Nos. 11-30345, 11-30529

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee/Cross-Appellant

v.

GREGORY MCRAE, *et al.*,

Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

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REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

STATEMENT OF THE ISSUES[1]

Whether the district court abused its discretion (1) in concluding that Travis McCabe had shown diligence in uncovering the allegedly newly discovered evidence, (2) in assessing David Warren's credibility, and (3) in granting McCabe

[1] The facts and issues presented herein pertain only to the United States' appeal as concerns defendant Travis McCabe. This brief incorporates by reference the statement of facts, jurisdictional statement, and statement of the case set forth in the United States' opening brief.

a new trial on all counts on the basis of evidence related only to Count 8 of the indictment.

SUMMARY OF THE ARGUMENT

The district court granted McCabe's motion for a new trial on the basis of "newly discovered" evidence: namely, Warren's testimony that he had received a copy of the narrative portion of Exhibit 34, the report concerning the shooting of Henry Glover, from fellow New Orleans Police Department officer Purnella Simmons. Despite McCabe's arguments in support of the district court's decision, the fact remains that the court made several, critical, errors in its decision granting McCabe a new trial. Nothing McCabe has offered in his brief changes this assessment.

First, the district court erred in relying upon Warren's testimony that he received the report from Simmons. The evidence McCabe cites regarding the discovery of the report by Warren's counsel does nothing to enhance Warren's credibility regarding this central matter. Second, the district court abused its discretion in concluding that McCabe had shown diligence in seeking out this evidence, given that McCabe at no point inquired whether Warren, the subject of the report, had any relevant evidence regarding the report. Finally, even if this Court holds that the district court did not err in granting a new trial on the 18 U.S.C. 1519 charge relating to McCabe's filing of a false narrative report, the

district court erred in granting a new trial on the 18 U.S.C. 1001 and 18 U.S.C. 1623 counts against McCabe, given the evidence on those charges that is unaffected by the "newly discovered" evidence. Moreover, McCabe's arguments in support of the district court's decision to grant him a new trial on those counts amount to an attempt to retry this case on appeal. He failed to meet his burden of proving that the allegedly newly discovered evidence would have any impact on the jury's verdict on the 18 U.S.C. 1001 and 1623 counts. *United States* v. *Freeman*, 77 F.3d 812, 817 (5th Cir. 1996).

Because the district court abused its discretion in granting McCabe's motion for a new trial, its decision should be reversed.

ARGUMENT

A. The Facts Recited In McCabe's Brief Regarding The Discovery Of The Report In Question Are Irrelevant To The Assessment Of Warren's Credibility

In his brief, McCabe focuses extensively on the sequence of events that led Warren's trial counsel to uncover the "newly discovered evidence" in question, noting that the trial court "heard, and obviously believed," the testimony of members of Warren's trial team. See Original Br. of Defendant/Cross-Appellee Travis McCabe (McCabe Br.) 15. McCabe makes much of the fact that the United States' brief does not reference these witnesses, claiming that "these omissions are telling." McCabe Br. 39. But, in fact, quite the opposite is true: the United States

did not discuss that testimony because it is irrelevant to the only question at issue here – whether David Warren had received a copy of the narrative report from Simmons. None of the witnesses whose testimony McCabe discusses can corroborate Warren's testimony regarding this central issue. If Warren did not receive the report from Simmons, then trial counsel's discovery of a slightly earlier copy of Exhibit 34 is of no moment.[2] And that their discovery of the report was prompted by what appeared to be an "offhand remark" by Warren does nothing to bolster Warren's testimony that Simmons gave him the report.

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[2] For the same reason, the evidence regarding Simmons' possession of page 5 of Exhibit 34 does not enhance McCabe's argument. See R. 4503-4506, 4560-4563. The jury already heard that evidence and plainly did not feel that it undermined the United States' case against McCabe. At a retrial, it would still come down to Warren's word against Simmons'; their relative credibility has already been decided by the jury.

Furthermore, while the United States incorporates by reference the statement of facts as set forth in its opening brief, one factual allegation set forth by McCabe regarding Simmons' authorship of Exhibit 34 must be addressed. Exhibit 34 is composed of a handwritten incident report and resisting arrest report, prepared by Simmons, as well as the typed two-page narrative that the United States proved at trial was authored by McCabe. McCabe argues that Simmons' handwritten additions to the resisting arrest report are "totally consistent with the Exhibit 34 Narrative, and inconsistent with the Alleged Missing Narrative that Simmons claimed to have written," and that this is further proof that the narrative presented at trial is the only narrative that ever existed. McCabe Br. 8. But this reasoning is incorrect, because, as Simmons testified at trial, her handwritten additions to the resisting arrest report were not her own description of events, but were *based on information David Warren had given her*. See R. 4480-4481. It thus makes perfect sense that these handwritten additions, just like the false report authored by McCabe, would describe a version of events favorable to Warren.

