Appeal No. 19-CF-902

DISTRICT OF COLUMBIA COURT OF APPEALS

EL HADJI TOURE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CRIMINAL DIVISION

No. 2017-CF1-5232

Reply Brief of Appellant El Hadji Toure

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I. Reversal Is Required Because the Government Withheld Material Evidence

The Government's case against Mr. Toure was entirely circumstantial and its cornerstone was the forensic evidence. The DFS witnesses played a role in collecting, processing and/or analyzing every piece of that evidence. This forensic evidence was presented to the jury as unimpeachable proof of his guilt. However, in violation of a pretrial ruling, the Government failed to disclose that five of the 11 DFS witnesses have mishandled evidence on multiple occasions, including deliberately contaminating evidence. Consequently, the defense was prevented from impeaching the competence of these witnesses and arguing that this constitutes reason to doubt the reliability of all the forensic evidence.

The issue is whether the suppression of this impeachment evidence was material. "[T]he materiality threshold is met if, in the absence of proper disclosure, we question whether the defendant received a fair trial and our 'confidence' in the outcome of the trial is thereby 'undermine[d].'" *Vaughn v. United States*, 93 A.3d 1237, 1262 (D.C. 2014) (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). "Evidence is material if the undisclosed information could have substantially affected the efforts of defense counsel to impeach the witness, thereby calling into question the fairness of the ultimate verdict[.]" *United States v. Oruche*, 484 F.3d 590, 597 (D.C. Cir. 2007).

"This test is not a particularly demanding one. This is true because the government's burden at the trial level is so demanding." *United States v. Robinson*, 68 F.4th 1340, 1348 (D.C. Cir. 2023). "Had even one juror harbored a reasonable doubt as to the defendant's guilt on any count, the guilty verdict on that count could not have been returned." *Id*.

Further, "*Brady* materiality must be assessed in terms of the cumulative effect of all suppressed evidence favorable to the defense, not on the evidence considered item by item. The cumulative effect of a collection of suppressed evidence may undermine confidence in the outcome of the trial even where each piece of evidence, viewed in isolation, would be insufficient." *Turner v. United States*, 116 A.3d 894, 913–14 (D.C. 2015). "Cumulative analysis of the force and effect of the undisclosed pieces of favorable evidence matters because the sum of the parts almost invariably will be greater than any individual part." *Johnson v. Folino*, 705 F.3d 117, 131 (3d Cir. 2013) (citation omitted).

In contravention of these established principles, the Government speculates that the jury would have ignored all of this impeachment evidence because most of the individual Q-CARs or disciplinary actions were relatively insignificant, standing alone. But DFS does not issue Q-CARs or impose disciplinary actions for minor mistakes. Instead, Q-CARs are official agency actions taken to address a "nonconformity," i.e., "[a] situation or condition that does not adhere to policy

and/or procedure and has the potential to have a fundamental impact on the quality of the work product or the integrity of the evidence," that has "great impact to the quality system or frequency of occurrence." DFS FSL Quality Assurance Manual at pp. 12, 14 (2022) (definitions of "nonconformity" and "Quality Corrective Action Report (Q-CAR)").[1]

Professional competence was especially important here because DFS witnesses' testimony placed their compliance with DFS procedures directly at issue. At trial, they repeatedly testified that they took steps to comply with standard procedures to protect against errors. The sheer volume of "nonconformities" committed by the DFS witnesses could well have negatively impacted the jury's view of all the forensic evidence. Moreover, Ms. Bischof's errors were, in DFS's own estimation, of such seriousness as to impugn public confidence in the agency as a whole. (*See, e.g.*, App. at 0982 (noting that her "compromising of evidence integrity could lead to serious negative impacts on the agency's reputation").) Even a single error this grave could have impugned the reliability of every piece of forensic evidence DFS touched (i.e., all the Government's forensic evidence).

Nor was the remainder of the Government's evidence so overwhelming that it is certain the jury would have ignored the evidence of DFS's shortcomings. The

[1] Available at https://dfs.dc.gov/sites/default/files/dc/sites/dfs/publication/attachments/FSL%20Quality%20Assurance%20Manual.pdf.

