IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 97-CF-1898, 99-CO-785, 99-CO-1528 & 01-CO-1407

Maurice A. Sykes,
Appellant,

vs.

United States,
Appellee.

On Appeal from the
Superior Court of the District of Columbia
Criminal Division — Felony Branch
F 9723-95

APPELLANT'S BRIEF

Robert S. Becker
Counsel of Record
5505 Connecticut Avenue, N.W.
No. 155
Washington, D.C. 20015
(202) 364-8013
Attorney for Appellant
(Appointed by the Court)

Filed: July 1, 2003

QUESTIONS PRESENTED

1. Whether the government's knowing failure to disclose the identities of potentially exculpatory witnesses pretrial in violation of its obligation under *Brady v. Maryland*, and subsequent failure to ensure the witnesses' presence to testify for the defense at trial deprived Appellant of his right to present a defense in violation of the Fifth and Sixth Amendments?
2. Whether a detective's deliberate *Bruton* violation. disclosure to the jury of a codefendant's confession inadmissible against Appellant, after he had been warned that the statement was redacted for use in a joint trial, deprived Appellant of his Sixth Amendment right to confront his accusers and to a fair trial by an impartial jury?
3. Whether the Trial Court abused its discretion by permitting the government in its case-in-chief to use highly prejudicial evidence it had withheld from the defense until mid-trial in violation of D.C. Crim. R. 16(a)(1)(C), where the evidence had no bearing on Appellant's culpability?
4. Whether, in the absence of a knowing, intelligent and voluntary waiver, Appellant was deprived of his Fifth Amendment right to testify in his own defense?
5. Whether admission at trial of an unduly suggestive and unreliable lineup identification deprived Appellant of his Fifth Amendment right to due process of law?
6. Whether Appellant is entitled to be resentenced because two of the charges for which he was convicted and sentenced merge, because the government failed to produce any evidence supporting essential elements of possessory firearms offenses — carrying a pistol without a license and possession of a firearm during a crime of violence or dangerous offense, and because it produced no evidence supporting an enhanced sentence for attempted robbery while armed?

TABLE OF CONTENTS

QUESTIONS PRESENTED .... **II**

TABLE OF AUTHORITIES .... **V**

STATEMENT OF THE CASE **1**

STATEMENT OF FACTS **8**

THE GOVERNMENT'S CASE **8**

Velio Kitanov's Testimony ***8***
Panayot Ignatiev's Testimony ***10***
Peter Enchev's Testimony ***11***
Sgt. Joseph T. McCann's Testimony ***12***
Det. Todd Williams's Testimony ***12***
Ralph Williams's Testimony ***16***

THE DEFENSE CASE **18**

Michael Sykes's Testimony ***18***
Michelle McCoy's Testimony ***18***
Det. Williams's Testimony ***18***

POST-CONVICTION PROCEEDING **19**

Maurice Sykes's Testimony ***19***
Gary Washington's Testimony ***20***
Bernard Grimm's Testimony ***21***

SUMMARY OF THE ARGUMENT **24**

ARGUMENT **26**

THE GOVERNMENT DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT A DEFENSE BY WITHHOLDING EXCULPATORY EVIDENCE **26**

The Brady Violation Deprived Sykes of Directly Exculpatory Testimony ***26***
Standard of Review ***28***
The Government Violated Its Obligation Under Brady To Disclose Identities of Exculpatory Witnesses ***29***

USE OF WASHINGTON'S "PIPE-HEAD" COMMENT DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM, AND IRREPARABLY HARMED HIS ABILITY TO OBTAIN A FAIR TRIAL **33**

Washington's Statement Would Have Been Inadmissible If Sykes Were Tried Separately ***34***
Standard of review ***35***

THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING USE OF THE NEWSPAPER ARTICLES AFTER THE GOVERNMENT WITHHELD THEM FROM THE DEFENSE FOR 18 MONTHS IN VIOLATION OF D.C. CRIM. R. 16 .... **36**

Standard of Review ***36***
The Government Withheld Material Information in Its Possession Pretrial Until After the Trial Began ***37***
The Trial Court Abused Its Discretion in Refusing To Bar Use of the Articles in the Government's Case-in-Chief, or to Declare a Mistrial ***37***
The Trial Court Failed To Impose Even A Modest Sanction ***39***

APPELLANT WAS DENIED HIS FIFTH AMENDMENT RIGHT TO TESTIFY IN HIS OWN DEFENSE **40**

Standard of Review ... *40*
Sykes Met His Burden of Proving Denial of His Right To Testify ... *41*
THE LINEUP WAS UNCONSTITUTIONALLY SUGGESTIVE AND ADMISSION OF IGNATIEV'S TENTATIVE IDENTIFICATION WAS HIGHLY PREJUDICIAL TO SYKES ... 43
Standard of Review ... *44*
Failure To Suppress the Out-of-Court Identification Was Not Harmless Error ... *44*
APPELLANT'S SENTENCE IS UNCONSTITUTIONAL AND IS NOT SUPPORTED BY EVIDENCE ... 46
CONCLUSION ... 50

TABLE OF AUTHORITIES

CASES

Abrams v. United States, 531 A.2d 964 (D.C. 1987) ---- 49

Adams v. United States,502 A.2d 1011 (D.C. 1986) ---- 46

Akins v. United States, 679 A.2d 1017 (D.C. 1996) ---- 2

Anderson v. City of Bessemer, 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed.2d 518 (1985) ---- 32

Bettis v. United States, 325 A.2d 190 (D.C. 1974) ---- 42

Boyd v. United States, 586 A.2d 670 (D.C. 1991) ---- passim

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) ---- passim

Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) ---- passim

Catlett v. United States, 545 A.2d 1202 (D.C. 1988) ---- 46

Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ---- 26

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) ---- 41, 44, 46

Cotton v. United States, 388 A.2d 865 (D.C. 1978) ---- 37

Earle v. United States, 612 A.2d 1258 (D.C. 1992) ---- 48

Edelen v. United States, 627 A.2d 968 (D.C. 1993) ---- 28, 30

Fahy v. Connecticut, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) ---- 44

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) ---- 40

Farley v. United States, 767 A.2d 225 (D.C. 2001) ---- 28

Garris v. United States, 491 A.2d 511 (D.C. 1985)(*Garris II*) ---- 46

Gibson v. United States, 388 A.2d 1214 (D.C. 1978) ---- 42

Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) ---- passim

Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951, 18 L. Ed. 2d 1178 (1967) ---- 46

Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) ---- 42

Halicki v. United States, 614 A.2d 499 (D.C. 1992) ---- 47

Ingram v. United States, 592 A.2d 992 (D.C. 1991) ---- 48

James v. United States, 580 A.2d 636 (D.C. 1990) ---- 30

Kelly v. United States, 590 A.2d 1031 (D.C. 1991) ---- 42

Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) ---- 28, 32

McCoy v. United States, 760 A.2d 164 (D.C. 2000) ---- 47

McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984) ---- 40

Meers v. Wilkins, 326 F.2d 135 (2d Cir. 1962) ---- 30

Morriss v. United States, 554 A.2d 784 (D.C. 1989) ---- 49

Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972) ---- 43, 44

Pettaway v. United States, 390 A.2d 981 (D.C. 1978) ---------- 42
Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) ---------- 40
Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957) ---------- 30
Smith v. United States, 684 A.2d 307 (D.C. 1996) ---------- 48
Taylor v. United States, 662 A.2d 1368 (D.C. 1995) ---------- 48
United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ---------- 29, 30
United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) ---------- 28, 29, 32
United States v. Blackley, 986 F. Supp. 600 (D.D.C. 1997) ---------- 31
United States v. Brodie, 871 F.2d 125 (D.C. Cir. 1989) ---------- 37
United States v. Curtis, 755 A.2d 1011 (D.C. 2000) ---------- 36
United States v. Douglas, 862 F.Supp. 521 (D.D.C. 1994) ---------- 38
United States v. Edelin, 128 F. Supp. 2d 23 (D.D.C. 2001) ---------- 31
United States v. Euceda-Hernandez, 768 F.2d 1307 (11th Cir. 1985) ---------- 38
United States v. Grossman, 843 F.2d 78 (2d Cir. 1988) ---------- 31
United States v. Lanoue, 71 F.3d 966 (1st Cir. 1995) ---------- 37, 38
United States v. LeRoy, 687 F.2d 610 (2d Cir. 1982) ---------- 31
United States v. Lewis, 511 F.2d 798 (D.C. Cir. 1975) ---------- 30, 38
United States v. Mejia, 69 F.3d 309 (9th Cir. 1995) ---------- 32
United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976) ---------- 31
United States v. Rodriguez, 799 F.2d 649 (11th Cir. 1986) ---------- 38
United States v. Seschillie, 310 F.3d 1208 (9th Cir. 2002) ---------- 32
United States v. Tavares, 100 F.3d 995 (D.C. Cir. 1996) ---------- 40
United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967) ---------- 43
United States. v. Holmes, 343 A. 2d 272 (D.C. 1975) ---------- 30
United States. v. Ruggiero, 472 F. 2d 599 (2d Cir.), *cert. denied*, 412 U.S. 939 (1972) ---------- 30
Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) ---------- 26
Whalen v. United States, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed 2d 715 (1980) ---------- 46
White v. United States, 763 A.2d 715 (D.C. 2000) ---------- 48
Wiggins v. United States, 386 A.2d 1171 (D.C. 1978) ---------- 30
Wiggins v. United States, 521 A. 2d 1146 (D.C. 1987) ---------- 30, 36

STATUTES

D.C. Code § 22-2401 ---------- 2
D.C. Code § 22-2901 ---------- 2
D.C. Code § 22-2902 ---------- 2
D.C. Code § 22-3202 ---------- 2

D.C. Code § 22-3204 ---------- 2, 46, 47
D.C. Code § 22-4502 ---------- 48
D.C. Code § 23-110---------- 6, 7, 25, 42

CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V----------passim
U.S. CONST., amend. VI----------passim
U.S. CONST., amend. XIV---------- 40

OTHER AUTHORITIES

Koestler, Arthur, *Darkness at Noon*, 1940, Bantam Books, Reissue edition (1984)---------- 45
Siniavskii, Andrei D., *The Trial Begins: The Soviet State versus "Abram Tertz" and "Nikolai Arshak,"* Harper & Row (1966)---------- 45
Solzhenitsyn, Alexandr, *Cancer Ward*, Dial (1968) ---------- 45
Solzhenitsyn, Alexandr, *First Circle*, Harper & Row (1968) ---------- 45
Solzhenitsyn, Alexandr, *Gulag Archipelago*, Harper & Row (1973) ---------- 45

DISTRICT OF COLUMBIA COURT OF APPEALS

MAURICE A. SYKES, **APPELLANT,** vs. **UNITED STATES,** **APPELLEE.**	Nos. 97-CF-1898, 99-CO-785, 99-CO-1528 & 01-CO-1407 (F 9723-95)

APPELLANT'S BRIEF

STATEMENT OF THE CASE

Appellant was arrested November 2, 1995 in Prince George's County on a warrant issued by the Superior Court of the District of Columbia charging one count of felony murder while armed. R. 3.[1] He was returned to the District of Columbia November 17th, and was presented in the Superior Court the following day. R. 1, 1. The Hon. Shelley Bowers found probable cause to believe that Sykes committed the charged offense and that he should be held without bond to await trial. Codefendants Gary Washington and Shon Hancock were arrested on similar warrants in Capitol Heights, Maryland, November 4, 1995. They were returned to Washington November 6th and appeared in the Superior Court the next day. They, too, were held without bond.

