No. 03-40657

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

DAVID SIPE,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument. The district court, based on a cumulative analysis, held that the United States violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), and granted a new trial. The United States believes that oral argument will assist this Court in its assessment of the underlying legal and factual issues presented.

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BRIEF FOR THE UNITED STATES AS APPELLANT

STATEMENT OF JURISDICTION

This is an appeal from an order by the district court granting defendant a new trial in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The defendant David Sipe ("Sipe") was convicted of a felony violation of 18 U.S.C. 242 by a jury on March 27, 2001 (R. Doc. 38/1 R. 129/RE 3).[1] The district court granted Sipe a new trial on April 18, 2003 (R. Doc. 84/2 R. 547/RE 5; see R.

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[1] "R. Doc. __" refers to the corresponding docket entry on the district court docket sheet. " __ R. __" refers, respectively, to the volume and page number of the record on appeal. "RE __" or "RE __:__" refers, respectively, to the tab number or the tab number and the page number of the document contained in the Record Excerpts For The United States. "Gov't Exh. _" refers to a trial exhibit. Corresponding cites are noted by a front-slash (/). Second or subsequent cites to material contained in the Record Excerpts will only refer to that citation.

Doc. 85/14 R. 1-50/RE 4:1-50). The United States filed a timely Notice Of Appeal on May 7, 2003 (R. Doc. 86/2 R. 549/RE 6). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding, based on a cumulative analysis, that the United States violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), and that a new trial was warranted.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of Texas, McAllen Division, Sipe was convicted on one count of violating 18 U.S.C. 242 (RE 3). Specifically, Sipe was convicted of using excessive force and causing bodily injury when, in the course of his employment as a Border Patrol Agent, Sipe used his metal flashlight to strike Jose Guevara on the back of his head.

After his conviction, Sipe filed a Motion For New Trial. The defendant was not sentenced by the district court. After multiple post-trial pleadings were filed (see pp. 10-11, *infra*), and after more than two years passed since the original motion, the district court granted Sipe's Motion For New Trial on April 18, 2003 (Hinojosa, J.).

STATEMENT OF FACTS

A. Facts Underlying Conviction

On April 5, 2000, Border Patrol Agent (BPA) David Sipe and partner BPA Lorraine Gonzales were on duty and assigned to cover an area near Penitas, Texas (8

R. 3; see 7 R. 109). BPAs Christopher Cruce and James Smith, who were also partners that evening, were assigned to the same general area (7 R. 106-107, 126-127; 9 R. 124). The area near Penitas and sensor number 306 includes a levy and cattle fields that have tall, dense reeds or "carizzo" (7 R. 108, 125, 128). The Penitas pump house is also nearby, and there is a street light at the pump house which casts light in the immediate area, but it does not provide light down in the brush or reeds (7 R. 108; 8 R. 10-11, 38; 9 R. 141).

At approximately 4 a.m., both pairs of agents were notified that a sensor alarm near Penitas, Texas was triggered, and they responded to the general area near sensor 306 (7 R. 107-109; 8 R. 5, 7, 26; 9 R. 125). A motion detector device in the ground is triggered when human or animal traffic passes the sensor (7 R. 107). Given the proximity of the sensor to the river, oftentimes the sensor gives notice to BPAs that illegal aliens are present (7 R. 108-109).

The two teams were in radio contact with each other and discussed their general location as they waited to see if illegal aliens came into view (7 R. 109; 8 R. 7, 10). A second sensor was triggered approximately 20 minutes after the first sensor, which indicated that traffic was heading toward Sipe and Gonzales' location (7 R. 109; 9 R. 126). Cruce and Smith started moving toward Sipe and Gonzales (7 R. 110; 9 R. 126). There were approximately 12 to 15 aliens, both men and women, moving toward the pump house (7 R. 111; 8 R. 12).

Jose Guevara entered the United States illegally by crossing the border from Mexico to an area near Penitas, Texas in the early morning hours of April 5, 2000

(10 R. 5). Guevara was traveling alone on April 5, yet there were several other aliens in the area when he reached the Texas side of the river (*ibid.*). When it appeared to the aliens that there were no immigration patrols in the area, they began moving (10 R. 6).

Sipe was the first agent who gave notice of his presence, yelling to the aliens in Spanish to stop and turning on his flashlight (7 R. 111; 8 R. 13; 10 R. 7). Sipe was near the levy when he announced his presence and ordered the aliens to stop, and Gonzales had remained near the pump house and the Border Patrol van she and Sipe were driving (8 R. 10). The aliens began to run in various directions toward the brush (8 R. 13-14). Immediately after Sipe's announcement, Gonzales, Sipe, and Cruce were able to apprehend some aliens and bring them to the van (7 R. 112-113; 8 R. 14, 33).

When Sipe announced his presence, Guevara ran toward the levy and the reeds with hopes he could hide from the agents (10 R. 7-8). Guevara had taken off his white shirt to try to minimize his visibility, and he crouched on his knees, on all fours, surrounded by the reeds (10 R. 9). He was motionless, hiding in the reeds for approximately two minutes, and then Sipe got on top and straddled him (10 R. 11; see 7 R. 113). Sipe hit Guevara with his (Sipe's) flashlight on the back of Guevara's head (8 R. 66-67; 9 R. 95-96; 10 R. 11). The flashlight is a Maglite that holds five batteries (7 R. 116, 134, 137; Gov't Exh. 1). Guevara heard the agent say "immigration" the first time he was struck (10 R. 13). Guevara did not strike or fight back, but he grabbed at his head with his right hand (10 R. 12). Guevara's left hand

was amputated as a child (10 R. 3). Guevara did not cry or yell out when he was hit (10 R. 13).

Two aliens, Nehemias Diaz and Evarado Sanchez, who were standing and hiding in the reeds within several meters of Guevara's position, observed Sipe's assault (8 R. 64, 66-67, 74, 120, 122). Sanchez saw Guevara alone, motionless, and in a squatting position, just before he saw an agent use a flashlight to hit Guevara's head at least twice (8 R. 66-67; see 8 R. 122-123). By the light from Sipe's flashlight, Sanchez saw that Guevara was wounded by the strikes, and that Guevara's face was covered with blood (8 R. 67). Diaz, who was slightly further away from Sanchez, saw an agent make a swinging motion three times with his flashlight to strike something (8 R. 122, 124).

Cruce heard Sipe yelling at the aliens and he headed back into the brush toward Sipe. When Cruce was a few feet away from Sipe, he saw Sipe on top of Guevara, who was lying on the ground, face down, and not struggling (7 R. 113, 115, 150, 153). Cruce could see Sipe and the alien's positions by the light from Cruce's flashlight (7 R. 115). Sipe was saying something to the alien, but Cruce could not hear specifics (7 R. 113-114). While BPA Smith could not see Sipe, he heard a struggle in the reeds and Sipe say words to the effect of, "is that enough," or "have you had enough?" (9 R. 129, 143). Cruce heard movement nearby in the brush, and suspecting aliens were hiding, he called out for them to stand up. Sanchez and Diaz complied with Cruce's order and came toward Cruce (7 R. 113). The three men then moved closer toward Sipe (7 R. 113, 116).

Sipe offered to take Sanchez and Diaz to the van where the other aliens were in custody saying only, "I'll take them back," or words to that effect (7 R. 116). Sipe said nothing to Cruce about the existence or cause of Guevara's injury (*ibid.*). In addition, Sipe said nothing to Cruce or Smith about any threat or concern he had for his or their safety based on Guevara's actions (7 R. 117-118, 149-150; 9 R. 133).

It was only after Sipe left the scene that Cruce and Smith saw that Guevara was bleeding profusely from a wound on the back of his head, and that there was blood on the ground and on the reeds (7 R. 116-117, 151; 9 R. 129). Guevara was kneeling, holding the back of his head with his right hand (9 R. 129). Smith instructed Guevara to stand up, but Guevara was not able to do so initially, and he vomited (7 R. 117; 9 R. 131). Cruce, in an angry voice, then yelled for Sipe to return to the scene (7 R. 117-118; see 9 R. 131).

