THIS CASE HAS NOT BEEN SCHEDULED FOR ORAL ARGUMENT

No. 08-3004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN COOK,

Appellant

_____

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

_____

BRIEF FOR THE UNITED STATES AS APPELLEE

_____

JEFFREY A. TAYLOR
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General

DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. *Parties And Amici*

All parties, intervenors, and amici appearing in the district court and in this court are listed in the Brief for Appellant.

B. *Ruling Under Review*

Except for the following, references to the ruling at issue appear in the Brief for the Appellant: judgment was entered against appellant on January 22, 2008. Appellant has represented that he intends to include a copy of the judgment in the deferred appendix.

C. *Related Cases*

The United States is not aware of any prior appeal in this case or of any related cases pending in this or any other court.

January 9, 2009

_____

SARAH E. HARRINGTON
Attorney

TABLE OF CONTENTS

PAGE

JURISDICTIONAL STATEMENT. 1

STATEMENT OF ISSUES. 2

STATUTES AND REGULATIONS. 2

STATEMENT OF FACTS AND STATEMENT OF THE CASE. 4

SUMMARY OF ARGUMENT. 15

ARGUMENT

I THE UNITED STATES DID NOT SUPPRESS ANY MATERIAL, EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY* V. *MARYLAND* 17

A. Omar Hunter's "Freeman's Writ To Travel" And Copyright Papers 19

B. Bernard Thornton's Mental Competency Reports. 23

C. Hunter's Refusal To Answer To His Name At Central Cell Block 28

D. Viewed Cumulatively, The Evidence In Question Is Not Material. 32

II COOK'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS NOT INFRINGED WHEN HIS SUPERVISOR ASKED HIM TO FILL OUT ROUTINE REPORTS 34

A. The Fifth Amendment Does Not Protect False, Exculpatory Statements 35

TABLE OF CONTENTS (continued): **PAGE**

B. In Any Case, Cook's Statements Were Voluntary. 40

CONCLUSION..... 48

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

**Brady* v. *Maryland*, 373 U.S. 83 (1963). 14, 17

**Bryson* v. *United States*, 396 U.S. 64 (1969). 37

Fraternal Order of Police v. *City of Philadelphia*,
859 F.2d 276 (3d Cir. 1988). 38

**Garrity* v. *New Jersey*, 385 U.S. 493 (1967)..... 34-35

Kyles v. *Whitley*, 514 U.S. 419 (1995)..... 17-18, 32

LaChance v. *Erickson*, 522 U.S. 262 (1998). 37

McKinley v. *City of Mansfield*, 404 F.3d 418 (6th Cir. 2005),
cert. denied, 546 U.S. 1090 (2006)..... 38

National Federation of Federal Employees v. *Greenberg,*
983 F.2d 286 (D.C. Cir. 1993)..... 41

United States ex rel. Annunziato v. *Deegan*,
440 F.2d 304 (2d Cir. 1971). 38-39

United States v. *Agurs*, 427 U.S. 97 (1976)..... 21

United States v. *Andrews*, 532 F.3d 900 (D.C. Cir. 2008)..... 17

United States v. *Apfelbaum*, 445 U.S. 115 (1980). 37

United States v. *Bagley*, 473 U.S. 667 (1985). 17-18

United States v. *Bowie*, 198 F.3d 905 (D.C. Cir. 1999)..... 28

*Authorities upon which we chiefly rely are marked with asterisks.

CASES (continued): **PAGE**

United States v. *Brodie*, 524 F.3d 259 (D.C. Cir. 2008)..... 22

United States v. *Cuffie*, 80 F.3d 514 (D.C. Cir. 1996)..... 22

United States v. *Dean*, 55 F.3d 640 (D.C. Cir. 1995),
cert. denied, 516 U.S. 1184 (1996)..... 17, 21, 32

United States v. *Derr*, 990 F.2d 1330 (D.C. Cir. 1993)..... 21

United States v. *Devitt*, 499 F.2d 135 (7th Cir. 1974),
cert. denied, 421 U.S. 975 (1975)..... 38

**United States* v. *Friedrick*, 842 F.2d 382 (D.C. Cir. 1988)..... 37, 41, 47

United States v. *Johnson*, 519 F.3d 478 (D.C. Cir. 2008). 27-28

United States v. *Knox*, 396 U.S. 77 (1969)..... 36, 40

United States v. *Law*, 528 F.3d 888 (D.C. Cir. 2008)..... 44

United States v. *Oruche*, 484 F.3d 590 (D.C. Cir. 2007)..... 18, 30

United States v. *Ramos*, 27 F.3d 65 (3d Cir. 1994). 31

United States v. *Reed*, 522 F.3d 354 (D.C. Cir. 2008)..... 34, 42

United States v. *Roy*, 473 F.3d 1232 (D.C. Cir. 2007). 4

United States v. *Santiago*, 410 F.3d 193 (5th Cir. 2005),
cert. denied, 547 U.S. 622 (2006)..... 34, 42

United States v. *Smith*, 77 F.3d 511 (D.C. Cir. 1996). 25

**United States* v. *Tarantino*, 846 F.2d 1384 (D.C. Cir.),
cert. denied, 488 U.S. 840 (1988)..... 18, 20

CASES (continued): **PAGE**

United States v. *Taylor*, 339 F.3d 973 (D.C. Cir. 2003). 20, 40

United States v. *Vangates*, 287 F.3d 1315 (11th Cir. 2002). 34, 41-42, 47

**United States* v. *Veal*, 153 F.3d 1233 (11th Cir. 1998),
cert. denied, 536 U.S. 1147 (1999). 38-40

United States v. *Wadlington*, 233 F.3d 1067 (8th Cir. 2000),
cert. denied, 534 U.S. 1023 (2001). 31

United States v. *Waldon*, 363 F.3d 1103 (11th Cir.),
cert. denied, 543 U.S. 867 (2004). 38, 47

**United States* v. *White*, 887 F.2d 267 (D.C. Cir. 1989). 37

United States v. *Williams-Davis*, 90 F.3d 490 (D.C. Cir. 1996),
cert. denied, 519 U.S. 1128 (1997). 31

**United States* v. *Wilson*, 160 F.3d 732 (D.C. Cir. 1998),
cert. denied, 528 U.S. 828 (1999). 20-21, 26

STATUTES:

18 U.S.C. 242. 2

18 U.S.C. 1001. 2-3

18 U.S.C. 1512. 3-4

18 U.S.C. 3500. 19

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 08-3004

UNITED STATES OF AMERICA,

Appellee

v.

STEPHEN COOK,

Appellant

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

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this case pursuant to 18 U.S.C. 3231. This Court has jurisdiction pursuant to 28 U.S.C. 1291. Judgment was entered against the defendant on January 22, 2008. The defendant filed a timely notice of appeal on January 28, 2008.

STATEMENT OF ISSUES

1. Whether the defendant is entitled to a new trial where he failed to demonstrate a reasonable probability that he would have been acquitted had any of the evidence that was turned over to him mid-trial been disclosed prior to trial.

2. Whether the Fifth Amendment prohibits the government's use of statements from the defendant that were neither compelled, inculpatory, nor truthful.

STATUTES AND REGULATIONS

The defendant was convicted of violating 18 U.S.C. 242; 18 U.S.C. 1001(a)(1), (a)(2); and 18 U.S.C. 1512(b)(1), (c)(2). 18 U.S.C. 242 provides, in pertinent part:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both[.]

18 U.S.C. 1001 provides, in pertinent part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--
>
> > (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
> >
> > (2) makes any materially false, fictitious, or fraudulent statement or representation
> >
> > * * *
>
> shall be fined under this title, imprisoned not more than 5 years or * * * both.

18 U.S.C. 1512 provides, in pertinent part:

> (b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to--
>
> > (1) influence, delay, or prevent the testimony of any person in an official proceeding;
> >
> > * * *
>
> shall be fined under this title or imprisoned not more than 20 years, or both.
>
> (c) Whoever corruptly--
>
> > (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so

* * *

shall be fined under this title or imprisoned not more than 20 years, or both.