Washington and Sykes appeared in separate lineups December 14, 1995. One witness positively identified Washington, No. 6 in the first lineup, as the person who shot the decedent. Tr. 12/4/96, 89. The same witness had identified Washington as the shooter on October 28, 1995, when police drove him through the 900 block of Balboa Avenue in Capitol Heights in an effort to locate the car allegedly used in the crime. Tr. 12/20/96, 7. A different witness who spoke only Bulgarian, responding through an interpreter, tentatively identified Sykes, No. 4 in the second lineup. *Id.* at 92. No other witness, including the one who positively identified Washington, identified Sykes as one of the assailants.

[1] References to the Record on Appeal in No. 97-CF-1898 will be designated "R." followed by the relevant document number and, where necessary, the page number, i.e. R. 1. 3. Where it is necessary to refer to the Record on Appeal in one of the consolidated cases it will be designated "R." followed by the docket number, the relevant document number and, where necessary, the page number, i.e. R. (01-CO-1407) 1, 2. References to transcripts of proceedings will be designated "Tr." followed by the date of the proceeding and the relevant page number, i.e. Tr. 11/26/95, 5. References to transcripts of Grand Jury proceedings will be designated "Gr. J.," followed by the date of the proceeding and the relevant page number, i.e. Gr. J. 5/2/96, 4.

In a Status Hearing January 29, 1996 the Judge continued the case despite the government's failure to obtain an indictment, Tr. 1/29/96, 4, 8. The indictment filed May 8, 1996 charged all three defendants with conspiracy to commit armed robbery in violation of D.C. Code §§ 22-2901 and 22-3202 (Count B); two counts of attempted armed robbery in violation of D.C. Code §§ 22-2902 and 22-3202 (Counts C and D); two counts of first degree felony murder while armed in violation of D.C. Code §§ 22-2401 and 22-3202 (Counts E and F); first degree premeditated murder while armed in violation of §§ 22-2401 and 22-3202 (Count G); possession of a firearm during a crime of violence or dangerous offense in violation of D.C. Code § 22-3204(b) (Count H); and carrying a pistol without a license in violation of D.C. Code § 22-3204(a). The defendants were arraigned on the indictment May 10, 1996.

Bernard Grimm, Sykes's counsel, made a specific *Brady*[2] request in a June 11, 1996 letter to the government for the names of witnesses who failed to identify Sykes in the lineup. R. 27, 1. Prosecutor Mary Incontro responded, "I decline at this time to provide the names and addresses of witnesses who either failed to identify Mr. Sykes or who identified someone other than your client. The only misidentifications were tentative." *Id.* at 2. She recounted disparate descriptions of the second assailant, the one who was not the shooter, given by various witnesses. Grimm filed a motion June 20, 1996 to compel disclosure of the identities of witnesses who failed to identify Sykes. R. 26. The Trial Court did not rule on the motion.

Grimm moved to sever Appellant's case from those of his codefendants, noting that shortly after their arrests Washington and Hancock gave statements to police implicating themselves and Sykes in the crime. Citing *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), and *Akins v. United States*, 679 A.2d 1017 (D.C. 1996), he argued that in a joint trial introduction of those statements, which would be inadmissible against Sykes, would be highly prejudicial to him and redaction of the statements would not protect his Sixth Amendment right to confront his accusers. R. 40. The government opposed the motion, and the Judge ordered it to turn over to him redacted versions of the codefendants' statements and its proposed conspiracy jury instruction. R. 42. In a hearing spanning several court days in March and April 1997 the government dismissed the conspiracy charges against all defendants to alleviate some objections to use of codefendant statements in a joint trial. Tr. 3/4/97, 56. After considering redactions the government proposed,

[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

the Trial Court denied Sykes's motion to sever,[3] but concluded that the government could not introduce a portion of Hancock's statement implicating Appellant. Tr. 3/28/97, 38, Tr. 4/7/97, 26.

On November 26, 1996 Grimm filed a motion to suppress the alleged robbery victim's tentative lineup identification of Sykes because it was unduly suggestive and unreliable. R. 44 – 46. He argued that on the evening of the crime the victim gave only a general description of his attacker and that Sykes was the only person in the lineup who matched that description, and one of only three individuals in the appropriate age range. In a motions hearing Grimm argued in addition that Sykes was the only person in the lineup who was wearing leg shackles, and the victim would have seen them. Tr. 1/14/97, 234. But the Judge denied the motion. *Id.* at 237.

In a motions hearing March 28, 1997 Grimm noted that police stopped three individuals near Dupont Circle shortly after the homicide because they matched lookout descriptions broadcast by investigators. Police transported the men to the Bulgarian Embassy for a showup identification procedure, and a witness to the homicide identified one of them as the second assailant. Tr. 3/28/97, 50 – 51. Grimm argued that the witness's identity was *Brady* material, and the Court ordered disclosure over the government's objection. *Id.* at 53. At that time the witness was out of the country and it was not clear whether he would be back before trial. *Id.*

The core of the government's evidence against Sykes was to be testimony of a confidential informant who claimed to have overheard the three defendants recount the crime at about 11 p.m. on the night of the homicide. In a hearing immediately before trial, Grimm said he had recently received a letter from the prosecutor identifying two individuals who the informant said were present when the defendants allegedly implicated themselves, but they gave conflicting testimony in the Grand Jury. Tr. 4/7/97, 7 – 8. Grimm stated that the government had violated its obligations under *Brady* by failing to disclose the identities of these witnesses earlier and that the government had not subpoenaed either witness for the trial. The prosecutor acknowledged that she had not subpoenaed the men and that investigators could not locate either one. *Id.* at 8 – 9. The government conceded that the Grand Jury testimony fit within *Brady* and *Giglio*,[4] but it did not disclose the witnesses' identities because their testimony would impeach the informant, not exculpate Sykes. *Id.* at 9. It ar-

[3] The Judge gave Hancock the option of having a separate trial to avoid potential prejudice from statements Washington made to police, but Hancock elected a joint trial to avoid admission of his entire statement to police. Tr. 4/7/97, 39.
[4] *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2[d] 104 (1972).

gued further that if it had disclosed the men's identities earlier it would have jeopardized the informant's safety. The Judge ruled that the government should have informed the defense of the two witnesses identities earlier, or subpoenaed them to appear for trial so defense counsel could interview them. *Id.* at 10. He denied motions from all three defendants to dismiss the cases, but offered to postpone the trial while government and defense investigators searched for the witnesses.[5] *Id.* at 22 – 23. The Court stated that before opening statements, if the witnesses could not be located, it would consider allowing use of the witnesses' Grand Jury testimony at trial. *Id.* at 17. Noting that police and defense investigators had failed to locate the two witnesses, before beginning jury selection the Judge ordered the prosecutor to turn over to the defense transcripts of the two witnesses' Grand Jury testimony. Tr. 4/9/97, 5.

Over objection the Judge ordered disclosure of *Giglio* material concerning the informant for use by defense counsel in preparing their opening statements. Tr. 4/11/97, 20.

The trial began April 9, 1997, and from April 11 to April 28 the government presented its case through testimony of eight civilian witnesses and seven law enforcement witnesses. The prosecutor informed Grimm April 17, 1997 that Det. Todd Williams had recently found two newspaper articles about this case in a file and she wanted to use them as evidence. Tr. 4/17/97, 282. She said that on November 17, 1995 Sykes had torn the articles up while sitting in an interrogation room and discarded them in a trash basket. *Id.* at 283. Grimm strongly objected to admission of the articles, and the Judge recognized that they might be powerful evidence against Sykes. *Id.* at 284 – 9. But the Trial Court ultimately allowed the government to introduce the articles. Tr. 4/21/97, 522.

Neither Washington nor Hancock presented witnesses. Sykes's brother Michael and sister Michelle McCoy testified that Appellant was in North Carolina attending his great grandmother's funeral when the homicide occurred. Grimm also called Det. Williams as a defense witness. Before the defense rested, brief portions of the Grand Jury testimony of the two missing witnesses were read to the jury. Tr. 4/29/97, 817 – 826. The Trial Court granted motions by Sykes and Hancock for judgments of acquittal on the first-degree premeditated murder counts because the government's evidence indicated their intention only to commit robbery, and because there was no evidence of premeditation or deliberation on their parts. *Id.* at 817. Counsel

---

[5] Because the Judge refused to release the defendants, who had been incarcerated for over two years, on bond all three defense counsel rejected the offer of a continuance.

made final arguments April 29 and 30, and the jury began deliberating April 30, 1997. On May 6, 1997 the jury convicted Washington of two counts of attempted robbery while armed, two counts of first-degree felony murder while armed, second-degree murder while armed, possession of a firearm during a crime of violence, and carrying a pistol without a license. Tr. 5/6/97, 16 – 17. It convicted Sykes of two counts of attempted robbery while armed, two counts of first-degree felony murder while armed, possession of a firearm during a violent crime or dangerous offense, and carrying a pistol without a license. *Id.* at 18 – 19. Jurors resumed deliberations concerning the charges against Hancock, and the Trial Court declared a mistrial May 8th, when they still had not reached a verdict. Tr. 5/8/97, 9.