Just before Cruce called to him, Sipe had reached BPA Gonzales with aliens Sanchez and Diaz (8 R. 16-18). Agent Gonzales testified that Sipe appeared "calm," and he did not tell her anything about a confrontation or problem with Guevara in the reeds at that time (8 R. 25).

When he returned to the brush where Guevara was, Sipe initially acted as if he was not aware of Guevara's injuries (7 R. 118). Sipe then said to Cruce and Smith that he initially hit Guevara's leg with his flashlight because Guevara was running away from him (*ibid.*). Sipe also stated that Guevara turned around to face him (Sipe), and because he (Sipe) feared he would be assaulted, he hit Guevara again (*ibid.*). With assistance from Cruce and Smith, Guevara walked from the brush to

the Border Patrol vehicle (7 R. 123). Smith recognized Guevara as someone whom he stopped the night before in the same area (9 R. 132).

When Guevara reached Gonzales and the Border Patrol van, he was covered in blood, still bleeding and upset (8 R. 20-22, 52). Gonzales asked Sipe, who still appeared calm, how many times he struck Guevara (8 R. 21-22, 46). Sipe said he hit Guevara once in the hip, and then three times in the head (8 R. 22). Gonzales called for an ambulance and a supervisor to come to the scene (*ibid.*). The wound on Guevara's head was approximately four inches long (8 R. 106). Guevara was transported from the scene to a hospital by ambulance, and he needed five staples to close the wound (*ibid.*).

Several Border Patrol Agents testified (Cruce, Smith, Gonzales, Fortunato) that they make hundreds of arrests each year, and they each have at least several years' experience as Border Patrol Agents (7 R. 105 (Cruce: three years, eight months' experience); 8 R. 2 (Gonzales: over four and a half years' experience); 9 R. 16 (Fortunato: four years' experience); 9 R. 124 (Smith: approximately four years' experience)). Throughout their numerous years of service and arrests as Border Patrol Agents, these agents almost never needed to use any type of "intermediate force," such as a baton or pepper spray, to make an arrest. Gonzales had never used her baton or pepper spray to make an arrest, nor had she seen another agent use anything more than direct contact with hands to make an arrest (8 R. 48-49). Fortunato identified only one instance – when narcotics were in plain view during a car stop – when he drew his weapon and used more than voice commands and

hands-on force to effectuate an arrest as a Border Patrol Agent (9 R. 48, 51). Cruce is the only agent who, in two instances, used his baton, pepper spray, or his flashlight in order to restrain someone to effectuate an arrest (7 R. 140, 143-144). Cruce's one instance of using his flashlight to hit someone in the leg was the most force he had ever needed to use while a BPA (7 R. 145).

Border Patrol Agents are taught that a strike to a person's head or face is only authorized when deadly force is necessary because such a strike can be deadly (9 R. 20-21, 28, 65; see 7 R. 158-159). Agent training emphasizes that the upper body should not be targeted for strikes since an agent may, unintentionally, give a lethal blow to the head (9 R. 28). Sipe was tested on this material, and he correctly answered relevant questions (9 R. 30-31). In addition, an agent testified that if only an individual's head or similarly sensitive area is within reach for a strike, such a blow is not authorized if the agent does not need to use deadly force (9 R. 65). An arrestee who is face down and lying on his stomach is in the least threatening position to an agent (9 R. 66). During training and course work in the Spring of 2000 for a refresher course on being an Emergency Medical Technician, Sipe similarly was instructed that blows to the head can be deadly, and that head wounds bleed extensively.

Border Patrol Agent Romeo Garcia was assigned to be Sipe's partner for the midnight shift beginning April 5, 2000, the evening after the incident (9 R. 93). Sipe told him that he hit an alien several times, initially to slow him down by hitting him in the head with the flashlight (9 R. 95). When he was on the alien's back, Sipe said

he hit the alien again because he would not give up his hands, he was "a little bit resistant," and "uncooperative" (9 R. 95-96). Sipe also said he hit the part of the alien's body that was "closest" to him (9 R. 95). When asked why he used such a large flashlight, Sipe responded, "so the aliens wouldn't f– with him" (9 R. 96). Sipe did not appear upset about his use of force against Guevara, yet he was "confus[ed]" about the fact that he was being investigated for the use of force (9 R. 97). He added, however, that he did not think he would get in trouble given that he wrote in his report that he was defending himself from Guevara, and he did not write the description the way he described it to Garcia (9 R. 99-100).

Sipe was indicted on November 14, 2000, on one count of violating 18 U.S.C. 242 by using excessive force. After a six-day jury trial, Sipe was convicted on March 27, 2001.

B. Pre-trial Discovery And Post-Trial Motions

On December 5, 2000, Sipe filed a motion for the government to produce exculpatory and mitigating evidence (R. Doc. 10/1 R. 19). Sipe subsequently filed a request for discovery pursuant to Rule 16 of the Federal Rules of Criminal Procedure. The United States produced to Sipe pretrial various discovery, including Cruce's grand jury transcript, in which Cruce made several negative comments about Sipe's professional behavior. The United States also notified Sipe that the Mexican National witnesses were granted permission to remain and work in the United States pending trial (R. Doc. 76/2 R. 447).

After a six-day trial, Sipe was convicted of violating 18 U.S.C. 242 on March 27, 2001. On April 3, 2001, Sipe filed a Motion For New Trial in which he alleged multiple instances of witness perjury with the government's knowledge and acquiescence, and prejudice by the late production of a report on Guevara's post-incident stop by the Immigration and Naturalization Service, although Sipe acknowledged his prior awareness of Guevara's incident (R. Doc. 40/1 R. 131-161). Sipe filed a Supplemental Motion For New Trial on July 26, 2001, in which he repeated his claims from the original motion, and further asserted that the United States violated *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963), in several respects, including by not informing Sipe that Border Patrol Agent Cruce stated he did not like Sipe (R. Doc. 50/1 R. 206). Sipe asserted that he first learned of Cruce's apparent dislike when a statement to that effect was included in the Presentence Report (PSR) (*ibid.*).

On August 2, 2001, at a hearing originally scheduled for sentencing, the district court considered the several post-trial motions. The district court postponed sentencing to allow additional briefing on the source of the statement in the PSR that Agent Cruce "disliked" Sipe (R. Doc. 57/1 R. 248). The probation officer and the United States determined that the PSR's statement was verbatim of text contained in an internal Department of Justice (DOJ) memorandum that is referred to as a Prosecution Memorandum or "Pros Memo," which inadvertently was made available to the probation officer (see R. Doc. 58/1 R. 255-256). The Pros Memo was prepared by the line attorney assigned to the case and it was submitted to the Chief

of the Criminal Section, Civil Rights Division, DOJ. The Pros Memo sets forth a recommendation on prosecuting the case, including assessments of the evidence and strengths and weaknesses of legal issues. The relevant portion of the Pros Memo stated, "*Cruce admits* to disliking the subject [Sipe] even before this incident. Cruce said that [Sipe] has an abrasive personality, keeps to himself, and is generally disliked by most of the other agents" (emphasis added) (R. Doc. 69/2 R. 356).

On August 31, 2001, Sipe moved for the production of the United States' entire investigative file (R. Doc. 65/2 R. 299-301). After a hearing held on October 16, 2001 (R. Doc. 73), the Court ordered the government to produce its file to defense counsel, and to provide any material covered by privilege to the court for *in camera* review. On October 29 and 30, 2001, the government complied with the Court's order, and produced the bulk of its file to Sipe, and a portion of its file to the court for *in camera* review (R. Doc. 72/2 R. 401-405; R. Doc. 74/2 R. 406-409). Based on the material produced by the government, on November 14, 2001, Sipe filed a Second Supplemental Motion For New Trial, and expanded his claims that the government withheld several documents and information in violation of *Brady*, and knowingly elicited false testimony (R. Doc. 76/2 R. 413-460). Sipe also filed a Second Motion For Production Of Documents regarding benefits given to the Mexican National witnesses (R. Doc. 77/2 R. 461-467). The United States agreed to, and did produce additional responsive materials (R. Doc. 78/2 R. 469-470; R. Doc. 79/2 R. 481-534).

