APPENDICES

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 12-CF-1871 & 12-CF-1985

CHAMONTAE WALKER AND COREY D. YATES,
Appellants,

v.

UNITED STATES,
Appellee.

Appeals from the Superior Court
of the District of Columbia
(CF1-5957-11, CF1-14652-11)

Hon. Thomas J. Motley, Trial Judge
Argued July 1, 2015
Decided August 24, 2017
[STAMP: FILED 08/24/2017]

* * *

Before GLICKMAN and FISHER, *Associate Judges*, and REID, *Senior Judge*.

GLICKMAN, *Associate Judge*: Appellants Chamontae Walker and Corey Yates were indicted with Meeko Carraway on charges relating to the September 25, 2010, murder of Darrell Hendy. Carraway, who fired the shots that killed Hendy, pleaded guilty to second-degree murder. Walker and Yates, charged as Carraway's accomplices in the shooting, went to trial. Walker was convicted of three felonies—first-degree murder while armed, conspiracy to commit murder, and acces-

sory after the fact to murder—and a misdemeanor charge of assaulting, resisting, or interfering with the police officer ("APO") who arrested him shortly after the shooting. Yates was convicted of second-degree murder while armed and accessory after the fact. In these consolidated appeals, Yates claims the government presented insufficient evidence to convict him of murder and suppressed evidence that he was not guilty of being an accessory after the fact. In addition, both appellants claim the trial court erred in rulings on evidence and in allowing the prosecutor to misstate the evidence in closing argument.

I.

On September 25, 2010, Darrell Hendy was walking in the 800 block of Southern Avenue when Meeko Carraway approached him from behind and shot him. At appellants' trial, the government presented evidence that Walker had been feuding with Hendy and instigated the shooting, and that he and Yates were Carraway's accomplices and after-the-fact accessories.

Ebony House, Walker's girlfriend at the time of the murder, testified that Walker and Hendy had a falling out in the spring of 2010 and were not on speaking terms. Walker told House about a month before the shooting that he believed Hendy and another man had "put a hit out on him." During the summer of 2010, Walker acted "paranoid" whenever he saw Hendy.

On the morning of September 25, Walker and House had what she described at trial as a long and physically violent fight at his mother's house, where the two were living. Walker eventually calmed down, but as far as House was concerned, their relationship was "over." House recalled that after the fight, Walker received two phone calls that she partially overheard.

The first call, at around noon, was from either Carraway or Yates. House heard Walker say "yeah, I'll meet you at the building." The second call was from a man she knew as "Uncle Poochie." Walker told her that Uncle Poochie, who was in his car outside, was taking him to Realco, a gun store in Maryland, "to go get bullets."

Uncle Poochie, whose real name was Kenneth Buchanan, testified that Walker had called him and asked to be picked up. Buchanan drove Walker to Realco, where Walker purchased a box of 9mm ammunition. Buchanan recalled that Walker was in a solemn mood and said he was "angry at his girl."

After buying the ammunition, Walker asked Buchanan to drive him to 10th Place S.E. in the District to pick up his "cousins," Yates and Carraway. They went to 10th Place and Savannah Street, which was where Yates resided with his grandfather. Walker got out of Buchanan's car and spoke privately with Yates and Carraway in the alley. Buchanan was unable to hear their whole conversation, but he did hear Walker say "something B" with regard to "his girl." The three men—Walker, Carraway, and Yates—returned to Buchanan's car and asked him to drive them to an apartment building at 800 Southern Avenue. On the way, Yates sat in the back of the car next to the box of ammunition Walker had purchased. Buchanan heard Yates ask what kind of bullets they were.

As they approached their destination, Walker told Buchanan to slow down, and both Walker and Yates said, "There goes the van." This was an apparent reference to Darrell Hendy's van, which subsequently was found in a parking lot at 800 Southern Avenue. Buchanan asked, "What van?" Yates told him, "Don't worry about it." Walker said "they was just looking for

somebody" and he and Yates told Buchanan to keep going and drive around the corner. Yates then said, "Let's suit up." Over defense objection, Buchanan testified he understood this "to mean to do bodily harm to somebody.... you want to hurt somebody." Frightened, Buchanan said to the group, "Y'all ain't about to do nothing crazy, because if you is, get out the car." Buchanan dropped Walker, Yates, and Carraway off at the side of the building at 800 Southern Avenue and left them there.

Two months later, Walker and Ebony House started dating again and she asked him about the rumors she had heard concerning Hendy's shooting on September 25.[1] Walker admitted his involvement in the shooting and described to House what happened. Over Yates's objection, the trial court ruled that Walker's incriminating statements to House were declarations against Walker's penal interest and hence admissible as affirmative evidence against Yates.[2] House recalled Walker telling her that after "Uncle Poochie" took him to Realco to get bullets, they drove directly to the "high-rise" at 800 Southern Avenue, where Walker met

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[1] Walker and House broke up after their fight on the morning of September 25. Then, as explained further below, Walker was arrested that night on an unrelated charge. He spent more than half of the next two months in and out of jail. After being released on November 16, 2010, he and House started dating again. Within a couple of days, he told House about the shooting.

[2] Walker's statements were substantively admissible at trial against Walker himself, of course, because they were the statements of a party-opponent. *See Chaabi v. United States*, 544 A.2d 1247, 1248 (D.C. 1988). This ground is not to be "confused with statements against interest, a distinctly separate ground of admissibility." *Johnson v. Leuthongchak*, 772 A.2d 249, 250 n.4 (D.C. 2001).

up with Carraway and Yates.[3] After leaving Uncle Poochie, the three men went to apartment 405. There, House testified, Walker "said he was mad because we had broken up, and he told Meeko and Corey, you all I got, you all I got, somebody gonna die today."

Carraway then told Walker that Darrell Hendy was "down the street." Walker retrieved his gun from somewhere in the apartment and gave it to Carraway. Carraway loaded the weapon with Walker's bullets. The three men then went downstairs "[a]nd all three of them walked down the street" in Hendy's direction.

Walker told House they found Hendy sitting on a stoop in the Tiger Market parking lot on the Maryland side of Southern Avenue. The three men crossed over to that side and remained there for a while, keeping watch on Hendy. At some point, Carraway announced, "I'm about to do it, Cuz. I'm about to do it," but Walker warned him not to because there were too many cameras in the area. Walker and Yates then crossed back to the District side of Southern Avenue and waited there while Carraway stayed on the Maryland side in their sight. In the course of the encounter, Walker told House, Hendy asked "what's up," Walker said "what's up" back to him, and he and Hendy "was giving each other dirty looks, like mugging on each other."

It appeared to Walker that Hendy did "not feel right about the situation." Hendy got up, crossed the street back to the District side, and headed on foot toward his van in the parking lot at 800 Southern Ave-

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[3] In this and some related respects, House's account of what Walker told her conflicted with Buchanan's testimony. The conflicts are at the heart of one of the claims we discuss below, namely, whether the prosecutor misstated the facts in closing argument.

nue. Walker gestured for Carraway to come back across the street to join them, which he did. Walker told House that he, Carraway, and Yates then proceeded to follow Hendy as he walked away. Carraway went ahead of Walker and Yates and closed in on Hendy from behind. Next, Carraway looked back at his two friends, told them to "watch this," and then shot Hendy multiple times from behind.[4] Walker, Yates, and Carraway then fled together into the high-rise at 800 Southern Avenue and back to apartment 405.

Video footage taken by security cameras just before and after the shooting and introduced in evidence at trial corroborated much of the story House recounted. The footage showed Yates and Walker waiting across the street from Hendy; Hendy and another person[5] walking toward Hendy's van; Carraway crossing the street and joining Walker and Yates; Carraway passing Walker and Yates, turning back to say something, and continuing after Hendy; and then, after the shooting, Carraway running into the apartment building at 800 Southern Avenue, followed by Walker and Yates. The shooting itself was not caught on video.

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[4] The medical examiner found nine bullet holes in Hendy's body.

[5] This was Raymond Pray, who testified that he had been hanging out with Hendy at the Tiger Market shopping center. Pray was walking with Hendy toward 800 Southern Avenue when the shooting started. He immediately ran. When he looked back, all he saw was Hendy lying on the ground. However, shortly before he and Hendy left the shopping center, Pray testified, he ran into Walker in a carryout there. Pray and Walker were acquainted and on good terms, and they greeted each other. Pray "wasn't paying attention" to whether anyone was with Walker and left without having further conversation with him.

Walker's cousin, Orlando Smith, testified at trial that he was in apartment 405 at 800 Southern Avenue at the time of the shooting and heard the gunshots. Moments later, Walker, Yates, and Carraway arrived at the apartment. The three men were sweating. Smith testified that Walker advised Carraway to cut his hair and helped him begin doing it. Walker and Yates then left the apartment together. Carraway did not go with them. Police searching the building in the immediate aftermath of the shooting (based on witness reports that the suspects had fled into the building) found and arrested Carraway while he was still in apartment 405. However, because the police lacked sufficient evidence at that time to charge him for Hendy's shooting, Carraway soon was released.

The police search of the building continued, floor by floor. Officer Sean Corcoran, who had assisted in Carraway's arrest in apartment 405, found Walker in another apartment on the eleventh floor. When Corcoran discovered him, Walker was "straddling the balcony as if he was going to jump off or climb down." As Corcoran tried to handcuff him, Walker grabbed for the officer's service pistol, but Corcoran succeeded in restraining him. This was the conduct that led to the APO charge against Walker. Like Carraway, however, Walker was not charged at this time for Hendy's shooting, and he was released two days later.

The basis for the accessory-after-the-fact charges was evidence that Walker and Yates helped Carraway hide out in North Carolina a few days after the shooting when it became clear to them that the police were about to arrest Carraway for Hendy's murder.[6] On

[6] As discussed below, the police learned Yates was a witness to Hendy's murder and brought him in for questioning on Septem-

September 29, Yates, Walker, and Carraway were observed at unoccupied property belonging to Yates's family in the town of Seaboard, North Carolina. Shamel Prude and Kathleen Wade, two neighbors who lived across the street and who were well-acquainted with Yates and his family, testified at trial.

Shamel Prude testified that he walked over to the property after seeing a blue van in the driveway and found Yates there with two other men he did not know. At trial he identified those two men as Walker and Carraway. Prude chatted with them briefly. After he went to bed that night, he heard the van drive off. The

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ber 27. Yates identified Carraway as the shooter. The prosecution theory that Yates and Walker knew Carraway's arrest was imminent and helped him to evade it was set forth in the government's closing argument as follows:

> Mr. Yates realized two days after the murder that the police could put him on the scene, because they came and got him and took him to the station for questioning. And Mr. Yates, realizing the police had information and were on to what had happened and who was present, told them Meeko Carraway was the shooter in this case. And he knew and understood, it's reasonable to infer, that when he identified the shooter in the murder to the police, an arrest warrant was going to issue for murder for that person. And in fact the next day an arrest warrant did issue for murder for Meeko Carraway based on the word of Corey Yates.
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> So what did he do? Mr. Yates? The next day, perhaps because he felt guilty for snitching on his friend, perhaps because he realized the person he had just identified to police would now perhaps be picked up and be a witness against him, perhaps because he felt bad this was his good friend and he knew an arrest was coming and he wanted to get him out of Dodge. Mr. Yates, along with Mr. Walker, took Meeko Carraway to Seaboard, North Carolina, a sleepy town two states away, where Meeko Carraway had no association.

next day, Prude saw only Carraway at the house. Prude lent him a telephone to use and brought him something to eat. That evening, Prude testified, Ms. Wade's daughter and her husband gave Carraway a ride out of town, and Prude accompanied them in the car. Carraway was alone and had no luggage.[7]

Kathleen Wade testified that she too saw a blue van at Yates's family's house. The next morning, September 30, 2010, Prude informed her that Yates was there and that he had "brought two guys with him." Later in the day Carraway appeared at her house and asked to use her phone. By then Yates was gone. Wade did not think Carraway was supposed to be there by himself and told him to call Yates to come pick him up. While Carraway was on the phone with Yates, Wade asked to speak to him. She asked Yates why he had left Carraway "stranded" at the empty house. Yates answered that it was his family house and that he would be coming back. Wade asked him how he had gotten into the house and Yates told her his grandfather had given him the key. Afterward, Carraway told Wade that Yates was coming back for him. However, as the day wore on, Yates did not appear. That night, Wade arranged for her daughter and her daughter's fiancé to drive Carraway to Roanoke Rapids, North Carolina, where he claimed to know someone.[8]

Walker presented no evidence at trial. Yates called two witnesses. Detective Robert Cephas testified that he interviewed Yates on September 27, and that Yates

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[7] The following day, which would have been October 1, 2010, a local police officer came by and showed Prude photographs of the two men Prude had seen with Yates.