Sykes filed his first *pro se* new trial motion asserting that Grimm had provided ineffective representation.[6] R. 95. He made numerous allegations concerning Grimm's failure to investigate and prepare for trial, failure to object to admission of evidence, and refusal to permit Appellant to testify in his own behalf. In a hearing June 10, 1997 the Trial Court permitted Grimm to withdraw as counsel and extended the time for filing a new trial motion. Tr. 6/10/97, 9. Attorney William H. Murphy appeared at the next hearing to represent Sykes, and the Court again extended the filing deadline so counsel could obtain trial transcripts and prepare a new trial motion. Tr. 7/10/97, 8.

On October 10, 1997 the Judge imposed a sentence of 30 years to life in prison on one count of felony murder while armed, 15 years to life for each count of attempted robbery while armed, five to 15 years for possession of a firearm during a violent crime or dangerous offense, and 20 to 60 months for carrying a pistol without a license. The sentences for attempted robbery and carrying a pistol without a license were to run concurrently with the felony murder sentence, and the sentence for possession of a firearm during a violent crime was to run consecutively to the felony murder sentence. The aggregate sentence, taking into account mandatory minimum terms of 30 years for felony murder and five years for possession of a firearm during a violent crime, is 35 years to life. R. 101. Sykes filed a timely Notice of Appeal November 7, 1997. R. 133.

Because the trial transcripts were not completed before the sentencing hearing the Trial Court again extended the time to file a new trial motion. Tr. 10/10/97, 24.

---

[6] The handwritten motion is dated June 1, 1997, and was stamped "Received" in chambers June 11.

In an Order December 7, 1997 the Court gave Appellant's counsel 30 days to file a supplemental motion and the government 30 days to respond. R. 114. That day the Judge issued a separate Order stating that he lacked jurisdiction to consider Sykes's post-conviction motion under Rule 33 because the time for filing expired before Appellant filed his *pro se* motion. R. 115. Sykes filed a second *pro se* Motion to Vacate Sentence dated January 2, 1998. R. 118. Sykes wrote several letters to the Court asking that he be provided transcripts at no charge, and ultimately stating that he had exhausted all available funds and could not pay for some of the transcripts that had been ordered.[7] See R. 102. R. 107, R. 120, R. 121, 5 – 6, 8, R. 123, 2 – 3, R. 126. The Trial Court denied these requests. R. 104, R. 111, R. 124, R. 129.

Murphy never filed a new trial motion, and in an Order dated February 18, 1998 the Court directed the government to respond to Sykes's two *pro se* motions. R. 125. The government argued that Grimm provided effective representation and that Sykes did not demonstrate he had been prejudiced by his lawyer's performance, even if it was deficient. R. (99-CO-785) 17. In a footnote it argued that Sykes had given no indication during trial that he wanted to testify, and that it was a reasonable tactical decision for Grimm to have advised him of the serious consequences for all three defendants if one of them testified. *Id.* at 26 n. 18. Sykes filed a reply to the government's Opposition. R. (99-CO-785) 22. Without holding a hearing, the Judge denied Appellant's D.C. Code § 23-110 motion in a March 19, 1999 Order. R. (99-CO-785) 7, 9. The Court rejected Appellant's argument that he was deprived of his Fifth Amendment right to testify, but noted:

> The court believes that it advised the defendant of his right to testify. However, upon review of the court file and court's written notes, the court cannot definitively make the determination. The Court, therefore, requests that government counsel review the trial transcripts and advise the court whether its recollection is correct. While that information may require the court to supplement this Order, the court does not believe that whatever is discovered will change the court's determination that ineffectiveness has not been demonstrated by the defendant. The court therefore does not deem it necessary to delay the issuance of this Order.

Id. at 5 n. 4.

Appellant filed a timely Notice of Appeal April 22, 1999. R. (99-CO-785) 32.

Because the government failed to comply with the directive cited above, the Court issued an Order March 2, 2000, directing the government to comply within 30 days after it received all relevant transcripts, and imposing a $100-a-day sanction for further delay. R. (01-CO-1407) 10. The government filed two Status

[7] Sykes had been represented by retained counsel in all proceedings in the Superior Court. At some point this Court determined that Appellant was eligible for appointment of appellate counsel under the Criminal Justice Act.

Reports indicating that it had misplaced its copies of the trial transcripts and that it had ordered new copies. R. (01-CO-1407) 11, R. (01-CO-1407) 12. Appellant, through counsel, filed a Motion To Vacate Order Denying D.C. Code § 23-110 Motion on November 6, 2000. R. (01-CO-1407) 17. He argued that the Trial Court did not conduct a *Boyd*[8] inquiry to determine whether Sykes wanted to testify, and included an Affidavit in which Sykes asserted that he had expressed to trial counsel his desired to testify, and from codefendant Washington stating that during trial Sykes had expressed to him the desire to testify. *Id.* The government filed a status report November 14, 2000 in which it said that it had reviewed all transcripts with the exception of one sealed bench conference[9] and it "was unable to find on the available record that a *Boyd* inquiry was conducted by the Court." R. (01-CO-1407) 18, 5. At the Court's direction the government filed an Opposition to the Motion To Vacate, and Appellant subsequently filed a reply. R. (01-CO-1407) 28, R. (01-CO-1407) 33. At a two-day hearing in May 2001 Sykes and Washington testified concerning Appellant's expressed desire to testify at trial, and Grimm and Carl Ballard Sr., a court officer in the trial, testified for the government. In addition to making oral arguments at the conclusion of the hearing, Sykes and the government filed written argument on the motion. R. (01-CO-1407) 50, R. (01-CO-1407) 53, R. (01-CO-1407) 57. The Trial Court issued an Order October 21, 2001 denying Appellant's motion to vacate R. (01-CO-1407) 60, 15.

Appellant filed a timely Notice of Appeal November 5, 2001. R. (01-CO-1407) 61.

[8] *Boyd v. United States*, 586 A.2d 670 (D.C. 1991).

[9] That bench conference during trial April 21, 1997 included the Judge, Sykes and Grimm, and dealt exclusively with whether Appellant would request fingerprint analysis of a newspaper article.

STATEMENT OF FACTS

This case concerns a homicide outside the Bulgarian Embassy October 23, 1995 at about 9:15 p.m. According to witnesses on the embassy steps, two men followed Panayot Ignatiev, a Bulgarian in Washington to make repairs to the embassy, as he approached the steps. The shorter assailant attacked Ignatiev, hit him and attempted to steal his watch, and the taller assailant went up the steps and, brandishing a gun, demanded money from several younger Bulgarian males on the steps. The armed assailant also demanded that Evgeny Mihailov, the decedent, give up his leather jacket. The decedent refused, telling his friends in Bulgarian that he did not believe the gun was loaded. The taller assailant fired one shot and the decedent lunged toward the locked embassy door. Someone rang the door buzzer, and then the armed assailant fired a second shot. The decedent collapsed inside the entry to the embassy, and both assailants fled. Witnesses reported that the attackers got into the rear of a metallic gold Chevrolet Caprice around the corner from the embassy, and the driver of the car sped away.

The government called eight civilian witnesses, but only two implicated Sykes in the crime: Ralph Williams, a confidential informant seeking to work off a 10-year mandatory-minimum prison term for drug distribution in Prince George's County, and Ignatiev, who tentatively identified Sykes in the lineup December 14, 1995, but did not make an in-court identification. Sykes's siblings testified for the defense that Appellant left town with them on a trip about six hours before the homicide, and did not return until two days later. Defense counsel offered Grand Jury testimony of two men who contradicted significant portions of the informant's testimony implicating Sykes.

THE GOVERNMENT'S CASE

Velio Kitanov's Testimony

Velio Kitanov lived at the Bulgarian Embassy in October 1995 and had been on the steps with Mihailov and Peter Enchev for about two hours. Tr. 4/14/97, 152 – 4. About 20 to 30 minutes before the robbery he saw a large orange car drive in front of the embassy and turn right on R Street, going the wrong way. *Id.* at 154. Kitanov saw Ignatiev come around the corner, toward the embassy, and before he reached the steps two men began attacking him. *Id.* at 156. The attackers pushed Ignatiev to the ground and the taller assailant, who

was over six feet tall and wore a knee-length leather jacket, brandished a gun and demanded money from the three younger men.

Kitanov ran up the steps and the taller assailant pointed the gun at Mihailov, demanding the leather jacket he wore, as well as money. *Id.* at 159 – 60. According to Kitanov, Ignatiev was struggling to crawl up the steps and told the young men in Bulgarian to get help. Kitanov told Mihailov to give up the coat, but the decedent responded in Bulgarian that he did not believe the gun was loaded, and attempted to pull away from the armed man. *Id.* at 162. Kitanov said he heard a shot as Mihailov screamed and bolted up the steps. *Id.* The tall assailant shot a second time as the decedent opened the embassy door and entered the building. The shooter fled immediately. *Id.* at 163. Kitanov identified Washington in court as the shooter, and described the gun as a silver revolver that was not shiny. *Id.* at 165-6.

Later that evening police took Kitanov to 22d and Decatur Streets, N.W., and showed him three individuals, but he said they were not the robbers. *Id.* at 193. On October 27, 1995 investigators showed Kitanov a photo array including Washington, but he could not identify anyone in it. *Id.* at 194. The next day Police Sgt. Joseph T. McCann took him to see whether he could identify a car, but none of the cars he saw matched his recollection. *Id.* 194 – 5. As they drove down the street one car had its door open and he recognized the person sitting in the driver's seat as the shooter. *Id.* at 196 – 7. He went to two lineups and in the first he identified Washington immediately as the shooter. *Id.* at 199.

Under cross-examination he said he first saw Ignatiev on R Street coming toward the embassy, but shortly after the shooting he told Det. Todd Williams that he first noticed Ignatiev as the he reached the bottom of the steps. *Id.* at 206, 208. Similarly, Kitanov testified that he was outside until after the second shot, but he told Det. Williams he had entered the embassy before the second shot. *Id.* at 230. Kitanov insisted that he had a clear view of the assault on Ignatiev and told investigators he could identify the shorter assailant. *Id.* at 257. But in the second lineup, in which Sykes was No. 4, Kitanov picked No. 7 as the second assailant. *Id.* at 262. He described the second assailant as less than 5 feet, 10 inches tall, having a dark complexion, and wearing a white baseball cap with dark stripes. *Id.* at 269 – 70. He admitted under redirect examination that he did not get a good look at the shorter assailant's face. *Id.* at 281.