Government asserts that "the evidence of Toure's guilt was overwhelming even without the evidence introduced through DFS witnesses." (Gov. Br. at 31.) The lead example it cites is the DNA analysis of a semen stain on the victim's leggings, which were removed from her body by an assistant medical examiner and tested by an independent laboratory. However, elsewhere in its brief the Government admits that "[t]he bindings were packaged, sealed, and tagged with a bar code by two DFS employees, and then sent to [the independent laboratory]." (*Id*. at 24.) DFS was the intermediary between the medical examiner and the lab. The inescapable fact is that DFS personnel collected, processed, and/or analyzed every item of evidence that was linked to Mr. Toure through DNA analysis. Had the jury entertained doubts about the competence of those personnel, it could have undermined entirely the most compelling evidence that the Government presented. None of the other evidence that the Government cites is remotely as strong and it is scarcely "overwhelming."

Next, the Government contends that the withheld evidence could not have been used to show that DFS has a history of making errors because the "[u]se of prior bad acts evidence to show propensity is impermissible[.]" (Gov. Br. at 35–36 (citation omitted).) However, the *Brady* material at issue here is not evidence of "prior bad acts" being used to attack the character of a witness. Instead, it is evidence that impeaches the professional competence (not the character or veracity) of the DFS witnesses and of the law enforcement investigation. *See Van Ness v. United*

States, 568 A.2d 1079, 1090 (D.C. 1990) (Schwelb, J., concurring in part) (police officer's "competence was subjected to persuasive challenge by the exposure of apparent deviations from proper police procedures"); *Moreland v. Robinson*, 813 F.3d 315, 329 (6th Cir. 2015) (recognizing that evidence is admissible to "challenge the competence of the detectives' actions and investigation as a whole"). "[T]he reasons for professional discipline may be admissible to impeach [an] expert's credibility." 31A Am. Jur. 2d. *Expert and Opinion Evidence* § 53 (2024). Criminal defendants are entitled "to weed out not only the fraudulent analyst, but the incompetent one as well." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009).

Restrictions on the use of prior bad acts do not apply to evidence that is used to impeach a forensic witness's professional competence. For example, Federal Rule of Evidence 608 was revised in 2003 to clarify that its restrictions apply only when the sole reason for proffering evidence is to attack or support the witness's character for truthfulness. Previously, "the Rule's use of the overbroad term 'credibility' ha[d] been read 'to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility.'" Fed. R. Evid. 608 advisory committee's note to 2003 amendments (quoting American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d ed. 1998)).

But here, Mr. Toure seeks to use evidence of these witnesses' failures to adhere to applicable standards and procedure as a means of impeaching their professional competence, not their character.[2] The trial court, in the course of ruling on Mr. Toure's motion for a new trial, agreed that the defense would have been entitled to cross-examine the DFS employees about these prior disciplinary actions. (*See* App. at 1098–99 (1/25/24 Transcript).) This Court has never held that restrictions on the use of prior bad acts evidence precludes this form of impeachment. It should not do so here.

In sum, the withheld impeachment evidence in this case was extensive in scope and, in the case of Ms. Bischof, especially damning. The sheer volume of nonconformities by the DFS witnesses, and their cumulative impact, could well have created doubt among one or more jurors about the reliability of the forensic evidence. Clearly, the undisclosed information substantially affected the efforts of defense counsel to impeach the DFS witnesses, thereby calling into question the fairness of the ultimate verdict[.]" *United States v. Oruche*, 484 F.3d at 597. Thus, it was material under *Brady*. Mr. Toure is entitled to a new trial at which he has the benefit of this evidence in presenting this defense.

[2] Evidence of Ms. Bischof's suspension for contaminating evidence also bore on her veracity. (*See* App. at 1103–04 (1/25/24 Transcript) (trial court noted the defense may have been able to use Ms. Bischof's disciplinary record to probe "whether she had a motive to bolster the government's case given that she was on shaky ground with her employer").)

II. Mr. Toure Was Denied His Rights of Confrontation and Due Process

In addition, Mr. Toure was deprived of his constitutional rights of confrontation and due process as a result of calculated misconduct by the lead prosecutor. The Government's brief studiously ignores this misconduct and seeks refuge in case law that frowns on defendants who seek to call a blameless prosecutor as a witness. Those decisions are completely inapposite here.