[8] Carraway soon returned to the District of Columbia and, on October 12, 2010, he turned himself in to the police.

identified Carraway as the person who shot Hendy. The police obtained a warrant for Carraway's arrest the next day. The second witness was Samuel Hamilton. Hamilton, an attorney, testified that Yates came to see him in late September 2010 to inquire whether it would be wise for a person who might be facing some charges "to get a lawyer and to approach the authorities." Hamilton said Yates also expressed vague ("gloriously indefinite") concerns about possible retaliation. Hamilton had a subsequent meeting with Yates, Walker, and Carraway, in which they asked him whether an attorney could help someone "who might have some concerns about people in the community about maybe retaliating against him or doing something in the community because they think that he might have been involved in something, some criminal activity." The testimony of Detective Cephas and Mr. Hamilton supplied the evidentiary predicate for Yates's defense claim that any actions he took following Hendy's murder were not done with the intent to hinder or prevent Carraway's arrest.[9]

II.

Appellants present several grounds for reversal of their convictions. Yates claims the government presented insufficient evidence to convict him of murder as an aider and abettor, and that it withheld materially exculpatory evidence bearing on the accessory-after-the-fact charge against him. In addition, appellants claim the trial court erred in ruling that Walker's admissions to Ebony House were statements against penal interest; in permitting Buchanan to opine as to the

[9] This was a defense to the accessory-after-the-fact charge. Yates's defense to the murder charge was that he was an innocent bystander.

meaning of Yates's remark, "Let's suit up"; in allowing Officer Corcoran to testify that unknown persons had implicated Walker in the shooting; and in allowing the prosecutor, in closing argument, to misstate the evidence regarding when and where Walker allegedly told Yates and Carraway that "somebody gonna die today." We address the claims in that sequence.

A. Sufficiency of the Evidence of Aiding and Abetting

Yates contends the evidence was insufficient to prove that he did anything to aid or abet the commission of Hendy's murder or that he had the mental state required to be guilty of second-degree murder as an aider and abettor. We do not agree.

A challenge to the sufficiency of the evidence to support a criminal conviction requires the appellate court to assess the evidence "in the light most favorable to the government, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact . . . ."[10] We must "deem the proof of guilt sufficient if, 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[11] The evidence need not "negate every possible inference of innocence" to meet this standard.[12]

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[10] *Gibson v. United States*, 792 A.2d 1059, 1065 (D.C. 2002) (quoting *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987)).

[11] *Rivas v. United States*, 783 A.2d 125, 134 (D.C. 2001) (en banc) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)).

[12] *Timberlake v. United States*, 758 A.2d 978, 980 (D.C. 2000) (abrogated on other grounds).

Second-degree murder is a killing done with "malice aforethought,"[13] a term meaning "either specific intent to kill or inflict serious bodily harm, or a conscious disregard of the risk of death or serious bodily injury."[14] Our aiding-and-abetting statute provides that "[i]n prosecutions for any criminal offense, all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals . . . ."[15] For such criminal liability to attach, of course, the encouragement or aid must be deliberate, not accidental: "In order to aid and abet another to commit a crime[,] it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed."[16] Where a particular *mens rea* is an element of the offense, the defendant must have had that *mens rea* himself to be guilty of aiding and abetting that offense.[17]

To prove that Yates encouraged or aided the commission of Hendy's murder with malice aforethought,

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[13] D.C. Code § 22-2103 (2012 Repl.).

[14] *Coleman v. United States*, 948 A.2d 534, 550 (D.C. 2008).

[15] *See* D.C. Code § 22-1805 (2012 Repl.).

[16] *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949) (internal quotation omitted); *accord Wilson-Bey v. United States*, 903 A.2d 818, 840 (D.C. 2006) (en banc) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)).

[17] *Coleman*, 948 A.2d at 552; *see also Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006); *Wilson-Bey*, 903 A.2d at 838 ("[I]t is particularly inappropriate to permit the conviction of an aider or abettor upon a lesser showing of criminal intent than is required vis-à-vis a principal when the defendants are being prosecuted for homicide.").

the government relied primarily on the account of Yates's words and actions provided in the testimony of Kenneth Buchanan and Ebony House, together with the corroboration supplied by Orlando Smith and the security camera footage. If the jury credited that evidence, as was its prerogative, it could have found Yates aided and abetted Hendy's murder for the following reasons.

First, crediting Buchanan, the jury could have found that he drove Yates along with Walker and Carraway to the scene of Hendy's murder; that Yates asked about the ammunition in the car; that Yates was on the lookout for Hendy and pointed out Hendy's van to his companions; that when Buchanan inquired, Yates told him "not to worry" whose van it was; that upon arriving at Southern Avenue Yates helped direct Buchanan where to go; and that Yates then said to Walker and Carraway, "Let's suit up." From this evidence alone, the jury reasonably could infer that Yates encouraged his companions in their venture to find and attack Hendy, expressly associated himself with that venture, and aided the mission by lending his support, helping to locate Hendy, directing Buchanan where to take them, and keeping Buchanan in the dark about their aims.

Second, though Buchanan's testimony by itself permitted the jury to draw the reasonable inference that Yates shared the *mens rea* required to find him guilty of second-degree murder while armed, further powerful evidence of Yates's knowledge and intent was furnished by House. According to her, Walker said that Yates continued to pursue Hendy with him and Carraway *after* Walker said "somebody gonna die today," *after* Walker gave his gun and ammunition to Carraway, *after* Carraway loaded the gun, and *after* the

group found Hendy and Carraway declared that he was "about to do it."[18] That Yates demonstrably knew his companions planned a murderous attack on Hendy and never withdrew or disassociated himself from it, but instead stayed with them from start to finish, was itself "sufficient to establish implied approval, and hence aiding and abetting."[19]

Third, the evidence of Yates's conduct on Southern Avenue showed that he did not behave like an "innocent bystander."[20] His association there with Walker and Carraway went well beyond mere presence at the scene of the murder to provide concrete aid as well as tacit encouragement. Specifically, the testimony and surveillance footage allowed the jury to find that Yates stalked Hendy with Walker and Carraway; that Yates helped keep Hendy under surveillance and waited with his friends for Hendy to leave the area where his shoot-

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[18] House testified that Walker told her the conversation in which he said "somebody gonna die today" took place on Southern Avenue. If so, Walker presumably had not yet made this pronouncement when, in the car on the way to Southern Avenue, Yates pointed out Hendy's van and called upon Walker and Carraway to "suit up" with him. In closing argument, however, the prosecutor urged the jury to infer that Walker actually made the statement earlier, when (per Buchanan) he met up with Yates and Carraway on 10th Place. As we discuss below, Yates and Walker contend that this inference was unwarranted and that the argument was improper. Although we conclude otherwise, we do not rely on the inference urged by the government in our sufficiency analysis.

[19] *Johnson v. United States*, 883 A.2d 135, 143 (D.C. 2005); *see also, e.g.*, *Settles v. United States*, 522 A.2d 348, 358 (D.C. 1987) ("[T]he jury could find that by not availing himself of opportunities to withdraw from the scene, he gave his tacit approval and encouragement to what [the principal actor] was doing.").

[20] *Creek v. United States*, 324 A.2d 688, 689 (D.C. 1974).

ing would be caught on camera; that Yates joined Walker and Carraway in pursuing Hendy when he tried to walk away from them; that Yates maintained this pursuit up until Carraway shot Hendy in the back; and that Yates then fled with Walker and Carraway to the safety of Orlando Smith's apartment. The jury readily could infer that Yates's participation not only fortified his accomplices' resolve to proceed with the murder but also helped them to accomplish it by reinforcing their power over Hendy and making it harder for him to defend himself, obtain assistance, or escape.[21]

For these reasons, we hold that the evidence was sufficient to sustain Yates's conviction for second-degree murder while armed.

B. Withholding of Exculpatory Evidence

Yates was convicted for having been an accessory after the fact ("AAF") to murder based on the evidence that he sheltered Carraway and helped him hide from the police at his family's home in North Carolina following Hendy's murder. Yates's defense to this charge was that he did not intend to hinder or prevent Carraway's arrest; to the contrary, it was Yates who enabled the police to obtain the arrest warrant for Carraway by identifying him as Hendy's assailant to Detective

[21] *See Bailey v. United States*, 416 F.2d 1110, 1113-14 (D.C. Cir. 1969) ("Presence is thus equated to aiding and abetting when it is shown that it designedly encourages the perpetrator, facilitates the unlawful deed—as when the accused acts as a lookout—or where it stimulates others to render assistance to the criminal act.") (footnotes omitted); *Johnson*, 883 A.2d at 142 (same); *see also Gayden v. United States*, 584 A.2d 578, 583 (D.C. 1990) ("[T]raveling with a principal to the scene of a crime, remaining at the scene during commission of the crime and fleeing with the principal are sufficient facts to underpin a conviction for aiding and abetting.").

Cephas.[22] That Yates might have secreted Carraway in North Carolina for a different reason, namely, to protect him from the revenge of Hendy's friends, was indicated, arguably, by the evidence that Yates consulted an attorney, Samuel Hamilton, regarding his concerns about retaliation.

Yates asks us to set aside his AAF conviction and grant him a new trial on the charge because, he claims, the prosecution withheld from him evidence materially favorable to his defense to the AAF charge in violation of his right to due process as set forth in *Brady v. Maryland*.[23] Favorable evidence is deemed to be withheld if the prosecution fails to disclose it "in time for the defense to be able to use it effectively, not only in the presentation of its case, but also in its trial preparation."[24] For this reason, deferring the disclosure of

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[22] AAF is a common-law crime codified in D.C. Code § 22-1806 (2012 Repl.). *See Heard v. United States*, 686 A.2d 1026, 1029-30 (D.C. 1996). "The elements of accessory after the fact to first [or second] degree murder while armed are: (1) that the offense of first [or second] degree murder while armed had been committed, (2) that the defendant knew that this offense had been committed, (3) that, knowing that this offense had been committed, the defendant provided assistance to the person who committed it, and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial, or punishment." *Jones v. United States*, 716 A.2d 160, 163 (D.C. 1998); *see also United States v. Barlow*, 470 F.2d 1245, 1252-53 (D.C. Cir. 1972) ("The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime. Evidence of this offense is most frequently found in acts which harbor, protect and conceal the individual criminal such as by driving him away after he commits a murder.").

[23] 373 U.S. 83, 87 (1968).

[24] *Miller v. United States*, 14 A.3d 1094, 1111 (D.C. 2011).

Brady evidence until the trial is under way or about to start is risky at best and "is not compatible with the Constitution, with our case law, or with applicable professional standards."[25]

Favorable evidence is material within the meaning of *Brady* if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[26] The defendant must show that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"[27]; and "where disclosure was made but made late, the defendant must show a reasonable probability that an earlier disclosure would have changed the trial's result and not just that the evidence was material."[28]

"[W]hether a defendant has established a violation by the government of its obligations under *Brady* presents a mixed question of fact and law."[29] We review

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[25] *Id.* at 1108.

[26] *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

[27] *Turner v. United States*, 116 A.3d 894, 913 (D.C. 2015), *aff'd*, 137 S. Ct. 1885 (2017) (quoting *Miller*, 14 A.3d at 1115, and *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

[28] *United States v. Andrews*, 532 F.3d 900, 907 (D.C. Cir. 2008) (internal quotation marks omitted); *see also, e.g.*, *Zanders v. United States*, 999 A.2d 149, 164 (D.C. 2010) ("Notwithstanding the incomplete and late disclosures in this case, we must conclude that reversal is not warranted because appellant has not met his burden of demonstrating that there was a reasonable probability that, had the evidence been disclosed earlier, the result of the proceeding would have been different.") (internal brackets and quotation marks omitted).

[29] *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011) (internal quotation marks omitted).

the trial court's factual conclusions under the clearly erroneous standard, but we review legal conclusions *de novo*.[30] Materiality "is, in the end, a legal conclusion."[31]

The evidence that Yates claims the government withheld was grand jury testimony in which (1) Ebony House said Walker told her the person who drove Carraway to North Carolina was someone other than Yates, and (2) Carraway's mother said she heard Yates urge Carraway to surrender to the police.

1. Ebony House's Grand Jury Testimony

The night before House testified at trial, the government provided her grand jury testimony to the defense in compliance with its obligation under the *Jencks* Act and Criminal Rule 26.2 to turn over statements of its witnesses.[32] The next morning, Yates moved for a dismissal with prejudice or, alternatively, a mistrial based on the government's untimely disclosure of *Brady* evidence. House testified in the grand jury that she had asked Walker how Carraway got down to North Carolina, and that Walker said a friend of his who lived there picked Carraway up in Virginia and drove him down. House testified that she did not know the friend's name. Yates argued that this testimony had been disclosed too late for him to investigate or make effective use of it at trial, and that it was materially exculpatory because it conflicted with the prosecution's theory, as set forth in the government's opening

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[30] *Id.*

[31] *Turner*, 116 A.3d at 915.