Panayot Ignatiev's Testimony

Panayot Ignatiev, 53, arrived in Washington from New York at about 8 p.m. October 23 to make repairs to the embassy building. Tr. 4/14/97, 286. He walked to Connecticut Avenue and returned 20 to 30 minutes later. *Id*. at 287. As he approached the embassy, Ignatiev said, he stopped on the side to examine cracks and then walked to the center of the intersection of 22^{d} and R Streets to look at the building. *Id.* at 288. As he walked toward the steps someone grabbed his arm and he suddenly noticed two men. Tr. 4/15/97, 297. He tried to pull away and get to the steps, but one of the attackers struck a sharp blow to the left side of his head. *Id.* at 297 – 8. The next thing he knew he was on the ground at the bottom of the steps and the shorter assailant was on top of him. *Id.* at 299. He was lying on his right side while the attacker hit him, and he got a good look at the man. *Id.* at 299 – 300. Ignatiev said he called to one of the young men to ring the buzzer, and when he heard a shot the man attacking him ran away. *Id.* at 301. He did not see where the assailants went, but noticed that the young men had run into the embassy and he followed. *Id.*

Ignatiev described the shorter assailant as having large, "characteristic" eyes, full cheeks and not thin. *Id.* at 300. The taller man had a smaller head and large lips. Both were between 20 and 30 years old, wore dark clothes and hats, Ignatiev stated. *Id.* at 299, 300. At a showup later that evening he told police none of the three men had been involved in the attack. *Id.* at 308. In the first lineup, Ignatiev said, he thought he recognized the taller person, and he told police it was No. 3. *Id*. at 310, 313. When he entered the room for the second lineup he recognized No. 4 as the person who attacked him, Ignatiev testified. *Id.* at 310. He asserted that he was certain of the second identification but took time to be sure. *Id.* at 313.

Ignatiev admitted on cross-examination that he had been warned not to discuss his lineup identifications with anyone, but as he left the building with the other Bulgarians he discussed the procedures. *Id.* at 314 – 16. From the description Kitanov gave he realized he had not identified the right person in the first lineup. *Id.* Ignatiev acknowledged that he did not indicate at the lineup that he was more certain of the second identification than he had been about the first, and before selecting Sykes in the second procedure he asked police to direct No. 6 to open his eyes. *Id.* at 328 – 30. In a recorded interview a few days after the crime Ignatiev told Det. Williams police should interview the younger Bulgarians because he did not have a good memory for faces. *Id.* at 336 – 7. He recalled that both men wore hats, but could not recall the color of the shorter man's hat. *Id.* at 350. According to Ignatiev neither attacker tried to take anything from him. *Id*. at 349.

Ignatiev stated on redirect examination that police asked whether he could identify the assailants and he replied that he would try. *Id*. at 356.

Peter Enchev's Testimony

Peter Enchev said he was on the embassy steps with Mihailov and Kitanov when a gold or orange Chevrolet Caprice drove by and turned right on R Street. Tr. 4/16/97, 12 – 13. He saw Ignatiev leave the embassy, and when he returned it appeared that someone was pushing or dragging him. *Id.* at 14. As the older man came around the bushes someone pushed him to the ground, and the shorter assailant attacked Ignatiev while the taller one came up the steps. *Id*. at 15. The taller attacker had a gun that "I'm going to use the word silver but it wasn't black at all." *Id.* at 16. Enchev said when the man demanded money Mihailov offered $2, and someone said to Ignatiev, "I know that you have money." *Id.* Ignatiev told the others in Bulgarian to get help. *Id.* at 17.

Mihailov refused to give the armed man his jacket and began running up the stairs. *Id.* Enchev thought the man fired the first shot in the air, and then shot Mihailov as he entered the embassy. *Id*. at 18. Then both attackers left. *Id*. at 19.

Enchev described the gunman to police as 6 feet 1 inch tall, thin, 25 to 30 years old, wearing a knee-length black leather jacket. *Id.* at 19 – 20. The shorter man had a round face and wore a bomber jacket and a black roll-up style hat. *Id.* at 21. He did not identify anyone at the showup that night and said he did not get a good look at either attacker. *Id*. at 26 – 7. He said he did not really see the man who attacked Ignatiev and he did not identify anyone at the lineup. *Id.* at 27 – 8.

Enchev said during cross-examination that the gunman demanded Mihailov's jacket after the decedent gave him $3. He told police on the scene that the gunman fired two warning shots before shooting Mihailov, and he later said he heard the gun click a couple of times, but only two shots were fired. *Id.* at 53 – 4. Enchev said he did not recall hearing Mihailov scream after the first shot, but Kitanov told him that happened. *Id.* at 55 – 58. Enchev told police he got a good look at the gunman and described him as 6 feet 3 inches tall, with a dark complexion and possibly a thin beard or moustache, short black hair and a thin face, but he later said the man had a thin build and was 6 feet 1 inch tall. *Id.* at 70 – 2. He said the shorter attacker was 5 feet 7 inches tall, with a dark complexion, round faces, no facial hair, 18 to 25 years old, wearing a black bomber

jacket and blue jeans, *Id.* at 95 – 6, and a black cap, *Id.* at 110 – 11. At the showup he was not certain whether the three men police showed him had been involved in the crime, even though he had told police they were not the assailants. *Id.* at 79. He said he did not talk to Kitanov or Ignatiev after the lineup about the identification procedure. *Id.* at 87.

Sgt. Joseph T. McCann's Testimony

Sgt. Joseph T. McCann supervised detectives working on this case and participated in the arrests of Washington and Hancock. Based on evidence provided by informant Ralph Williams, he and Det. Williams took Kitanov and Mary Sherman Willis, another eyewitness, to Capitol Heights October 28, 1995 to see if they could identify Hancock's car as the vehicle used in the crime. Tr. 4/18/97B, 374. Kitanov rode in McCann's car and the first time they passed Hancock's car the witness said nothing. *Id.* at 376. McCann turned around and drove back when suddenly Kitanov became agitated and exclaimed, "Oh my God. Oh my God. Get me out of here. That is him. That is him." *Id.* According to McCann, Kitanov said he saw the shooter. *Id.* at 378.

McCann interviewed Washington after he was arrested November 4, 1995, and Washington admitted that on October 28th he saw McCann drive by with a white person wearing a baseball cap. *Id.* at 384. But Washington denied that he had seen Kitanov previously. *Id.* at 384, 438. Washington said he had been sitting in Hancock's car when McCann and Kitanov passed. *Id.* at 438. Kitanov did not identify the car during either drive through Balboa Avenue, McCann stated during cross-examination. *Id.* at 390.

Det. Todd Williams's Testimony

Before Homicide Det. Todd Williams testified to the jury the Trial Court conducted a *voir dire* to determine the circumstances under which he claimed to have acquired the two newspaper articles Sykes allegedly tore up in an interrogation room November 17, 1995, and the reasons the government failed to disclose them to Appellant's counsel under D.C. Crim. R. 16. *See above at 4.* Det. Williams testified that he was the primary investigator in the embassy shooting case and participated in arresting Sykes in Prince George's County November 2, 1995. When Sykes was returned to the District of Columbia November 17, Det. Williams placed him in an interrogation room in the Metropolitan Police Homicide Branch and left him alone for a while. Tr. 4/18/97B, 450. Det. Williams said he used a video camera to watch Appellant, and saw him take

some papers from his pocket, tear them up, put the pieces in a trash basket and slide the basket away from him. *Id.* The detective said Sykes was not wearing handcuffs at the time. *Id.* at 457. After he interviewed Sykes, Det. Williams took him to the MPD cellblock and then returned to the interrogation room to examine the contents of the trash can. Williams testified he found the torn newspaper articles about the case, which he pieced back together with tape. *Id.* at 452. He said he had two files on this case, one containing documents directly related to it and a second containing information about this case and about other robberies in Northwest Washington. *Id.* at 452. He placed the articles in the latter file and called them to the prosecutor's attention April 16 when he reviewed the file in preparation for testifying. *Id.* at 454.

Under questioning from the Court in the *voir dire*, Det. Williams said he did not make notations about the articles in a running résumé or other document. *Id.* at 456. He said the only torn pieces of paper in the trash can were parts of the articles. *Id.* at 457. Det. Williams said he gave the prosecutor the file containing the articles early in the Grand Jury process, and he recalled having mentioned them to other police officers but not the prosecutor. *Id.* at 458. He admitted having touched the articles while taping them together, but gave no reason for failing to submit them for fingerprint analysis. *Id.* at 458 – 9.

Det. Williams said under cross-examination that he knew when he found the articles that they were important to the murder case and should have been disclosed to the defense long before trial. Tr. 4/18/97C, 3 – 4. He would not vouch for the chain of custody of the articles because he gave the file to the prosecutor early in the case and other police officers may have had it in the interim. *Id.* at 465. The detective said he could see on the television monitor that Sykes was tearing something up, but not what the objects were, and he could not be certain the objects were the articles. *Id.* at 469. He said he found the fact that Sykes had the articles "interesting," but said it was not worthy of being noted in a report. *Id.* at 471. Det. Williams said he did not know whether Sykes's destruction of the articles had any significance in the case. *Id.* at 479.

Before the jury Det. Williams restated that on November 17 he left Sykes in an interrogation room without handcuffs and watched on the monitor as Appellant tore up and discarded the articles. Tr. 4/21/97, 574 – 5. Over defense objection the Trial Court admitted the articles as Gov't Exh. 36, a *Washington Post* article dated November 9, 1995, and Gov't Exh. 37, another *Post* article dated November 10. *Id.* at 578 – 80. He

explained that he had intended to tell the prosecutor about them earlier, but did not do so until the previous week. *Id.* at 581 -2.