C. District Court Ruling

A substantive hearing on the post-trial motions was not held until April 11, 2003, more than two years after Sipe filed his initial Motion For New Trial.[2] The district court held that the government improperly withheld from Sipe documents or information regarding four topics: (1) the statement in the Pros Memo; (2) documentation concerning witness Mr. Alexander Murillo's prior criminal history; (3) a summary of an interview of Ms. Herico Rodriguez, a fellow EMT student of Sipe's who was not called as a witness; and (4) additional documentation regarding employment permits and other benefits that were given to Mexican National witnesses until the completion of the trial, including copies of social security cards and lodging and related expenses during trial. The district court concluded that the cumulative effect of not producing this evidence created a reasonable probability that the verdict would have been different, and thus violated *Brady* v. *Maryland*, 373 U.S. 83 (1963) (R. Doc. 85/14 R. 48/RE 4:48).

First, the district court did not accept the government's explanation that the challenged sentence regarding Cruce's alleged dislike of Sipe represented the line attorney's own impressions, and not a memorialization of Cruce's admission (RE 4:41, 45). The district court stated that the United States should have produced the

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[2] No hearing was scheduled between February and September 2002. Between September 2002 and April 2003, the district court scheduled, cancelled, and rescheduled a hearing on the pending motions for a new trial. In many instances, the hearing was cancelled within 24 to 48 hours notice, or less, of the scheduled date. Moreover, in most instances, a new hearing date was scheduled to occur within four weeks of the previously cancelled hearing.

Pros Memo "especially in light of" Cruce's grand jury testimony, "[i]t's not that I dislike [Sipe]," but that he did not like the way Sipe handled himself on the job (RE 4:46; see RE 4:43). In addition, the district court stated that the challenged statement was not written as if it were an impression (RE 4:41), and that a second internal DOJ memorandum that stated fellow BPAs did not like Sipe "corroborat[es]" and "leads [sic] credence" to the view that Cruce "admitted" his dislike of Sipe (RE 4:44, 46).

With respect to Mr. Murillo's criminal history, which consists of an acquittal, deferred adjudication, and two dismissals, the district court noted that this type of evidence is normally not admissible (RE 4:21). Since, however, Murillo was "totally credible" and considered detrimental to Sipe (*ibid.*; see RE 4:7), and these prior incidents "go to the core of the credibility of the witness," the district court would have given "serious consideration" to admitting on cross-examination some of this evidence to address Murillo's credibility (RE 4:20-21, 46). The court, however, did not conclude which evidence it would have admitted, or how it was material to the assessment of Sipe's guilt.

During an interview with representatives of the United States, Ms. Herica Rodriguez, a fellow EMT student of Sipe's, stated that Sipe was "a nice person" and that he did not make (or she did not hear) any statements that reflected his dislike or disrespect for aliens or others whom he came in contact with through work (RE 4:7-8). Ms. Rodriguez was not called as a witness. At trial, some witnesses, including fellow EMT students, testified about Sipe's use of demeaning terms to discuss Mexican Nationals. Based on this difference, the district court held that Ms.

Rodriguez's statement was "favorable" to Sipe, and it was error to withhold the statement from Sipe because it could have been used to "undo the statements that were being made with regards to his dislike of the people that he had to come in contact with as a result of his job" (RE 4:46-47; RE 4:8).

The district court found that Sipe was not informed specifically about the Mexican National witnesses' receipt of social security cards, the type of travel permits they received, or all of the expenses that were paid on their behalf at trial. The court was concerned that the United States had notified Sipe's counsel by letter that the "only" advantage given these witnesses was permission to stay in the United States (RE 4:47), and that this additional information could have been used to cross-examine the witnesses (RE 4:47-48).

Finally, while noting its minimal importance, the district court stated that the United States should have produced to Sipe photographs that were taken at the crime scene two months after the incident. The district court stated that Sipe could have used this evidence to cross-examine witnesses about what they could and could not see through the reeds (RE 4:48).

STANDARD OF REVIEW

This Court reviews asserted violations of *Brady* v. *Maryland*, 373 U.S. 83 (1963), *de novo*. *United States* v. *Hughes*, 230 F.3d 815, 819 (5th Cir. 2000). When a motion for new trial is based on asserted violations of *Brady*, *Brady's* three-factor analysis determines whether the motion will be granted, *i.e.*, proof that evidence is favorable to the defendant, withheld, and material. *United States* v. *Runyon*, 290

F.3d 223, 246-247 (5th Cir.), cert. denied, 537 U.S. 888 (2002). "The defendant has the burden to establish a reasonable probability that the evidence would have changed the result." *Hughes*, 230 F.3d at 819.

SUMMARY OF ARGUMENT

None of the documents or information withheld from Sipe individually constitute information under *Brady* v. *Maryland*, 373 U.S. 83, 87-88 (1963), that warrants a new trial. Moreover, the district court's cumulative analysis of materiality was flawed because the court improperly considered evidence that did not satisfy *Brady*'s criteria that evidence be suppressed and favorable to Sipe. See *Kyles* v. *Whitley*, 514 U.S. 419, 450 (1995) (evidence "had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s [cumulative] standard of materiality is satisfied"); cf. *United States* v. *Freeman*, 164 F.3d 243, 249 (5th Cir.) (*Brady* has three requisite elements; assuming without deciding that a *Brady* violation is established to conclude withheld evidence is not individually or cumulatively material), cert. denied, 526 U.S. 1105 (1999); see Section VII, pp. 40-42, *infra*.

Even if all evidence identified by the district court was properly considered, its conclusion that the withheld evidence cumulatively established a reasonable probability that the jury would reach a different verdict should be rejected by this Court. Cf. *United States* v. *Hughes*, 230 F.3d 815, 822 (5th Cir. 2000) (reversing grant of new trial; failure to produce prior statement of one witness that raised question of defendant's knowledge and statement by second witness regarding bias

against defendant did not individually or cumulatively establish reasonable probability that the verdict would be different). Here, none of the withheld evidence bears directly on the issue of whether Sipe used excessive force. Moreover, the impeachment value of the withheld evidence is minimal, and does not support rejecting the crux of the challenged witnesses' testimony (see Section VII, pp. 43-44, *infra*).

The United States was not obligated to produce Cruce's statement that he "disliked" Sipe pursuant to *Brady* because Sipe was aware of or could have identified this information with reasonable diligence, and Cruce's statement was cumulative of his grand jury testimony, which was produced to Sipe. Even if this statement is deemed different from Cruce's grand jury testimony, and not cumulative, it is not material; that is, it does not create a reasonable probability that the verdict would be different. Cf. *ibid*.; see Section II, pp. 20-26, *infra*.

Moreover, the criminal history data for witness Murillo was not material. Cf. *Felder* v. *Johnson*, 180 F.3d 206, 211-213 (5th Cir.), cert. denied, 528 U.S. 1067 (1999). Initially, most if not all of Murillo's prior history is inadmissible under Rules 608(b), 609(a), and 403 of the Federal Rules of Evidence, and therefore it could not affect the verdict. Even if admissible, any adverse impact on Murillo's testimony would not have a reasonable probability of affecting the verdict since several witnesses corroborated Murrillo's testimony, and his testimony was collateral to the jury's verdict (see Section III, pp. 26-31, *infra*).

The United States had no obligation under *Brady* to produce the statement of Ms. Rodriguez, who was known to and equally accessible to Sipe. Even if obliged to produce, her statement is not "favorable" or exculpatory to Sipe and, therefore, this evidence does not support a new trial (see Section IV, pp. 32-34, *infra*).

Given that the withheld information concerning the nature and scope of benefits for Mexican National witnesses either was cumulative of other evidence previously provided, was already known by Sipe, or could have been identified by Sipe with reasonable diligence, this information is not material and, therefore, does not warrant reversal under *Brady*. Moreover, Sipe's cross-examination of witnesses on the challenged topics refutes any claim that evidence was "suppressed." Thus, the district court's reliance on this lack of production in its cumulative analysis is flawed (see Section V, pp. 35-38, *infra*).

