IN THE SUPREME COURT OF THE UNITED STATES

MOTION TO PROCEED IN FORMA PAUPERIS

ROBRT McMILLIAN,

PETITIONER

v.

UNITED STATES OF AMERICA

Respondent

APPENDIX

Steven R. Kiersh
DC Bar #323329
5335 Wisconsin Avenue, N.W.
Suite 440
Washington, D.C. 20015
(202) 347-0200

Attorney for Petitioner
Appointed pursuant to the
District of Columbia Criminal
Justice Act

Member of the Bar of the
Supreme Court of the United
States

APPENDIX

I. Opinion from the District of Columbia Court of Appeals issued on Februray 24. 2021.

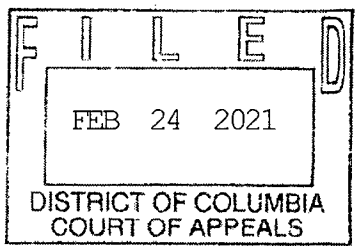
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-CO-0107

ROBERT MCMILLIAN, APPELLANT,

V.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF1-23454-06)

(Hon. Erik P. Christian, Trial Judge)

(Argued November 03, 2020 Decided February 24, 2021)

Before BLACKBURNE-RIGSBY, *Chief Judge*, and GLICKMAN, *Associate Judge*, and FERREN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: A jury found appellant Robert McMillian guilty of second-degree murder while armed,[1] possession of a firearm during a crime of violence,[2] and carrying a pistol without a license.[3] Now on his third appeal after a partial remand,[4] McMillian argues that the trial court erroneously denied his motion to

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[1] D.C. Code §§ 22-2103, -4502 (2001).

[2] *Id.* § 22-4504(b).

[3] *Id.* § 22-4504(a).

[4] *McMillian v. United States*, No. 12-CO-1343, Memorandum Opinion and Judgment, July 3, 2014 (hereinafter *McMillian II*), at 1; *McMillian v. United States*, No. 08-CF-282, Memorandum Opinion and Judgment, July 6, 2012 (hereinafter *McMillian I*), at 1.

vacate these convictions[5] and asks us to order a new trial based on the government's failure to disclose before trial the impeachment evidence of a government witness, allegedly in violation of *Brady*.[6] For the reasons that follow, we affirm the remand court's order denying McMillian's motion to vacate.

I. Background Facts

The facts date back to 2004, which we have previously detailed in two unpublished memorandum opinions.[7] On February 27, 2004, a man driving a burgundy van fatally shot Anthony Boone through the eye while he was standing at a bus stop near the corner of 13th and Savannah Streets, S.E.[8] According to the government, although "no physical evidence was recovered linking appellant [McMillian] to the murder," and "no one directly witnessed the shooting," four government witnesses — Cynthia Harris, Damian Berry, LeVerne Chapman, and Charles Rindgo — testified, collectively, at trial that they: (1) identified the burgundy van at the scene as belonging to McMillian (Harris, Berry, Chapman, Rindgo);[9] (2) identified McMillian as the individual who drove the van up to the bus stop (Rindgo);[10] (3) saw the driver point a gun out the window (Berry);[11] (4)

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[5] *See* D.C. Code § 23-110 (2012 Repl.).

[6] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that suppression of material evidence known to the government and favorable to the defendant violates due process).

[7] *McMillian II*; *McMillian I*.

[8] *McMillian II* at 3; *McMillian I* at 2.

[9] *McMillian I* at 2 n.2 ("All four witnesses identified, to the police, the burgundy van as belonging to appellant.").

[10] *McMillian II* at 3 ("Mr. Rindgo testified that 'he saw appellant drive up to the bus stop where the victim was standing' in a 'purplish' van . . . ."); *McMillian I* at 2 n.4 ("Rindgo testified that he saw appellant drive up to the bus stop where decedent was standing in a burgundy van.").

saw the driver exit the van, "tussle[]" with Boone, and grab Boone's coat (Berry, Rindgo);[12] (5) recognized McMillian at the bus stop (Harris);[13] (6) heard gunshots (Harris, Berry, Chapman, Rindgo);[14] (7) saw the driver shoot Boone and return to the van (Berry);[15] and (8) watched McMillian's van driving away (Harris, Berry, Chapman).[16]

Witness Cynthia Harris testified, more specifically, that she had seen McMillian at the bus stop talking to Boone and heard McMillian say "you know what this is" (presumably referring to McMillian's gun) and "give that [s**t] up" (apparently referring to Boone's coat).[17] Although Harris did not directly observe the shooting, she testified that she had heard gunshots, then saw McMillian's

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(. . . continued)

[11] *McMillian II* at 3 ("Mr. Berry testified that he saw someone point a gun out of the burgundy van, which he later identified in a photograph."); *McMillian I* at 6 ("Berry . . . saw the burgundy van drive up to the decedent, [and] saw an individual point a gun at the decedent . . . .").