Next he testified that on November 4, 1995 he was going to Capitol Heights to look for Hancock's car, when he saw it parked in Northeast Washington. *Id.* at 583. He said he called McCann and for backup, and parked where he could watch the vehicle. *Id.* at 584. A short time later three men got in the car and drove away with Det. Williams and McCann in pursuit. *Id.* at 586. They followed the car along Benning Road, N.E., but did not stop it because no backup cars were available. Shortly after they entered Prince George's County the car pulled into a carryout, where Det. Williams and McCann decided to make a stop. *Id.* at 587. As they got out of their cars one man exited the rear of the car and fled with McCann in pursuit. *Id.* Det. Williams found Hancock in the driver's seat and Washington in the front passenger seat, and arrested them. *Id.*

Both men were taken to the Prince George's County Police headquarters, where Det. Williams interviewed Hancock. *Id.* at 590. The detective testified that he explained to Hancock why he had been arrested, and when the defendant denied involvement in the homicide Det. Williams explained the principle of felony murder. *Id.* at 593 – 4. Hancock replied, "So I'm charged with driving the car away." *Id.* at 594. Hancock said he had been at Greasy's house on Brenner Street in Capitol Heights at about 8 p.m. the night of the homicide, Det. Williams testified. *Id.* at 595.

On November 6, 1995, after Washington and Hancock were returned to D.C., Det. Williams interviewed Washington. *Id.* at 600. Washington said he was not involved in the crime and only knew what he had learned from McCann two days earlier. *Id.* at 601 – 2. According to Det. Williams, Washington recalled seeing both investigators drive through Balboa Avenue, and remembered seeing a young white man wearing a baseball cap in McCann's car. *Id.* at 602. When Det. Williams told him the man had identified him as the shooter, Washington responded that McCann had told him the witness said he looked like the shooter, but had not made a positive identification. *Id.* at 602. Washington said he wanted to stand in a lineup and take his chance that the other white boys at the embassy would not be able to identify him. *Id.* at 603. According to Det. Williams, Washington also said police wanted him to say he was on the steps at the embassy and that the shooting was an accident. *Id.* The witness said he had not told Washington how many witnesses there were, their genders or what had occurred at the Bulgarian Embassy.

Det. Williams admitted under cross-examination telling Washington that Sykes had implicated him as the shooter in the crime. Tr. 4/23/97, 57 – 60.

Questioned during cross-examination about the newspaper articles, Det. Williams said Sykes was ordered to empty his pockets when he arrived at the interrogation room. *Id.* at 192. He said Appellant may have taken the articles out of his pocket, but the detective did not recall that, and the PD 163 he prepared did not indicate that personal items were inventoried. *Id.* at 194. However, the detective recalled having taken personal articles from Sykes that day. *Id.* at 200. According to Det. Williams, when a suspect is brought to the Homicide Branch from the MPD cellblock he assumes the person has been searched, and that the articles would have been found in such a search, but he does not know if that happened in Sykes's case. *Id.* at 195 – 6.

Det. Williams admitted that Sykes never gave a statement and that he lied when he told the codefendants that Appellant identified Hancock as the driver and Washington as the shooter. *Id.* at 203. He told the Grand Jury he had made such statements to Washington and Hancock but did not tell grand jurors that those statements were lies. Tr. 4/24/97, 67 – 8. Then the prosecutor began redirect with the following colloquy:

> Q. Detective Williams, when you told Gary Washington that Maurice Sykes had told you everything, and that wasn't true, why were you using that technique?
>
> A. The reason I was doing that was that if in this case, there's more than one person arrested. And we had arrested Mr. Sykes prior to the interview of Mr. Washington. I thought that if I told him that Maurice, when he was arrested, told us the whole story, that might encourage him to admit his responsibility in the shooting.
>
> Q. And once you said what you said about Mr. Sykes, to Mr. Washington, what was his response?
>
> A. When I … told him that we arrested Mo, and that he told us everything, that Gary was the shooter, he said that … he wasn't going to say anything because Mo was a pipe-head, and that he would take his chances in court.

Tr. 4/24/97, 71 – 2. Grimm immediately requested a bench conference, arguing that the prosecutor had warned Det. Williams not to mention Washington's comment, which had been redacted from the version placed in evidence. Grimm said the case against Sykes should be dismissed because the prosecutor's question and Det. Williams's response were either intentional or grossly negligent.

The Court conducted a *voir dire* to determine why Det. Williams revealed to the jury material that had been ruled inadmissible.

> THE COURT: Detective Williams, in reference to the last question that you were asked by Ms. Incontro, in your response, you brought out the fact that Mr. Washington allegedly said that Maurice Sykes was a pipe-head. Is that right?

THE WITNESS: Yes.

THE COURT: Had you been told by Ms. Incontro not to mention that?

THE WITNESS: We had a conversation about that. And I don't … remember it being specifically told: Do not say "pipe-head" in court. …
…
THE COURT: Did you appreciate that bringing out that information might well result in Mr. Sykes being prejudiced and, therefore, his case not being able to go forward as a result of that?

THE WITNESS: Well, I appreciated it to a certain degree, that it would prejudice Mr. Sykes. I didn't think that it would result in him not being allowed to go forward.
…
[MR. GRIMM] Q. Detective Williams, prior to trial, Ms. Incontro went over with you a concept called "redactions," correct?

A. Yes.

Q. And there were certain things in Hancock's and Washington's statement that under no circumstances could be mentioned in this courtroom, correct?

A. No, that's not correct.

Q. Well, she showed you what the redactions were, correct?

A. Yes, she did.

Q. … And you know that that statement that Mr. Washington made, that Maurice is a "pipe-head" was redacted out?

A. … Yes, it was redacted.

Q. So you knew when you took the stand today, and yesterday, that that was not to be mentioned unless told otherwise by the Court or Ms. Incontro, correct?

A. That's not correct.

Q. Well, she told you not to mention it, correct?

A. On direct examination, yes. That if there was some cross-examination that pertained to something, that I could get into it.

Q. … And did I ask you what Gary Washington said on cross-examination? I don't think so.

A. I don't remember.

Q. Right. And, it was Ms. Incontro who asked you this question that prompted the objection, correct? Not any defense lawyer.

A. Yes.

Tr. 4/24/97, 78 – 80.

Ralph Williams's Testimony

Ralph Williams, the confidential informant, was 26 years old and had grown up in Capitol Heights. Tr. 4/25/97, 205. He said he had known the defendants for five or six years. *Id.* at 206.

Ralph Williams said that on the night of October 23, 1995 he was gambling with Wayne Sellars and Tony Parrott at Greasy's house on Brenner Street in Capitol Heights, and the three defendants appeared there

at about 10:45 p.m. *Id*. at 208 – 10. He testified that Washington "was talking about he had to bust this motherfucker up on Sixteenth Street, over a jacket. … He said he was trying to get to this guy, and this guy was trying to make it into a door. The guy was trying to run from him. And a buzzer went off, so he like panicked and shot him." *Id.* at 212 – 13. According to Ralph Williams, "Maurice was saying that he was beating this guy up for a watch, an older guy," and he was "just like shadow boxing." *Id.* at 213. He added that "Shon said he was in the car." *Id.* at 214. Washington wore a ¾ length black leather jacket, Ralph Williams testified. All he could recall about the other defendants' attire was that Sykes wore black jeans. *Id.* at 215. He said Washington wanted to sell the jacket, and he, Parrott and Sellars tried it on. *Id.* at 217. According to Ralph Williams, when he put the jacket on he found a rusted gray .38 caliber revolver in the pocket and he handed the gun to Washington, who removed two bullets from it. *Id.* at 218. The informant said he left Greasy's at about 11:30 p.m. to go to work, and he saw Hancock's car parked outside. *Id.* at 219 – 20. He had never seen anyone other than Hancock drive the vehicle, and he had previously seen Washington, but not Sykes, in the car. *Id.* at 221.

Ralph Williams testified that he did not believe what Washington said until the next day, when he heard a news report about the shooting at the Bulgarian Embassy, and then he discussed the news report with Parrott before calling Prince George's County Det. Lucia two days later. *Id*. at 220 – 2. The informant asked if there was a reward for information, and Lucia put him in touch with McCann. *Id.* at 223. Ralph Williams recalled talking to McCann about three days after the homicide, but in the interim he saw Washington again in the leather jacket, and was present, along with Parrott and Hancock, when Washington sold the jacket to Sellars. *Id.* at 225 – 6. When he saw Hancock's car on Balboa Avenue October 28, 1995 he called Lucia, and saw McCann drive by with a white man in a baseball cap. *Id.* at 227 – 8. Ralph Williams said he was at Greasy's when Washington discussed seeing "one of the foreign guys from 16th Street." *Id.* at 229.

Ralph Williams admitted that when he called Lucia he had a pending drug case for which he could have received a 10-year mandatory sentence, but he denied informing on the defendants in hopes of getting a lighter sentence. *Id.* at 330 – 1. He acknowledged receiving $300, but denied that Prince George's County or D.C. officials promised to assist him at sentencing in the drug case. *Id.* at 331 – 2. In March or April 1996 he met with the FBI, and agents gave him a cell phone to use to contact them, but he denied using that for other

purposes, and said the only other payment he received, $2,100 for moving expenses, came after he became scared that his name would become public. *Id.* at 335 – 7.

THE DEFENSE CASE

Michael Sykes's Testimony

Appellant's brother Michael testified that their great grandmother Sally Sykes Morton of Roanoke Rapids, N.C., died in October 1995, and the funeral was scheduled for October 25, 1995. Tr. 4/28/97, 635 – 9. He said he and sister Michelle McCoy picked Appellant up at his apartment in Northeast Washington between 2:30 and 3 p.m. October 23rd for the drive to North Carolina. *Id.* at 638 – 40. They left Washington at about 3 p.m. and arrived in North Carolina at about 7 p.m. He testified that when the embassy homicide occurred, he and Appellant were "hanging out" with an uncle on land their family owned near Roanoke Rapids. *Id.* at 641. They stayed in a trailer on the land and returned to Washington after the funeral. *Id*. at 642.

Michelle McCoy's Testimony

Michelle McCoy said she learned of her great grandmother's death over the weekend of October 21 – 22, and had to arrange time off from her job at the Washington Hospital Center. *Id.* at 651 – 3. She arranged with other members of the staff to cover her shifts from Monday to Thursday. *Id.* at 652 – 3. She said they decided to go to North Carolina a few days in advance because they had not seen relatives who lived there for a long time. *Id.* at 654. McCoy corroborated Michael Sykes's testimony that he picked her up Monday afternoon and then they pick up Appellant. She said they arrived in North Carolina between 7 and 7:30 p.m. and she was with Appellant at 9 p.m. *Id.* at 654 – 6.