Finally, the United States had no obligation to give Sipe photographs of the crime scene that were taken months after the incident. The sight is equally known and accessible to Sipe, and the photographs are not material (see Section VI, pp. 38-40, *infra*).

ARGUMENT

I

OVERVIEW OF *BRADY* PRINCIPLES

In *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), the Court held that the suppression of "evidence favorable to an accused upon [his] request violates due process where the evidence is material either to guilt or punishment." Thus, there

are three elements of *Brady* information to warrant a new trial: (1) it is favorable to the defendant; (2) it is withheld from the defendant; and (3) it is material. *United States* v. *Villafranca*, 260 F.3d 374, 379 (5th Cir. 2001); see *Brady*, 373 U.S. at 87 (failure to produce confession by codefendant was material to assessing defendant's sentence, not guilt). Favorable evidence includes exculpatory evidence and evidence relevant for impeachment. See *United States* v. *Bagley*, 473 U.S. 667, 676 (1985) (inducements to government witnesses constitute *Brady* material); *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) (evidence reflecting a witness's bias, including agreement with the government, falls within the scope of *Brady* material).

Evidence that is known by a defendant, or is readily available based on reasonable diligence, is not withheld or suppressed from a defendant. See *Brown* v. *Cain*, 104 F.3d 744, 750 (5th Cir.), cert. denied, 520 U.S. 1195 (1997); *United States* v. *Dixon*, 132 F.3d 192, 199 (5th Cir. 1997) (no *Brady* violation for not producing defendants' car titles and financial records seized during search warrants), cert. denied, 523 U.S. 1096 (1998); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980) ("[i]n no way can information known and available to the defendant be said to have been suppressed by the Government").

To secure a new trial, a defendant must show that the evidence is *material*; that is, that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Ibid*. (remand necessary to determine whether failure to

provide information on inducements to government witnesses created a reasonable probability the trial's result would be different); see *Kyles* v. *Whitley*, 514 U.S. 419, 435 (1995) (defendant needs to show that the withheld evidence can "put the whole case in such a different light as to undermine confidence in the verdict"). If this standard is met, there is no further review for harmless error. *Ibid*.

The Supreme Court explained that, "[i]n assessing the significance of the evidence withheld, one must of course bear in mind that not every item of the [government's] case would have been directly undercut if the *Brady* evidence had been disclosed." *Id*. at 451; see *United States* v. *Nixon*, 881 F.2d 1305, 1308 (5th Cir. 1989) (not every piece of exculpatory or impeachment evidence that is withheld "automatically entitle[s] a defendant to a new trial.").

Finally, the assessment of materiality is "considered collectively, not item by item." *Kyles*, 514 U.S. at 436; see *United States* v. *Hughes*, 230 F.3d 815, 819 (5th Cir. 2000) (when multiple *Brady* violations alleged, consider the "cumulative effect of the suppressed evidence"). This assessment, however, includes consideration of the individual item's "tendency and force" to affect the jury's verdict. *Kyles*, 514 U.S. at 436 n.10. Moreover, if the evidence is either not favorable or not suppressed, the Court should not consider the evidence in its cumulative materiality assessment since all three elements must be satisfied to establish a violation of *Brady*. See *Kyles*, 514 U.S. at 450 (evidence "had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s [cumulative] standard of

materiality is satisfied"); *Hughes*, 230 F.3d at 819 ("[t]here are three components to a *Brady* violation").

II

THE DEPARTMENT OF JUSTICE MEMORANDUM REFERRING TO AGENT CRUCE'S "DISLIKE" OF SIPE DOES NOT CONSTITUTE *BRADY* INFORMATION

The district court erred in concluding that the United States violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by not producing Border Patrol Agent Cruce's statement that he "disliked" Sipe because (1) Sipe was aware of or could have identified this information with reasonable diligence; and (2) the statement was cumulative of other information given to Sipe and, therefore, it was not material. Even if this text is deemed different from Cruce's grand jury testimony, and not cumulative, evidence that Cruce "disliked" Sipe does not create a reasonable probability that the verdict would be different.

The challenged text from the Prosecution Memorandum is: "*Cruce admits* to disliking the subject [Sipe] even before this incident. Cruce said that [Sipe] has an abrasive personality, keeps to himself, and is generally disliked by most of the other agents" (R. Doc. 69/2 R. 356) (emphasis added).[3]

As the United States asserted before the district court, the challenged text was an inarticulate statement of the line attorney's impressions of Cruce's statements,

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[3] The next sentence of the Pros Memo reads: "Cruce said that, while he never witnessed the subject hit anyone before, he is often verbally abusive and bullish toward the aliens" (*ibid.*).

and an inaccurate attribution of a statement to Cruce. The United States does not assert, however, that the district court's reliance on the plain language of the memorandum to conclude this was a statement by Cruce was clearly erroneous.

This Court has repeatedly held that the government has no obligation under *Brady* to produce information or documents that the defendant knows or is readily available through the exercise of reasonable diligence. See *Brown* v. *Cain*, 104 F.3d 744, 750 (5th Cir.), cert. denied, 520 U.S. 1195 (1997); *United States* v. *Dixon*, 132 F.3d 192, 199 (5th Cir. 1997) (no *Brady* violation for not producing defendants' car titles and financial records seized during search warrants), cert. denied, 523 U.S. 1096 (1998); *United States* v. *Nixon*, 881 F.2d 1305, 1310 (5th Cir. 1989); *United States* v. *Fogg*, 652 F.2d 551, 559 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980) ("[i]n no way can information known and available to the defendant be said to have been suppressed by the Government").

This Court assumes that information is known or available through reasonable diligence based on the defendant's relationship with the witness or relevant individuals. *E.g.*, *Nixon*, 881 F.2d at 1310; *Fogg*, 652 F.2d at 559. In *Nixon*, 881 F.2d at 1309-1310, this Court rejected a defendant's claim that the failure to produce an internal prosecution memorandum violated *Brady* since the defendant already knew "or should have known" the challenged contents of the memo based, in part, on his relationships with and knowledge of the individuals discussed in the memorandum. Similarly, in *Fogg*, 652 F.2d at 559, this Court found no *Brady*

violation by the government's failure to produce grand jury statements of witnesses since the defendant worked with these individuals and ran his kickback scheme with their assistance, and therefore the information was known or available through reasonable diligence.

Moreover, if the withheld information is merely cumulative of other information given to the defendant, such information is not material under *Brady*. See *Jackson* v. *Johnson*, 194 F.3d 641, 649-650 (5th Cir. 1999) (failure to produce four prior statements of key witness is cumulative of other prior statements given to defendant, and therefore not material), cert. denied, 529 U.S. 1027 (2000).

At a minimum, Sipe was on notice that BPA Cruce did not have a high opinion of Sipe's character and on-the-job performance upon the government's production of BPA Cruce's grand jury testimony to Sipe pretrial (see R. Doc. 54/1 R. 225). In the grand jury, Cruce stated that he did not associate with Sipe outside the office, that he considered Sipe to have an "abrasive personality," and that he did not "get along with [Sipe] that well" because of his behavior on the job. Cruce's examples of Sipe's "abrasive personality" were based on Sipe's conduct toward aliens when he was processing them. Sipe was "[s]ometimes rude" and "aggressive" toward aliens, and Cruce considered that behavior disrespectful and unnecessary (*ibid.*). Finally, Cruce stated, "[n]ot that I dislike him [Sipe], but he's not somebody I associate with" (*ibid.*).[4] The import of Cruce's testimony is clear: he did not

[4] The district court appears to suggest that production of the Pros Memo was (continued...)

respect or like Sipe due to Sipe's behavior and conduct on the job. Thus, whether before or after receipt of this transcript, Sipe should have been aware, or could have found out through reasonable diligence if he was not already aware, of BPA Cruce's views given that they worked together as border patrol agents. Cf. *Nixon*, 881 F.2d at 1309-1310; *Fogg*, 652 F.2d at 559.