[32] *See* Super. Ct. Crim. R. 26.2; 18 U.S.C. § 3500 (2017). "Disclosure in accordance with the *Jencks* Act … is not seasonable disclosure as required by *Brady*." *Miller*, 14 A.3d at 1114.

statement, that Yates himself drove Carraway to North Carolina.[33] In response, the prosecutor stated that the government would not introduce any evidence as to who actually drove the vehicle in which Carraway traveled to North Carolina, and that Yates's AAF liability was based simply on the evidence of his having sheltered Carraway from the police in North Carolina regardless of who drove Carraway there.[34] The prosecutor added that the government had no information as to the identity of the friend Walker mentioned to House.

After further discussions with the trial court, and with the permission of Walker's defense counsel, Yates's counsel was able to interview Walker himself about who drove Carraway to North Carolina. Yates's counsel reported back to the court that Walker was "not helpful"—he said he did not know who went with Carraway to North Carolina.[35] The court then asked the prosecutor to disclose what Carraway, who did not testify at trial, had said about how he got to North Carolina when the government debriefed him in connection with his guilty plea. Reading out loud from her notes of the debriefing, the prosecutor reported that Carraway

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[33] In her opening statement, the prosecutor said, "And knowing that the police were hot on Meeko Carraway's trail, Walker and Yates drove him to North Carolina to help him escape capture."

[34] The AAF count of the indictment did not charge Yates with having driven Carraway to North Carolina, but rather with having assisted him to evade arrest "by … traveling to and staying in North Carolina … ."

[35] Walker denied going to North Carolina himself; nor would he say Yates did *not* accompany Carraway.

said he and Yates stole a blue van from Maryland in which Yates drove him to North Carolina.[36]

Apart from its opening statement, the government presented no evidence or argument that Yates personally drove Carraway to North Carolina. Even after having received House's grand jury testimony, Yates did not ask her at trial to repeat what Walker told her about the identity of the driver.[37] At the hearing on Yates's new trial motion a few months later, his counsel explained that he did not seek to elicit testimony at trial from House about Walker's statement because of concern that the jury would "penalize" the defense for raising expectations it then could not satisfy with proof that the "mysterious third party" actually existed.[38]

The trial court denied Yates's *Brady* motion for lack of reason to believe the government's delay in disclosing House's grand jury testimony had resulted in the suppression of any material evidence. In reaffirming this ruling when it ruled on Yates's motion for a new trial, that court noted that even with the additional

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[36] In addition, as the government disclosed at the subsequent hearing on Yates's new trial motion, Carraway's mother testified in the grand jury that Carraway told her "Jack [Walker] and Corey [Yates] took him to North Carolina, where he stayed at Corey's grandmother's house" following Hendy's murder.

[37] Walker's statement to House about the driver was hearsay, and whether it would have been admissible in evidence at trial is not clear to us. Although much of what Walker told House was admitted under the exception for statements against penal interest, the parties have not addressed whether this particular statement fell within that exception.

[38] The government suggests that Yates's failure to ask House about Walker's statement regarding the driver is a strong indication that the statement was immaterial.

time to investigate, Yates still had no evidence substantiating the existence of "this third party" who might have been the driver.

Even if Walker's statement itself was inadmissible, it potentially might have led to the discovery of admissible evidence verifying it. On the premise that such theoretically obtainable evidence could have been at least somewhat favorable to Yates's defense, we agree with Yates that the government should not have waited until trial to reveal it to him.[39] Nevertheless, we agree with the trial court that the belated disclosure did not result in a *Brady* violation, for Yates has not met his burden of showing a reasonable probability that earlier revelation of the information would have resulted in a different verdict.

So far as appears, Walker's statement about the driver could not be verified or even corroborated; instead, Yates learned that Carraway flatly contradicted it and Walker himself recanted it (assuming he actually did say it in the first place, as House reported).[40] Yates's counsel argued to the trial court that if he had

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[39] *See Turner*, 116 A.3d at 921 n.76; *see also Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003) ("The circuits are split on whether a petitioner can have a viable *Brady* claim if the withheld evidence itself is inadmissible. Most circuits addressing the issue have said yes if the withheld evidence would have led directly to material admissible evidence. … [G]iven the policy underlying *Brady*, we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.") (emphasis in original).

[40] *Cf. Zanders*, 999 A.2d at 164 (finding no *Brady* violation in late disclosure of witness's exculpatory statement to police where the statement was uncorroborated and the witness "completely recanted" it).

received the information earlier, he would have subpoenaed phone records or traveled to North Carolina to identify the driver. But as the trial court pointed out, Yates had the opportunity to pursue such investigation in the months following the jury's verdict, and he still could not proffer that it would have generated evidence helpful to him at trial. To this day, Yates has "identif[ied] no evidence that [he] was unable to present or any argument that he was precluded from making as a result of the tardy disclosure."[41] There is thus no reason to think earlier disclosure of Walker's statement would have enabled Yates to obtain evidence that could have helped him at trial. The "mere speculation that earlier [investigation] might have led the defense to discovery of additional exculpatory evidence is insufficient to establish a *Brady* violation."[42]

Furthermore, the information that someone other than Yates drove Carraway to North Carolina would not, by itself, have been materially exculpatory because it would not have undermined the evidence on which the government actually relied to prove that Yates helped Carraway evade arrest by hiding out in North Carolina. The government presented the uncontradicted testimony of Kathleen Wade and Shamel Prude—testimony the trial court at the post-trial hearing described as "very, very powerful," "extremely powerful," and "extremely credible"—that Yates did in fact go with Carraway and Walker to his family's home in Seaboard, North Carolina on September 29, 2010. In other words, regardless of who did the driving, the government proved that Yates was along for the ride.

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[41] *United States v. Straker*, 800 F.3d 570, 605 (D.C. Cir. 2015).

[42] *Mackabee*, 29 A.3d at 961 (citing *United States v. Agurs*, 427 U.S. 97, 109-10 (1976)).

Even if he had presented evidence that someone else drove Carraway to North Carolina, therefore, we see no reasonable probability that it would have changed the outcome of the trial. We are confident the jury still would have convicted Yates of being an accessory after the fact to murder.

2. W-10's Grand Jury Testimony

After trial, the government informed Yates about the grand jury testimony of "W-10," who was Carraway's mother, and who had not been a witness at trial. In the grand jury, W-10 testified to having overheard Yates urge Carraway to surrender to the police. The government provided the following information:

> On June 24, 2011, W-10 testified in the grand jury that on October 12, 2010, Carraway came to W-10's place of work to speak with W-10. W-10 told Carraway they should talk outside. When they stepped outside, W-10 saw Walker and Yates. They were in a van .... Carraway told W-10 that Carraway was in some trouble and was going to turn himself in (ostensibly to police) but would not tell W-10 any details. Walker was quiet and appeared to be rushing Carraway. Yates appeared agitated and also rushing. Yates kept saying, "We need to go, if you're going to do this, you need to go now before you decide not to do it. You said you were going to turn yourself in today, let's go."[43]

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[43] In its transmittal letter, the government explained that it "came across" this information in the course of reviewing its files in response to Yates's motion for a new trial and was disclosing it "in an abundance of caution" because it recognized that Yates might seek to rely on W-10's grand jury testimony to "demonstrate his lack of intent to help Carraway evade arrest on Septem-

At the hearing on Yates's new trial motion, the government disclosed W-10's additional grand jury testimony that after this conversation about Carraway's turning himself in, W-10 called Yates and asked him what her son was turning himself in for.[44] According to W-10, Yates said, "Ma, I don't want to talk about it over the phone; I'll meet you at the house," but then he never showed up and she never saw him again.[45]

Yates argued that the government's failure to disclose W-10's grand jury testimony before trial violated *Brady* because her testimony showed that his intent was not to shield Carraway from arrest but rather to encourage him to surrender. The trial court acknowledged that W-10's testimony might have been admissible for this purpose but disagreed that there had been a *Brady* due process violation for two reasons: First, because W-10 was with Yates when he urged Carraway to turn himself in, Yates already knew she could testify to that fact, so the government did not suppress her favorable evidence. Second, even if Yates had presented W-10's testimony at trial, the court was "absolutely convinced" there was no reasonable probability that it would have changed the outcome of the trial.

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ber 30, 2010." The letter went on to explain that the government did not consider the nondisclosure of W-10's testimony to be a *Brady* violation, because the information was not unknown to appellant and because there was no reasonable probability that it would have altered the verdict. In support of the latter reason, the letter cited the fact that "[t]he jury convicted Yates of accessory-after-the-fact even though he put on evidence designed to show that he wanted to cooperate with police after the murder."

[44] As previously mentioned, Carraway did, in fact, turn himself in to the police on October 12, 2010.

[45] W-10 explained that although she was not Yates's mother, he called her "Ma" because of their close relationship.

We agree with the first reason and find it unnecessary to address the second. It is well-settled that "*Brady* only requires disclosure of information unknown to the defendant."[46] Thus, "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself."[47] Yates does not claim to have been unaware that W-10 was present and heard him urge Carraway to surrender, nor does he claim to have been unable to secure W-10's testimony to that effect at trial. The only thing Yates claims not to have known is that W-10 told the grand jury what he already knew she could say. But as Yates's ignorance of the government's possession of W-10's grand jury testimony did not prevent him from presenting the same exculpatory information from the same witness at trial, we fail to perceive a *Brady* violation in the nondisclosure.

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[46] *United States v. Derr*, 990 F.2d 1330, 1335 (D.C. Cir. 1993), *overruled on other grounds by United States v. Bailey*, 36 F.3d 106 (D.C. Cir. 1994) (citing *Agurs*, 427 U.S. at 103); *see also, e.g.*, *Coleman v. Mitchell*, 268 F.3d 417, 438 (6th Cir. 2001) ("The *Brady* rule does not assist a defendant who is aware of essential facts that would allow him to take advantage of the exculpatory evidence at issue."); *United States v. LeRoy*, 687 F.2d 610, 618 (2d Cir. 1982) ("Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence. As a result, the Government is not required to disclose grand jury testimony to a defendant who is "on notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that he might furnish.") (internal citations and quotation marks omitted).

[47] *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984) (quoting *United States v. Campagnuolo*, 592 F.2d 852, 861 (5th Cir. 1979)).

C. Rulings on the Admission of Evidence

1. The Admission Against Yates of Walker's Statements to House Under the Hearsay Exception for Declarations Against Penal Interest

Over Yates's objection, the trial court allowed Ebony House to testify to what Walker told her about Hendy's murder. Yates contends the court erred in finding that the inculpatory statements House attributed to Walker were admissible under the declaration-against-penal-interest exception to the rule against hearsay.

To determine whether a statement fits within the exception for declarations against penal interest, a trial court must "undertake a three-step inquiry to ascertain (1) whether the declarant, in fact, made a statement; (2) whether the declarant is unavailable; and (3) whether corroborating circumstances clearly indicate the trustworthiness of the statement."[48] Yates concedes that Walker, the declarant in this case, was unavailable to testify,[49] but he asserts that the court could not properly find the other requirements to have been met.

In determining whether a declarant in fact made the declaration claimed to be against his penal interest (the first step of the inquiry), the trial court must "focus … on the veracity of the witness who repeats the

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[48] *Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979) (en banc).

[49] *See Thomas v. United States*, 978 A.2d 1211, 1228 n.42 (D.C. 2009) ("[I]f the declarant is a co-defendant in a criminal trial in which the government seeks to introduce his statement in its case-in-chief, the unavailability requirement is satisfied because the government cannot call him to the witness stand, even though the co-defendant might later elect to testify in his defense.").

declaration" and consider, where appropriate, the witness's "general credibility" and any "interest, bias, and … possible motive for fabrication."[50] In determining whether the declaration is trustworthy (the third step), relevant considerations include: "(1) the timing of the declaration; (2) to whom the statement was made; (3) the existence of corroborating evidence in the case; and (4) the extent to which the declaration is really against the declarant's interest."[51] Although the conclusion that a statement is against the declarant's penal interest is "clearly a legal question,"[52] whether the declaration in fact was made and whether it is trustworthy are otherwise essentially factual determinations to which a reviewing court must defer unless they are clearly erroneous.[53] "The 'clearly erroneous' standard precludes the appellate court from setting aside a trial court's finding of fact unless the 'judgment is plainly wrong or without evidence to support it.'"[54]

As to the first step of the inquiry, while Yates admits Walker spoke to House, he disputes that Walker

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[50] *Laumer*, 409 A.2d at 199. *Laumer*'s requirement that the trial judge assess the credibility of the witness reporting an out-of-court declaration against penal interest has been questioned on the ground that witness credibility is presumptively for the jury to determine, but we have held that it "remains good law" in this jurisdiction. *McCorkle v. United States*, 100 A.3d 116, 122 (D.C. 2014).