Det. Williams's Testimony

Defense counsel recalled Det. Williams to testify about an interview he had with Ignatiev the day after the homicide. The detective testified that he told Ignatiev he would obtain pictures of suspects and ask the Bulgarian if he could identify the assailants. *Id.* at 665. Reading from a transcript of the interview, Det. Williams said Ignatiev

> "… said actually he would try to assist in the investigation in any way he could, but he hasn't so good memory about their faces … regarding the faces Mr. Ignatiev thinks maybe the boys would be more help."
> …
> "Maybe the boys would be more help because they had seen them just face to face and they would be — he had seen the faces only in the minutes, few minutes, even not minutes."

Id. at 666.

POST-CONVICTION PROCEEDING

Maurice Sykes's Testimony

Sykes testified that early in his working relationship with Grimm they discussed whether he would testify at trial, and Grimm advised him not to make that decision until he saw how the case unfolded. Tr. 5/15/01, 31. Sykes told his lawyer he wanted to testify "to be clear that I had no participation in this crime." *Id.* at 47. Counsel said that if he testified the jury would learn about his two Maryland drug convictions. *Id.* at 31-32.

During cross-examination government counsel explored at length Sykes's two Maryland drug cases in which he pled guilty to one felony and one misdemeanor. He said in both he hoped for dismissal, but when that did not happen he sought the lowest plea offer possible. He said he never considered going to trial in those cases. *Id.* at 55-58.

Grimm and Sykes again discussed whether Defendant would testify after Det. Williams blurted out Washington's "pipe-head" comment and testified about the newspaper articles. *Id.* at 33. Sykes said counsel never prepared him for the eventuality that jurors would hear that testimony. *Id.* at 75. After Det. Williams made the "pipe-head" statement, Sykes said, jurors began "whispering to one another, and like … looking at me in a very strange manner which made me very uncomfortable." *Id.* at 36. He noted that although one of the Maryland convictions was for possession of narcotics, he had never tested positive for drug use. *Id.* at 76. Perceiving that juror reaction to him had changed and in reaction to admission of the newspaper articles, Sykes said he passed Grimm a note indicating "that I needed to testify because it's no other way that … I will be able to rebut those []false allegations." *Id.* at 33.

Later, in the cell block behind the courtroom, with Washington and Hancock present, they discussed Sykes's belief that he needed to testify, and Grimm advised Defendant not to testify. *Id.* at 33, 35 – 36. Again, during testimony by Ralph Williams, Sykes expressed his need to testify because the informant "started lying on me." *Id.* at 37. Although Grimm advised him early in the case that they would decide later whether Sykes would testify, counsel never prepared him for that eventuality — never went through questions he would ask on direct examination and the prosecutor would ask on cross-examination. *Id.* at 37 – 38. Grimm never told

Appellant he had the right to testify even though counsel advised against it, and never said they had reached the point in the trial at which Sykes had to testify or he would lose the right to do so.[10] *Id.* at 38 – 39.

On cross-examination Sykes said he recalled a discussion of jury instructions late in the trial, but said he did not understand much of what was said. Grimm did not specifically discuss the significance of the instruction about the defendant's failure to testify. *Id.* at 75.

Gary Washington's Testimony

Washington said he first became aware that Sykes wanted to testify during McCann's testimony. Tr. 5/15/01, 11. He could not recall what McCann said, but "Sykes became agitated during his testimony and made a statement to Grimm that he wanted to testify."[11] *Id.* at 12.

Washington recalled an incident in which "Sykes became so agitated that he threw … his note pad that he was keeping notes on to the back of the chair trying to get Mr. Grimm's attention to explain to him that he wanted to testify." *Id.* at 13. But Washington was not sure whether that occurred while McCann or Det. Williams was testifying. *Id.* at 13, 25-26. On cross-examination Washington said, "Mr. Grimm turned his back on him as if he didn't want to hear what Mr. Sykes was saying, and Mr. Sykes threw the note pad to the back of the chair." *Id.* at 26. He said Grimm responded, "I don't think that would be in your best interests." *Id.* at 13-14. Washington said one of the marshals interceded and told Sykes "to calm down, … talk to your lawyer when you get in the back, this is not the place for it." *Id.* at 15. The marshals told Sykes to be quiet on more than one occasion. *Id.* at 16.

Washington testified that during a recess Grimm asked Sykes in the cell block, "why would you do that in the courtroom?" and Sykes replied, "because they're lying, and I wanted to defend myself, I wanted to testify."

When the informant testified, Sykes told Grimm in the cell block that the witness was "lying on him, and he … wanted to defend his self." *Id.* at 15. Washington said he and Hancock were present during this loud discussion. *Id.* at 15, 27. Washington noted that all three defendants were kept in the same cell in the cell block. *Id*. at 29.

---

[10] Sykes's two prior criminal cases had ended with guilty pleas, so his lawyers in those cases had never discussed these issues with him. *Id.* at 39.

[11] During the trial the three defendants were seated behind their lawyers. Washington was in the center with Sykes to his right and Hancock to his left. *Id.* at 12.

At one point during the trial

> There was a time when Mr. Sykes asked me to confer with my lawyer Mr. Jonathan Stern to try to get him to intercede between those two because … the rapport between Mr. Grimm and Mr. Sykes was kind of poor so he wanted me to talk to my lawyer and have my lawyer to talk to Mr. Grimm about him testifying ….
> …
> … That's what he asked me to try to intercede, and I said it's not possible.

Id. at 17, 25.

On cross-examination Washington confirmed that he overheard conversations between Grimm and Sykes in which Sykes expressed the desire to testify and Grimm advised him that "it would not be in his best interests" to do so. *Id.* at 22-24. In response to the Court's question about whether he recalled a *Boyd* inquiry, Washington said, "to the best of my recollection I don't believe I was asked whether or not I wanted to testify." *Id.* at 29.

Bernard Grimm's Testimony

Grimm testified that he met with Sykes about 30 times at the jail during the time he represented Appellant, and Sykes called his office frequently. Tr. 5/15/01, 86. During phone conversations Grimm refused to discuss substantive issues to protect the attorney/client privilege. *Id.* at 87 – 88. Trial counsel corroborated Sykes, testimony that early in their working relationship they discussed whether he would testify at trial.

> I always reminded Mr. Sykes that he ultimately had the option of testifying in the trial, that it would be my obligation and he could expect me to fully sit down with him and go over his testimony in terms of how one would present themselves in court, what I would expect his cross-examination and told him that that right remained with him up until the last second that the defense closed out.

Id. at 94. On cross-examination Grimm corroborated Sykes's testimony about their early discussion, stating that "in my experience it serves no purpose for the client or the attorney to commit to an irretrievable position" on whether to testify. *Id.* at 105.

But Grimm never prepared Sykes to testify. When asked "in preparation for the defense case … when the Government had rested, did you sit down with Mr. Sykes and prepare him to testify?" Grimm replied, "Mr. Sykes was not prepared in the sense that I would technically prepare someone to testify, but he was — if he decided at the last moment to testify, he could have testified. He knew enough about the case and what I had believed were the danger areas of his testifying." Tr. 5/23/01, 19.

Grimm said he normally tells clients that at some point during the defense case the judge would conduct a *Boyd* inquiry, but he could not recall whether he said that to Sykes. Tr. 5/15/01, 102. He said he expects that every Superior Court judge will hold such an inquiry. *Id.* He denied feeling any responsibility for making sure that the Court conducted a *Boyd* inquiry.

> Q. … [Y]ou don't recall saying well, Mr. Sykes, the Judge — Maybe you should talk to the Judge about whether you want to testify?
>
> A. No, that would be malfeasants (sic) for someone to encourage a client in a Courtroom to commence a discussion with a Judge that is unprotected by the Fifth or Sixth Amendment, and so I'm not sure what you're driving at.
>
> Q. Well, isn't that the nature of the Boyd Inquiry? Often lawyers ask Judges to conduct that Boyd Inquiry to make sure there is a record of the decision not to testify?
>
> A. That dialogue is commenced by the Court and not by the client, Mr. Becker.
>
> Q. But as a practical matter, isn't it often the lawyer who reminds the Judge to do that?
>
> A. As a practical matter, it's the Court who reflectively (sic) remembers….

Tr. 5/23/01, 21.

According to Grimm, Sykes's initial reaction was that he did not want to testify because he had a criminal record in Maryland; however "I told him not to have a closed mind about it…." Tr. 5/15/01, 94. But he denied that Sykes ever expressed his desire to testify. *Id.* at 96. Grimm asserted that "I ultimately asked him if he had any change in his mind about refusing to testify, and he said that he believed he had made the right decision, he would not testify." *Id.* at 96 – 97.

Most of their discussions about his right to testify occurred at the jail, Grimm said. He explained that, "In the cell block there were general discussions about it but nothing in [] detail. For obvious reasons Mr. Sykes's codefendants were there. It's not the optimal place to discuss Mr. Sykes' critical right that he has in the case." *Id.* at 96. But on cross-examination Grimm could not recall meeting with Sykes at the jail during the defense case. Tr. 5/23/01, 7, 20 – 21. Although he claimed they had no substantive discussions in the cell block about whether Sykes would testify, Grimm said,

> He didn't, in court, in the cell block, say the words I'm not going to testify, I remember that I did most of the talking because I didn't want Mr. Sykes talking, but I remember essentially asking him is your decision with respect to testifying still the same, and acknowledgment from him that it was the same. I believe that was either during or at the close of his defense case.

Tr. 5/15/01, 97 – 98.

Grimm also corroborated Washington's recollection that "Mr. Sykes had at some point in the case some sort of outbreak in the court," although he could not recall whether that occurred while the jury was present. *Id.* at 96. When asked whether, after Det. Williams called him a pipe-head, Mr. Sykes asked to testify, Grimm replied, "I have no recollection of him saying it or not saying it one way or another." *Id.* at 100. He did not recall as well whether they argued in court or in the cell block about whether Sykes would testify. *Id.*

But during cross-examination, when asked about Sykes's outburst in the courtroom, Grimm said, "I remember Mr. Sykes being very excited and annoyed at what Todd Williams had testified to. I remember other parts during the trial where Mr. Sykes became excited and perhaps angry at evidence that came out or testimony that came through." Tr. 5/23/01, 12.

He agreed that Sykes communicated with him in the courtroom by passing notes, but did not recall one in which Appellant stated that he wanted to testify. Tr. 5/15/01, 98 – 99.