The theme of Mr. Toure's defense was that the police rushed to judgment and, among other things, had failed to investigate whether the killer was someone known to C.M. or someone who knew her art. The crime scene bore a striking resemblance to a photo on C.M.'s web site yet the police had failed to investigate potential leads that this might yield. AUSA Nestler was sufficiently nervous about this loose end that he engaged in prosecutorial misconduct to tie it down and prevent it from unraveling the prosecution's circumstantial case against Mr. Toure. He coached Sgt. Batton to provide hearsay testimony about investigating C.M.'s web site and then elicited before the jury Batton's false and misleading testimony that the MPD had conducted this investigation.

After this misconduct was exposed, the defense requested that the court declare a mistrial and dismiss the case with prejudice or else instruct the jury "that Mr. Nestler deliberately elicited inadmissible evidence to counteract the Defense's theory and argument about the case." (App. at 0332–34 (3/13/19 Transcript).) The

court denied both requests and also denied a defense request to have AUSA Nestler testify. It only permitted the defense to cross-examine Sgt. Batton and demonstrate that he had no personal knowledge of any investigation of C.M.'s web site and had merely repeated what AUSA Nestler had told him.

Although the trial court asserted that it would "preclude the Government from introducing any evidence about any investigative steps that they may have taken, whether that be in the grand jury or other detectives or officers who Sergeant Batton was unaware of who may have followed up on those IP addresses," (*id.* at 0343), it reversed course during the Government's re-direct examination of Sgt. Batton. It permitted the Government to introduce a copy of the grand jury subpoena for the IP address information—thereby corroborating Sgt. Batton's testimony that an investigation had been conducted—even though he had no direct knowledge of the subpoena and could not authenticate it. The trial court's rationale was that "I understand that [the subpoena] is an established fact that the defense is not in a position to dispute." (*Id.* at 0391.) Upon the admission of the subpoena, the parties stipulated that "after reviewing the data … which was the subject of the subpoena, the Government took no further steps to identify the accountholders of the IP addresses." (*Id.* at 0400.)

The next day the defense again moved to question AUSA Nestler, explaining that "[a]s the evidence stands now, the Government has essentially won that point

without proffering or putting forward any legitimate evidence … [and] has left the jury with the impression that it hoped to leave it with, that there was an investigation into [C.M.'s] website … [but] there was just no way to follow-up on the information or investigate further." (App. at 0410 (3/14/19 Transcript).) However, "this is entirely unconfronted evidence and evidence we are powerless to rebut without the actual people involved [AUSA Nestler] taking the stand." (*Id.*) The defense laid out a series of highly relevant questions that had been left unanswered and unexplored, and that only AUSA Nestler could answer. Nonetheless, the trial court denied this request, asserting that "I don't see that … any additional relevant evidence is going to be gleaned by placing Mr. Nestler under oath in order to inquire further on the matter." (*Id.* at 0415.)

The Government contends that the trial court did not abuse its discretion when it denied Mr. Toure's request to call AUSA Nestler as a witness. But this is not the applicable standard of review. "This court reviews de novo whether the admission of certain evidence violates a defendant's constitutional rights under the Confrontation Clause." *Austin v. United States*, 315 A.3d 580, 592 (D.C. 2024).

The Confrontation Clause "was intended to preclude conviction in circumstances where the defendant was not given the opportunity to test the reliability of the witness's statements in the crucible of cross-examination." *Id.* at 587. "[T]he government cannot avoid the requirements of the Confrontation Clause

by presenting an expert witness to testify as a surrogate for the person who performed a forensic examination." *Burns v. United States*, 235 A.3d 758, 785 (D.C. 2020). Surrogate witnesses are no more permissible where lay testimony is involved, as here. Sgt. Batton was a surrogate for AUSA Nestler when he testified about the steps taken to investigate C.M.'s web site. It was AUSA Nestler who actually took those steps. Thus, under the Sixth Amendment, Mr. Toure was entitled to cross-examine him.

Furthermore, the grand jury subpoena that the Government introduced into evidence during its re-direct examination of Sgt. Batton was also inadmissible hearsay. Sgt. Batton could neither authenticate nor explain the subpoena. More importantly, Mr. Toure could not cross-examine the subpoena. Again, he was entitled to cross-examine AUSA Nestler about the subpoena.