STATEMENT OF FACTS AND STATEMENT OF THE CASE[1]

On the evening of August 29, 2005, Omar Hunter was arrested in the District of Columbia by a Metropolitan Police Department (MPD) officer for driving without a license. Tr. 51-52 (Omar Hunter).[2] The officer took Hunter to the Third District station, where the police booked and photographed him. Tr. 52-53 (Hunter). The photographs show that Hunter's face was not injured or bruised at that time. Tr. 54, 56-58 (Hunter); Govt. Exhs. 102-104.

After spending the night in the custody of MPD, Hunter was transported in a van to the D.C. Superior Court on the morning of August 30, 2005. Tr. 58-59

---

[1] This Court must view the facts in the light most favorable to the government. *E.g.*, *United States* v. *Roy*, 473 F.3d 1232, 1233 (D.C. Cir. 2007).

[2] References to "Tr. __" are to pages in Volumes 1-3 of the trial transcript, which are consecutively paginated; references to "Tr4. __" are to pages in Volume 4 of the trial transcript; references to "Tr5. __" are to pages in Volume 5 of the trial transcript; references to "GTr. __" are to pages in the transcript of the *Garrity* hearing, held on October 15, 2007; references to "Govt. Exh. __" are to trial exhibits introduced by the United States; references to "R.__" are to the docket number of documents filed in the district court; and references to "Br. __" are to pages in the appellant's opening brief. The United States will file a final brief with parallel appendix page citations after the appellant files the deferred appendix.

(Hunter). The inside of the van contained benches along each side, with approximately four to five arrestees seated on each bench. Tr. 181-182 (Bernard Thornton). The arrestees on each side were attached to each other at the wrist by flexible plastic ties known as "flex cuffs." Tr. 58-59 (Hunter); Tr. 181 (Thornton); Tr. 232 (James McNeill). Because Hunter was seated at the rear of the van along the driver's side – *i.e.*, at the end of his line of arrestees – his right arm was free and his left arm was attached by a flex cuff to Bernard Thornton, the arrestee sitting next to him. Tr. 59, 63 (Hunter); Tr. 181-183 (Thornton). James McNeill, the MPD officer who transported Hunter to Superior Court, testified that Hunter did not have any injuries on his face when the officers loaded him into the van. Tr. 243 (McNeill).

When the van arrived at Superior Court, it backed into an area known as the "sally port" where Deputy United States Marshals were waiting to unload the van and take custody of the arrestees so that they could be taken upstairs to appear before a judge. Tr. 364-369 (Brian Behringer). That morning, Deputies Stephen Cook, Brian Behringer, and Michael Sharpstene were working in the sally port, and Cook volunteered to process the van when it arrived. Tr. 365, 369, 513 (Behringer). Following the usual procedure, Cook took the list of incoming arrestees from the MPD officer, opened the back of the van, and asked whether

anyone in the van was hurt, injured, or sick. Tr. 369, 515 (Behringer). None of the arrestees responded that he was hurt, injured, or sick. Tr. 369, 515 (Behringer).

Cook then informed the arrestees that he would call out either their first or last names in turn, and that each arrestee should answer with the other half of his name. Tr. 60 (Hunter); Tr. 369, 515 (Behringer); Tr. 636 (Michael Sharpstene). Hunter testified that Cook cursed and seemed aggressive when calling out arrestees' names. Tr. 60-62 (Hunter). Hunter testified that, when Cook called out his first name, he responded by saying "the name on the document is Hunter" rather than simply stating "Hunter." Tr. 61-63 (Hunter); see also Tr. 184-185, 244 (Thornton); Tr. 370, 515 (Behringer); Tr. 638 (Sharpstene). Cook again called out Hunter's name and Hunter responded in the same manner. Tr. 62-63 (Hunter). Cook then swore at Hunter and told him to get off the van. Tr. 63 (Hunter). Hunter responded that he could not step off the van unless Cook told the arrestees to whom Cook was attached to get off the van as well. Tr. 63, 102 (Hunter); Tr. 201-203 (Thornton). In response, Cook stepped up on the van, grabbed Hunter by his shirt – forcefully enough to rip the shirt – and pulled him off the van. Tr. 63-64 (Hunter); Tr. 186-187, 204 (Thornton); Tr. 370 (Behringer); Tr. 642-643 (Sharpstene).

Cook and Hunter fell to the ground, along with the other arrestees to whom Hunter was attached. Tr. 63-64 (Hunter); Tr. 185 (Thornton); Tr. 244 (McNeill); Tr. 372 (Behringer); Tr. 643-644 (Sharpstene). Hunter testified that Cook punched him in the face and head three to four times. Tr. 64-66 (Hunter). Hunter, who was still cuffed to another arrestee, attempted to cover his head with his free arm, after which Cook punched him an additional four to five times. Tr. 66-67 (Hunter). Hunter testified that Cook cursed at him while hitting him. Tr. 69 (Hunter). Five other witnesses – the arrestee to whom Hunter was attached, the MPD officer who transported Hunter to Superior Court and the three other Deputy United States Marshals who were present in the sally port area – testified that Cook pulled Hunter out of the van, punched him in the head and face multiple times, and kicked him in the head once. Tr. 185-188, 191, 205, 209, 211 (Thornton); Tr. 244, 248-250 (McNeill); Tr. 372-374, 531-533 (Behringer); Tr. 645-648, Tr4. 21 (Sharpstene); Tr4. 65-67 (Del Ramsey). The witnesses also testified that Hunter did not strike, threaten to strike, or attempt to strike Cook, and that Hunter did not make any threatening gestures or statements toward anyone. Tr. 68 (Hunter); Tr. 374 (Behringer); Tr4. 63 (Ramsey).

After the altercation, Sharpstene and Behringer helped the arrestees off the ground and took them through the sally port to the elevator, where Deputy Del

Ramsey – who had observed parts of the incident from the elevator area of the sally port, Tr4. 54-68 (Ramsey) – escorted the arrestees up to the main cell block area of Superior Court. Tr4. 69-70 (Ramsey). Ramsey testified that Hunter was bleeding from the mouth or face area. Tr4. 70 (Ramsey). Hunter testified that his nose was bleeding, and that the right side of his face was painful. Tr. 70 (Hunter). After Hunter spoke to a judge at Superior Court and was released, he went back to the Third District MPD station to retrieve his belongings and to file a complaint about the incident. Tr. 72-73, 84 (Hunter).

Hunter went to the hospital with his family to receive medical care for his injuries. Tr. 73-74 (Hunter); Tr. 159-161 (Robert Hunter). His father took photos of Hunter's injuries at that time, and those photos were admitted at trial. Tr. 74 (Hunter); Tr. 159-162 (Robert Hunter); Govt. Exhs. 105-112. The photos document that Hunter had multiple bruises and marks on his face and that his face was swollen. Tr. 74-83 (Hunter); Tr. 160-162 (Robert Hunter). Hunter testified that he had trouble swallowing for two to three weeks after the incident due to the swelling. Tr. 85 (Hunter).

Hunter also filed a copy of his complaint at Superior Court. Tr. 84 (Hunter). On August 31, 2005, Deputy United States Marshal Paul Rivers – who was Cook's supervisor – received a copy of Hunter's complaint. Tr. 581-582 (Paul Rivers);

Govt. Exh. 101. The complaint alleged that Hunter had been punched in the face by a marshal on August 30, but did not name the marshal. Govt. Exh. 101. When Rivers read the complaint, he did not recognize the description of the marshal. Tr. 585, 603 (Rivers). He happened to be standing next to Cook, however, and knew that Cook had worked in the sally port area the previous day, so he showed the complaint to Cook. Tr. 603-604 (Rivers). Cook read the report and volunteered that he had been involved in an incident the previous morning with an arrestee who did not want to come off the MPD van in the sally port area. Tr. 585-586, 604 (Rivers). Cook told Rivers that it had not been a serious incident. Tr. 586 (Rivers).

Rivers asked Cook to fill out a "field report" (also referred to as a 210 or an "incident report")[3] and a "use of force report" (also referred to as a 133) explaining what had happened between him and Hunter on August 30. Tr. 585-588 (Rivers); Govt. Exhs. 401, 406. Cook completed the requested reports and gave them to Rivers, who read them over, had Cook sign them, signed them himself, and forwarded them to his supervisor. Tr. 588-590 (Rivers). The reports, which contain identical narrative statements, state that Cook "entered the van and

[3] The United States Marshals Service policies require employees to file a 210 field incident report about "all operational incidents or activities" that do not require a different reporting form. Govt. Exh. 602.

assisted Mr. Hunter out of the van" after Hunter refused to answer up with his last name and refused to exit the van and do not mention any use of force by Cook. Govt. Exhs. 401, 406.