When asked by the Court whether there had been a *Boyd* inquiry, Grimm said,

> Judge, the answer is no, I was first asked to recollect this when Mr. … Sykes started filing papers on this case, and I had no memory of it, called both co-counsel in the case who both had no memory of it either, and I couldn't believe between myself, Mr. Stern and Miss Roberts that none of us, all three of us collectively and individually dropped the ball on that, but I have no memory of it.

Tr. 5/15/01, 101, 5/23/01, 21.

On cross-examination Grimm stated that he had no recollection of reviewing jury instructions one-by-one with Sykes before the lawyers and the Judge discussed them in open court. Tr. 5/15/01, 104-5.

In an attempt to bolster Grimm's credibility, the government called Carl Ballard Sr., a court security officer who worked for Judge Walton's courtroom for several years, including Sykes's entire trial. Ballard was the only witness who claimed to recall the Court conducting a *Boyd* inquiry. Tr. 5/23/01, 36, 41. He was the only witness who never saw Sykes's "outburst," to which both Grimm and Washington testified. *Id.* at 43-44.

SUMMARY OF THE ARGUMENT

In Sykes's multi-defendant trial for first degree felony murder and attempted armed robbery the government withheld from the defense for nearly a year information about two witnesses whose Grand Jury testimony conflicted with that of its key witness against Appellant, informant Ralph Williams. When the prosecutor finally informed defense counsel about the exculpatory witnesses neither police nor defense investigators could locate them and defense counsel were limited to reading small portions of their Grand Jury testimony to jurors. Because at least one of the witnesses would have exculpated Sykes, and would have cast significant doubt on the informant's testimony, the *Brady* violation deprived Appellant of his ability to mount a defense, and permitting defense counsel to read some Grand Jury testimony to jurors was a wholly inadequate remedy.

Before Det. Williams testified about Washington's post-arrest statement the prosecutor informed him about portions that had been redacted because they were inadmissible against Sykes and Hancock. Nonetheless, after testifying about statements Washington made that tended to implicate himself in the crime, Det. Williams disclosed to jurors that Washington had said that Sykes was a "pipe-head." The detective admitted knowing that the statement would prejudice Sykes, and that he had been warned not to mention redacted portions of Washington's statements unless they were relevant to questions asked by defense counsel in cross-examination. His willful *Bruton* violation could not be cured through a jury instruction, and Appellant's conviction must be vacated because he was denied the right to confront his accusers and to a fair trial..

In violation of Rule 16(a)(1)(C) the government withheld from Sykes until the middle of trial two newspaper articles it claimed he tore up in an interrogation room. The Trial Court recognized that jurors might view the articles as evidence of consciousness of guilt, and that the defense had been prejudiced by the government's actions, but it permitted the government over objection to introduce the articles in its case-in-chief. The articles were highly prejudicial and of negligible probative value and the Trial Court abused its discretion by refusing to bar admission of the articles or to bar their introduction until the government's rebuttal case.

In a proceeding on a motion for new trial pursuant to § 23-110, Appellant demonstrated by more than a preponderance of evidence that he wanted to testify at trial, and that he was deprived of his Fifth Amendment right to do so. The Trial Court's decision to deny the motion must be vacated.

When Sykes stood in a lineup he was the only individual wearing leg shackles and it is clear that they were visible to the one eyewitnesses who made a tentative identification of Appellant as his assailant. Because the lineup was unduly suggestive, and there is a strong likelihood that the witness was influenced by the presence of the leg irons, admission of the lineup identification at trial deprived Sykes of his Fifth Amendment right to due process, and he is entitled to a new trial because the Trial Court's error was not harmless beyond a reasonable doubt.

Sykes was convicted of and sentenced for first-degree felony murder and attempted robbery while armed, the underlying felony, and he must be resentenced because those offenses merge. His conviction for carrying a pistol without a license and possession of a firearm during a crime of violence or dangerous offense must be vacated because the government produced no evidence that Sykes actually or constructively possessed Washington's gun. Because the government produced no evidence that Sykes knew Washington was armed, he cannot be convicted as an aider and abettor to either crime. Finally, as the principal in the attempted robbery of Ignatiev, because he did not know Washington was armed he cannot be convicted of the enhanced offense of attempted robbery while armed.

ARGUMENT

THE GOVERNMENT DEPRIVED APPELLANT OF HIS RIGHT TO PRESENT A DEFENSE BY WITHHOLDING EXCULPATORY EVIDENCE

"The right of an accused in a criminal trial to due process is … the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 1045, 35 L. Ed. 2[d] 297 (1973).

> The right to offer the testimony of witnesses … is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2[d] 1019 (1967). This right is grounded in both the Fifth and Sixth Amendments.

In this case the government acknowledged Sykes's right under *Brady, supra*, and *Giglio, supra*, to disclosure of the identities of Sellars and Parrott, and that it failed to provide that information. It acknowledged as well that it took no steps to ensure either potential witness's availability to the defense, and that after an exhaustive search it could not locate them.

The Trial Court recognized the prejudice Sykes suffered as a result of the government's actions, and it should have excluded Ralph Williams's testimony. Instead, it fashioned a remedy that benefited Washington, permitting limited use of the witnesses' exculpatory Grand Jury testimony favorable to the defense and excluding portions favorable to the government. But the transcripts provided an inadequate remedy for Sykes, and, therefore, he is entitled to dismissal of the charges or a new trial.

The* Brady *Violation Deprived Sykes of Directly Exculpatory Testimony

The prosecutor called Wayne Sellars and Tony Parrott before the Grand Jury 11 months before trial, and Sellars gave testimony clearly exculpating Sykes. Parrott's testimony, far less credible, was exculpatory, only in that it impeached Ralph Williams's credibility. In this case, where the only evidence against Sykes was Ralph Williams's account of the conversation at Greasy's the night of the homicide and Ignatiev's equivocal identification, testimony from Sellars, if not from Parrott, probably would have changed the outcome of the case.

Sellars told the Grand Jury that he had grown up with all three defendants in Capitol Heights. Gr. J. 5/2/96, 61 – 2. He said he learned about the homicide at the Bulgarian Embassy from a newspaper article, and that he bought a Versace ¾ length black leather jacket from Washington for $200. *Id.* at 62, 68. He could not recall the date on which he bought the jacket or whether that occurred after he read about the crime. *Id.* The witness said he saw Hancock a few weeks before he bought the jacket, but he had not seen Sykes in a long time. *Id.* at 65 – 6. When pressed, he said he had not seen Sykes for a "month or so" before he bought the jacket. *Id.* at 65.

According to Sellars, it was night time and he was playing cards with Parrott when Washington came into Greasy's with the jacket in his hand and offered to sell it. *Id.* at 71, 77 – 8. No one else was present for the transaction. *Id.* at 63, 93. Sellars said Washington stayed about 15 minutes but did not mention the homicide, and Sellars did not see Washington with a gun. *Id.* at 63 – 4, 71, 81, 84. "Ain't no way I would have bought a coat if I thought it had anything to do with anything," he said. *Id.* at 87. Sellars stated that he asked where Washington got the coat, but did not get an answer. *Id.* at 87 – 9.

Parrott told the Grand Jury he had known all three defendants since high school. Gr. J. 5/2/96, 5 – 6. On October 23, 1995 he went to the movies with his girlfriend. *Id.* at 6 – 7. They returned home between midnight and 1 a.m., he said. *Id.* at 11. He later said he was not sure which date he went to the movies but denied being at Greasy's house October 23. *Id.* at 46 – 7.

Parrott said he knows Greasy and the house on Brenner Street where Greasy lived, but he denied being present when Hancock claimed he loaned his car to Sykes or when Sykes allegedly returned the car. *Id.* at 8. He said none of the defendants discussed the homicide or "busting a dude down in D.C." in his presence. *Id.* He acknowledged having read about the crime in the newspaper, "it said something about three Capitol Heights boys." *Id*. at 9, 39. He also denied being present when Washington sold the jacket to Sellars and that he ever saw Washington, Hancock or Sykes with a firearm. *Id.* at 37 – 8. Parrott said he had not seen or talked to Sykes in several years, but that the last time he talked to Ralph Williams was the previous day. *Id.* at 10. He said the first time he learned about his purported connection to the case was a week before his Grand Jury appearance. *Id.* at 20. Parrott said the prosecutor told him that Hancock had identified him as being present when Hancock claimed to have loaned his car to Sykes. *Id.*

Ralph Williams testified that he was gambling with Parrott and Sellars at Greasy's house at about 10:45 p.m., when the three defendants came into the room and bragged about shooting one man and robbing another. He said Washington was wearing the leather jacket, which had a gun in the pocket, and offered to sell the jacket. But the transaction actually happened another day, the informant claimed. Sellars directly contradicted the informant, testifying that only he and Parrott were gambling when Washington entered the room alone with the jacket in his hand and no gun. Sellars said he bought the jacket the first time it was offered, and there was no discussion of the crime, which he learned about from a newspaper account.

Such testimony is clearly exculpatory of Sykes and Hancock, although it inculpates Washington, and the prosecutor had a duty under *Brady* to disclose it. She acknowledged that testimony given by Parrott and Sellars in the Grand Jury fell within the *Brady* doctrine, but asserted that because it would merely impeach Ralph Williams's credibility she had no obligation to inform the defense before trial. When pressed by the Trial Court, which rejected that argument, she claimed that she withheld the witnesses' identities to protect the informant's identity.

Standard of Review

This Court has held that where a *Brady* violation has occurred the defendant is entitled to reversal of his conviction if "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Farley v. United States*, 767 A.2d 225, 228 (D.C. 2001)(citing *Edelen v. United States*, 627 A.2d 968, 971 (D.C. 1993). It noted that "when the government's evidentiary suppression 'undermines confidence in the outcome of the trial' " there is a reasonable probability of a different result. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2^{d} 490 (1995); *United States v. Bagley*, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2^{d} 481 (1985), *supra*, at 678).

In Appellant's case the Court must decide whether Sykes was denied his Fifth and Sixth Amendment rights to due process because the deliberate delay in disclosing the witnesses' identities deprived him of the ability to present their live testimony to the jury. This is a mixed question of law and fact which must be reviewed *de novo*. Furthermore, because trial counsel asserted that the government's actions deprived Sykes of the ability to defend himself, Appellant is entitled to reversal unless the government can demonstrate that, despite the inadequacy of the remedy fashioned by the Court, the error was harmless beyond a reasonable doubt.

