Cox. Indeed, that part of his testimony was not corroborated by other witnesses; neither Cox nor Walker could say whether Conley was at the fence. In contrast, with respect to Count 2, Brown's testimony was corroborated by both Cox and Walker.

[6] The government responded to these claims by Conley in its Reply Memorandum to Coney's Section 2255 Motion in district court. See Docket #149.

> We do not . . . automatically require a new trial whenever of combing the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict. * * * Instead a finding of materiality is required under *Brady*.

United States v. *Cunan*, 152 F. 3d 29, 34 (1st Cir. 1998) (quoting *Giglio* v. *United States*, 405 U.S. 150, 154 (1972)). Conley does not come close to meeting this burden here and his conviction should thus be reinstated.

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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