[51] *Ingram v. United States*, 976 A.2d 180, 188 (D.C. 2009) (internal quotation marks omitted); *see also Laumer*, 409 A.2d at 200-03.

[52] *Laumer*, 409 A.2d at 203.

[53] *See id.*; *see also Ingram*, 976 A.2d at 187.

[54] *Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (en banc) (quoting D.C. Code § 17-305 (a)).

in fact told her many of the specific incriminating details to which she testified at trial. Yates notes that House did not initially tell law enforcement about such details as Walker's "somebody gonna die today" remark to Yates and Carraway. He claims House embellished her account of Walker's statement because the government threatened her with a perjury prosecution for withholding information from the grand jury, and because she admittedly was afraid for her own safety and feared (as she told the grand jury) that "if he [Walker] don't get charged for this stuff, at the end of the day, it will fall back on me." As to the third step of the inquiry, although Yates does not deny that the inculpatory admissions House attributed to Walker were indeed against Walker's penal interest, he challenges their trustworthiness on the grounds that the two-month lapse of time between the shooting and when Walker spoke to House diminished the reliability of his account to her, and that key parts of Walker's statement (for example, the "somebody gonna die today" remark) were not corroborated.

Yates raised concerns about House's credibility and the trustworthiness of Walker's statement in a pretrial motion seeking severance of his trial from that of Walker.[55] He did not request specific findings on those issues, though, and the trial court did not make findings with respect to them when it denied severance and ruled that Walker's statement was a declaration

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[55] In connection with that motion, however, Yates mainly argued that Walker's references to him were not really against Walker's penal interest (and hence could not be admitted against Yates under the penal interest exception). *See generally Williamson v. United States*, 512 U.S. 594, 599-600 (1994); *Thomas*, 978 A.2d at 1228-29. Yates does not pursue this argument on appeal.

against penal interest. Nor, thereafter, did Yates request the court to make findings on House's credibility or the trustworthiness of Walker's statement when the issue came up again at trial and the court permitted House to testify to Walker's admissions.[56] Despite the absence of explicit findings (about which Yates does not complain; he agrees the court made the findings implicitly), we cannot conclude that the court's implicit determinations of House's credibility and the trustworthiness of Walker's inculpatory statements are clearly erroneous.

The implicit determination that House was credible in recounting what Walker told her is not clearly erroneous merely because, as she admitted in her trial testimony, she "didn't tell the whole story" to the grand jury at first. House explained that she was "still with" Walker then, and that she loved him. By the time she testified at trial, the two were no longer dating. When asked then how she felt about him, House testified that "I don't have nothing against him. I don't really too much care. I moved on with my life." As for House's intimation in the grand jury of fear for her safety if Walker did not "get charged for this stuff," she made that statement in explaining why she had not answered Walker truthfully when he asked her what she was telling the grand jury. Given that context, we readily understand why the trial court did not view House's remark as evincing a disqualifying bias or motive to fabricate. As a rule, a trial judge's witness credibility de-

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[56] Although Yates preserved his hearsay objection to House's testimony at trial, he declined the court's express invitation to augment his argument against the applicability of the penal interest exception.

terminations are "virtually unreviewable,"[57] and "[w]e will not redetermine the credibility of witnesses where … the trial court had the opportunity to observe their demeanor and form a conclusion."[58] We would not be justified in deviating from that principle of deference here.

We likewise are satisfied that the trial court did not err—and certainly did not clearly err—in finding Walker's account sufficiently corroborated and trustworthy to be admissible under the penal interest exception. It is true that two months passed between the shooting and Walker's account of it to House. We appreciate that statements made months after a crime may be "too attenuated and remote to provide assurance of reliability."[59] But "the mere fact that the declaration was made after a lapse of time does not *in and of itself* render the statement unreliable."[60] In our view, other factors weigh clearly in favor of a finding of overall reliability in this case. Walker made the statement in private to his girlfriend at the time, someone he evidently trusted to keep his secrets; "[i]n that setting, in contrast to, for example, a custodial interrogation by police, he had no apparent motive to lie, exaggerate, curry

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[57] (*Terri*) *Jenkins v. United States*, 902 A.2d 79, 87 n.12 (D.C. 2006).

[58] *Lazo v. United States*, 54 A.3d 1221, 1230 (D.C. 2012) (internal quotation marks omitted).

[59] *Gilchrist v. United States*, 954 A.2d 1006, 1015 (D.C. 2008) (quoting *Laumer*, 409 A.2d at 201) (upholding the trial court's finding of untrustworthiness where, among other things indicative of unreliability, the declarant's statement was made five years after the murder in question).

[60] *Laumer*, 409 A.2d at 201 (emphasis in original).

favor or shade the truth" about Hendy's shooting.[61] He unambiguously incriminated himself and two of his closest friends in a premeditated murder, admitting that he supplied the gun and ammunition to commit it. On the major points, his account was amply corroborated by other evidence at trial—most notably, the testimony of Kenneth Buchanan and Orlando Smith and the surveillance video showing how Walker, Yates, and Carraway tracked Hendy up until the moment of the shooting. The corroboration was not total—as Yates points out, some important details (such as Walker's admission that he told Yates and Carraway "somebody gonna die today") were not corroborated; moreover, Walker's account of meeting up with Yates and Carraway at 800 Southern Avenue was contrary to Buchanan's testimony that they met up at 10th Place. But neither total corroboration nor an absence of conflicting evidence is required. In our view, the lack of confirmation of some details is not enough to detract from the demonstrated overall trustworthiness of Walker's statement, let alone to render the trial court's implicit finding of trustworthiness clearly erroneous.

2. The Admission of Buchanan's Understanding of Yates's Remark, "Let's suit up"

Over defense objection, the trial court allowed Buchanan to testify that he understood Yates's remark, "Let's suit up," to convey his intent "to do bodily harm to somebody." Appellants argue that the court abused its discretion in admitting this lay opinion. We do not agree.

The non-expert opinion testimony of a lay witness is admissible in evidence if it is rationally based on the

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[61] *Thomas*, 978 A.2d at 1230.

witness's personal observations and would be helpful to the trier of fact in understanding the witness's testimony or a fact in issue.[62] In accordance with that rule, we have held that "[a] lay witness with personal knowledge about particular slang properly may testify to its meaning."[63] "[W]hen 'the reasoning process … employed to interpret the street language was the everyday process of language acquisition' as opposed to 'special training or scientific or other specialized or professional knowledge,' opinion testimony explaining such language does not veer impermissibly into expert testimony."[64]

The criteria for admission were satisfied here. Buchanan had just taken Walker to obtain handgun ammunition and then to meet up with Yates and Carraway. Yates asked about the bullets, pointed out a van, and refused to tell Buchanan what was going on while Walker stated they were looking for someone.

Next, Buchanan heard Yates say, "Let's suit up." It was in light of those observations that Buchanan said he "took it to mean to do bodily harm to somebody." Buchanan did not rely on any special training or knowledge to interpret Yates's utterance in that way;

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[62] *Gee v. United States*, 54 A.3d 1249, 1261 (D.C. 2012).

[63] (*Emanuel*) *Jenkins v. United States*, 80 A.3d 978, 1000 (D.C. 2013) (upholding admission of lay opinion testimony about slang used in jail calls, such as that the phrase "off the water" referred to smoking or being addicted to PCP); *see also King v. United States*, 74 A.3d 678, 680-83 (D.C. 2013) (upholding admission of police officers' lay opinion testimony as to the meaning of "street lingo," such as that "bagging somebody" means "robbing them, getting their stash").

[64] (*Emanuel*) *Jenkins*, 80 A.3d at 1000 (quoting *King*, 74 A.3d at 682-83).

his understanding simply reflected his personal familiarity with the slang in the context in which he heard the words spoken. The ominous meaning Buchanan attached to Yates's expression was pertinent to the jury's fact-finding task, for if Buchanan's understanding was correct, the words were indicative of Yates's culpable intent. Moreover, Buchanan's understanding explained his own subsequent actions—why he felt frightened and declared, "Y'all ain't about to do nothing crazy, because if you is, get out the car."

Appellants may be correct that the jury surely understood Yates's remark without Buchanan's interpretation. In closing argument, the prosecutor argued that "there's really only one obvious, common sense thing that 'let's go suit up' could mean under these circumstances[:] Let's go load the gun and let's get to killing." If that meaning of "Let's suit up" was obvious to the jury, Buchanan's explanation was at worst superfluous, but not a reason to reverse appellants' convictions. But even if the remark was susceptible to a more benign interpretation, a trial court's decision to admit lay opinion testimony "will not be overturned unless it constitutes a clear abuse of discretion."[65] The court did not abuse its discretion here.

3. Admission of Testimony That Unknown Persons Had Implicated Walker in Hendy's Murder

Walker contends the trial court erred in instructing the jury it could consider hearsay linking him to Hendy's murder, albeit only for a limited, non-hearsay purpose. We conclude that Walker forfeited this claim at trial and has not shown plain error entitling him to relief on appeal.

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[65] *Gee*, 54 A.3d at 1261 (internal quotation marks omitted).

When Officer Corcoran testified about encountering Walker "straddling the balcony" of an 11th floor apartment during a building-wide search for the suspects in Hendy's shooting, the prosecutor asked him who he was looking for at that time and what description he had been given of that suspect. Without objection, Officer Corcoran testified that he was looking for a suspect named "Kojak" (Walker's nickname) who had been described as "a black male with long hair, medium complected," no shirt, and "800 Southern" tattooed on his chest. The trial court interrupted the testimony and called counsel to the bench. In the ensuing colloquy, though neither Walker nor Yates objected to the testimony, the court ruled that a hearsay description from unknown persons was not admissible as evidence of Walker's complicity in Hendy's murder. The court accordingly barred the government from eliciting further testimony about the suspect's description or asking Officer Corcoran whether Walker met the description.

The government argued, however, that the hearsay description the jury had heard was admissible for a non-hearsay purpose related to the APO count against Walker for resisting his arrest, namely to show the reasonableness of Officer Corcoran's detention and handcuffing of Walker. Neither Walker nor Yates disagreed with this rationale for limited admission; nor did they at any point ask the court to strike Officer Corcoran's testimony about the suspect's description or instruct the jury to disregard it in its entirety. With appellants' consent, the court therefore instructed the jury that it could consider the description Officer Corcoran had received only in connection with the APO charge as evidence of the reason for the officer's actions, but not as substantive identification evidence with respect to the

homicide charge.[66] No party objected to this instruction or questioned its adequacy. Thereafter, the court

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[66] The court gave two limiting instructions. Immediately following its colloquy with counsel about Officer Corcoran's testimony, the court instructed the jury:

> Now, ladies and gentlemen, these descriptions have nothing to do with the shooting. They just are the reasons why the officer was looking for a particular person. So do not use them in any way to say that this—was anybody given the description of the shooter. So strike that part from it. You can say that's the reason that he's looking for a particular person. But that does not show when someone says: Well, this person went this way, this person that way. That should not be used for substance of identification of what happened with regard to the homicide.

At the conclusion of the government's direct examination of Officer Corcoran, the court re-instructed the jury on the matter as follows:

> Ladies and gentlemen, I just want the record to be clear in the case here. When they say that he was looking for somebody, that information is only given to you to indicate a state of mind why he was doing this. There is a charge in the indictment of assault on a police officer, resisting arrest. So that would be a charge that you're going to consider.
>
> But with regard to the homicide charge, and to say people said, "Look for this guy," it has nothing to do with that. Do not use it in that way because those people are not here or anything like that. That's just somebody they stopped and why he is stopping the person. That's the extent to use that. Do you all understand that?
>
> [The transcript here states: "Jury respond in kind."]
>
> All right. That's the only reason we brought it up. Other than that it wouldn't be brought up because someone said: Oh, that guy went there. That guy went there. Go look for him. That's not evidence of itself, that they saw

allowed Walker's counsel to obtain Officer Corcoran's acknowledgement on cross-examination that the person who provided the suspect's description was "[n]ot [someone] that actually saw him do the shooting." Although this too was hearsay, the court allowed the testimony, over the government's objection, on a curative admissibility rationale. Walker did not request any other remedial measure. Thereafter, the description that Officer Corcoran received was not mentioned again at trial; the prosecutor did not allude to it in the government's closing and rebuttal arguments.

Walker argues that the trial court erred in allowing the jury to consider a hearsay description implicating him in Hendy's murder even though only for a non-hearsay purpose. The admission of this highly damaging evidence served no legitimate purpose, Walker contends, because the reason Officer Corcoran arrested and forcibly restrained him was not relevant or at issue in the trial. The government disagrees. It argues that Officer Corcoran's knowledge of a description justifying his detention and forcible restraint of Walker as a murder suspect was indeed relevant, for non-hearsay reasons, to two components of the APO charge against Walker: (1) whether Walker's conduct was "directed against an officer's performance in the line of duty,"[67]

> something and they're making identification, because it says why am I there doing this.