Rivers also asked deputies Behringer, Sharpstene, and Ramsey to file field reports about the incident between Cook and Hunter. Tr. 592-595 (Rivers). Deputy Behringer testified that he called Cook right after Rivers asked him to file a report to "find out if [Cook] knew what was going on." Tr. 383 (Behringer). Cook informed Behringer that he had already filed a field report, and Behringer asked Cook to email a copy of the report to him. Tr. 383-384 (Behringer). Behringer testified that he wanted his report to look the same as Cook's, so he cut and pasted portions of Cook's report into his own. Tr. 384-387 (Behringer); Govt. Exh. 402. He further explained that he did not want to report what he saw occur between Cook and Hunter – what he described as a "use of force [that] was not warranted" – because he did not want to show Cook in a bad light and did not want other deputies to view Behringer as someone who was sympathetic to arrestees (what he referred to as a "bandit lover"). Tr. 374, 384-387 (Behringer). Behringer's report does not mention any use of force by Cook against Hunter. Tr. 386 (Behringer); Govt. Exh. 402. Behringer later emailed his report to Cook, "[j]ust to let him know [they] were all on the same page." Tr. 396 (Behringer).

A few days later, Behringer called Deputy Sharpstene to tell him that Rivers wanted a report from him as well. Tr. 393 (Behringer). Sharpstene had been temporarily transferred out of town to an assignment related to dealing with the aftermath of Hurricane Katrina. Tr. 393 (Behringer); Tr. 650 (Sharpstene). Sharpstene testified that initially he did not write a report even after one was requested of him because he did not want to be viewed as a "rat" by other officers. Tr. 651-652 (Sharpstene). After Behringer called Sharpstene a second time to discuss Sharpstene's writing a report, Behringer emailed his report to Sharpstene and informed him that he had based it on Cook's report. Tr. 393-396 (Behringer); Tr. 654 (Sharpstene). Sharpstene modeled his report on Cook's and Behringer's, stating that Cook "assisted" Hunter off the van after Hunter was noncompliant. Tr. 654 (Sharpstene); Govt. Exh. 403. Sharpstene testified at trial that he knew his report was a lie. Tr. 655-656 (Sharpstene). He ultimately emailed his report to Rivers so that he wouldn't have to sign it. Tr. 655 (Sharpstene); Govt. Exh. 403.

Deputy Ramsey testified that, after Rivers asked him to write a field report about the incident between Cook and Hunter, he initially sat down and wrote a truthful report. Tr4. 72-73 (Ramsey). Because Ramsey did not want to be the one to get Cook in trouble, however, he deleted much of the content from his report before giving it to Rivers. Tr4. 72-74, 102-103 (Ramsey). Ramsey testified that

he gave Rivers a draft report recounting that Ramsey observed Hunter being helped up from the ground, that Hunter was bleeding from the nose, and that Hunter asked "why did he do that?" Tr4. 73 (Ramsey); Govt. Exh. 404. The following day, Rivers spoke to Ramsey about his report; he pointed out the segments about Hunter being helped up and about his bleeding, and stated that, while he was not telling Ramsey to change his report, Ramsey might want to confer with the other officers about what they included in their reports. Tr4. 76, 105 (Ramsey). Ramsey interpreted that as a "direct hint" that he should not include that information, retyped his report to exclude it, and turned the edited report in to Rivers. Tr4. 77, 106-107 (Ramsey); Govt. Exh. 405.

Several months later, in January 2006, the FBI interviewed Deputy Behringer about the incident between Cook and Hunter. Tr. 397 (Behringer). Behringer, who was living in Milwaukee at the time, lied to the investigators at that first meeting, stating that the incident occurred as he and Cook had recounted it in their reports. Tr. 397-398 (Behringer). Behringer stuck to that story during a second interview with the FBI in February 2006. Tr. 401-403 (Behringer). Behringer testified that he decided to finally tell the truth only after he was subpoenaed to testify before the grand jury in September 2006. Tr. 404-408 (Behringer).

After Behringer agreed to cooperate with the FBI's investigation, the FBI arranged for him to place three tape-recorded telephone calls to Cook. Tr. 408-416 (Behringer); Govt. Exhs. 501, 501A, 502, 502A, 503, 503A. Behringer was supposed to try to get Cook to talk about the incident with Hunter and the false reports he filed. Tr. 408, 453-456 (Behringer). During the first call, which was placed on September 28, 2006, Behringer told Cook that he had received a grand jury subpoena. Govt. Exh. 501A at 1-2 (transcript of phone call). Cook repeatedly told Behringer to stick to what he wrote in his report when testifying in front of the grand jury. Govt. Exh. 501A at 2, 4-5, 8, 13, 18. Cook specifically told Behringer to say that Hunter had not been punched or kicked, and that Hunter had left the MPD van under his own power. Govt. Exh. 501A at 8. Behringer placed the second recorded call to Cook on October 23, 2006, and Cook again urged him to stick to what he wrote in his report. Tr. 412 (Behringer); Govt. Exh. 502, 502A at 4-5, 7, 11-12 (transcript of phone call).

On August 7, 2007, a federal grand jury returned a seven-count indictment against Cook. Count One charged him with using excessive force against Omar Hunter while acting under color of law, resulting in bodily injury, in violation of 18 U.S.C. 242. Count Two charged Cook with knowingly making a false statement by submitting a field report in which he concealed and falsified

information regarding his use of force on Hunter, in violation of 18 U.S.C. 1001(a)(1), (a)(2). Counts Four and Six[4] charged Cook with knowingly tampering with a witness during the recorded phone calls with Behringer on September 28, 2006 and October 23, 2006, with the intent to influence, delay, and prevent the testimony of the witness in order to affect the grand jury's investigation of Cook's use of force on Hunter, in violation of 18 U.S.C. 1512(b)(1).

Cook filed a motion for acquittal and a motion to dismiss pursuant to Federal Rule of Criminal Procedure 29 at the close of the government's case, Tr4. 111, and again at the close of his case, Tr5. 9. Cook also filed a post-trial motion for new trial or judgment of acquittal pursuant to Rules 29 and 33, arguing in part that the government's alleged violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), entitled him to a new trial. R. 28. The district court denied those motions. Tr4. 111-113;[5] Tr5. 9; R. 37. In rejecting Cook's *Brady* arguments, the district court concluded that Cook failed to establish a reasonable probability that he would have been acquitted had any identified evidence been disclosed earlier or at

---

[4] Counts Three, Five, and Seven were dismissed before the conclusion of the trial.

[5] The district court granted Cook's motion as to Count Three of the indictment, which charged a conspiracy in violation of 18 U.S.C. 371, and dismissed that count. Tr4. 111-115.

all. R. 37 at 2-6. On October 30, 2007, after a five-day trial, a jury found Cook guilty on all four submitted counts. R. 30. On January 18, 2008, the district court held a sentencing hearing and sentenced Cook to 24 months' imprisonment on all counts, to be served concurrently. R. 41. Cook filed a timely notice of appeal on January 28, 2008. R. 43.

SUMMARY OF ARGUMENT

Cook cannot prevail on his claim that the government withheld evidence favorable to his defense, resulting in prejudice to his case, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Most of the evidence Cook identifies was turned over to him during trial, giving his defense ample opportunity to make use of it. Indeed, Cook's own counsel ultimately decided not to introduce most of the evidence at issue after it was turned over during the trial. In any case, Cook fails to establish that pretrial disclosure of any of the evidence he cites would have raised a reasonable probability that he would have been acquitted. Moreover, his most strenuous complaint – that the government suppressed evidence that Omar Hunter may have been beaten at the police station prior to arriving at Superior Court – is erroneous and based on a blatant mischaracterization of the testimony and evidence presented at trial.