As the United States set forth in its opening brief, the district court erred in four ways in its evaluation of Warren's testimony. First, the court erred in crediting Warren on the basis of his having delivered this report to his trial counsel in May 2009, before McCabe became aware of the government investigation of him. See R. 2269-2270 (noting that when Warren turned this evidence over to his trial counsel, he "could not have known that the contents of the newly discovered narrative report and the fact that Warren received it from Simmons would have been critical to the government's case against McCabe"). This fact certainly does not show that Warren was credible in having testified after trial that he received the report from Simmons. At the time Warren gave his counsel the report, he did not tell anyone that he had received it from Simmons. R. 2304-2306. Moreover, it makes perfect sense that someone indicted for murder would have turned over evidence related to his case to his trial counsel. This evidence is thus, at best, neutral.

Second, the court erred in failing to recognize the benefits that Warren himself could gain from the disclosure. See R. 2269. Although McCabe posits that, "[i]t cannot be seriously argued that Warren was intentionally laying the ground for a future Section 2255 claim in the middle of his trial" (McCabe Br. 44), as the district court recognized, Warren's new testimony about having received the report from Simmons does, in fact, position him to argue that his "counsel should

have made further inquiry into the substance of the report (because the newly discovered narrative report corroborates Warren's account of the shooting)." R. 2265 n.6. And, indeed, Warren's brief in this Court cites the grant of a new trial to support his argument that his case was improperly joined with McCabe's. See Original Br. of Appellant David Warren 38.

Third, the district court erred in failing to question why it was only toward the end of trial that Warren suddenly recollected what turned out to be an imagined discrepancy between the copy of the report he had allegedly received from Simmons and the report introduced at trial.[3] Despite McCabe's attempts to explain Warren's mindset (McCabe Br. 45-46), it is nevertheless the case that Exhibit 34 was mentioned hundreds of times during the course of trial (see R. 2272 n.15), that Warren obviously would have been aware of having received the report from Simmons this entire time, and that he would have understood the significance of this fact. The district court erred in failing to make this assessment. Moreover, the court failed to confront the fact that it makes no sense for a report that Simmons allegedly wrote to mistakenly assert that Warren, rather than Officer Linda

[3] As set forth in the United States' opening brief, according to his own affidavit, Warren raised the issue of the report to his attorneys by stating that he thought Exhibit 34 contained a mistake not present in the version Simmons gave him, namely, the incorrect statement that Warren had been the one to notify Simmons about the shooting. R. 2055, 2064. However, in actuality, both Exhibit 34 and the "newly discovered" narrative state that Warren was the person who called Simmons. R. 2302-2303.

Howard, had contacted her about the shooting. It would make more sense that McCabe, who was not at the scene of the shooting and who was not with Simmons when she received Howard's call, would have made such a mistake.

Finally, the district court clearly erred when it found that Simmons' trial testimony was called into question because she had failed to mention at trial that her original report was prepared on a page with a border around it (R. 2270). Simmons had referred to her use of a pre-printed form, which has a border around it, during her grand jury testimony, and, indeed, the form in question was introduced before the grand jury. R. 2418-2419; see also Exh. NT-3, Exh. NT-4 at 7-8. Though McCabe asserts that it is "difficult to follow the government's reasoning," because the fact that the report was on a "pre-printed form with a border potentially is quite significant" (McCabe Br. 47), the explanation is in fact quite simple: in the context of a four-week trial, where Simmons' testimony went not only to Exhibit 34, but also to the Warren shooting and investigation and the circumstances surrounding the burning of Henry Glover's body at the levee near Habans School, her omission of one detail regarding a report that she had written five years beforehand – and which she had already testified about before the grand jury – hardly throws the jury's verdict into question.

McCabe's attempt to distinguish the case law cited by the United States is also unavailing. Naturally, the cases do not reflect the unusual factual

circumstances at issue here – where the "newly discovered evidence" consists of the late-breaking "recollection" of a convicted felon. Nevertheless, those cases recognize the central point that "codefendant testimony that is not offered until the codefendant has been sentenced is 'untrustworthy and should not be encouraged.'" *United States* v. *Rodriguez-Romero*, Nos. 92-50720, 93-50183, 1994 U.S. App. LEXIS 11272, at *11 (9th Cir. May 9, 1994) (unpublished) (citing *United States* v. *Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir.), cert. denied, 506 U.S. 890 (1992)); see also *United States* v. *Blount*, 982 F. Supp. 327, 331 (E.D. Pa. 1997) ("A co-defendant who has already been convicted of a crime and is languishing away in jail has little to lose by lying to save a friend's hide.").