In addition, Sipe had a full opportunity to cross-examine Cruce regarding his opinion or bias against Sipe since he was aware of Cruce's negative opinion based on his grand jury testimony. Sipe, however, chose not to cross-examine Cruce on this topic (see 7 R. 124-158). Instead, Sipe extensively cross-examined Cruce about the levels of force that may be used to make an arrest, instances when Cruce used more than voice commands to effectuate an arrest, the types of flashlights that are issued and used by BPAs, Cruce's version of the events in issue, and the extent of his meetings and preparation with government counsel before testifying (7 R. 124-158). Because Sipe chose not to pursue this line of questioning, any claim by Sipe that the statement in the Pros Memo was material should be rejected. Cf. *United States* v. *Villafranca*, 260 F.3d 374, 379 (5th Cir. 2001) (no *Brady* violation when witness's testimony regarding terms of agreement with the government was more detailed than

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[4](...continued)
warranted given Cruce's statement, "not that I dislike him," apparently because that statement is different from the statement in the Pros Memo (RE 4:45-46). To the extent that this is a factual finding, it is clearly erroneous. BPA Cruce's comment "not that I dislike him" has no significance in isolation, nor does it modify the thrust of Cruce's grand jury testimony. The district court's suggestion that this phrase is inconsistent with Cruce's other comments ignores the full context of Cruce's grand jury testimony.

specific terms in the contract that was produced to defendant since the defendant had an opportunity to cross-examine the witness on the issue).

Sipe's claim that this evidence is favorable to him, in order to show Cruce's alleged bias against Sipe, is questionable. If Cruce was questioned about his "dislike" of Sipe, the United States could introduce the basis for Cruce's opinion, which is due to Sipe's generally disrespectful attitude toward and treatment of Mexican Nationals while on the job. Other witnesses (Murillo, Sanchez, Diaz, and Garcia) similarly testified to Sipe's negative attitude toward Mexican Nationals, so rather than discrediting Cruce, this additional evidence could have bolstered Cruce's credibility, with adverse consequence to Sipe. Cf. *Cain*, 104 F.3d at 750 (no *Brady* violation due, in part, to statement including inculpatory and exculpatory evidence).

In addition, there is no significant difference between BPA Cruce's grand jury testimony and the Pros Memo's statement that he "dislike[d]" Sipe based on Sipe's work performance. Cf. *Jackson*, 194 F.3d at 649-650. The logical conclusion to draw from Cruce's grand jury testimony is that Cruce, at a minimum, did not respect Sipe's professional actions and behavior and, therefore, he had a negative opinion, or "disliked" Sipe based on Cruce's observations of Sipe at work. Because the reference to Cruce's "dislike" in the Pros Memo is consistent with his grand jury testimony, the Pros Memo is merely cumulative of evidence given to Sipe and, therefore, it is not material; it would not create a reasonable probability of affecting the verdict. See *United States* v. *Weintraub*, 871 F.2d 1257, 1264 (5th Cir. 1989) (additional evidence that could impeach a witness whose credibility was already in

doubt "could therefore be considered cumulative and would not be material to [the defendant's] conviction"); cf. *United States* v. *Hughes*, 230 F.3d 815, 819-821 (5th Cir. 2000) (FBI report that was withheld and summarized key witness's statement was not material under *Brady* since statement was ambiguous, impeachment value was limited, defendant had a full opportunity to cross-examine the witness, and other evidence supported the verdict).

Even if this Court considers the Pros Memo's statement of Cruce's "dislike" different than Cruce's grand jury testimony, Sipe cannot show how this additional bias is so significant that it creates a reasonable probability that the verdict would be different had the jury known of this evidence.[5] While Cruce was an important witness, much of his testimony regarding the incident in issue was corroborated by other agents. Most significantly, Cruce's testimony of how Sipe failed to identify immediately Guevara's injury or admit any altercation took place is consistent with testimony from fellow BPAs Gonzales and Smith. For example, Gonzales testified that Sipe was "calm" when he brought aliens Sanchez and Garcia to the van immediately after he assaulted Guevara (8 R. 25, 46). Sipe did not explain any assault to Gonzalez until she questioned him, after she saw Guevara bleeding (8 R. 21-22, 25). Smith testified that Sipe did not report over the radio at any point that he had a problem or altercation with any alien (9 R. 133). Both Smith and Cruce

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[5] Since Cruce stated that he did not see Sipe outside of work, there is no basis to conclude that his "dislike" is based on personal contact. Even if assumed, however, a personal rather than professional animus does not present a substantively different bias.

testified that Guevara's wound bled profusely, that Guevara suffered nausea when he first tried to get up from the ground after the assault, and that blood was present on the ground and in the brush immediately around Guevara (7 R. 116-117, 151; 9 R. 129-131).

III

THE DISTRICT COURT ERRED IN CONSIDERING, IN ITS CUMULATIVE ANALYSIS UNDER *BRADY*, THAT THE FAILURE TO PRODUCE CRIMINAL HISTORY DATA FOR WITNESS MURILLO WARRANTED A NEW TRIAL

While the United States erred in not producing to Sipe documentation on Murillo's criminal history, (which consists of a deferred adjudication, acquittal, and two dismissals), this error does not warrant a new trial because the evidence, whether admissible or not, is not material. Cf. *United States* v. *Newman*, 849 F.2d 156, 161 (5th Cir. 1988) (no violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), when government failed to produce witness's prior arrest record).

Whether a *Brady* challenge is based on the government's failure to produce admissible or inadmissible evidence, this Court conducts the same inquiry of materiality: whether the disclosure of such evidence raises a reasonable probability of changing the jury's verdict. *Felder* v. *Johnson*, 180 F.3d 206, 212 & n.8 (5th Cir.), cert. denied, 528 U.S. 1067 (1999). If the evidence is inadmissible, and it is only mere speculation that it can lead to admissible evidence, such evidence cannot affect the jury's verdict, and does not constitute *Brady* material. See *Felder*, 180 F.3d at 212-213 (no *Brady* violation when arrest for forgery is inadmissible and there is no indication that arrest would lead the defendant to admissible evidence).

A. Because None Of Murillo's Prior Bad Acts Are Admissible, This Evidence Is Not Material

Rule 609 of the Federal Rules of Evidence admits for impeachment purposes a felony conviction, subject to Rule 403, or a conviction involving dishonesty or false statements. Evidence short of a conviction, even if concerning a violent crime, is not admissible under Rule 609. See *United States* v. *Parker*, 133 F.3d 322, 327 (5th Cir.) (pending state murder charges are not admissible under Rule 609 to challenge witness's credibility), cert. denied, 523 U.S. 1142 (1998); see also *United States* v. *Colbert*, 116 F.3d 395, 396 (9th Cir.) (convictions for lewd conduct and prostitution do not involve dishonesty for admission under Rule 609), cert. denied, 522 U.S. 920 (1997). In addition, this Court has concluded that "when adjudication of guilt is deferred, there is no 'conviction.'" *United States* v. *Hamilton*, 48 F.3d 149, 153 (5th Cir. 1995) (citing cases, yet finding no abuse of discretion in allowing limited queries to other witness about defendant's deferred adjudication); see *United States* v. *Dotson*, 555 F.2d 134, 135-136 (5th Cir. 1977) (defendant truthfully stated on firearms application that he had no prior conviction when he had a deferred and suspended sentence following plea of *nolo contendere*).

Under Rule 608(b), a specific instance of conduct may not be proved by extrinsic evidence, but it may be the basis for cross-examination if it relates to the witness's "character for truthfulness or untruthfulness." See *United States* v. *Riggio*, 70 F.3d 336, 339 (5th Cir. 1995), cert. denied, 517 U.S. 1126 (1996) (no abuse of discretion to permit questioning under Rule 608(b) "to test the truthfulness of

testimony given on direct examination"; defendant questioned about certain fires that did not result in charges after he had denied involvement in any fires); *Newman*, 849 F.2d at 161 (arrest for theft/destruction of property does not qualify for impeachment under Rule 608(b)).