Cook also cannot prevail on his claim that he was compelled to give testimony against himself in contravention of the guarantees of the Fifth Amendment when his supervisor asked him to fill out routine incident and use of force reports. The Fifth Amendment's guarantee – as articulated in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), and elsewhere – does not protect exculpatory statements that are untruthful and voluntary. It is well established that *Garrity* protection does not entitle an individual to make false statements. Cook was convicted of making false statements in his field report, and he does not challenge the adequacy of the evidence to support that conviction. The Supreme Court has long held that an individual may be prosecuted for making false statements, regardless of whether those statements were coerced. In any case, Cook cannot demonstrate that his statements were coerced because, as the district court found, he had neither a subjective nor an objectively reasonable belief that he would be fired if he failed to write the reports Rivers requested of him.

ARGUMENT

I

THE UNITED STATES DID NOT SUPPRESS ANY MATERIAL, EXCULPATORY EVIDENCE IN VIOLATION OF *BRADY* V. *MARYLAND*

Cook claims that he is entitled to a new trial because the government failed to disclose three items of evidence that were both favorable and material, in violation of the Supreme Court's mandate in *Brady* v. *Maryland*, 373 U.S. 83 (1963). In order to establish a violation of *Brady*, a defendant must demonstrate: (1) that the evidence at issue is favorable to his defense, either because it is exculpatory or because it is impeaching; (2) that the evidence was suppressed by the government; and (3) that the evidence was material – that is, that he suffered prejudice as a result. *United States* v. *Andrews*, 532 F.3d 900, 905 (D.C. Cir. 2008); *United States* v. *Dean*, 55 F.3d 640, 663 (D.C. Cir. 1995), cert. denied, 516 U.S. 1184 (1996). In order to establish that the evidence in question was material, Cook must demonstrate a reasonable probability that the outcome of his trial would have been different had the disputed evidence, taken as a whole, been disclosed.[6] *Kyles* v. *Whitley*, 514 U.S. 419, 432-437 (1995); *United States* v.

---

[6] Cook erroneously suggests in passing (Br. 6) that the district court erred by focusing on the materiality of the disputed evidence rather than focusing on whether Cook received a fair trial. Of course, as the Supreme Court has made

(continued...)

Bagley, 473 U.S. 667, 675-682 (1985). Where, as here, the evidence in question was disclosed during the trial, the defendant must demonstrate that the outcome of the trial would have been different if the disclosure had come earlier. *United States* v. *Tarantino*, 846 F.2d 1384, 1417 (D.C. Cir.), cert. denied, 488 U.S. 840 (1988).

Cook filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 based on the alleged *Brady* violations he reasserts on appeal. R. 28. The district court denied that motion, finding that Cook had failed to demonstrate a reasonable probability that he would have been acquitted had the evidence in question been disclosed prior to trial. R. 37 at 2-6. While this Court defers to the district court's findings of fact under the abuse of discretion standard, "once the existence and content of undisclosed evidence has been established, the assessment of the materiality of this evidence under *Brady* is a question of law" subject to de novo review. *United States* v. *Oruche*, 484 F.3d 590, 595 (D.C. Cir. 2007). Because Cook cannot establish that the government suppressed any favorable, material evidence, he is not entitled to a new trial.

---

[6] (...continued)
clear, the question whether disputed evidence is material is the same as whether a defendant received a fair trial. *Kyles* v. *Whitley*, 514 U.S. 419, 432-438 (1995).

A. Omar Hunter's "Freeman's Writ To Travel" And Copyright Papers

Cook first claims that the United States violated *Brady* by not turning over prior to trial a packet of papers containing two forms filled out by Omar Hunter – a "Freeman's Writ To Travel" and a copyright form. Hunter testified on cross-examination that, when he was pulled over by a Metropolitan Police Department officer on August 29, 2005, he presented the officer with a "Freeman's Writ to Travel" rather than a driver's license. Tr. 90-95 (Hunter). He testified that the "Writ" was a document he drafted himself and used in lieu of a driver's license. Tr. 92 (Hunter). He also testified on direct and cross-examination that he considers his name to be a "common law trademark" or copyright, and that he had attempted to record his trademark. Tr. 86-89 (Hunter). During cross-examination, Hunter stated that he had turned over the Writ to the government during the investigation, Tr. 125 (Hunter), and the defense requested that the government produce it, Tr. 130. At the direction of the district court, the government produced the packet of papers so that the court could determine whether they constituted Jencks material.[7] The court then permitted the defense to introduce the Writ that

[7] The Jencks Act, 18 U.S.C. 3500, requires the United States to disclose to a criminal defendant any statement made by a government witness that is in the possession of the United States and "relates to the subject matter as to which the witness has testified" after such government witness has testified.

Hunter had provided to the MPD officer at the time of his arrest. Tr. 148. Although the district court informed the defense that it could introduce the rest of the documents included in the packet – including the copyright forms – provided defense counsel could demonstrate relevance, Cook's counsel declined to do so. Tr. 132-135, 152-153.

On appeal, Cook argues (Br. 10) that, by failing to turn over the forms in question prior to trial, the government suppressed impeachment[8] evidence concerning Hunter's "attitudes and behaviors" "towards law enforcement," in violation of *Brady*. He does not even assert that the documents are material, let alone explain how he was prejudiced by their disclosure mid-trial. Even assuming that the forms qualify as impeachment evidence, Cook cannot demonstrate that he was prejudiced by their disclosure mid-trial. In order to prevail, Cook must demonstrate a probability that the verdict would have been different had the documents been disclosed earlier. *Tarantino*, 846 F.2d at 1417. As this Court has held, "a new trial is rarely warranted based on a *Brady* claim where the defendants obtained the information in time to make use of it." *United States* v. *Wilson*, 160

[8] Cook does not even attempt to argue that the Writ and copyright papers are exculpatory and has waived his right to do so. *United States* v. *Taylor*, 339 F.3d 973, 977 (D.C. Cir. 2003).

F.3d 732, 742 (D.C. Cir. 1998), cert. denied, 528 U.S. 828 (1999); see also *Dean*, 55 F.3d at 663.

Initially, Cook fails to establish that the government suppressed any favorable information regarding Hunter's use of the Writ or of the copyright symbol in conjunction with his name. Indeed, Cook admits (Br. 10) – as the district court found, R. 37 at 3-4 – that he knew about Hunter's beliefs regarding the Writ and copyright symbol prior to trial. As this Court has held, "*Brady* only requires disclosure of information unknown to the defendant, and then generally only upon request." *United States* v. *Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993) (internal citations omitted) (citing *United States* v. *Agurs*, 427 U.S. 97, 103, 107 (1976)). As the district court found, R. 37 at 3-4, at trial Cook's counsel thoroughly cross-examined Hunter on his use of the Writ, as well as the belief system supporting his opinion that he was entitled to use the Writ instead of a driver's license, and Hunter freely admitted to having used the Writ in lieu of a driver's license. Tr. 90-95 (Hunter). Cook was also aware before trial that Hunter believed his name to be copyrighted because he had a copy of Hunter's complaint against Cook, at the bottom of which Hunter signed his name along with a copyright symbol. Tr. 86 (Hunter); Govt. Exh. 101; see also Govt. Exh. 501A at 15 (Behringer commenting in recorded phone conversation with Cook about

Hunter's use of the copyright symbol). As a result of that knowledge, the defense cross-examined Hunter about his belief that he had copyrighted his name and about his desire to protect his name from use by anyone else. Tr. 86-89 (Hunter).

On appeal, Cook attempts to manufacture a *Brady* issue by focusing on the fact that he did not have possession of the Writ itself or Hunter's copyright forms. His argument is unavailing. The fact that Hunter's Writ was turned over to Cook mid-trial did not hamper his ability to impeach Hunter's testimony based on Hunter's use of the Writ. Indeed, because Cook had already questioned Hunter about his use of the Writ, the introduction of the Writ itself was cumulative. *United States* v. *Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996) (holding that impeachment evidence is cumulative if the witness in question was already impeached at trial by the same type of evidence). This Court has held that impeachment evidence that is cumulative is not material under *Brady*. *United States* v. *Brodie*, 524 F.3d 259, 268-269 (D.C. Cir. 2008). In any case, the Writ was ultimately turned over to Cook, and the defense was able to use it without restriction in cross-examining Hunter. On appeal, Cook does not offer so much as a theory about how earlier disclosure of the Writ could have affected the outcome of the trial.