B. McCabe Did Not Show Diligence In Seeking The Allegedly Newly-Discovered Evidence

The district court abused its discretion in holding that McCabe showed due diligence in attempting to uncover the allegedly newly discovered evidence. The government's theory against McCabe was clear from the face of the indictment and McCabe had every reason to know the relevance of an inquiry into whether Simmons ever possessed a copy of Exhibit 34. Yet, despite the fact that it would make perfect sense for Warren, the subject of the report, to possess a copy of the document, the fact remains that McCabe never asked David Warren for any information about the report. See R. 2265.

While McCabe goes to some length to explain why he had no reason to believe that Warren might have a copy of the report (McCabe Br. 29-32), and to defend the district court's holding that it had not been presented with "any persuasive evidence or argument that McCabe's counsel had reason to request such" (R. 2265), his justifications lack merit. This Court's precedent is clear that a failure to investigate or respond to the government's theory constitutes lack of due diligence. See *United States* v. *Pena*, 949 F.2d 751, 758 (5th Cir. 1991) (holding that just because witness was uncooperative and unavailable did not preclude attorney from discovering needed evidence from other sources); *United States* v. *Jaramillo*, 42 F.3d 920, 925 (5th Cir.) ("Due diligence requires that a defendant exert some effort to discover the evidence."), cert. denied, 514 U.S. 1134 (1995); *United States* v. *Sullivan*, 112 F.3d 180, 183 & n.3 (5th Cir. 1997) (holding that the failure to seek a continuance to investigate is not diligent and citing cases to support the same); *United States* v. *Mulderig*, 120 F.3d 534, 546 (5th Cir. 1997) (diligence not shown when defendant failed to "investigate a key Government theory of guilt"), cert. denied, 523 U.S. 1071 (1998).

That the relevant information is in the hands of a co-defendant does not alter this conclusion. Both this court and others have made clear that even when a co-defendant possesses the relevant information, a defendant cannot obtain a new trial if he did not diligently investigate and attempt to present the information at trial.

See *United States* v. *Vasquez*, 386 F. App'x 479, 479 (5th Cir. 2010) (motion for new trial properly denied when there was "no indication in the record that [the defendant] exercised diligence in obtaining [his co-defendant's] statement"), cert. denied, 131 S. Ct. 972 (2011); cf. *United States* v. *Muja*, 365 F. App'x 245, 246 (2d Cir. 2010) ("Muja also contends that because Hysko was represented by counsel and detained in a separate facility, neither Muja nor his attorney could have obtained Hysko's statement with due diligence. It is well established, however, that a co-defendant's mere unavailability cannot transform evidence that 'existed all along' into 'newly discovered' evidence.") (citation omitted); *United States* v. *Diggs*, 649 F.2d 731, 740 & n.10 (9th Cir.) (lack of diligence where there was no evidence that defendant ever approached co-defendant's counsel about obtaining exculpatory testimony), cert. denied, 454 U.S. 970 (1981), overruled on other grounds by *United States* v. *McConney*, 728 F.2d 1195 (9th Cir.), cert. denied, 469 U.S. 824 (1984).

Contrary to McCabe's assertion, the district court's holding both impermissibly shifts the burden onto the United States – faulting the government for failing to prove that McCabe was required to seek the information in question – and overlooks the plain fact that McCabe had every reason to wonder whether David Warren, the subject of Simmons' investigation, might have received a copy of the report. Given that McCabe failed to make even the most basic inquiry to his

co-defendants on a matter of central importance to his case, the district court abused its discretion in holding that McCabe had shown diligence and in granting him a new trial. See *United States* v. *Wall*, 389 F.3d 457, 467 (5th Cir. 2004) ("If the defendant fails to demonstrate any one of [the *Berry* v. *Georgia*, 10 Ga. 511 (1851),] factors, the motion for new trial should be denied."), cert. denied, 544 U.S. 978 (2005).

C. The District Court Abused Its Discretion In Granting McCabe A New Trial On The 18 U.S.C. 1001 And 18 U.S.C. 1623 Counts Against Him

The district court abused its discretion in granting McCabe a new trial on the 18 U.S.C. 1001 and 18 U.S.C. 1623 counts against him. In addition to charging McCabe with making false statements with regard to the narrative portion of the incident and resisting arrest report under 18 U.S.C. 1519, the Section 1001 count charged him with knowingly stating falsely to an FBI agent that he and Simmons interviewed Officer Howard before writing the narrative report. The Section 1623 count charged him with knowingly giving false testimony to the grand jury that he interviewed Howard before writing the report, and knowingly testifying falsely that he did not connect the Warren shooting to the burned car on the Patterson Road Levee until an account of the incident appeared in the newspaper several years after it occurred. R. 347-350, R. 2259-2260.