[12] *McMillian II* at 3 ("[Berry] also saw the driver 'tussle[]' with . . . the victim . . . ."); *id.* ("Mr. Rindgo testified that . . . [he saw appellant] argue with the victim over the victim's coat."); *McMillian I* at 2 n.4 ("[Rindgo] witnessed appellant and the decedent arguing, and saw appellant grab the decedent's coat.").

[13] *McMillian I* at 2 n.3 ("Harris testified that she recognized appellant talking to the decedent at the bus stop . . . .").

[14] *McMillian II* at 3 ("Ms. Harris did not see appellant shoot the victim but heard gunshots."); *id.* ("Mr. Chapman likewise testified that he heard gunshots . . . ."); *id.* ("Although Mr. Rindgo never saw a gun, he heard at least one gunshot go off and saw a 'spark' coming from appellant's vicinity."); *McMillian I* at 6 ("Berry . . . saw an individual point a gun at the decedent, followed by the sound of gunshots.").

[15] *McMillian II* at 3 ("[Berry] saw the driver . . . shoot the victim and then pull away in the same van.").

[16] *Id.* ("[Harris] saw appellant's 'big burgundy van' pull away."); *id.* ("[Berry] saw the driver . . . pull away in the same van."); *id.* ("[Chapman] testified that he . . . saw a van 'pulling off.'").

[17] *McMillian II* at 3; *McMillian I* at 2 nn.3&4.

burgundy van drive off from the bus stop, and later joked with McMillian about the murder.[18]

On October 18, 2007, a jury found McMillian guilty on the second-degree murder and weapons charges, and on February 8, 2008, McMillian was convicted and sentenced to 35 years of incarceration. On February 25, 2008, he filed a direct appeal. In September of 2009, he expressed concern about whether trial counsel had been constitutionally effective.[19] Accordingly, this court permitted McMillian's trial counsel (who was then acting as appellate counsel) to withdraw and ordered appointment of new appellate counsel.[20]

On March 24, 2010, during pendency of the direct appeal, the government disclosed for the first time that it had possessed, at time of trial, certain impeachment evidence pertaining to a government witness, Cynthia Harris.[21] Institutionally, the government (though not McMillian's trial prosecutor) knew that Harris had appeared as a government witness in another trial (*McQueen*), where she testified that she had told her defense counsel about her "multiple personalities, one of which was a 'liar,' that allegedly observed the murder . . . in that case," and that she had revealed this to counsel "in an effort to avoid testifying."[22] The government also acknowledged that a full medical evaluation revealed only that Harris had suffered from depression and post-traumatic stress disorder (PTSD); no multiple personality disorder was indicated.[23]

After these disclosures, McMillian filed a motion on June 9, 2010, to vacate his convictions and receive a new trial pursuant to D.C. Code § 23-110, alleging multiple grounds for reversal, including a *Brady* violation for suppression of

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[18] *McMillian II* at 3; *McMillian I* at 2 n.3.

[19] *McMillian II* at 2.

[20] *Id.* at 2.

[21] *Id.* at 3-4.

[22] *Id.* at 4.

[23] *Id.* at 4 n.5.

Harris's *McQueen* testimony.[24] On July 6, 2012, this court issued an unpublished memorandum opinion and judgment affirming McMillian's convictions on direct appeal.[25] Two weeks later, on July 19, 2012, the trial court issued an order denying McMillian's § 23-110 motion without a hearing, and McMillian appealed that order.[26] In that second, collateral appeal, McMillian asserted that the trial court had erroneously denied his § 23-110 motion without a hearing based on: (1) constitutionally ineffective assistance of counsel at trial, and (2) the *Brady* failure to disclose before trial Harris's *McQueen* testimony indicating that she was a "liar."[27]

On July 3, 2014, we issued an unpublished memorandum opinion and judgment on McMillian's § 23-110 appeal, affirming in part but reversing and remanding in part the trial court's July 19, 2012 order.[28] We affirmed the portion addressing McMillian's ineffectiveness claim but reversed on McMillian's *Brady* claim, remanding it for a renewed § 23-110 hearing.[29] We explained that the hearing was essential because impeachment evidence regarding possible multiple personalities — especially a "liar" personality — bore uniquely on Harris's "mental state," in contrast with the other evidence used to impeach her at trial (such as her drug use and failure to wear glasses on the day of the shooting).[30] We further explained that a hearing would allow the parties to present "testimony, as needed, from Ms. Harris, as well as witnesses who can shed additional light on the information regarding her multiple personalities."[31]

II. The December 7, 2016 Hearing

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[24] *Id.* at 2.