In its instructions at the close of trial, the court reminded the jury, "When I've instructed you to consider certain evidence only for limited purpose such as to determine credibility, you may only consider it for that limited purpose."

[67] *In re C.L.D.*, 739 A.2d 353, 357 (D.C. 1999). The APO statute in effect at the time of the offenses in this case does not use the words "line of duty"; it is directed at interference with a law enforcement officer "engaged in the performance of his or her offi-

and (2) whether Officer Corcoran used reasonable rather than excessive force in effectuating Walker's arrest.[68]

Because he did not object at trial to admission of the hearsay description for the non-hearsay purpose of explaining Officer Corcoran's actions, or to the adequacy of the limiting instructions to cabin the jury's consideration of the description to that purpose, Walker's claim of error is subject to "the rigors of plain error review."[69] As this court has said, "[t]he defendant's burden in plain error cases is, and should be, a formidable one; we will reverse a conviction for error not complained of below only in an extreme situation in which the defendant's substantial rights were so clearly prejudiced that the very fairness and integrity of the trial

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cial duties." D.C. Code § 22-405 (b) (2012 Repl.). The trial court instructed the jury that, in order to convict of APO, it would have to find Officer Corcoran "was engaged in the performance of his official duty."

[68] The trial court instructed the jury that in deciding whether Walker acted without justification or excuse in resisting Officer Corcoran, it should consider, *inter alia*, whether the officer used more force to restrain him than "appear[ed] reasonably necessary."

[69] *Thomas v. United States*, 914 A.2d 1, 6 (D.C. 2006). If the issue before us were whether the trial court erred by permitting the jury to consider the description for its truth, i.e., despite the court's own expressed recognition that it was inadmissible hearsay, we might agree with Walker that "the appropriate standard of review is harmless error and not plain error" because then "[t]he purpose of the requirement of timely exceptions to trial errors[,] to alert the trial court and give it an opportunity to correct the error," would have been fulfilled regardless of Walker's inaction. *Chatmon v. United States*, 801 A.2d 92, 100 (D.C. 2002). But the court did not permit the jury to consider the description for its truth; it told the jury not to do so.

was jeopardized."[70] The defendant must demonstrate not merely that there was an error, but also that the error was clear or obvious—so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object. In addition, the defendant must demonstrate that the error affected his substantial rights by showing a reasonable probability that it had a prejudicial effect on the outcome of his trial. Lastly, even if the defendant succeeds in those demonstrations, he also must show that the error seriously affected the fairness, integrity or public reputation of the judicial proceeding.[71]

It suffices to say that we think Walker has shown neither clear error nor a reasonable probability of prejudice. We take Walker's point that otherwise inadmissible hearsay incriminating a defendant may be admitted to provide the explanation for a police officer's actions only when the officer's actions genuinely need to be explained—in other words, only when the explanation is relevant to the issues in the case. We would be opening an unacceptably "large loophole in the hearsay rule" if we were to sanction the introduction of evidence "explaining why government agents 'did what they did' through reference to statements of absent informants" without regard for the relevance of that explanation.[72]

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[70] *Comford v. United States*, 947 A.2d 1181, 1189 (D.C. 2008) (quoting *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992)).

[71] *Comford*, 947 A.2d at 1189-90 (internal quotation marks and footnotes omitted).

[72] *United States v. Evans*, 216 F.3d 80, 86 (D.C. Cir. 2000) (holding that FBI agent's testimony that the FBI had received information that the defendant was involved in drug trafficking

Whether the description was legitimately relevant for a non-hearsay purpose in this case is certainly doubtful in our view, but we think we must recognize that the trial court had grounds to think Officer Corcoran's reason for arresting Walker might be relevant at least to the issue of the reasonableness of his use of force. "The trial court enjoys particularly broad discretion in determining the relevance of a piece of evidence because the inquiry is fact-specific and proceeds under a flexible standard."[73] The threshold is low. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.[74] Officer Corcoran's testimony—that he arrested Walker because Walker matched the description of the suspect in Hendy's murder—at least arguably satisfied this undemanding test. The evidence might not have been necessary to prove the APO charge; although the statute does not define the term "official duties," a law enforcement officer engaged in making even an unlawful arrest is deemed as a matter of law to be engaged in the performance of those duties, and the unlawfulness of the arrest by it-

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was not admissible for the non-hearsay purpose of explaining why the FBI recruited individuals to cooperate against the defendant).

[73] *Richardson v. United States*, 98 A.3d 178, 186 (D.C. 2014); *see also Riddick v. United States*, 995 A.2d 212, 216 (D.C. 2010) ("An evidentiary ruling by a trial judge on the relevancy of a particular item is a highly discretionary decision that will be upset on appeal only upon a showing of grave abuse.") (internal quotation marks and citations omitted).

[74] *See* Fed. R. Evid. 401; *see also In re L.C.*, 92 A.3d 290, 297 (D.C. 2014).

self does not justify or excuse forcible resistance.[75] But though the argument for relevance strikes us as weak, we think it was not unreasonable for the trial court to conclude that Officer Corcoran's testimony regarding the suspect's description did have some tendency to show the reasonableness of the officer's firm use of force in restraining Walker. This was not an entirely uncontested issue. Walker essentially argued in closing that he was compliant with Officer Corcoran's commands and that the officer used more force than necessary to restrain him and then overreacted to an innocuous movement on his part. We therefore find ourselves unable to say the trial court clearly erred in ruling the description testimony relevant.[76]

In any event, though, we are confident that Walker has shown no reasonable probability that introduction

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[75] *See* D.C. Code § 22-405 (d); *Dolson v. United States*, 948 A.2d 1193, 1201 (D.C. 2008); *see also Mattis v. United States*, 995 A.2d 223, 225-27 (D.C. 2010).

[76] Walker's primary challenge is to the relevance *vel non* of the description testimony, but to the extent he also argues that the testimony should have been excluded as being substantially more prejudicial than probative (under the policy set forth in Federal Rule of Evidence 403, which this court has adopted), our conclusion on plain error review would be the same. A Rule 403 claim, had it been made in the trial court, would have required the court to assess whether the probative value of the description testimony was *substantially* outweighed by the danger of what we refer to as "unfair prejudice," which "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Comford*, 947 A.2d at 1187 (internal quotation marks omitted). Rule 403 thus "tilts in favor of admitting as much relevant evidence as it is reasonable and fair to include. Under Rule 403, probative evidence should not be excluded because of crabbed notions of relevance or excessive mistrust of juries." *Id.* (internal punctuation and citations omitted).

of the description testimony had a prejudicial impact on the outcome of his trial. For one thing, the court gave repeated limiting instructions, and we "presume that a jury follows the court's instructions, absent any indication to the contrary."[77] We have stronger reasons than that, however. The evidence arrayed against Walker at trial to prove he was the instigator and one of the perpetrators of Hendy's shooting was overwhelming wholly without the description testimony. It included not only the testimony of Buchanan, House, and Smith, but also the surveillance video footage taken before and after the shooting, which showed Walker and his two accomplices pursuing Hendy and then, after the shooting, fleeing into the building at 800 Southern Avenue. The jury hardly needed a hearsay description of the suspects to know that Walker was one of them.

D. The Government's Closing Argument

Appellants' final claim is that the prosecutor prejudicially misstated the evidence in the government's initial closing argument. The comments at issue concerned when and where Walker declared to Yates and Carraway that he and House had broken up, his two friends were "all I got," and "somebody gonna die today." The prosecutor argued to the jury that Walker must have delivered this "somebody gonna die today" speech when the three men conversed out of Buchanan's hearing in the alley on 10th Place, *before* Buchanan drove them to 800 Southern Avenue—and thus *before* Yates pointed to Hendy's van and said, "Let's suit up."

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[77] (*Roscoe*) *Lewis v. United States*, 930 A.2d 1003, 1008 (D.C. 2007). Walker belatedly argues that the court's instructions were flawed and unclear, but he perceived no serious deficiencies in the trial court, and we are satisfied that the jury understood the central point, that it was not to consider the hearsay description as evidence of Walker's involvement in Hendy's shooting.

Appellants claim this was a misstatement of the evidence because the only evidence of Walker's "somebody gonna die today" remark was provided by Ebony House, and she testified that Walker told her he said it at 800 Southern Avenue, *after* Buchanan dropped him off there—and thus *after* Yates allegedly called attention to Hendy's van and called upon Walker and Carraway to "suit up."

The trial court overruled Yates's objection to the prosecutor's argument. It concluded that the jury fairly could reconcile Buchanan and House's conflicting accounts by inferring that they had testified to the same conversation and that it occurred on 10th Place. The court considered this to be a reasonable inference from the evidence. We agree with the trial court.

"It is improper for an attorney to make an argument to the jury based on facts not in evidence or not reasonably inferable from the evidence."[78] Inferences must have a "foundation in the record."[79] But the converse also holds: "In closing argument, a prosecutor may make 'reasonable comments on the evidence and may draw inferences that support the government's theory of the case' so long as those inferences are not

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[78] *Morrison v. United States*, 547 A.2d 996, 999 (D.C. 1988); *see also, e.g.*, *Anthony v. United States*, 935 A.2d 275, 284 (D.C. 2007) ("It is incumbent upon the prosecutor to take care to *ensure* that statements made in opening and closing arguments are supported by evidence introduced at trial.") (emphasis in original; internal quotation marks omitted).

[79] (*Rodney*) *Jenkins v. United States*, 80 A.3d 978, 1001 (D.C. 2013).

'unsupported by the evidence.' This is so even though the evidence may be ambiguous."[80]

The prosecutor in the present case did not simply assert her conclusion that the "somebody gonna die today" conversation occurred on 10th Place. She explained to the jury why the evidence reasonably supported that conclusion. She argued that "[c]ommon sense … tells you that's what the conversation was about" because "[t]he only way to make sense of what happened … after that … [in the] four-minute drive from Corey Yates's house to the high-rise … is if the conversation occurred at that time." In particular, the prosecutor argued, this timing explained why Yates and Walker both pointed out Hendy's van, "[b]ecause the only reason that van could have been significant to them at that time and in that moment was because they both realized they had just found someone suitable to kill. They had just found the target for Walker's rage."[81]

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[80] *Id.* (quoting (*Rodney*) *Lewis v. United States*, 996 A.2d 824, 832 (D.C. 2010)).

[81] The entire portion of the government's argument addressing the timing of Walker's "somebody gonna die today" statement was transcribed as follows:

> Mr. Buchanan or Uncle Poochie tells you that after he arrived with Walker at [house address omitted] 10th Place, SE. Walker got out of the car and went over to the side of the house where Yates and Carraway were standing and he had a conversation with them. A conversation that Mr. Buchanan could not hear. But you know what that conversation was about because Ebony House explained to you what Walker told her he said to Corey Yates and Meeko Carraway when he met up with them.

Three things should be noted about this argumentation. First, the prosecutor did not misstate any testimony—she did not claim, for example, that any witness actually had said that the "somebody gonna die today" conversation took place on 10th Place. Rather,

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> He told them about what had happened with Ebony. He told them that his relationship with Ebony had ended, that they were all he had left in the world and that somebody had to die that day.
>
> Common sense also tells you that that's what the conversation was about. Because the only way to make sense of what happened in the four minutes after that, because it's just a four minute drive from Corey Yates' house to the high-rise. The only way to make sense of what happened after that, is if that conversation occurred at that time. Because as they got—when they got back in the car, what Yates was talking about where [sic] the .9 millimeter jackets that were sitting next to him on the seat. And as they passed Darrel Hendy's van in the parking lot, Walker told Buchanan to slow down so they can get a good look and make sure that really was Darrel Hendy's van. And you know it was Darrel Hendy's van, ladies and gentlemen[,] because you've seen the pictures of where it was parked. And you know it was visible as they approached the high-rise and as they drove past it. …
>
> And as they passed that van, Yates and Walker, both said "There's the van, there it is right there." And that's a really important fact, ladies and gentlemen. Because the only reason that van could have been significant to them at that time and in that moment was because they both realized they had just found someone suitable to kill. They had just found the target for Walker's rage. They had just found the target that would allow Corey Yates to show what a true and loyal friend and servant he was to Chamontae Walker. And in case you have any doubt about what Corey Yates' intentions were when he said, "There's the van." He made them abundantly clear when moments later he said, "Let's go suit up."

the prosecutor acknowledged that to be an inference from other testimony. Second, by making the chain of inference clear, the prosecutor enabled the jurors to evaluate its persuasiveness and decide rationally for themselves whether they agreed with her conclusion. The prosecutor did not ask the jury to just rely on her say-so. Third, by exposing her reasoning as and when she did, the prosecutor enabled defense counsel to respond to it, identify its weaknesses, and defend an alternative conclusion from the evidence as to the time and place of the conversation at issue. This is how closing argument is meant to work.