This Court may dispose of Cook's implied claim that he was prejudiced by the mid-trial disclosure of the documents related to Hunter's attempt to copyright his name even more easily. After the government turned over those documents at trial, the defense itself decided not to introduce them. Tr. 152-153. Thus, any alleged prejudice Cook could have suffered from the jury's inability to peruse the purported copyright filing was a result of his own counsel's decision not to introduce the filing. Again, Cook fails to offer any theory as to how the outcome of his trial might have been different had the forms been turned over prior to trial.

B. Bernard Thornton's Mental Competency Reports

Cook also argues (Br. 10-13) that the government violated *Brady* by not informing him prior to trial that government witness Bernard Thornton had undergone a competency evaluation several months after Cook assaulted Hunter. Thornton was the arrestee who was attached to Hunter at the wrist during the altercation between Cook and Hunter on August 30, 2005. During the cross-examination of Thornton, he mentioned that he was at St. Elizabeth's Hospital from late 2005 to January 2006 for a competency evaluation, and that a report was prepared concerning his competency tests.[9] Tr. 218-219, 222-223 (Thornton).

[9] As the government explained in its opposition to Cook's motion for a new trial, the government had not located Thornton's competency reports prior to trial (continued...)

The following day, the government provided the district court with two competency reports about Thornton that were prepared at St. Elizabeth's – one dated November 22, 2005, finding Thornton incompetent to participate in court proceedings, and one dated January 24, 2006, finding that he had been rendered competent. Tr. 331-333. The district court noted that Thornton was clearly competent when he testified in this case, and the defense did not dispute that. Tr. 332. The government argued that the reports are not relevant because they were written several months after the events at issue in this case, and defense counsel did not disagree. Tr. 331-332. The district court decided not to produce the reports because they were written months after the incident and because Thornton was ultimately found to be competent. Tr. 331-333; R. 37 at 4. The court did offer the defense the opportunity to recall Thornton to ask him whether he was under the influence of any medication or other drugs that might have impaired his perception at the time of the incident between Cook and Hunter. Tr. 332-334. He chose not to do so.

---

[9] (...continued)
because the prosecution relied on information in government's case database that indicated only that Thornton had been found to be competent and entered a guilty plea. R. 33 at 3.

On appeal, Cook argues that his defense was impaired by his lack of access to the competency reports themselves and by the district court's restriction on the permissible scope of cross-examination had Cook chosen to recall Thornton. Cook claims (Br. 12) that these limitations prevented him from exploring Thornton's "ability to correctly perceive and remember events in the past," for the sake of impeachment. Cook is incorrect. Initially, the fact that Thornton was judged temporarily incompetent several months after the events at issue in this case does not in itself impugn the credibility of his testimony about the altercation between Cook and Hunter. There is no evidence that Thornton suffered from any mental illness or impairment at the time of the events about which he testified. Cf. *United States* v. *Smith*, 77 F.3d 511, 516 (D.C. Cir. 1996) ("[E]vidence regarding mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth.").

To the extent the disclosure of Thornton's later competency testing raised questions about his ability to perceive and later remember events that occurred on August 30, 2005, the district court offered the defense the opportunity to recall Thornton for questioning on exactly that – precisely the type of "exploring" of Thornton's "ability to correctly perceive and remember events in the past" that Cook claims (Br. 12) on appeal he was denied. Cook's counsel declined to do so.

On appeal, Cook misstates the scope of further cross-examination of Thornton that the district court would have permitted. He states (Br. 12) that the district court granted him the opportunity to recall Thornton only "for the very limited purpose of questioning him about his use of drugs at the time of the incident." But the district court informed Cook that he could recall Thornton in order to question him not only about any drug use at the time of the incident, but also about whether he was taking any medications at that time. Tr. 332. Thus, if Cook's counsel was prevented from questioning Thornton about any relevant impairment to his mental state on August 30, 2005, it was because he opted not to pursue that line of questioning by recalling the witness.

Thus, to the extent Cook complains that he was prejudiced by the government's failure to inform him prior to trial that Thornton had been declared incompetent in late 2005, he "fail[s] to show, beyond vague generalities, how the trial would have been different with earlier knowledge" of Thornton's subsequent competency evaluations. *Wilson*, 160 F.3d at 742. Because Cook obtained information about Thornton's competency tests "in time to make use of it" at trial, and chose not to use it, he cannot show that the evidence was material, as required under *Brady*. *Wilson*, 160 F.3d at 742.

Nor can Cook demonstrate a reasonable probability that he would have been acquitted had the competency reports been turned over to him. Even if this Court were to credit Cook's speculation[10] that the competency reports contain useful impeachment information, there is no reasonable probability that any amount of impeachment regarding Bernard Thornton's mental state would have led to an acquittal of Cook. Thornton's testimony about the altercation between Cook and Hunter was corroborated by four other witnesses – one police officer and three deputy United States Marshals – as well as the victim himself. Cook does not even attempt to argue that there is a probability he would have been acquitted if the jury had only the consistent testimony of the victim and four law enforcement officers to rely on, without the corroborating evidence of Hunter's fellow arrestee. Because Cook has failed to demonstrate that the disclosure during trial of Bernard Thornton's after-the-fact competency evaluations were material, he has failed to establish that the government committed a *Brady* violation by not disclosing the existence of those evaluations prior to trial.

---

[10] Although the defendant bears the burden of demonstrating that disputed evidence is favorable and material, see *United States* v. *Johnson*, 519 F.3d 478, 488 (D.C. Cir. 2008), Cook made no post-trial attempt to obtain the competency reports.

This Court recently reached the same conclusion in *United States* v. *Johnson*, 519 F.3d 478, 489-490 (D.C. Cir. 2008). In that case, the defendant argued that the government violated *Brady* by not turning over evidence about disciplinary action that had been taken against one of the police officers testifying for the government. *Id.* at 488. The Court found that, even if the evidence about the reprimand had been admissible as impeachment evidence against the government's witness, the nondisclosure of that evidence was not material – and therefore did not run afoul of *Brady* – at least with respect to the charges in support of which the government presented the corroborating testimony of other law enforcement officers. *Id.* at 489. See also *United States* v. *Bowie*, 198 F.3d 905, 911-912 (D.C. Cir. 1999) (finding that suppressed impeachment evidence was not material because testimony of potentially impeachable police officer witness was corroborated by the testimony of another police officer). The case against materiality is even more compelling in the instant case, in which Thornton's testimony was corroborated by five other witnesses.

C. Hunter's Refusal To Answer To His Name At Central Cell Block

Finally, Cook argues (Br. 13-16) that the government violated *Brady* by not disclosing an alleged incident involving Hunter that took place at Central Cell Block – where Hunter spent the night – on the morning of August 30, 2005. That

incident involved Hunter's refusal to answer when his name was called by two civilian MPD employees who were in the process of preparing to transport him from Central Cell Block to Superior Court. Because that evidence was neither favorable to Cook nor material, his argument cannot prevail.

Metropolitan Police Officer James McNeill was the officer who transported Hunter and other arrestees from Central Cell Block to Superior Court on the morning of August 30, 2005. During direct examination by the government, McNeill testified that his van was delayed leaving Central Cell Block on the morning of August 30 because, according to the two civilian employees, an arrestee ultimately identified as Hunter would not answer when they called his name. Tr. 240-243, 247-248, 292 (McNeill). Cook asked that the government turn over any information it had regarding Hunter's failure to answer up at Central Cell Block. Tr. 258. The government responded that the only information it had was McNeill's grand jury testimony, which Cook conceded he already had. Tr. 257.

On appeal, Cook grossly mischaracterizes McNeill's description of what occurred at Central Cell Block by referring to it as "a use of force incident" resulting in "injuries" to Hunter (Br. 13-15). McNeill testified that two civilian technicians at Central Cell Block told him that, when they went to "pull" Hunter

out of his cell for transport to Superior Court, he would not answer when his name was called and did not want to come out of his cell. Tr. 240-242, 292, 298-299, 346-347 (McNeill). But McNeill also specifically testified that, when he referred to "pulling" arrestees out of their cells, he did not intend to indicate that any force whatsoever was involved. Tr. 347 (McNeill) ("There is no physical force at all as far as pulling when we say pulling prisoners to transport to court."). McNeill also testified that Hunter did not have any physical injuries when McNeill loaded him into the van on the morning of August 30. Tr. 348 (McNeill). In response to Cook's post-trial motions, the district court found that Cook's characterization of "whatever occurred at [Central Cell Block]" as a "use of force incident" was "without any evidentiary support." R. 37 at 5. The court went on to note that there is not "a shred of evidence in the record to support" Cook's "theory" that Hunter was injured at Central Cell Block. R. 37 at 5. The district court's factual determinations are entitled to deference by this Court. *Oruche*, 484 F.3d at 595.