[25] *McMillian I* at 1.

[26] *McMillian II* at 2.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* at 12.

[31] *Id.* at 13.

At the remand hearing on December 7, 2016, neither McMillian nor the government presented a witness. Nor was McMillian or the government able to locate any medical record supporting a diagnosis that Harris ever had a multiple personality disorder or schizophrenia. Nonetheless, in addressing the only contested *Brady* issue, namely "prejudice,"[32] counsel for McMillian argued that the newly disclosed evidence concerning Harris — especially the *McQueen* transcript — would have altered the outcome of McMillian's trial because defense counsel could have impeached Harris by causing her to acknowledge that "she was a self-admitted, self-confessed liar."

Counsel for McMillian observed that, at McMillian's trial, Harris had testified that she goes by four different names, including "Camilla," but counsel stressed that she had not characterized that personality. Earlier in *McQueen*, however, Harris had testified under oath that, as "Camilla," she gets into trouble and lies. According to counsel, the word "liar" is a "very rare" and "very powerful word" that the defense could have used to discredit Harris, who was "the centerpiece in the case" as the only witness who knew McMillian "by name" and "recognized his voice." Counsel argued that the testimonies of other witnesses were relatively weak because "[t]here were significant discrepancies in what they saw and the details about what they saw," such as McMillian's exiting the van from different sides and the van's fleeing in opposite directions. Finally, defense counsel maintained that these "other witnesses" gave "suspect" testimonies because they were the beneficiaries of plea bargains, intent on currying favor with the government based on "very sweet deals."[33]

In response, the government argued that the *McQueen* impeachment evidence would not have changed the outcome of McMillian's trial. First, observed the government, it could have rehabilitated Harris as a witness based on her complete testimony in the *McQueen* trial. On that occasion, defense counsel had attempted to impeach Harris's credibility with Harris's admission that she had told a Public Defender Service (PDS) investigator that she had four personalities. On redirect, however, the government had elicited from Harris that she had lied

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[32] *Id.* at 12.

[33] In his brief on appeal, McMillian's counsel referenced plea agreements for witnesses Berry and Rindgo but not for Chapman.

about multiple personalities only to a PDS investigator, and then only for a specific purpose: to end their frequent visits to her home, which scared her and her children. The government added that it would have elicited similar testimony in McMillian's trial, thereby rehabilitating Harris as a witness by explaining that her telling an investigator she had multiple personalities was merely a clever excuse to be left alone.

The government further argued, and defense counsel acknowledged, that there "were no psychological or mental health records of any kind," reflecting that Harris suffered a multiple personality disorder; and the only medical records that either party could locate evidenced a history and treatment of drug use, consistent with Harris's testimony at McMillian's trial.

The government also argued that Harris's own testimony effectively rebutted the notion that she was a liar, if only because, had she been attempting to curry favor with the government, she could have made a stronger case against McMillian by testifying, for example, that she actually had seen the shooting or had seen McMillian get back into the van.

Finally, in arguing against the claimed prejudice from suppression of Harris's *McQueen* testimony, the government emphasized the determinative testimony of the three government witnesses other than Harris: Chapman, Berry, and Rindgo (the last of whom had known McMillian "since childhood"). Rather than the "centerpiece" of the prosecution, as the defense maintained, the government called Cynthia Harris "a bit player in corroborating the testimony" of Rindgo and Chapman. Harris, argued the government, "could have been impeached from here til[l] Kingdom Come with how much drugs she used"; her *McQueen* testimony "would not have made a difference in the outcome of the case."

III. The January 16, 2018 Order

After the remand hearing, the remand court issued an order on January 16, 2018, concluding that McMillian had failed to meet his burden to show a reasonable probability that the government's failure to disclose the Harris impeachment evidence from *McQueen* was "material enough to undermine the Court's confidence in the verdict." In fact, the court reached this conclusion even assuming that defense counsel could have prompted Harris to call herself a "liar" on the stand.