In our view, moreover, the prosecutor's inference was a reasonable one. Both Buchanan and House testified about a conversation that Walker had with

Yates and Carraway on September 25, 2010. The evidence provided several reasons to conclude they were talking about the same conversation and that it took place when Buchanan said it did. First, both Buchanan and House described the conversation as occurring when and where the three men met. Although House said Walker told her their meeting was at 800 Southern Avenue, the jury reasonably could conclude she was confused or misinformed about that fact after it heard Buchanan's conflicting testimony that he was present when Walker met Yates and Carraway on 10th Place and that he personally drove all three from there to Southern Avenue.[82] Second, Buchanan overheard

[82] In rebuttal, the prosecutor plausibly argued that when Walker spoke to House, his concern was to tell her how he caused Carraway to shoot Hendy, not to enumerate "every minute detail of what happen[ed]," so "[t]he fact that Walker doesn't tell Ms. House that he drove to 10th Place where he picked up Yates and Carraway doesn't mean it didn't happen; he just isn't going through every single stop that he made."

Walker complain about House, which was consistent with House's testimony that Walker told Yates and Carraway about their breakup. Third, Buchanan said the three men walked away from him to confer out of his earshot; that behavior was understandable if they were having the disturbing conversation House recounted, in which Walker openly declared that "somebody gonna die today." And fourth, as the prosecutor emphasized, what Buchanan said the three men did in his car immediately following their encounter on 10th Place was plausibly explained by their just having had the conversation House described.

We conclude that the prosecutor did not misstate the evidence and that her argument was rationally grounded in the record.

III.

For the foregoing reasons, we affirm appellants' convictions.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
2011 CF1 14652

UNITED STATES OF AMERICA,

v.

COREY YATES,

Defendant.

November 1, 2012
2:00 p.m.
BEFORE THE HONORABLE THOMAS J. MOTLEY,
Associate Judge

* * *

P R O C E E D I N G S

[2] THE COURT: Calling the matter of the United States of America versus Corey Yates, Case No. 2011 CF1 14652. Counsel, please introduce yourself.

MS. MILLER: Good afternoon, Your Honor. Emily Miller for the United States.

MR. BRAUNSTEIN: Good afternoon, Your Honor. Todd Braunstein on behalf of the United States.

MR. THOME: Good afternoon, Your Honor. Matt Thome on behalf of Mr. Yates.

THE COURT: You may have a seat. Thank you. All right. We're here on the defendant's, Mr. Yates' motion for a judgment of acquittal or on the alternative, for a new trial. And I imagine this is also a Brady motion as well. I guess that's assumed in it, but there is a Brady contingent as well; is that correct?

MR. BRAUNSTEIN: Yes, Your Honor.

THE COURT: Okay. All right. I have a motion for a judgment of acquittal or in the alternative, for a new trial. Then I have the government's opposition. Then I have Mr. Yates' reply, and I've got the government surreply which I received today, which is a total of—

Well, ends on page 21, Ms. Miller.

And I'm happy to report that I was able to read it, although I did not take a case off the cert list because [3] I was reading it. There was one there, so I couldn't have finished it by the time I had to take this hearing.

All right. I think I understand the issues, and I guess we'll—some of them go to both the motion for judgment of acquittal or in the alternative, for a motion for a new trial. And I guess the first issue has to do with the government's timeline on when statements were made. And I guess my first question is: The government did not misrepresent the timeline, did it?

Mr. Braunstein, the government does not misrepresent the timeline?

MR. BRAUNSTEIN: I believe they did, Your Honor, in the sense that—

THE COURT: Well, I mean they didn't tell the jury: She said this happened on 10th place, did she, 10th Place, Southeast, Washington, D.C.?

MR. BRAUNSTEIN: What—what they said is—I don't have the exact quote in front of me, but what they said was that before Corey Yates said, "Suit up," when they had the private meeting at 10th Place, that that's when Mr. Walker made the comment.

THE COURT: Right. But it wasn't that—it wasn't that Ms. House said that. She's taking Mrs. House's statement and saying that's when that conversation took place.

* * *

[123] THE COURT: Ms. Miller, we're running out of time. I'm going to let you finish this up on Monday, but let me just ask one question. This was a disclosure that you gave them after the trial?

MS. MILLER: Yes, Your Honor.

THE COURT: Okay. So when you said that I didn't—one of the—one of the complaints—because, see, this is new information to me, that you didn't give it to them during the trial. You give them after the trial, because if we had it during the trial, we could have done something with it or anything like that. I now—I'm trying to figure out what it is, because you gave it to them after the trial and said, "I'm sorry. I have a continuous *Brady* obligation" or some reason that you give it to them. And then now I hear you saying, "Well, I don't know very much about this."

But if I let him talk—which he's run out of time, but he'll tell me on Monday—is that you should have told him during—during the trial. You should have told him all about this, and then we could have sorted it out. Now, the fact is I'm trying to sort it out now, because now I have to see whether it's *Brady* and whether it would have had an effect on trial. And that's what I'm

going to have to do, and we're going to—we're out of time, just out of time. Chief judge told me to stop, and I listen to judges.

[124] All right. Monday, 9:30. Thank you.

Thank you.

Thank you.

(Court adjourned at 4:46 p.m.)

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.
2011 CF1 14652

UNITED STATES OF AMERICA,

v.

COREY YATES,

Defendant.

November 5, 2012
9:46 a.m.
BEFORE THE HONORABLE THOMAS J. MOTLEY,
Associate Judge

* * *

P R O C E E D I N G S

[127] THE COURT: Calling the matter of *United States v. Corey Yates*, Case No. 2011 CF1 14652.

MS. MILLER: Good morning, Your Honor, Emily Miller on behalf of the United States.

MR. BRAUNSTEIN: Good morning, Your Honor. Tom Braunstein on behalf of Mr. Yates.

MR. THOME: Good morning, Your Honor. Matt Thome on behalf of Mr. Yates.

THE COURT: All right. All right. Mr. Yates is here.

Could you take his handcuffs off the front?

THE DEPUTY MARSHAL: All right.

THE COURT: Ms. Miller, I hadn't forgotten that you had a very busy schedule this morning. I know you were probably thinking wow.

MS. MILLER: Thank you, Your Honor. I appreciate it.

THE COURT: Okay. I sensed some reluctance on Thursday, but I appreciate your being here. All right.

MR. BRAUNSTEIN: Your Honor, can we just have two minutes for me to consult with my client about something?

THE COURT: Absolutely.

MR. BRAUNSTEIN: Thank you.

(The defendant conferred with counsel privately.)

[128] MR. BRAUNSTEIN: Thank you, Your Honor.

THE COURT: Yes, sir. All right. Anything to add to the arguments we have gone over? Anything new? I just didn't want you to say, "Well, Your Honor, I had something more to add to one argument or another."

MR. BRAUNSTEIN: I think we do have a couple things we'd like to add, Your Honor.

THE COURT: All right. Let's start off with that.

MR. BRAUNSTEIN: With respect to the missing photo, we do know that there were multiple photos shown to witnesses in North Carolina, but at testimony we—at trial we didn't hear any evidence of photos of Mr. Yates being shown to anyone in North Carolina. In other words, there were photos of Meeko Carraway

and Chamontae Walker but no photos of Corey Yates, which suggests that the missing photo—at least would tend to suggest that the missing photo, the photo that's now missing, was not of Corey Yates at all. In addition, there are—you know, I just reiterate the point we made on Thursday, that if we'd had information about the photo or evidence that the photo was missing, we could have argued to the jury that the missing photo would have helped clear things up.

Now, with respect to the telephone records, or not the telephone records but the evidence of which phone number was in contact with Mrs. Wade's—

* * *

[162] to help tell a story from multiple pieces of evidence that would have allowed us to make an entirely different argument. Our argument was not Corey Yates wasn't there on September 30th, 2010. Our argument was intent. We would have made a different argument entirely, had we known all these things. The guy in the van—the guy in—we would have made a different argument entirely, had we known all of these things before trial. The person Ms. House testified about—

THE COURT: Counsel, let me just say, I said I was going to deal with them individually; and I made the historical analogy of Sherman going through Georgia, but didn't mean that I'm not going to go back and look about all of there.

MR. BRAUNSTEIN: Very well.

THE COURT: But first I have to deal with them individually and analyze them individually, because individually the question is: What is this meaning? And if its meaning is not exculpatory in and of itself, then I

have to look at that, and then I'll go back and look at the picture of it. But I think I'm correct in saying I'm going to deal with them individually. All right.

MR. BRAUNSTEIN: All right. As long as we're going back and looking at them as a whole, then we're not arguing that this phone number by itself is—if this is [163] the only thing we're talking about, of course it's not a Brady issue, but combined with everything else, it is, in our view.

THE COURT: Well, we'll have to look at that. Okay. All right. All right. What's the next one? The witness who turned himself in to the police, in other words, the witness who heard Corey Yates have a conversation in October and said, "Look, you need to turn yourself in."

MR. BRAUNSTEIN: Right.

THE COURT: Okay. And you said that's exculpatory evidence because it indicates your client's state of mind.

MR. BRAUNSTEIN: Your Honor, during trial the Court allowed us to introduce evidence of Corey Yates' state of mind after the trip to North Carolina because it was relevant to his state of mind during the trip to North Carolina. Our argument at the time was that—

THE COURT: The government said I was wrong in doing that, by the way.

MR. BRAUNSTEIN: But the Court did it, and law of the case.

THE COURT: Well, I understand. Okay? So I understand that, but the question is you said I should—"They should have given me this witness, given the Court's ruling."

MR. BRAUNSTEIN: They should have given us the [164] witness regardless.

THE COURT: Okay.

MR. BRAUNSTEIN: If the Court ruled in our favor, it should have been foreseeable to the government that the Court might rule in our favor.

THE COURT: Okay.

MR. BRAUNSTEIN: And the government should have turned it over.

THE COURT: Who is W10?

MR. BRAUNSTEIN: I don't know.

THE COURT: Okay.

MR. BRAUNSTEIN: I mean I have an idea, but I don't know for a fact.

THE COURT: Tell me who you think W10 is.

MR. BRAUNSTEIN: In open court?

THE COURT: Yes. Why not? What's the reason?

MR. BRAUNSTEIN: My understanding is—as long as the government is fine with it. My understanding is that it's Mr. Carraway's mother.

MS. MILLER: That's correct, Your Honor.

THE COURT: Okay. W10 is Mr. Carraway's mother. Okay. All right. Now, Mr. Carraway's mother was—said that Corey Yates was saying "Turn yourself in" sometime in October?

MR. BRAUNSTEIN: Yeah. Before Mr. Carraway turned [165] himself in, yes.

THE COURT: I think it's the day of.

MR. BRAUNSTEIN: I believe that's correct.

THE COURT: Okay. I imagine Corey Yates' mother was telling him to turn himself in too—I mean Mr. Carraway's mother was saying, "Turn yourself in" too.

MR. BRAUNSTEIN: I only know what the government disclosed, Your Honor, and I don't think the government disclosed that.

THE COURT: All right. You didn't—you didn't—

MS. MILLER: I didn't disclose the whole transcript, Your Honor. I just disclosed the portion that I—after seeing their motion for a new trial, as I was going through all the record, I saw that part. I said, "Seems like something that you should have in support of your argument, although we do not believe it's—we're obligated to turn it over."

THE COURT: Okay. Let me ask you something. Where was your client when this conversation was taking place? He was the one talking, right?

MR. BRAUNSTEIN: Yes.

THE COURT: And Ms. Carraway, she was the only person hearing your client say that?

MR. BRAUNSTEIN: Correct.

[166] THE COURT: How is this suppressed by the government when your client knew and was there having the conversation? How is your statement to a third party suppressed by the government? That's what I don't get.

MR. BRAUNSTEIN: Your Honor, may I just have a moment, Your Honor?

(The defendant conferred with counsel privately.)

THE COURT: You understand the nature of my question, Counsel? I mean it's not like your client was in a coma and something happened around him and he had no knowledge. For example, Mr. Carraway could have come here and talked about it, that Mr.—that your client talked him into surrendering, right?

MR. BRAUNSTEIN: Could have.

THE COURT: Right, right. That's something I presume you said where the benefits and liabilities of Mr. Carraway calling him as a witness when the Court, in no uncertain terms, stressed to both parties that Mr. Carraway should be here. I imagine that was on a list of pros.

MR. BRAUNSTEIN: Your Honor, Mr. Carraway's mother does not bring the same—the cost-benefit analysis is quite different.

THE COURT: I understand. I understand, but Mr. Carraway could have talked about that, because your client did tell him to turn himself in, right?

[167] MR. BRAUNSTEIN: Absolutely.