Specifically, the United States did not produce documents regarding Alexander Murillo's prior criminal conduct: (1) on May 21, 1991, Murillo was found not guilty of submitting a false report to an officer; (2) on September 3, 1997, harassment charges were dismissed; (3) on May 30, 2000, charges for driving with a suspended license were dismissed; and (4) on November 2, 1994, Murillo received a deferred adjudication for misdemeanor theft (R. Doc. 76/2 R. 415-420).[6]

Since Murillo's first three offenses did not result in a conviction, and the deferred adjudication is not considered a conviction, this evidence is not admissible under Rule 609. Cf. *Hamilton*, 48 F.3d at 153; *Parker*, 133 F.2d at 327. In addition, the harassment and license charges have no bearing on truthfulness. Cf. *Colbert*, 116 F.3d at 396; *Newman*, 849 F.2d at 161. Even though Murillo's acquittal of submitting a false report involves honesty, the prejudicial impact of admitting an acquittal that is more than ten years old outweighs any probative value under Rule 403. Cf. *United States* v. *Schwab*, 886 F.2d 509, 513 (2d Cir. 1989) (acquittals of tax fraud and perjury are not admissible under Rules 608(b) and 403 due to prejudicial impact outweighing probative value), cert. denied, 493 U.S. 1080 (1990); see also

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[6] The arrest report describes the charge as "THEFT >=$200 BUT <$750 BY CHECK" (R. Doc. 76/2 R. 417).

United States v. *Newton*, 326 F.3d 253, 261 (1st Cir. 2003) (prejudicial impact of acquittal in state proceedings involving same subject matter outweighs probative value for admission). Similarly, even if admissible under Rule 608(b), the seven year old deferred adjudication is more prejudicial than probative, and it should not be admitted under Rule 403. Cf. *Schwab*, 886 F.2d at 513 (error in admission of acquittal exacerbated by charges being 18 and 23 years old); *Newton*, 326 F.3d at 261; Fed. R. Evid. 609(b) (court must specifically determine that the probative value of a conviction outweighs any prejudice when the date of conviction or release from imprisonment is more than ten years old).

B. Even If Admissible, Murillo's Prior Bad Acts Are Not Material

Even if this Court concludes that evidence of Murillo's prior charges for theft and/or false report are admissible under Rules 608 and 403, this opportunity to cross-examine Murillo does not rise to the level of materiality under *Brady*. Cf. *United States* v. *Weintraub*, 871 F.2d 1257, 1262 (5th Cir. 1989) (withheld evidence is not material when it is collateral to guilt, witness's testimony is corroborated by others, and there is strong evidence of guilt).

Murillo, a fellow EMT classmate of Sipe's, testified that Sipe told him and another classmate that he was in trouble because he "hit a tonk" over the head with a flashlight (11 R. 18-21). Sipe explained that a "tonk" is the sound heard when a "wetback" is hit over the head with a flashlight (11 R. 21). Sipe further stated that the alien had "gotten too big for his britches" (11 R. 22). Sipe did not express any

remorse when he said that he hit an alien, and Murillo thought Sipe's comments were made in a "joking[] manner" (11 R. 23).

EMT classmates Rene Garza and Gema Sanchez and Border Patrol Agent Romeo Garcia corroborated Murillo's testimony by similarly testifying about Sipe's casual comments and use of demeaning terms to discuss his assault on Guevara. More specifically, Ms. Sanchez overheard Sipe tell others on April 5, 2000, in a calm and unconcerned manner, that he hit a "tonk" on the back of the head with his flashlight while at work earlier in the day (9 R. 73, 75). Mr. Garza overheard Sipe refer, in a calm and sarcastic tone, to his flashlight as a "tonk" and his baton as a "chinga stick" in various conversations (9 R. 84-85, 88). BPA Garcia testified that Sipe said that on April 5, he chased a group of aliens, and he "slowed him [Guevara] down by hitting him with the flashlight on the head" (9 R. 95).

The district court stated that it would have given "serious consideration" to admitting on cross-examination *some* of the evidence regarding Murillo's prior criminal history (RE 4:46; see RE 4:20-21). While noting that this type of evidence is normally not admissible, the district court stated that Murillo was a "strong witness" whose testimony was detrimental to Sipe, and these incidents "go to the core of the credibility of [Murillo]" (RE 4:7, 21). The district court, however, did not resolve what, if any, evidence it would have admitted ultimately, or state how the inability to impeach Murillo on these matters rose to the level of materiality under *Brady*.

First, even if Sipe cross-examined Murillo on the theft and false report offenses, the impeachment value is minimal given the passage of seven and ten years between the alleged crimes and trial, and the ultimate adjudications of deferred adjudication and acquittal. Cf. *Schwab*, 886 F.2d at 513. Second, Murillo's testimony is corroborated generally by Sanchez, Garza, and Garcia. Even if their recollections of Sipe's use of the word "tonk" differs, the common message from their testimony is Sipe's cavalier attitude with respect to his assault of Guevara. Moreover, even accepting the district court's characterization of Murillo as a "strong," adverse witness, that assessment alone is insufficient to establish materiality, particularly when his testimony is ancillary to whether Sipe used excessive force against Guevara. As this Court assessed in *Weintraub*, 871 F.2d at 1262, this Court should also determine here that "[t]he corroborating evidence of [Sipe's] guilt and the collateral nature of the withheld impeachment evidence compels the conclusion that this evidence [of Murillo's prior charges] was not material to [Sipe's] conviction." See *United States* v. *Hughes*, 230 F.3d at 815, 819-822 (5th Cir. 2000); *Felder*, 180 F.3d at 213 (physical evidence corroborating witness's testimony is one factor in concluding no reasonable likelihood to change verdict). Thus, whether or not this Court deems any portion of Murillo's prior criminal history admissible evidence, it was error for the district court to consider the United States' failure to produce this evidence in its cumulative analysis under *Brady*. Cf. *Felder*, 180 F.3d at 212; *Weintraub*, 871 F.2d at 1262.

IV

THE UNITED STATES WAS NOT REQUIRED TO PRODUCE NOTES OF AN INTERVIEW OF MS. RODRIGUEZ BECAUSE SHE WAS KNOWN TO SIPE AND HER STATEMENT IS NOT EXCULPATORY

The United States has no obligation to produce a statement by Ms. Herica Rodriguez, who was another one of Sipe's fellow EMT students and not a witness at trial, because Sipe had the same opportunity to obtain her statement and present her as a witness. See *Brown* v. *Cain*, 104 F.3d 744, 750 (5th Cir.) (no obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to produce information that is known or equally available to the defendant (*e.g.*, defendant's alcohol and drug abuse history)), cert. denied, 520 U.S. 1195 (1997). Moreover, Ms. Rodriguez's statement is not exculpatory. See *Andrews* v. *Collins*, 21 F.3d 612, 626 (5th Cir. 1994) (neutral evidence, including inability to identify defendant, is not subject to *Brady*), cert. denied, 513 U.S. 1114 (1995).

The Memorandum of Interview (MOI) prepared by Office of Inspector General (OIG) Special Agent Widnick stated that Ms. Rodriguez considered Sipe to be a "nice guy," and she never heard him use derogatory terms to describe aliens (R. Doc. 76 (Encl. 11)/2 R. 414). Ms. Rodriguez also heard Sipe say that he was "under review" for "knock[ing] an alien over the head with his flashlight," but she did not hear any other details about the incident (*ibid.*). The district court stated that Ms. Rodriguez's statement was "favorable" to the defendant because it could have been used to "undo the statements that were being made with regards to his [Sipe's]

dislike of the people that he had to come in contact with as a result of his job" (RE 4: 46-47; see RE 4:8).

First, since Sipe knew Ms. Rodriguez, and therefore he had the same opportunity to interview her and present her as a witness, there is no *Brady* violation. This Court has repeatedly held that the government has no obligation under *Brady* to produce information that the defendant knows or is readily available through the exercise of reasonable diligence. See *Cain*, 104 F.3d at 750; *United States* v. *Fogg*, 652 F.2d 551, 559 (5th Cir. 1981), cert. denied, 456 U.S. 905 (1982). In fact, Sipe's own defense belies any claim that he was not aware of potentially relevant testimony from his contacts through EMT training. Sipe called an instructor of an EMT class, Cesar Garcia, as a witness in part to refute the EMT students' testimony (Murillo, Garza, and Sanchez) regarding Sipe's comments about the April 5 incident (11 R. 123-126). Garcia stated that Sipe knew more than the other students about EMT techniques, suggesting a motive for the students' negative comments (11 R. 126). Moreover, Garcia stated that Sipe raised the April 5 incident to discuss how safety concerns can affect an EMT's delivery of medical services (11 R. 125-126).