The remand court explained that, even without the *McQueen* impeachment, Harris's testimony in the McMillian trial already was sufficient for a jury to infer that she sometimes lied, as she had "repeatedly and consistently contradicted herself on the stand." The remand court also concluded that the government's explanation of Harris's motive for lying to the PDS investigator to assuage her and her children's fears would have put the impeachment evidence "in context" for the jury, undermining the defense argument that Harris, in effect, was a congenital liar. Finally, the court emphasized that "other eyewitnesses testified as to having witnessed Defendant commit the crime, . . . corroborated by Ms. Harris." Accordingly, the remand court concluded that McMillian's "convictions should be affirmed."

IV. McMillian's Third Appeal

On February 5, 2018, McMillian filed a third appeal, this time contesting the trial court's January 16, 2018, order after remand (remand order). He claims three errors in the remand court's denial of his § 23-110 motion: (1) the remand hearing was inadequate, (2) he was prejudiced by the late-disclosed impeachment evidence, and (3) the remand order conflicts with precedential case law.

A. Adequacy of the Remand Hearing

McMillian's first alleged error — premised primarily on uncontested evidence that witness Cynthia Harris suffered from PTSD[34] — is easily disposed of. He maintains, first, that the remand hearing was inadequate because Harris herself did not testify, and that no expert testimony or other medical evidence was introduced concerning the "memory disturbances" and other "extreme stressor[s]" predominant in PTSD. McMillian himself, however, failed to call for testimony from Harris at the remand hearing, or to proffer any expert witness to establish the relevance, if any, of his claim that PTSD generated a tendency in Harris to lie to the jury.[35]

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[34] *McMillian II* at 4 n.5.

[35] Although McMillian's appellate brief specifies studies that describe a "wide array of symptoms" evidencing PTSD, a tendency to lie is not mentioned.

It is true, as McMillian points out, that in *McMillian II* we said that the trial court, on remand, could "hear testimony, as needed, from Ms. Harris, as well as witnesses who can shed additional light on the information regarding her multiple personalities."[36] But it was McMillian's responsibility, not the court's, to elicit such testimony.[37] Therefore, as his counsel on appeal acknowledged at oral argument, McMillian must demonstrate plain error,[38] meaning that the remand court erred in failing *sua sponte* to identify and call a suitable expert, or to evaluate and apply on its own, the medical literature on PTSD proffered by McMillian in support of reversal. Without question, however, there was no error, let alone plain error, here; McMillian's substantial rights were not affected by the trial court's refusal to arrange for, or act itself as, a medical expert.

B. Prejudice under *Brady*

In *Brady*, the Supreme Court held that a criminal defendant has a due process right to disclosure of material evidence known to the government and favorable to the defendant.[39] The government, therefore, has a duty to disclose such evidence "in time for the defendant to make effective use of it at trial."[40]

For a defendant to establish a *Brady* violation, "(1) the evidence at issue must be favorable to the accused either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the government, either willfully or inadvertently; and (3) prejudice must have ensued, meaning that the

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[36] *McMillian II* at 13.

[37] *Dickens v. United States*, 163 A.3d 804, 814 (D.C. 2017) ("Appellant has the burden of proving the three components of 'a true *Brady* violation.'").

[38] *Collins v. United States*, 73 A.3d 974, 980 (D.C. 2013) (explaining that reversal for plain error is only merited when appellant can show "(1) there is error, (2) the error is plain, meaning 'clear' or 'obvious,' . . . (3) the error affected [his] substantial rights[,] [and (4)] the error seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings.") (quoting *Baker v. United States*, 867 A.2d 988, 1002 (D.C. 2005) (internal citations and quotation marks omitted).

[39] *Brady*, 373 U.S. at 86-87.

[40] *Ingram v. United States*, 976 A.2d 180, 192 (D.C. 2009) (quoting *Stewart v. United States*, 881 A.2d 1100, 1116 (D.C. 2005)).

suppressed evidence must have been material."[41] Evidence will be "material" if there is a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[42] Put another way, materiality turns on whether the nondisclosed evidence "could reasonably . . . undermine confidence in the verdict."[43] If a defendant prevails under *Brady* — a matter we review for materiality *de novo*[44] — "then the defendant's conviction cannot stand."[45]

In our remand order, we observed that the government has conceded that McMillian has satisfied the first two *Brady* elements.[46] He argues here that the third element also is satisfied — that the government's failure to disclose Harris's *McQueen* testimony before trial prejudiced the defense by suppressing "material" information that, if available, would have permitted the defense to establish Harris as a "self-admitted, self-confessed liar."