In the absence of *any* support for Cook's contention that Hunter was involved in any use of force incident or received any injuries while at Central Cell Block, the mere fact that Hunter refused to answer to his name at Central Cell Block is not exculpatory. Nor could any inference a jury might draw from Hunter's behavior regarding his lack of cooperation with law enforcement be

considered exculpatory. Cook's defense was not that he used an appropriate amount of force to deal with an uncooperative arrestee, but that the physical altercation never happened at all. Finally, Hunter's refusal to answer to his name at Central Cell Block could not be used to impeach his testimony because he freely admitted at trial that he did not answer in the manner requested when Cook called his name in the sally port. Tr. 61-63 (Hunter).

Even if the evidence of Hunter's behavior at Central Cell Block were favorable to the defense, it was not material. Cook argues (Br. 15 & n.3) that he suffered prejudice because he was not able to investigate what happened at Central Cell Block by, for instance, questioning the civilian employees who removed Hunter from his cell. Initially, this Court will not find a *Brady* violation based upon mere speculation about the existence of exculpatory evidence. See *United States* v. *Williams-Davis*, 90 F.3d 490, 514 (D.C. Cir. 1996), cert. denied, 519 U.S. 1128 (1997); see also *United States* v. *Wadlington*, 233 F.3d 1067, 1076-1077 (8th Cir. 2000), cert. denied, 534 U.S. 1023 (2001); *United States* v. *Ramos*, 27 F.3d 65, 71 (3d Cir. 1994). In any case, Cook's argument is disingenuous. The defense was, in fact, able to get in touch with those employees during a lunch break at trial and opted not to call them as witnesses after speaking to them. Tr. 391-392. The defense also accepted the court's offer to recall Hunter to question him about the

incident. Tr. 571-573 (Hunter). Because Cook was offered the chance to make use at trial of all the evidence he contends should have been disclosed to him, he cannot demonstrate a probability that he would have been acquitted had the evidence been disclosed earlier.

D. Viewed Cumulatively, The Evidence In Question Is Not Material

As the Supreme Court held in *Kyles* v. *Whitley*, this Court must view the evidence at issue cumulatively to determine whether it is material for purposes of *Brady*. *Kyles*, 514 U.S. at 432-437. Cook has failed to demonstrate any probability that the outcome of his trial would have been different had all of the evidence he identifies been disclosed prior to trial.[11] Indeed, Cook has failed to demonstrate even a possibility of a different outcome because he ultimately had the opportunity to use all of the disputed evidence at trial. Where, as here, a defendant "effectively used, or had an opportunity to use, all the late-disclosed" evidence potentially favorable to his case at trial, he cannot prevail on a *Brady* claim. *Dean*, 55 F.3d at 664.

---

[11] If Cook means to suggest (Br. 6) that the district court erred by not considering the alleged *Brady* evidence cumulatively, he is in error. The district court explicitly considered "the totality of all this evidence" in concluding that Cook failed to establish a *Brady* violation. R. 37 at 6.

Cook merely asserts (Br. 15-16) that the cumulative effect of the mid-trial disclosure of the evidence in question resulted in prejudice to his case without any supporting argument. The defense itself opted not to introduce much of the evidence Cook now complains was withheld, including the copyright papers, testimony from Thornton about his ability to perceive and remember events on the date of the altercation between Cook and Hunter, and testimony from the civilian MPD employees who removed Hunter from his cell on that morning. It is difficult to imagine any prejudice that could have resulted from the absence of this evidence; but if there were any prejudice, it resulted from the defense's decision not to use it, not from any tardiness in disclosures by the government. Hunter's "Freeman's Writ to Travel" was introduced at trial with ample opportunity for the defense to cross-examine Hunter about it. No prejudice resulted from the mid-trial introduction of that document, particularly because the defense had already questioned Hunter about his use of the Writ. Finally, Cook does not offer so much as a theory as to how the outcome of his trial would have been different had he had access to Thornton's mental health reports. Because Cook cannot demonstrate any probability that he would have been acquitted had the evidence he identifies been disclosed earlier, he cannot demonstrate that the evidence is material, and his *Brady* claim must fail.

II

COOK'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION WAS NOT INFRINGED WHEN HIS SUPERVISOR ASKED HIM TO FILL OUT ROUTINE REPORTS

Cook argues (Br. 16-23) that the United States' use at trial of his field report and use of force report violated his Fifth Amendment privilege against compelled self-incrimination. He relies primarily on the Supreme Court's decision in *Garrity* v. *New Jersey*, 385 U.S. 493 (1967). This Court reviews de novo legal questions regarding the applicability of *Garrity* and the Fifth Amendment, including whether a statement was given voluntarily. Factual and credibility determinations made by the district court during the *Garrity* hearing are entitled to deference. *United States* v. *Santiago*, 410 F.3d 193, 202 (5th Cir. 2005), cert. denied, 547 U.S. 622 (2006); *United States* v. *Vangates*, 287 F.3d 1315, 1319-1320 (11th Cir. 2002); see also *United States* v. *Reed*, 522 F.3d 354, 358 (D.C. Cir. 2008). The general principle established in *Garrity* is that, where a public employee is required to incriminate himself upon threat of losing his job, any incriminating statements are involuntary and, therefore, may not be used as evidence against the employee in a criminal prosecution. *Garrity*, 385 U.S. at 496-500. In this case, neither *Garrity* nor the Fifth Amendment more generally proscribes the use of Cook's

field and use of force reports because they were not incriminating, were not truthful, and were not coerced.

A. The Fifth Amendment Does Not Protect False, Exculpatory Statements

The Fifth Amendment protection articulated in *Garrity* entitles a public employee who is compelled to give evidence against himself upon threat of the loss of his job to choose between two options: (1) he may incriminate himself without fear of that incriminating evidence being used against him in a later criminal prosecution for the crimes under investigation; or (2) he may invoke his Fifth Amendment right and refuse to answer the questions without fear of losing his job unless he is granted immunity against the later use of those answers. *Garrity*, 385 U.S. at 499-500.[12] Cook attempts to fit his situation into the first scenario, arguing that, because he was coerced into giving evidence against himself when he filed his incident and use of force reports, the district court erred in allowing the government to use the reports against him. Cook focuses the bulk of his attention on arguing that his statements were not voluntary; but this Court need not tackle that fact-intensive question. Cook's reliance on *Garrity* is misplaced both because he did not include any incriminating information in his

[12] To the extent Cook suggests (Br. 19) that *Garrity* holds that officers under investigation are entitled to explicit warnings of their Fifth Amendment rights in all cases, he is incorrect.

reports, and because the Fifth Amendment privilege against compelled self-incrimination is not a privilege to lie.

As an initial matter, nowhere in his lengthy protestations (Br. 16-18) about the Constitution's abhorrence of "involuntary confessions" does Cook mention that he did not, in fact, confess to anything in the reports at issue. With respect to Cook's use of force against Hunter, the reports are wholly exculpatory. Even if the statements were coerced, it is difficult to see how the Fifth Amendment's protection against compelled self-incrimination could bar the use of exculpatory statements. See *United States* v. *Knox*, 396 U.S. 77, 82 (1969). Indeed, the government did not rely on Cook's reports in proving that he used excessive force on Hunter in violating 18 U.S.C. 242, relying instead on the testimony of five eyewitnesses and the victim himself.

What Cook apparently intends to argue is that *Garrity* prohibits the government from prosecuting an individual for giving a false statement if that statement was coerced. But the Supreme Court has long held that the Fifth Amendment – as applied in a *Garrity* situation and elsewhere – does not protect an

individual from being prosecuted for giving false statements, regardless of whether the statements were involuntary:[13]

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently a question that the Government should not have asked. Our legal system provides methods for challenging the Government's right to ask questions – lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood.