THE COURT: Okay. All right. Now, you brought in his lawyer waiving the attorney-client privilege in order to make this point to the jury. Okay? I imagine you sat down and said, "You went and talked to the lawyer. 'Turn yourself in.' Tell me about all your other conversations." I imagine it had to be, "Where are you? You're at Mrs. Carraway's house." Oh, let's—that is something that you could have found out about or should have been something that your client says—who other witnesses were there? Well, the attorney was there. Well, let's call the attorney. Who else? The mother was there. We'll call the mother. Mr. Walker

was there, Mr. Carraway, all the people who heard your client make these statements.

MR. BRAUNSTEIN: Your Honor, this assumes that my client has perfect recall of everything that happened. And the Third Circuit addressed this issue in the case that we cited in our papers, questioning whether or not the fact that an individual made a statement is per se not a Brady violation. Under conditions of high stress like a person encouraging another person to turn himself in for a murder, it is not—unreasonable to think that the person two years later would have perfect recall for this.

THE COURT: That he forget about having the [168] conversation with Mr. Carraway in front of his mother for Mr. Carraway to turn himself? Let me just tell you, Mr. Carraway could have been a witness to this as well, could have been probably the best witness about this. You didn't call hum.

MR. BRAUNSTEIN: Your Honor, the cost-benefit analysis is very different.

THE COURT: All right. And if you thought enough to call Mr. Carraway, the question is: Well, if Mr. Carraway didn't do it, who else was around? Well, Mr. Walker was around. I guess he couldn't be called. And the question is: What third party? Well, you went so far as to get his lawyer. I'm not so sure, if this is evidence that's suppressed by the government, that it's within the control of the defense. I'm just not so sure about that.

MR. BRAUNSTEIN: Your Honor, may I have a second to consult with my client?

(The defendant conferred with counsel privately.)

MR. BRAUNSTEIN: Your Honor, I think that the reason why—I think that the fact that we went so far as to waive attorney-client privilege, put my client's lawyer on the stand, should indicate how important it was to us and should underline the sincerity of our representation that he didn't remember. And it is understandable that conditions such as this that he doesn't have perfect recall of every [169] statement he made, every witness who was there, and if the government has that information, they should turn it over.

THE COURT: How do I know he doesn't remember?

MR. BRAUNSTEIN: Well, all I'm saying, Your Honor, is that it is reasonable to think that, and, you know that is some—

THE COURT: That's in the realm of speculation right now.

MR. BRAUNSTEIN: I think it's less speculative than some of the other things that we've heard from the government throughout this argument, Your Honor.

THE COURT: Well, I've gone through them individually, and I have no evidence, no inference or anything like that in this situation, because all I know is—and with regard to that, the fact is he turned himself in. Mr. Carraway did turn himself in. And the question is your client and the fact that your client advised him to turn himself in doesn't change its—even the jury believing that doesn't change the outcome of the charge, because the charge is going down to North Carolina. And I understand why the Court let in later information to that effect in that situation to determine maybe his intent could be decided after the fact by

what he did after the fact. But in a case like this, it wasn't that material, although I permitted it. It wasn't that material to the outcome of [170] this case, and that is a minor point that could have been shown by other witnesses.

So even if the Court agreed with you that it was suppressed by the government, the question is whether it was favorable. I probably would have let the evidence in if I let the evidence in before. But the question is: Did it make a material difference in this case? Did the outcome change because of that? I do not think that if that testimony had come in, the outcome of the trip to North Carolina would have been different, if I'd look at it individually.

MR. BRAUNSTEIN: Can I respond, Your Honor? Well, I guess it's too late to respond.

THE COURT: No, Counsel. This one is—the argument was made. It was there, and the question is you say, "I have another witness that the government had and on this point that we would have been making." And I don't think it would have made—that statement is not material. You weren't prejudiced by it. The outcome of the case would not have been different based on Mr. Carraway's mother coming in here with whatever baggage and bias she may come in here with to make a difference in this case.

All right. I understand you have a global argument. Go ahead.

MR. BRAUNSTEIN: We do. And given that this was [171] the theme of our defense, Your Honor—the theme of our defense was his intent in going down was that he wasn't trying to hide Mr. Carraway. He was trying to turn him in. And we tried. We brought in a

cop, and we brought in his lawyer to make those points. And the government had a lot to work with in terms of showing that our evidence was not—did not show what we said that it showed. We had the ambiguities of Mr. Hamilton's testimony saying it was gloriously ambiguous.

THE COURT: When did you know that W10 was Mr. Carraway's mother?

MR. BRAUNSTEIN: When did I personally know?

THE COURT: When did the defense team know?

MR. BRAUNSTEIN: After trial, Your Honor, obviously.

THE COURT: W10 was in an affidavit? Was she in an affidavit?

MR. BRAUNSTEIN: I don't think so, Your Honor.

MS. MILLER: Your Honor, while W10 had been mentioned in discovery letters prior, but not about this topic, on this topic we disclosed it in the August 28th, 2012 discovery letter that was filed simultaneous with our opposition to their new trial motion.

THE COURT: Okay. All right.

MR. BRAUNSTEIN: I guess the other question I [172] have, Your Honor, is if it would make a difference, you said we don't know that he forgot. And I'm asking whether or not if there was—if the Court wants to hold an evidentiary hearing, it's something we would consider, and I'm asking whether or not such an evidentiary hearing would make a difference.

THE COURT: Well, it wouldn't make a difference because I am very convinced that the situation is not such that there would be a reasonable probability that

the outcome would be different, had Mrs. Carraway testified. I am absolutely convinced of that fact.

MR. BRAUNSTEIN: Okay.

THE COURT: So the fact that there's an ambiguity of whether it was truly suppressed by the government—there's no question in my mind that her coming in and saying to her that on a day her son turned himself in, he was, assuming that she would testify—he was arguing that he should turn himself in, and she was probably arguing the same point. And you could bring Mr. Carraway in as to what the intention was at that point in time. And I'm not saying I wouldn't let the information in, but the question is: Would it have changed the outcome of this case? Is there a reasonable probability of it? Absolutely not in my judgment.

MR. BRAUNSTEIN: Very well, Your Honor.

[173] THE COURT: All right. Now, maybe—at least not on that point in the situation, and I'll get back to it when we look at the global issue. All right. My court reporter needs a break. We all talk fast. I'm the slowest of the three, I think. Thank you.

(Recess from 10:56 to 11:06 a.m.)

THE COURT: Back on the record of the United States versus Corey Yates, Case No. 2011 CF1 14652.

MS. MILLER: Good afternoon—well, good morning, Your Honor. Emily Miller for the United States.

MR. BRAUNSTEIN: Good morning, Your Honor. Todd Braunstein for Mr. Yates.

MR. THOME: Good morning, Your Honor. Matt Thome for Mr. Yates.

THE COURT: The parties have agreed to have their preliminary hearing at three o'clock today. They also have a video—or allegedly. I don't know. Anyway, back to the issue.

Counsel, isn't the—*Brady* in itself does not require reasonable diligence, but courts have put that requirement on defense, reasonable diligence. Is that not correct in the *Brady* context? In other words if it's something that the defense knew or with reasonable diligence could have known, is that not the standard in *Brady*?

MR. BRAUNSTEIN: I think if there is a disclosure [174] that is made that tips—that provides a sufficient lead to the defense to discover the exculpatory information, I believe that's correct, Your Honor.

THE COURT: Right. In other words, with reasonable diligence—it's they knew or with reasonable diligence should have known.

MR. BRAUNSTEIN: I believe that's correct, Your Honor, although I don't have a case offhand that I can think of that specifically says that.

THE COURT: I think—I'm pretty clear that that is the standard, and the question is the reasonable diligence here. You said you didn't know, but the question is: With reasonable diligence, should you have known? And you said it was so important to you to know—let the jury know that your client was trying as hard as he could to convince Mr. Carraway to turn himself in, notwithstanding the fact that he talked to the police, knew he was suspect, "he" being Mr. Yates.

MR. BRAUNSTEIN: Mr. Yates was a suspect or Mr. Carraway?

THE COURT: That he knew Mr. Carraway was a suspect. And the reason he knew Mr. Carraway was is because he said Mr. Carraway had done the shooting?

MR. BRAUNSTEIN: Yes.

THE COURT: Okay. So then—and took him to [175] North Carolina, which you seem to concede or not concede. Because see, I'm in a post-trial situation, and so, you know, some of this I understand you contested at trial. But in order for me to understand exculpatory, I don't know, because if you say he didn't take him, then you said, well, we did. Was that conceded at trial or not conceded at trial or what situation was that?

MR. BRAUNSTEIN: Your Honor, we certainly didn't pursue—we made a strategic decision to concentrate our defense firepower on the intent aspect of this, not on both the "He wasn't there" and the "He didn't have the intent."

THE COURT: I understand. I understand, but intent can be shown, as the instruction I give to the jury, that one way you can figure out intent is by a person's actions.

MR. BRAUNSTEIN: Of course.

THE COURT: And his actions of taking him down the North Carolina was very powerful intent evidence.

MR. BRAUNSTEIN: And that's what the jury decided, Your Honor.

THE COURT: Okay. Now, if you say, "My client was doing everything he could to convince the person to turn himself in; we went so far as to waive attorney-client privilege because he talked to the lawyer to get him to turn himself in," and the only question is: Well, who else could [176] witness this? Walker, Carraway.

And you say but Carraway's mother who was probably a participant—I don't think she would just sit there listening. I imagine that she was trying to talk her son into turning himself in or was she not?

MR. BRAUNSTEIN: I have no idea, Your Honor. I haven't seen the transcript.

MS. MILLER: Your Honor, I can summarize from the transcript. At least that portion of what she says is essentially on October 12th, 2010 she is at her place of work, which is a diner, I think, in College Park, Maryland at the time; that Carraway came in and said words to the that he was going to turn himself in. Let me actually—and she had no idea what it was about, said that they should step outside. She said, "I told him, 'Let's go outside and talk,' because I didn't want to talk to him inside. He was like, 'I just wanted to come in and tell you I love you. I got myself into some trouble, and I wanted you to know that before I turn myself in that I love you, and I apologize to you for everything I did for you.'"

Then she was asked, "When you stepped outside with Meeko, did you see anyone else there?"

"Corey and Jack," who she identified as—explained as being Corey Yates and Chamontae Walker.

And she said, when I said—asked her, "When [177] Meeko came in and told you he got himself in trouble and was going to turn himself in, did he tell you what it was about?"

She said, "No. I asked him, and he said, 'I don't want you to be involved, so I'd rather not go into any details with you.'"

She said that—let me skip ahead. She said that when she saw them, all three of them, at the diner—I

asked her how were Jack and Corey, meaning Chamontae Walker and Corey Yates, behaving. And she said with respect to Corey, "He was like agitated. He kept saying, 'We need to go. If you're going to do this, you need to go now before you decide not to do it. You said you were going to turn yourself in today. Let's go,' just like rushing him."

I asked her, "Did you get an impression as to why they were rushing him?"

She answered, "I believe the vehicle that Corey was driving was stolen."

I asked, "Why did you think that?"

She said, "Because the ignition was messed up."

I asked what she observed about the ignition. She said that it looked like it had been pulled. I asked what kind of vehicle it was, and she said it was a van. I asked her what she did after she learned that Chamontae Walker and—

[178] THE COURT: What color was the van?

MS. MILLER: She didn't—I didn't—I didn't know that was relevant at the time I think that I was questioning her, so I didn't ask. Or I may have asked her during a witness conference, but didn't recall—didn't get with her on that in the grand jury, so I don't remember if she said it was blue.

She—I asked her what she did after she learned that Meeko and someone named Chamontae Walker were suspects—oh, sorry. I should back up. She said that after this conversation, she went and googled—went on Google or the Internet or something like that to try and figure out what this was all about, because

she didn't know what her son was turning himself in for.

And—Court's indulgence. She said she was trying to call Meeko's phone. He wasn't picking up, that later Corey picked up and said, "Ma, I don't want to talk about it over the phone; I'll meet you at the house," but he never showed up.

I asked her, "He called you Ma?"

She said "Yes."

I said, "Are you his mother?"

She said no. She said it was because of her relationship with him that he called her Ma and that it was not typical of him to say that he would meet her and then [179] not show up, that that had never happened before, and that she never saw him again after that conversation.

THE COURT: Who is the "he"?

MS. MILLER: Mr. Yates. She said that—and this was the subject of the pretrial litigation. The Court may recall that she had—well, actually, let me just—I asked her if she spoke to Mr. Carraway after the murder, and she said yes, she's visited him in jail and spoken to him on the telephone. And I asked her if she ever spoke to him about what she saw online about him and Chamontae Walker being wanted for murder in North Carolina. And she said, "Yes. He told me that the murder—when the murder happened, he initially got taken down to the precinct, asked questions, and released. Then he went to North Carolina. He never gave me a reason why, but he said Jack and Corey took him to North Carolina, where he stayed at Corey's grandmother's house" and that she believes they left because Meeko said that when Corey's grandmother

heard on the news that Meeko was wanted—sorry—for the murder, she called Corey and told Corey to come back and get Meeko.