Second, the failure to produce the MOI of Ms. Rodriguez does not violate *Brady* since her statements were not exculpatory. In addressing what is "favorable" evidence, the Fifth Circuit repeatedly has explained that "exculpatory and impeachment evidence falls within the purview of *Brady*, neutral evidence does not." *Andrews*, 21 F.3d at 626 (quoting *United States* v. *Dillman*, 15 F.3d 384, 390 (5th Cir.), cert. denied, 513 U.S. 966 (1994)). For example, evidence that a witness could

not identify the defendant is neutral and not exculpatory. See *ibid*. (cases cited); see also *Dillman*, 15 F.3d at 390 (witness's grand jury testimony that she did not recall events at meeting with defendants is neutral testimony, and not subject to *Brady*, despite assertions that it would refute other witness's testimony). In addition, evidence is not exculpatory if it is "not the basis of any count in the indictment." *United States* v. *Weintraub*, 871 F.2d 1257, 1262 n.7 (5th Cir. 1989) (no violation of *Brady* to withhold evidence that cast doubt on a defendant's involvement in a particular drug transaction when the indictment charged the defendant with conspiracy for drug distribution, and identified multiple overt acts); cf. *Cain*, 104 F.3d at 750 (witness statement that suggested defendant was "high," which supported defendant's theory for mitigation, yet also noted defendant's evasion to explain source of blood on his hands was "not clearly exculpatory"). Given this precedent, there is no basis for the district court's conclusion that a person's general comment that Sipe is a "nice guy" is exculpatory. Cf. *Dillman*, 15 F.3d at 390; *Weintraub*, 871 F.2d at 1262 n.7. Moreover, the fact remains that Sipe was equally aware of Ms. Rodriguez's existence, and he could have learned of her views through reasonable diligence.

V

ADDITIONAL EVIDENCE REGARDING FINANCIAL AND OTHER BENEFITS GIVEN TO MEXICAN NATIONAL WITNESSES IS NOT MATERIAL, INDIVIDUALLY OR COLLECTIVELY, TO WARRANT A NEW TRIAL

The government's failure to produce detailed documentation regarding the travel and work authorizations for Mexican National witnesses and the government's payment of the witnesses' lodging and related expenses during trial did not violate *Brady* v. *Maryland*, 373 U.S. 83 (1963), because this evidence either was known to Sipe, cumulative of information given to Sipe, or a matter of public record.

By letter dated March 5, 2001, the United States informed Sipe that the Mexican Nationals (Diaz, Sanchez, and Guevara) were granted permission to "remain and work in this country pending trial of David Sipe. No other promises or advantages have been given" (R. Doc. 76/2 R. 447). On direct examination, Diaz and Guevara stated that they received work permits to remain in the United States pending trial (8 R. 117 (Diaz); 10 R. 4 (Guevara)). On cross-examination, Sanchez and Diaz repeated that they received a work permit, and further stated that they worked in Penitas, Texas and North Carolina (8 R. 86, 95, 99 (Sanchez); 8 R. 128, 135; 9 R. 2 (Diaz)). Sanchez and Diaz also testified on cross-examination that they had gone back to Mexico, with the government's permission, between the assault on Guevara and trial (8 R. 92-93 (Sanchez); 9 R. 2 (Diaz); see 11 R. 118 (Widnick)). After trial, the United States produced detailed documentation regarding the authorizations for employment, including copies of social security cards, and other

documentation regarding witness expenses associated with trial (R. Doc. 79/2 R. 481-525).

The district court found that Sipe was not informed specifically about the Mexican National witnesses' receipt of social security cards, permitted travel to and from Mexico, or all of the expenses that were paid (RE 4:47). The court was concerned that the scope of these benefits exceeded the United States' notification to Sipe's counsel in its March 2001 correspondence, and that this additional information could have been used to cross-examine the witnesses (RE 4:47-48). The district court, however, incorrectly characterized or summarized the letter as stating that the "only" advantage these witnesses received was permission to stay in the United States since it also specifically referred to permission to work in the United States. Moreover, the district court mentions but does not assess the extent to which Sipe could have found out some of this additional information with reasonable diligence (RE 4:47). The district court also did not address the extent to which Sipe actually knew and cross-examined these witnesses about benefits they received.

Because the documentation that was withheld from Sipe regarding work and travel authorization does not significantly expand or modify the notice given to Sipe, it is only cumulative and, therefore, there is no *Brady* violation. As stated, when the defendant has some exculpatory or impeachment information, there is no *Brady* violation when additional documentation on the same topic is cumulative and withheld. See *Jackson* v. *Johnson*, 194 F.3d 641, 649-650 (5th Cir. 1999), cert. denied, 529 U.S. 1027 (2000); cf. *United States* v. *Villafranca*, 260 F.3d 374, 379

(5th Cir. 2001) (no *Brady* violation when a witness's testimony exceeded written document since the defendant had an opportunity to cross-examine the witness).

Moreover, Sipe's cross-examination of Sanchez and Diaz (Mexican National witnesses), Guevara, and OIG Special Agent Steve Widnick reflects his knowledge that the Mexican Nationals received aid from the United States beyond the statement in the government's letter, and refutes any claim that this additional, withheld information is "material." See *Fulford* v. *Maggio*, 692 F.2d 354, 357 (5th Cir. 1982) (cross-examination on withheld police report, which defendant obtained through own connections, did not cause prejudice and did not violate *Brady*, despite government's apparent wrongful withholding of the report), rev'd on other grounds, 462 U.S. 111 (1983). Even though the United States did not identify the witness's authority to return to Mexico prior to trial, this authorization is, at best, of nominal significance, and counsel's cross-examination eliminates any claim of materiality. Cf. *United States* v. *Stephens*, 964 F.2d 424, 435-436 (5th Cir. 1992) (production of tapes immediately before trial, after government's previous statement that none existed, did not violate *Brady* given absence of showing defendant had insufficient opportunity to use the material).

In addition, although Sipe was not specifically informed that the government paid witness fees, travel expenses, and lodging associated with trial, this lack of notice does not violate *Brady*. In *United States* v. *Wicker*, 933 F.2d 284, 293 (5th Cir.), cert. denied, 502 US. 958 (1991), this Court held that the failure of the government to notify defendant it is paying such expenses, which are a matter of

public record, did not violate *Brady*. Again, Sipe was aware sufficiently of these facts since he cross-examined Sanchez about these benefits. Sanchez testified that he returned to the United States approximately ten days before trial, he was staying in a hotel in McAllen, and he received money for food from "Olga," an employee of the U.S. Attorney's Office (8 R. 93-94).

Moreover, any claim of reliance on the government's March 2001 assertion that no other benefits were granted is belied by Sipe's cross-examination of the witnesses on these issues. Cf. *Stephens*, 964 F.2d at 435-436. Thus, in light of Sipe's knowledge and cross-examination on the benefits received, and his ability to learn more about certain benefits through reasonable diligence, the government's failure to produce this additional information does not create a reasonable probability that the verdict would be different.

VI

THE UNITED STATES HAD NO OBLIGATION TO PRODUCE PHOTOGRAPHS TAKEN AT THE CRIME SCENE TWO MONTHS AFTER THE ASSAULT

The United States had no obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to provide photographs taken at the crime scene *two months* after the incident since Sipe had equal access and opportunity to take pictures of the crime scene. Cf. *Brown* v. *Cain*, 104 F.3d 744, 750 (5th Cir.), cert. denied, 520 U.S. 1195 (1997); *United States* v. *Dixon*, 132 F.3d 192, 199 (5th Cir. 1997), cert. denied, 523 U.S. 1096 (1998).