Bryson v. *United States*, 396 U.S. 64, 72 (1969) (footnote omitted); see also, *e.g.*, *LaChance* v. *Erickson*, 522 U.S. 262, 265-268 (1998); *United States* v. *Apfelbaum*, 445 U.S. 115, 117, 127-128 (1980). This Court has also specifically held that the Fifth Amendment does not permit a public employee to lie in response to incriminating questions, even when the employee reasonably believes that he will lose his job if he does not answer. *United States* v. *White*, 887 F.2d 267, 274 (D.C. Cir. 1989). In such a situation, the employee may either "refuse[] to answer the incriminating question" or "answer[] without waiving his fifth amendment privilege." *Ibid.* Cook, however, "chose a third, unprotected response: He lied. He cannot now avail himself of the fifth amendment." *Ibid.*; see also *United States* v. *Friedrick*, 842 F.2d 382, 394 n.16 (D.C. Cir. 1988). Every other circuit

---

[13] As explained *infra*, the United States believes that the district court correctly determined that Cook's statements were voluntarily given.

to consider the issue agrees that the Fifth Amendment does not protect a defendant from being prosecuted for giving a false statement, even if it is compelled. See, *e.g.*, *McKinley* v. *City of Mansfield*, 404 F.3d 418, 427 (6th Cir. 2005), cert. denied, 546 U.S. 1090 (2006); *United States* v. *Waldon*, 363 F.3d 1103, 1112 (11th Cir.), cert. denied, 543 U.S. 867 (2004); *United States* v. *Veal*, 153 F.3d 1233, 1243 (11th Cir. 1998), cert. denied, 536 U.S. 1147 (1999); *Fraternal Order of Police* v. *City of Philadelphia*, 859 F.2d 276, 281 (3d Cir. 1988); *United States* v. *Devitt*, 499 F.2d 135, 142 (7th Cir. 1974), cert. denied, 421 U.S. 975 (1975); *United States ex rel. Annunziato* v. *Deegan*, 440 F.2d 304, 306 (2d Cir. 1971).

In attempting to evade this clearly established principle, Cook misinterprets (Br. 22) the Sixth Circuit's statement in *McKinley*, 404 F.3d at 427, that "*Garrity* precludes the use of public employees' compelled incriminating statements in a later prosecution for the conduct under investigation." Cook argues (Br. 22) that his prosecution for making false statements in the reports violated the Fifth Amendment because, at the time he filed his reports, he was already under investigation for "possible crimes involving falsification and obstruction." Cook offers no support for this claim, nor could he. Ultimately, though, it is irrelevant what types of crimes Cook may have been under investigation for at the time he

filed his reports; indeed, it is irrelevant whether he was the subject of any investigation at all.

There is no question that making a false statement in violation of 18 U.S.C. 1001 is itself a new crime, the prosecution of which is not prohibited by the Fifth Amendment, regardless of whether the statements in question were coerced. While the privilege against self-incrimination protects an individual from having coerced incriminating statements used against him in the prosecution of past illegal activity, it does not authorize him to commit a fresh criminal violation by perjuring himself, obstructing justice, or giving a material false statement. As the Eleventh Circuit explained in *Veal*:

> Although an accused may not be forced to choose between incriminating himself and losing his job under *Garrity*, neither *Garrity* nor the Fifth Amendment prohibits prosecution and punishment for false statements or other crimes committed while *making Garrity*-protected statements. Giving a false statement is an *independent* criminal act that occurs *when* the individual makes the false statement; it is *separate* from the events to which the statement relates, the matter being investigated.

153 F.3d at 1243; see also *Annunziato*, 440 F.2d at 306 (holding that defendant "was not prosecuted for past criminal activity based on what he was forced to reveal about himself; he was prosecuted for the commission of a crime while testifying, i.e. perjury."). In other words "*Garrity*-insulated statements regarding

past events under investigation must be *truthful* to avoid *future* prosecution" for crimes such as making a false statement. *Veal*, 153 F.3d at 1243. Nor is it a valid affirmative defense to a Section 1001 prosecution to claim that the statement in question was coerced. In *Knox*, the Supreme Court specifically noted that "[t]he validity of the Government's demand for information" is not an "element of a violation of § 1001." 396 U.S. at 80.[14] Thus, the Fifth Amendment does not immunize Cook's intentional filing of an incident report[15] that included false information from prosecution under Section 1001.

B. In Any Case, Cook's Statements Were Voluntary

Even if Cook had not lied in composing his incident and use of force reports, the filing of those reports is not entitled to *Garrity* protection. Cook does not claim that his supervisor, Paul Rivers, explicitly presented Cook with a choice between filing the incident and use of force reports or losing his job. Nor does he claim that, when asked to write the reports, Cook invoked his Fifth Amendment

---

[14] Cook does not contest the sufficiency of the evidence adduced at trial in support of his convictions, including his conviction for violating Section 1001, and has waived his right to do so. *United States* v. *Taylor*, 339 F.3d 973, 977 (D.C. Cir. 2003).

[15] Although Cook complains more about having to file the use of force report than the incident report, the government prosecuted him for making false statements in the incident report, not the use of force report. See R. 1 at 2 (Indictment, Count Two); Tr5. 37 (Jury Instructions).

privilege against self-incrimination and was instructed to write the reports anyway or face termination. See *National Federation of Federal Employees* v. *Greenberg*, 983 F.2d 286, 291 (D.C. Cir. 1993) ("Ordinarily, a person must invoke the [Fifth Amendment's] privilege [against compelled self-incrimination] in order to gain its advantage."). In the absence of such explicit threats, Cook may establish that his statements were not given voluntarily by demonstrating both that he subjectively believed that he would be fired if he did not submit the reports and that his belief was objectively reasonable. *Friedrick*, 842 F.2d at 395; see also *Vangates*, 287 F.3d at 1321-1322. The district court correctly concluded that Cook failed to demonstrate either.

On August 31, 2005, Cook's supervisor Paul Rivers received a copy of the complaint letter filed by Hunter. Tr. 582 (Rivers). When Rivers was unable to determine to which of his deputies the complaint referred, he handed the letter to Cook, who happened to be standing next to Rivers and whom Rivers knew had been on duty in the sally port area the previous day. Tr. 603-604 (Rivers). Cook immediately volunteered that he had been involved the previous day with an arrestee who did not want to come off the transport van and stated that it was not a serious incident. Tr. 585-586, 603-604 (Rivers). Rivers then instructed Cook to write an incident report and a use of force report, and Cook did so. Tr. 585-590

(Rivers). In support of his argument that the statements he included in those reports were coerced, Cook points to the totality of the circumstances surrounding Rivers' request, including: (1) the existence of Marshals Service regulations mandating disciplinary action, including termination, for failure to carry out orders; (2) his claim that he was under investigation at the time Rivers made his request; and (3) his belief that Rivers was out to get him.

Initially, the district court found Cook's claim that he subjectively believed that he would be fired if he did not file the requested reports to be "at best, dubious" and "implausible." R. 24 at 10-11. In concluding that Cook fell short of establishing that he had a subjective fear of termination if he did not file the reports, the district court considered Cook's testimony at the *Garrity* hearing – the very testimony he relies on in his brief before this Court (Br. 20-21) – and found it not to be persuasive. That factual determination is entitled to deference on appeal. *Santiago*, 410 F.3d at 202; *Vangates*, 287 F.3d at 1319-1320; see also *Reed*, 522 F.3d at 358.

Even if Cook did subjectively believe that he would be fired if he did not file the reports, that belief was not objectively reasonable. First, it was unreasonable for Cook to believe that he would be fired if he did not file the requested reports. The official policies of the United States Marshals Service

provide that the punishment for a first time offender for failure to carry out an order may range from reprimand to removal. GTr. 142-143 (Stanley Griscavage). Cook admitted during the pretrial *Garrity* hearing that he had never been disciplined by Rivers or anyone else at the Marshals Service at the time Rivers asked him to write the report. GTr. 73 (Stephen Cook). He also admitted that he was not aware at that time of what punishment the Marshals Service Policies directed or permitted for failure to file a report, and that he did not know of any employee of the Marshals Service who had been fired for refusing to file a report. GTr. 84, 88 (Cook). Moreover, Stanley Griscavage, the chief inspector for the Marshals Service's internal affairs office – known as the Office of Internal Investigations – testified at the *Garrity* hearing that he has never seen a complaint submitted to his office based on a deputy's failure to file a report. GTr. 143 (Griscavage). Griscavage also testified that, in his 17 years with the Marshals Service, he knew of no occasion when a deputy was dismissed for a first-time failure to file a report. GTr. 145-146 (Griscavage). Given that Cook would have been a first time offender had he refused an order to file a report, it was unreasonable for him to believe that he would be fired for doing so.