As discussed in the United States' opening brief (see Gov't Br. 123-126), the evidence presented at trial on the 18 U.S.C. 1001 and 18 U.S.C. 1623 counts

included: (1) Howard's testimony that she never spoke to McCabe about the incident (R. 3311); (2) Simmons' testimony that McCabe never joined her in interviewing Howard (R. 4469); (3) testimony from FBI Agent Ashley Johnson that McCabe had admitted to having made the connection between the burned car and the shooting in 2005 (R. 4805); (4) the testimony of Alec Brown that, after reporting to McCabe the burned vehicle and body on the levee, McCabe told him "[T]hey knew about it and don't worry about it. Police need to stick together." (R. 3407), and that, on a second occasion, McCabe approached Brown in the midst of a conversation he was having about the incident with another person to say, "I told you we already know about it. Just leave it alone." (R. 3410); and (5) Officer Keyalah Bell's testimony that, a few days after the shooting, she reported to McCabe that a man had appeared at the station looking for his car, and McCabe told her "to tell the guy that the car was at Habans" (R. 3986). None of this evidence involves the narrative report that became Exhibit 34.

McCabe takes issue with the United States' assertion that he failed to offer arguments or evidence as to how the allegedly newly discovered evidence on the false report charge undermines the 18 U.S.C. 1001 and 18 U.S.C. 1623 convictions. Beyond general assertions, however, McCabe's briefing in the district court did not demonstrate how the newly discovered report has any relevance to the evidence presented on these charges. See *United States* v. *Freeman*, 77 F.3d

812, 816-817 (5th Cir. 1996) (The *Berry* "rule requires a defendant, moving for a new trial based on newly discovered evidence, to *show* that * * * the evidence would probably produce acquittal at a new trial.") (emphasis added). In any event, even if it can be assumed that the district court considered all of the trial evidence and weighed its relative merits, it nevertheless erred in its conclusion, since the evidence on those counts stood apart from the evidence on the false report, and is not undermined by Warren's new testimony. Having obtained a jury verdict, it was not the government's burden to prove that the verdict should have been upheld.

The issue in this case is whether the basis for the new trial on the Section 1519 count applies to the other two counts against McCabe, not the strength of the government's case on those counts. While McCabe attempts to discuss the alleged weaknesses in the trial evidence against him, the fact remains that the jury was presented with this evidence before it convicted him on the charges, and that, for the reasons explained in the United States' opening brief, the evidence is in no way undermined by the allegedly newly discovered report. See Gov't Br. 123-127. Indeed, the report is not material to the evaluation of this evidence. Warren's testimony regarding the newly discovered report has absolutely nothing to do with Howard, or with her testimony that McCabe did not interview her about the shooting; Warren does not claim that he received the report from Howard, that she

was involved in its preparation, or that she is in any way connected to it. The newly discovered evidence also has absolutely no bearing upon FBI Agent Ashley Johnson's testimony regarding McCabe's statement in 2005 about making the connection between the burned car and the shooting, Alec Brown's testimony regarding McCabe's comment that "police have to stick together" and that he should "let it go," or Officer Keyalah Bell's testimony regarding McCabe's telling her that a missing vehicle being searched for was at Habans. David Warren has not claimed that any of these three witnesses had any role in giving him the newly discovered report, and the report's discovery has nothing to do with the testimony on these issues.

The district court therefore abused its discretion in concluding that, "[w]ere the jury to conclude that there never were two substantively different versions of the narrative report and that the version of events given by Simmons regarding the preparation of the report was false, a jury would probably resolve" in McCabe's favor the Section 1001 and 1623 counts against him. R. 2271. Its decision should be reversed.

CONCLUSION

For the reasons discussed above, this Court should reverse the district court's decision granting McCabe a new trial, and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2012, I electronically filed the foregoing Reply Brief for the United States as Appellee/Cross-Appellant with the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that on April 2, 2012, I served a copy of the foregoing document on the following counsel of record by First Class Mail:

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CERTIFICATE REGARDING PRIVACY REDACTIONS AND VIRUS SCANNING

I hereby certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. Rule 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Holly A. Thomas
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Date: April 2, 2012

CERTIFICATE OF COMPLIANCE

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