The district court noted that the failure to produce these photos is a "minor issue" that "would've been safer" with production, because, in the court's view, the victim is in one picture, and the photos could have been used to cross-examine witnesses regarding their ability to see at the crime scene (RE 4:48).

First, as explained, see page 17, *infra*, the United States does not have an obligation to produce materials when the defendant has equal access to the information. Sipe clearly had an equal opportunity to go to the crime scene and take photographs. Given that the photos were taken two months after the incident, there is nothing unique about these depictions, and they were not introduced at trial. The fact that the victim, rather than another person, is lying in the reeds in one photograph is not relevant to the question of general visibility, which was the focus of Sipe's inquiries.

Sipe cross-examined Diaz and Sanchez regarding their ability to see Sipe's assault through the tall grass, and he questioned Border Patrol Agents generally about the dense nature of the reeds, and how it inhibits one's view in the reeds. By questioning numerous witnesses on the topic for which he challenged the withholding of evidence, the photographs, at most, would have been cumulative evidence, and Sipe cannot show how the absence of production raises a reasonable probability of a different verdict. Cf. *Jackson* v. *Johnson*, 194 F.3d 641, 649-650 (5th Cir. 1999) (no *Brady* violation in withholding some of witness's prior statements that did not provided additional, substantive basis for impeachment), cert. denied, 529 U.S. 1027 (2000). The United States' failure to produce these photos

had no more influence on Sipe's ability to cross-examine witnesses than his own failure to take similar photos.

VII

THE WITHHELD EVIDENCE, CONSIDERED CUMULATIVELY, DOES NOT CREATE A REASONABLE PROBABILITY THAT THE VERDICT WOULD BE DIFFERENT

The district court erred in considering Border Patrol Agent Cruce's statement, Ms. Rodriguez's statement, the additional documentation regarding the benefits given the Mexican National witnesses, and the photographs of the crime scene as part of its cumulative analysis of materiality since this evidence does not meet at least one of the other criteria of *Brady* v. *Maryland*, 373 U.S. 83 (1963), *i.e.*, that the evidence is suppressed and favorable to the defendant. Even if the district court appropriately considered all of this evidence, its conclusion that the withheld evidence collectively had a reasonable probability of affecting the jury's verdict should be rejected.

In *Kyles* v. *Whitley*, 514 U.S. 419, 436 (1995), the Supreme Court held that the materiality assessment under *Brady* is "considered collectively, not item by item." A cumulative assessment, however, includes a court's "evaluat[ion of] the tendency and force of the undisclosed evidence item by item." *Kyles*, 514 U.S. at 436 n.10. The Supreme Court assessed the significance of each piece of suppressed evidence, which included prior inconsistent statements by eyewitnesses regarding identification of the defendant and evidence that questioned the source of critical physical evidence and the conduct of the police investigation. *Id*. at 441-451. The Supreme Court

concluded that, collectively, the evidence undermined confidence that the jury's verdict would have been the same.[7] *Id*. at 451-454.

Consistent with *Kyles*, this Court has evaluated the materiality of multiple claims of withheld evidence under *Brady* both individually and cumulatively. *United States* v. *Hughes*, 230 F.3d 815 (5th Cir. 2000); *United States* v. *Freeman*, 164 F.3d 243, 248-249 (5th Cir.) (failure to identify (1) a government witness's opportunity for a conjugal visit with a girlfriend and (2) a pending investigation of one of two government chemists for falsifying reports did not individually or cumulatively meet standard of materiality), cert. denied, 526 U.S. 1105 (1999). In *Hughes*, 230 F.3d at 820-821, this Court found that a prior statement of one witness that raised a question of the defendant's knowledge of the illegal source of monies was not material given the ambiguity of that statement, the extent of the impeachment of the witness on other issues, and the overall evidence of guilt. A statement by a second witness regarding his personal bias against the defendant also was not material; it "adds nothing to [the defendant's] defense." *Id*. at 822. This Court concluded that even if

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[7] [C]onfidence that the verdict would have been unaffected cannot survive when suppressed evidence would have entitled a jury to find that the eyewitnesses were not consistent in describing the killer, that two out of the four eyewitnesses testifying were unreliable, that the most damning physical evidence was subject to suspicion, that the investigation that produced it was insufficiently probing, and that the principal police witness was insufficiently informed or candid.

Id. at 454.

the second statement was considered "in conjunction" with the first withheld statement, this did not raise a reasonable probability that the verdict would be different. *Ibid.*

Because *Brady* has three requisite elements, this Court should not engage in a cumulative analysis of materiality if the withheld evidence does not meet the other criteria; *i.e.*, the evidence is withheld and favorable to the defendant. See *Kyles*, 514 U.S. at 450 (evidence "had some value as exculpation and impeachment, and it counts accordingly in determining whether *Bagley*'s [cumulative] standard of materiality is satisfied"); *Hughes*, 230 F.3d at 819 ("[t]here are three components to a *Brady* violation"); cf. *Freeman*, 164 F.3d at 249 (assuming without deciding that a *Brady* violation is established to conclude withheld evidence is not individually or cumulatively material). Thus, the district court should not have considered Ms. Rodriguez's statement, which was neither suppressed nor favorable to Sipe. Moreover, BPA Cruce's statement of "dislike," the additional information on benefits to the Mexican National witnesses, and the photographs similarly were not suppressed since this evidence also was equally available to Sipe. See *United States* v. *Dixon*, 132 F.3d 192, 199 (5th Cir. 1997) (no *Brady* violation for not producing defendants' car titles and financial records seized during search warrants), cert. denied, 523 U.S. 1096 (1998); *United States* v. *Brown*, 628 F.2d 471, 473 (5th Cir. 1980) ("[i]n no way can information known and available to the defendant be said to have been suppressed by the Government").

Even if this Court believes that all of the withheld evidence considered by the district court was appropriate for a cumulative materiality assessment, the district court's conclusion remains erroneous. Cf. *Hughes*, 230 F.3d at 820-822. Unlike *Kyles*, 514 U.S. at 451-454, where the withheld evidence directly raised doubts as to witness identification of the defendant and the integrity of physical evidence, none of the withheld evidence here directly addresses Sipe's use of excessive force. As discussed herein, the assessments of each category of withheld evidence, all of which is impeachment evidence, does not establish materiality individually. Cumulatively, the impact of this material does not meet the high standard of creating a reasonable probability that the verdict would be different because it does not significantly challenge the credibility of the witnesses, it is tangential to the crux of the witness's testimony, and some of the withheld evidence is cumulative of cross-examination that was or could have been conducted. Cf. *ibid.*; *Jackson* v. *Johnson*, 194 F.3d 641, 649-650 (5th Cir. 1999) (withholding of witness's four prior statements is not material, in part, because withheld statements provide no new information not already addressed on cross-examination), cert. denied, 529 U.S. 1027 (2000). For example, Sipe could have, but chose not to, cross-examine Cruce on his bias or dislike of Sipe based on Cruce's grand jury testimony (see 7 R. 124-158). Sipe challenged Sanchez and Diaz's ability to see Sipe and Guevara through the reeds (8 R. 85, 132) and questioned agents about the dense nature of the reeds (7 R. 127-128; 8 R. 38-39); he did not need the photographs to do so. Sipe also cross-examined Sanchez, Diaz, Guevara, and Widnick regarding the work authorization and other

benefits given the Mexican National witnesses (8 R. 93-94, 135-136; 11 R. 106-107) and additional documentation on benefits would not lead to substantially different cross-examination that would affect the jury's verdict. Because the collective impact of the withheld evidence does not put "the whole case in such a different light as to undermine confidence in the verdict," the district court's grant of a new trial should be reversed. *Kyles*, 514 U.S. at 435.

CONCLUSION

The district court's order granting a new trial should be vacated, Sipe's conviction should be affirmed, and the matter should be remanded for sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2003, two copies of the foregoing Brief For The United States As Appellant, and a diskette containing the brief, were served by Federal Express, overnight mail, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I certify that the foregoing Brief For The United States As Appellant complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 11,835, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

November 4, 2003

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