Second, Cook could not reasonably believe that he was under investigation for any wrongdoing at the time Rivers asked him to fill out the reports.[16] Chief Inspector Griscavage testified that line supervisors such as Rivers do not have authority to initiate formal criminal or administrative investigations. GTr. 121-124 (Griscavage). He testified that his office alone may initiate investigations and that an investigation never commences before the Office of Internal Investigations receives the appropriate paperwork such as an incident report or use of force report. GTr. 121-123 (Griscavage). Indeed, a large majority of the use of force reports received by the Office of Internal Investigations never result in any formal investigation – criminal or administrative – at all. GTr. 121 (Griscavage). Griscavage made clear that, when a supervisor such as Rivers gathers information such as an incident report or use of force report after receiving a complaint, that process is not considered to be an administrative investigation.[17] GTr. 123, 154

---

[16] In his brief on appeal, Cook suggests (Br. 18) that his due process rights were violated because he was not afforded unspecified procedural safeguards that the United States Marshals Service mandates when investigatory statements are taken from employees. Cook does not develop this argument at all and has waived his right to do so. *United States* v. *Law*, 528 F.3d 888, 908 n.11 (D.C. Cir. 2008). But in any case, because Cook was not the subject of an investigation when Rivers asked him to fill out routine reports, he was not entitled to any procedural protections. GTr. 127-128 (Griscavage).

[17] Griscavage also testified that line supervisors such as Rivers are not

(continued...)

(Griscavage). Rivers confirmed that he did not consider himself to be engaged in a criminal or formal administrative investigation when he asked Cook to fill out the appropriate reports. GTr. 11, 68 (Rivers).

It was not objectively reasonable for Cook to believe that he was under investigation based only on Rivers' request that he fill out routine reports after receiving Hunter's letter of complaint. Cook himself testified that filing incident reports was a routine part of his daily duties as a Deputy United States Marshal. GTr. 89 (Cook). Indeed, he testified that Rivers' request for the incident report was standard operating procedure and that he had no problem with the request. GTr. 109-110 (Cook). Rivers confirmed that the filing of incident reports was part of the day-to-day operation of the Marshals Service. GTr. 8 (Rivers). In light of Cook's admission that he had no problem with Rivers' request for the incident report, it is difficult to credit his alleged subjective belief that he would lose his job if he didn't file it, and even more difficult to discern an objectively reasonable basis for such a belief.

Although deputies file use of force reports less often than incident reports, Cook admitted to having written six to eight of them prior to his altercation with

---

[17] (...continued)
allowed to give an employee a *Garrity* warning before the Office of Internal Investigations has reviewed the matter. GTr. 125 (Griscavage).

Hunter. GTr. 75 (Cook). Thus, Rivers' request for the relatively routine use of force report also does not support Cook's contention that he reasonably believed he was under investigation merely because Rivers requested the report. In any case, because the substance of Cook's use of force report was word-for-word the same as his incident report, he cannot now complain about being compelled to offer information in the use of force report that he previously or simultaneously[18] provided in the incident report that he acknowledged was part of his regular job duties.[19]

Finally, Cook has failed to establish any objectively reasonable basis for his alleged belief (Br. 21) that Rivers would fire him if he didn't file the reports because Rivers "was looking for a reason to sanction or dismiss" Cook. Cook testified in his *Garrity* hearing that he had never been subject to discipline before the incident with Hunter, GTr. 73 (Cook), that Rivers had never initiated any administrative action against Cook, and that Rivers gave Cook a successful

---

[18] Cook testified in the district court that Rivers did not ask him for a use of force report until after he turned in his incident report. GTr. 77, 80 (Cook). Rivers testified that he asked for and received both simultaneously. GTr. 12, 14-15; Tr. 586-589 (Rivers).

[19] Moreover, as discussed *supra*, the information Cook included in his use of force report was not inculpatory, and he was not charged with filing false statements in his use of force report.

evaluation every time he evaluated him, GTr. 98 (Cook). Even if Cook did subjectively believe that Rivers was out to get him, moreover, there was no basis for him to reasonably believe that Rivers would fire him for not filing the requested reports because it was undisputed that Rivers did not have the authority to fire Cook. GTr. 18 (Rivers); GTr. 145 (Griscavage).

Thus, even if *Garrity* might apply to Cook's false, exculpatory statements, there is no objectively reasonable basis for Cook to have believed that he would be fired if he did not file the reports. His statements were, therefore, voluntary. *Friedrick*, 842 F.2d at 395; see also, *e.g.*, *Waldon*, 363 F.3d at 1112 (finding that law enforcement officer could not reasonably believe he would be fired if he did not testify at grand jury even though he had been subpoenaed to testify and relied on a municipal code provision stating that his employer reserved their right to discipline employees for exercising their Fifth Amendment privilege); *Vangates*, 287 F.3d at 1323-1324 (finding that correctional officer could not reasonably believe she would be fired if she did not offer testimony in a civil trial even though she had been subpoenaed to testify, appeared in uniform to testify, and was paid by her employer for the time she spent testifying). Cook fails to identify any case in which a court has found a Fifth Amendment violation on facts similar or analogous to his.

CONCLUSION

This Court should affirm the defendant's convictions.

Respectfully submitted,

JEFFREY A. TAYLOR
United States Attorney

GRACE CHUNG BECKER
Acting Assistant Attorney General

DIANA K. FLYNN
SARAH E. HARRINGTON
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-7999

APPELLEE'S DESIGNATION OF APPENDIX CONTENTS

Pursuant to Federal Rule of Appellate Procedure 30(c) and D.C. Circuit Rule 30(c), appellee United States of America designates the following items to be contained in the Joint Appendix:

Description	Date	Docket No.
Indictment	8/7/2007	1
Memorandum Opinion & Order	10/19/2007	24
Memorandum Opinion & Order	12/10/2007	37
Judgment	1/22/2008	41
Transcript of *Garrity* hearing, pages 8, 11, 12, 14-15, 18, 68, 73, 75, 77, 80, 84, 88-89, 98, 109-110, 121-125, 127-128, 142-143, 145-146, 154.	10/15/2007 [docketed 2/1/2008]	44
Trial Transcript Vol. 1, pages 51-54, 56-70, 72-89, 90-95, 102-103, 106-107, 125, 130, 132-135, 148, 152-153, 159-162, 181-188, 191, 201-205, 209, 211, 218-219, 222-223, 232, 240-244, 247-250, 257-258.	10/23/2007 [docketed 9/29/2008]	47
Trial Transcript Vol. 2, pages 292, 298-299, 331-334, 346-348, 364-370, 372-374, 383-387, 391-398, 401-416, 453-456.	10/24/2007 [docketed 9/29/2008]	48
Trial Transcript Vol. 3, pages 513, 515, 531-533, 571-573, 581-582, 585-590, 592-595, 603-604, 636, 638, 642-648, 650-652, 654-656.	10/25/2007 [docketed 9/29/2008]	49

Description	Date	Docket No.
Trial Transcript Vol. 4, pages 21, 54-70, 72-74, 76-77, 102-103, 105-107, 111-115.	10/26/2007	not docketed by appellant as of date of filing of this brief
Trial Transcript Vol. 5, pages 9, 37.	10/29/2007 [docketed 9/29/2008]	46

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 10,979 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

Date: January 9, 2009

_____

SARAH E. HARRINGTON
Attorney

CERTIFICATE OF SERVICE

I certify that on January 9, 2009, two copies of the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE, and one copy of an Entry of Appearance form, were served by Federal Express, postage prepaid, on the following counsel of record:

Faisal Gill, Esq.
1101 30th St. NW, Suite 500
Washington, DC 20007
(202) 625-4898

_____
SARAH E. HARRINGTON
Attorney