McMillian argues, more specifically, that the unavailability of *McQueen* impeachment evidence in time for trial was especially prejudicial because Harris, in identifying McMillian by name and recognizing his voice, was "an absolutely essential" witness, indeed the only government witness to make an identification without attempting "to gain a favorable benefit for herself" (unlike witnesses Rindgo and Berry, who testified pursuant to plea bargains).[47]

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[41] *Dickens*, 163 A.3d at 814-15 (quoting *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011)).

[42] *Terry v. United States*, 114 A.3d 608, 621-22 (D.C. 2015) (quoting *Mackabee v. United States*, 29 A.3d 952, 959 (D.C. 2011)).

[43] *Turner v. United States*, 116 A.3d 894, 913 (D.C. 2015) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

[44] *Id.* at 914-15.

[45] *Terry*, 114 A.3d at 621 (quoting *Miller v. United States*, 14 A.3d 1094, 1109 (D.C. 2011)).

[46] *McMillian II* at 10 n.15.

[47] There is no evidence that the other government witness, Chapman, benefited from a plea bargain.

To the contrary, we cannot discern the claimed prejudice. On this record, we must hold that the *McQueen* impeachment evidence was not material; there is no reasonable probability that its introduction at trial would have changed the outcome. More specifically, the court on remand did not err in concluding that, even if the *McQueen* testimony had been available for impeachment of Harris at McMillian's trial, the impeachment could not have materially profited the defense. In sum, we cannot gainsay the perception of the remand court — the very court which conducted the trial — that even if Harris had a confirmed propensity to lie, the government could have undermined her response with her other testimony in *McQueen*: that she had claimed multiple personalities merely as a ruse to convince a PDS investigator to leave her and her family alone.

McMillian's claim of prejudice — of material suppression of the *McQueen* testimony — cannot be resurrected by various inconsistencies in details recalled by the other witnesses, all of whom together, in various ways, were able to place McMillian at the scene[48] as the likely murderer. As the remand court observed, two or more witnesses may see or hear things differently, and thus an "innocent misrecollection, like a failure to remember," is "not an uncommon experience" — a concern addressed by cross-examination as well as appropriate jury instructions. Nor do the plea bargains negotiated with two of the government's witnesses necessarily taint their testimony, subject to cross-examination, corroboration by other witnesses, and eventual assessment by the jury.[49]

C. Judicial Precedent

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[48] *McMillian I* at 2 n.2.

[49] McMillian understands the remand court to have improperly discounted prejudice from suppression of the *McQueen* evidence — at least in part — on the ground that it was "character information" unrelated "in fact or substance to the instant case." But this court confirmed, as the government conceded, that however the *McQueen* testimony is characterized, it would have been favorable impeachment evidence, satisfying *Brady's* first element — no question about it. Thus, suppression of that testimony failed to warrant reversal not because of its nature but because the suppression was insufficiently prejudicial to satisfy *Brady's* third element.

Finally, McMillian argues that the trial court's order is inconsistent with our *Vaughn* decision,[50] a *Brady* case that reversed assault convictions for one of two appellants (Morton) because the government had failed to disclose that a correction officer — who testified that Morton had participated in a group attack on a jail inmate and another corrections officer — had falsely testified regarding another alleged inmate assault and had been demoted.[51] In language equally applicable here and in all *Brady* cases, we observed that "[f]avorable information" under *Brady's* first element "includes impeaching information," which "does not have a lesser standing [than more direct evidence] in the context of the government's *Brady* disclosure obligations"[52] because "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence."[53]

On the facts, however, *Vaughn* is distinguishable from the present case, for in *Vaughn*, one of only two government witnesses was unquestionably tainted,[54] whereas for reasons explained earlier, we cannot say that failure to impeach Harris with her *McQueen* testimony was prejudicial under *Brady*.

For all the foregoing reasons, McMillian's *Brady* claim fails.

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[50] *Vaughn v. United States,* 93 A.3d 1237 (D.C. 2014).

[51] *Id.* at 1243, 1266.

[52] *Id.* at 1254.

[53] *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

[54] *Id.* at 1263 ("Officer Childs was only one of two government witnesses who inculpated Mr. Morton . . . , and he was objectively the stronger witness.").

The trial court's January 16, 2018 order is affirmed, and McMillian's convictions remain affirmed.

So ordered.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Erik P. Christian

Director, Criminal Division

Copies e-served to:

Steven R. Kiersh, Esquire

Elizabeth Trosman, Esquire

Assistant United States Attorney