And—

THE COURT: She called Corey?

MS. MILLER: Meaning—let me slow that down, Your Honor. I—she said—Ms. Carraway said that after the murder, she talked to Carraway when he was in jail and [180] that she asked him about what happened and that he said that when—Carraway said that when the murder happened, he was taken to the precinct, questioned, and released; that he said he went to North Carolina. He said that Jack and Corey took him to North Carolina. He said he stayed in North Carolina at Corey's grandmother's house. He said that—when I asked her whether Corey and Jack stayed with him in North Carolina, she said, "I believe they left."

And I asked, "Why do you believe that?"

And she said, "Because Meeko said that when Corey's grandmother heard on the news that Meeko was wanted for the murder, she called Corey and told Corey to come back and get Meeko."

And I asked her, "When Meeko learned that he was wanted, what did he tell you?"

MR. BRAUNSTEIN: Your Honor, can I just ask what the relevance of this is to the *Brady*? None of this was provided to us at time of trial.

MS. MILLER: I was asked what Ms. Carraway—

THE COURT: Well, Counsel, I think the relevance is: What would be her entire testimony. Just—let me finish. Just like you had made a decision, because you knew Carraway could testify to this, you decided not to

call Carraway because of the baggage he brought. The question is: What baggage does she have? Now, there's a question of [181] whether that baggage would be admissible or not, but we'd at least like to make the whole record complete.

MR. BRAUNSTEIN: If you want the whole record to be complete, can we have a continuance then to review that transcript, so we can at least think about it intelligently, rather than jotting down notes of what Ms. Miller is reading in open court today?

THE COURT: I would think that—

MR. BRAUNSTEIN: I just—

THE COURT: I understand your point, Counsel. I understand your point, because she gave you the information but didn't give you the transcript.

MR. BRAUNSTEIN: No.

THE COURT: I know this to be a fact now, and she's reading excerpts from the transcripts that you have to digest at this point, because you might have looked at the transcript and said the cost-benefit analysis of calling her as a witness may be the same. I don't know. But with regard to—I mean I'm still at the bottom line of her coming and testifying as to Mr. Yates' state of mind after Corey had a discussion and Mr. Yates' state of mind on the day that Mr. Carraway turned himself in is not—there's not a reasonable possibility that the outcome would have been different. I mean just because of the timing, the fact that that was already presented to the jury, and that does [182] not go to explicitly why he went to North Carolina, especially after that.

By the way, one question: What day was he supposed to go to the grand jury?

MS. MILLER: The subpoena was—

THE COURT: I mean Mr. Yates.

MS. MILLER: The subpoena was for 9:30 a.m. on September 30.

THE COURT: Okay. Now, did your detective—because in your papers there was some question about that issue on whether he showed up for the grand jury that day. The defense has argued that the testimony was at most unclear. You argued that the testimony was clear that he didn't show that day. I cannot recall that, and that was one of my initial questions that I had for you on Thursday as question one.

MR. BRAUNSTEIN: Your Honor, we have the citation in our papers, and we gave Ms. Miller the transcript as well, and I remember this very well from trial. Yeah. It's volume 7 at pages 440 through 441. Detective Robert Cephas testified as follows, "I really don't recall whether he showed up or not." And that was never—I mean that was the entirety.

Can I just back up a second, Your Honor?

THE COURT: Well, just a sec. Right now I have [183] gone over this question. Didn't she ask a few more questions than that? I don't think that's the entirety, because she started asking questions about the United States Attorney's procedure of interviewing people before they go to the grand jury or something like that. And—

MR. BRAUNSTEIN: She showed the subpoena, says—I'm now on page 430.

THE COURT: What was the date of the subpoena?

MR. BRAUNSTEIN: The subpoena was—

THE COURT: Was for what day?

MS. MILLER: It says September 30, 2010—

MR. BRAUNSTEIN: September 30, 2010 at 9:30.

MS. MILLER:—at 9:30 a.m.

THE COURT: Okay. All right. When is Mr. Yates allegedly taking Mr. Carraway to North Carolina?

MS. MILLER: So based on the combined testimony of Prude and Wade, it appears that she woke up on the morning of September 30 at 2:30 a.m. and saw the van in the driveway. And we know that Mr. Prude said he went over there that night, greeted them, went back to bed and hear—when he was lying in bed, he heard the van leave. Approximately when that is was never actually elicited. So we don't know if he left at 3:00, 3:30, 6:00 a.m. In other words, if the Court's ultimate question is, "Was it physically possible for him to appear timely at the grand

* * *

[225]

* * *

RULING ON MOTION FOR NEW TRIAL

THE COURT: The motion for new trial is denied. With regard to the improper arguments during closing, the timing of it I do not think is an unreasonable inference by the government. The words surrounding the Court's sustained [226] objection—that matter was clarified, and I think the curative action by the Court was sufficient and that, given that there was a videotape that indicated what was going on, the jury did not believe this was a matter of surrounding but something much more subtle of getting out of the way of the cam-

eras and that Mr. Yates participated in that by his presence.

The decision to secure legal advice—the defense has abandoned that argument under the *Henderson* case.

With regard to the severance, two matters. The evidence would be the same in a single trial, because the Court indicated that Walker's statement to Ms. House was a statement against penal interest before trial. The Court incorporates those arguments in the Court's ruling. And I do not think the disparity of the evidence, given that it was the trial of the two aider and abettors, not even the trial of the principal, the person who did the shooting, Mr. Carraway, so I do not think the disparity of the evidence would be such that a severance would be required.

With regard to the erroneous admission of the evidence, "Let's suit up," the Court believes that the witness's interpretation of that statement made at the time was correct, and the question of what it meant—the jury was—had sufficient evidence. What it meant was based on what did they do. And here, the fact of the matter is when [227] he said, "Let's go suit up," they went and loaded a gun and went looking for Mr. Hendy, the decedent.

The prior possession of a 9-mm we have talked about in that situation. It is to put this relationship, the statement in context that it was that gun and that he was familiar with the murder weapon, to put the statement of "Let's suit up" in context. So I think that was properly admitted.

The exculpatory evidence I have dealt with individually. I think even putting this all together in a

global matter, I don't think it rises to that level. The strongest evidence the government had on this and the most credible witnesses were the two witnesses from the state of North Carolina, Mr. Prude and Ms. Wade, who were—who had great affinity for Mr. Yates, testified as to seeing Mr. Yates there in North Carolina and—that is Mr. Prude. And Mrs. Wade's testimony as to what the conversation on the phone was extremely credible, something that the jury had to rely on.

The five points that the defense makes—I do not think there was a reasonable probability that the outcome of this case would have been different. The Court also notes that whether these five points—there are substantial questions of any of them being exculpatory or would tend to be exculpatory, that there was at least one question with [228] one of the statements on whether reasonable diligence would have found that statement. But over all, singly or together, I do not think there's a reasonable probability that the outcome would have been different, had any of this information been disclosed timely.

The Court will note that the government did give information on August 28th after our trial was over. And this information I imagine that I should compliment the government for its continued obligation in looking at this, but earlier disclosure of this information would have been more helpful to the defense as far as their preparation. But I go back to my conclusion that no reasonable probability that the outcome of this trial would have been different.

And with regard to the final argument, the jury verdict is contrary to the evidence, the Court does not find that, so the motion for a new trial is denied as well.

All right. Now, with that in mind, we do have a sentencing date; is that correct?

MS. MILLER: I believe it's November 16th.

MR. BRAUNSTEIN: Yes. I believe it's November 16th.

THE COURT: I'm sorry. When is the date set?

THE DEPUTY CLERK: It was actually set on 10/26.

THE COURT: Did I understand both defendants [229] wanted to be sentenced on the same day?

MS. MILLER: I think that was the way the Court had set it up. I mean we could do it at separate times if the Court wants. I think Chamontae Walker's on the 16th at 9:30. I don't have his jacket with me, but—

THE COURT: 9:30? All right. I don't think I'd have set anything at 9:30 that day.

MS. MILLER: I don't have his jacket with me. I know the case number.

THE DEPUTY CLERK: What's the case number?

MS. MILLER: 2011 CF1 5957.

THE DEPUTY CLERK: 5957?

MS. MILLER: 5957.

THE DEPUTY CLERK: It's scheduled for November 16th at two o'clock.

MS. MILLER: Oh.

THE COURT: Yeah. I think that's where both of them are set for, November 16th at two o'clock in the afternoon. The morning is—you wouldn't want to be around in the morning.

All right. Parties are excused. Thank you.

MS. MILLER: Thank you, Your Honor.

MR. BRAUNSTEIN: Good day.

MS. MILLER: Two o'clock, right?

THE COURT: Two o'clock in the afternoon, not 9:30 [230] in the morning. We would know.

MR. BRAUNSTEIN: Two o'clock.

THE COURT: Yes.

(Hearing adjourned at 12:38 p.m.)

APPENDIX D

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 12-CF-1871
CF1-5957-11

CHAMONTAE WALKER,
Appellant,

No. 12-CF-1985
CF1-14652-11

COREY DESHAWN YATES,
Appellant,
v.

UNITED STATES,
Appellee.

[STAMP: FILED May 18, 2018]

BEFORE: Blackburne-Rigsby, Chief Judge; Glickman*, Fisher*, and Thompson, Associate Judges; Pryor*, Senior Judge

ORDER

On consideration of appellants Chamontae A. Walker and Corey D. Yates' petitions for rehearing or rehearing *en banc*, appellant Chamontae A. Walker's motion for extension of time to file a petition for rehearing or rehearing *en banc*, and appellee's opposition thereto, it is

ORDERED that appellant Chamontae A. Walker's motion for extension of time to file the lodged petition for rehearing or rehearing *en banc* is granted, and the Clerk shall file appellant Chamontae A. Walker's lodged petition for rehearing or rehearing *en banc*. It is

FURTHER ORDERED by the merits division* that the petitions for rehearing are denied; and it appearing that no judge of this court has called for a vote on the petitions for rehearing *en banc*. It is

FURTHER ORDERED that the petitions for rehearing *en banc* are denied.

PER CURIAM

Associate Judges Beckwith, Easterly and McLeese did not participate in this case.

Judge Pryor replaced Judge Reid on this panel following Judge Reid's retirement.

APPENDIX E

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

AMENDED JUDGMENT IN A CRIMINAL CASE
(Incarceration)

Case No. 2011 CF1 014652
PDID No. 591032
DCDC No.

UNITED STATES OF AMERICA,

Vs.

COREY DRESHAWN YATES,
DOB 08/09/1989

THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S) AS INDICATED BELOW:

Count	Court Finding	Charge
2	Jury Trial Guilty	Murder II While Armed
3	Jury Trial Guilty	Accessory After the Fact

SENTENCE OF THE COURT

Count "2" Murder II While Armed Sentenced to 24 years incarceration. 5 years supervised release., $100.00 VVCA Due Date 07/15/2022

Count "3" Accessory After the Fact Sentenced to 12 years incarceration, 3 years supervised release, $100.00 VVCA Due Date 07/15/2012

COUNTS "2 & 3" TO RUN CONCURRENT TO EACH OTHER AND CONSECUTIVE TO ANY OTHER SENTENCE.

$200.00 VVCA FUNDS ARE DUE BY JULY 15, 2022 AND MAY BE DEDUCTED FROM PRISON WAGES OR PRISON FUNDS

The defendant is hereby committed to the custody of the Attorney General to be incarcerated for a total term of **24 years**. MANDATORY MINIMUM term of **5 years** Applies

Upon release from incarceration, the Defendant shall be on supervised release for a term of: **5 years**

The Court makes the following recommendations to the Bureau of Prisons/Department of Corrections:

Mental Health Evaluation and Treatment; Obtain GED while incarcerated; DNA Testing; Problem Solving Class while incarcerated; and Anger Management course while incarcerated

Total costs in the aggregate amount of $ _____ have been assessed under the Victims of Violent Crime Compensation Act of 1996, and ___ have X have not been paid. X Appeal rights given X Gun Offender Registry Order Issued X Advised of right to file a Motion to Suspend Child Support Order ___Domestic violence notice given prohibiting possession/purchase of firearm or ammunition __ Restitution is part of the sentence and judgment pursuant to D.C. Code § 16-711. __ Voluntary Surrender

11/19/2012 nunc pro tunc
11/16/2012
Date

Certification by Clerk pursuant to Criminal Rule 32(d)

11/19/2012 nunc pro tunc
11/16/2012
Date

Received by DUSM: _____ Badge#: _____

Signature _____

[Superior Court seal]

/s/ Thomas J. Motley
JUDGE THOMAS J MOTLEY

Sandra Cave [illegible initials/signature]
Deputy Clerk