The trial court missed the mark in reasoning that no relevant evidence would be gleaned by cross-examining Mr. Nestler. (*Id.* at 0415.) "[T]he [Confrontation] Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one [surrogate] witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Bullcoming v. New Mexico*, 564 U.S. 647, 662 (2011). The remedial steps taken by the trial court simply turned Sgt. Batton from an undisclosed surrogate for AUSA Nestler into a disclosed surrogate. And the court then permitted the Government to corroborate

the surrogate's testimony by introducing the grand jury subpoena. This prosecutorial ventriloquism blatantly violated Mr. Toure's constitutional right to confront the witnesses against him.

"It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to 'confront[ation]' because use of that right would not have affected the jury's verdict." *Delaware v. Van Arsdall,* 475 U.S. 673, 680 (1986). "An error of constitutional magnitude in the trial court requires reversal of a criminal conviction on appeal unless the government establishes that the error was harmless beyond a reasonable doubt." *Burns v. United States*, 235 A.3d at 791 (emphasis added). Moreover, the prosecutorial misconduct violated not only Mr. Toure's confrontation right but also his due process rights under *Napue v. Illinois*, 360 U.S. 264, 269 (1959). "A *Napue* violation occurs when the government presents or fails to correct testimony it knows to be, or should know to be, false or misleading." *Jones v. United States*, 202 A.3d 1154, 1166 (D.C. 2019). "When a *Napue* violation is shown to have occurred, 'it entails a veritable hair trigger for setting aside the conviction.'" *Id.* (quoting *United States v. Gale*, 314 F.3d 1, 4 (D.C. Cir. 2003).

The Government has not made the requisite showing that this misconduct was harmless. None of the cases it cites support its argument. *Smith v. United States*, 809 A.2d 1216 (D.C. 2002), reversed defendant's conviction because the

constitutional error at issue was not harmless beyond a reasonable doubt. *Id.* at 1226. And neither *United States v. Milles*, 363 F. App'x 506 (9th Cir. 2010) nor *United States v. Rivera-Hernandez*, 497 F.3d 71 (1st Cir. 2007) involved constitutional error. Rather, they addressed prosecutorial misconduct of a lesser degree and affirmed the convictions after concluding that the misconduct at issue probably had not affected the jury's verdict. *See* 363 F. App'x at 508–09; 497 F.3d at 80.

The Government asserts that the evidence of Mr. Toure's guilt was "overwhelming." (Gov. Br. at 49.) But this assessment is belied by AUSA Nestler's own conduct. Having presented all of the evidence and seen the jury's reaction to it, he engaged in premeditated misconduct at the close of the Government's case in order to forestall the "inadequate investigation" defense that Mr. Toure's counsel were developing. "[T]his court has held that '[a prosecutor's] own estimate of his case, and of its reception by the jury at the time, is . . . a highly relevant measure . . . of the likelihood of prejudice.'" *Gardner v. United States*, 999 A.2d 55, 62–63 (D.C. 2010) (quoting *United States v. DeLoach*, 504 F.2d 185, 192 (1974)). "The gravity of the prosecutors' misconduct . . . may shed light on the materiality of the infringement of the defendants' rights …." *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). "If the prosecutors did not think their case airtight (and so they tried to bolster it improperly), this is some indication that it was indeed not airtight." *Id.* at 242. That is exactly what happened here: AUSA Nestler improperly bolstered the

case against Mr. Toure because he was concerned that it was not airtight. His on-the-spot assessment weighs far more heavily than the post-hoc assessment now offered by the Government in trying to uphold Mr. Toure's convictions.

Because the Government has failed to demonstrate that the prosecutor's misconduct was harmless beyond a reasonable doubt, Mr. Toure is entitled to a new trial at which he is afforded his constitutional rights to due process and to confront all of the witnesses against him.

III. The Double Jeopardy Clause Requires That Several of Mr. Toure's Convictions and Sentences Be Vacated

The Government concedes that Mr. Toure's felony murder convictions merge with his conviction for first-degree premeditated murder, and the felony murder convictions merge with the underlying felonies. (Gov. Br. at 50 n. 6.) Therefore, if this Court does not reverse Mr. Toure's convictions and remand for a new trial, it must remand this case to the trial court with instructions to vacate Mr. Toure's duplicative convictions and sentences.

CONCLUSION

For the above reasons, Mr. Toure respectfully requests that this Court (1) reverse and remand for a new trial, or (2) remand for re-sentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on November 1, 2024, a true and correct copy of the foregoing was served through the Court's e-filing system to Chrisellen R. Kolb and Daniel J. Lenerz.

/s/ Sean Belanger
Sean Belanger