The Government Violated Its Obligation Under **Brady** *To Disclose Identities of Exculpatory Witnesses*

There is no question that a *Brady* violation occurred in this case. The government admitted withholding the identities of two potentially exculpatory witnesses and, after an extensive search over several weeks beginning before trial, could not locate them. Based on the witnesses' Grand Jury testimony the Trial Court concluded that they would have provided material evidence contradicting and impeaching the credibility of Ralph Williams, a key government witness. The only real issue for this Court to consider is the inadequacy of the remedy the Trial Court fashioned, permitting defense counsel to read to the jury small portions of the missing witnesses' Grand Jury testimony.

The Supreme Court's directive in *Brady* is clear and simple:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
> …
> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice….

373 U.S. at 87 – 88. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio, supra*, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2^{d} 1217 (1959)). "[T]he duty encompasses impeachment evidence as well as exculpatory evidence." *Bagley, supra*, at 676..

The Trial Court properly concluded that even if the two witness only impeach Ralph Williams's credibility the defense had a right to interview them before making opening statements and decide whether to call them to testify. Tr. 4/7/97, 10 – 12.

In *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2^{d} 342 (1976), the Supreme Court stated:

> Although there is … no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

In Sykes's case, the prosecutor received a specific request in a letter from Grimm dated June 11, 1996. The prosecutor responded, "I acknowledge and will fulfill my obligation to provide *Brady* and *Giglio* information to you in a timely fashion." R. 27, 3.

Based on the above statement in *Agurs*, the D.C. Court of Appeals held that *Brady* and *Agurs* "are premised on the view that due process requires pretrial (or at least at-trial) disclosure, upon a specific request, of evidence material to guilt or punishment." *Lewis v. United States*, 408 A.2d 303, 306 (D.C. 1979)(*en banc*). "[T]his court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under *Brady*." *Edelen, supra*, 627 A.2d at 978 (citing *James v. United States*, 580 A.2d 636, 643 – 4 (D.C. 1990).

This Court had noted previously that pretrial "discovery of witnesses or witness lists may result from a number of rules and case decisions…. A constitutional requirement that the prosecution disclose exculpatory witnesses and evidence to the accused has been articulated by the Supreme Court and subsequent circuit court cases." *United States v. Holmes*, 343 A. 2d 272, 275 (D.C. 1975)(citing *Brady, supra*, *Meers v. Wilkins*, 326 F.2d 135, 136-38 (2d Cir. 1962)). Pretrial disclosure of the identities of grand jury witnesses who provided exculpatory information satisfies the government's obligation under *Brady*. *Wiggins v. United States*, 386 A.2d 1171, 1173 (D.C. 1978)(citing *United States v. Ruggiero*, 472 F. 2d 599, 603-5 (2d Cir.), *cert. denied*, 412 U.S. 939 (1972)).

In *Holmes* the Court addressed whether the Trial Court had authority to order the government before trial to disclose to a defendant the identities of eyewitnesses. It noted that the primary justifications for withholding such information are to protect witnesses' safety and the integrity of their testimony. *Id.* at 277. Citing *Roviaro v. United States*, 353 U.S. 53, 62, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), the Court of Appeals stated that "the problem is one that calls for balancing the public interest in protecting and encouraging witnesses for the government against the individual's need for the witness or witnesses for the preparation of his defense." *Id.*

The D.C. Circuit has said, "Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure." *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir.

1976)(citations omitted). It ruled that in determining the timing of disclosure trial courts must balance the "potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions." *Id.* at 974.

Two cases before Judge Lamberth illustrate this approach well. He ruled in *United States v. Blackley*, 986 F. Supp. 600, 601 (D.D.C. 1997), that "the government has an ongoing burden to provide material exculpatory evidence whenever it discovers that it has such information in its possession." To satisfy that obligation the government sent defense counsel a letter before trial indicating that a witness might have given exculpatory evidence to the Grand Jury. Judge Lamberth concluded that

> the letter proves adequate disclosure of the essential facts concerning the exculpatory evidence. The summaries fairly indicate the nature of the exculpatory testimony that each witness might offer. … [T]he defense now has the present opportunity and ability, with reasonable diligence, to contact these individuals and develop their testimony for trial. That is what *Brady* requires and nothing more.

Id. at 604-5. *See, also, United States v. Grossman*, 843 F.2d 78 (2d Cir. 1988); *United States v. LeRoy*, 687 F.2d 610, 619 (2d Cir. 1982)("rationale underlying *Brady* is … to assure that the defendant will not be denied access to exculpatory evidence only known to the Government.").

In *United States v. Edelin*, 128 F. Supp. 2d 23, 31 (D.D.C. 2001), Judge Lamberth noted that the government had demonstrated by a preponderance of the evidence that pretrial disclosure of witness names might jeopardize the lives or safety of individuals. He therefore held that defendants'

> willingness to interfere with the judicial process through a pattern of intimidation, threats and violence indicates that the names of witnesses should not be provided to the defendants or defense counsel prior to the Thursday before each witness will testify. This will allow defense counsel a minimum of three days to prepare for the testimony and cross-examination of government witnesses.

In this case the prosecutor argued that the identities of Parrott and Sellars were withheld to protect the informant's safety, but she proffered no evidence that the informant had been threatened. In addition, at some point the government paid $2,100 to relocate Ralph Williams after he expressed concern for his safety. Once he was moved the government had no justification for withholding the identities of Parrott and Sellars. The Trial Judge responded that at a minimum the prosecutor had a duty to place both men under subpoena so they would be available to the defense, and that if she had concerns about the informant's safety she should have raised them with him *ex parte*.

There can be no doubt, based on Sellars's Grand Jury testimony, that his evidence had to be disclosed

to the defense under *Brady*. His sworn testimony that he was not present when Sykes allegedly made comments about robbing an older man and the circumstances under which he bought the leather jacket sharply conflicts with that of the informant. Even if it is viewed as impeaching, rather than directly exculpatory, it would satisfy any interpretation of the standard enunciated in *Bagley, supra*, 473 U.S. at 682.

Deprived of this evidence pretrial, defense counsel was prevented from conducting an investigation to corroborate these witnesses' exculpatory evidence, and from mounting a strong attack in his opening statement on the informant's credibility.

As appellate courts have long recognized, "Trial transcripts are an imperfect substitute for live testimony." *United States v. Seschillie*, 310 F.3d 1208, 1214 (9th Cir. 2002).

> There can be no doubt that seeing a witness testify live assists the finder of fact in evaluating the witness's credibility. As the Supreme Court stated in *Anderson v. City of Bessemer,* 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed.2d 518 (1985): "[O]nly the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." … Live testimony enables the finder of fact to see the witness's physical reactions to questions, to assess the witness's demeanor, and to hear the tone of the witness's voice — matters that cannot be gleaned from a written transcript.

United States v. Mejia, 69 F.3d 309, 315 (9th Cir. 1995).

In assessing Sykes's argument that in violation of *Brady* the government withheld exculpatory evidence that was material to a determination of his guilt, and that there is a reasonable probability that the suppressed evidence would have produced a different result,[12] this Court must consider all of the suppressed exculpatory evidence. *Kyles, supra*, 514 U.S. at 438. The Court must now consider the cumulative effect of the government's Rule 16(a)(1)(C) violation with the *Brady* violation *See below at 36.*

In short, the government's case against Sykes was very weak. "Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result," Sykes is entitled to a new trial. *Kyles, supra*, 514 U.S. at 421-2.

---

[12] *See Kyle, supra*, at 434:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

USE OF WASHINGTON'S "PIPE-HEAD" COMMENT DEPRIVED APPELLANT OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM, AND IRREPARABLY HARMED HIS ABILITY TO OBTAIN A FAIR TRIAL

Citing *Bruton, supra*, trial counsel moved to sever Sykes's case from those of Washington and Hancock, arguing that written statements given by the codefendants implicated him in this crime and others. R. 39 & 40. In motions hearings and during the trial, counsel and the Trial Court engaged in lengthy discussions concerning use of statements police obtained from Washington and Hancock shortly after they were arrested. From the very beginning the "pipe-head" comment was excluded.

Washington's counsel argued strenuously for inclusion of the portion of his client's statement indicating that Det. Williams said "I told [Washington] that regardless of what the other witnesses say, we talked to Mo, and he said that Gary was the shooter, that he planned to shoot the kid." Tr. 3/25/97, 263 – 4. That statement immediately preceded and prompted Washington's comment that Sykes was a "pipe-head." The Trial Court correctly concluded that the prejudice to Sykes if the jury heard the detective's statement far outweighed its probative value to Washington. *Id.* at 265. After the government revealed that it had failed to disclose the newspaper articles Sykes allegedly tore up, the Judge ruled that Sykes should be allowed to ask about the lies Det. Williams told Washington and Hancock as a way to demonstrate that the detective was lying about the newspaper articles as well. Tr. 4/21/97, 534 – 8. At its conclusion, the prosecutor said:

> I have given Detective Williams some redacted statements, and I may even have to lead him a little bit just to make sure he is getting to the points.
>
> He is a very good witness. I don't think there will be a problem. But, I am going to do absolutely everything I can to make sure that we are eliciting only what the Court has indicated may be elicited.

Id. at 544.

During redirect examination Det. Williams blurted out Washington's statement that Sykes was a "pipe-head." In the bench conference that followed immediately, Grimm argued,

> Your Honor, I break my neck to make sure that this stays out.
>
> [The prosecutor] had 24 hours between yesterday and today to go over this with Williams. Williams is an experienced officer.
>
> I'm moving for the Court to dismiss the case, and rule right now under *Oregon vs. Kennedy*[13] that my client can leave this courtroom. Because that's the only remedy I'm entitled to at this point. This is simply outrageous. We were just up at the bench …. concerned about stuff like this. And Ms. Incontro was completely confident he wouldn't say anything like that.
>
> …

[13] *Oregon v. Kennedy*, 456 U.S. 667, 102 S. Ct. 2083, 72 L. Ed. 2^d 416 (1982).

> MR. GRIMM: … There was nothing in my cross-examination that would have prompted Ms. Incontro to ask: what was Gary's response?
>
> …
>
> It is irrelevant; it is immaterial; it has nothing to do with this case, what Washington said. What it has to do with is why the detective lied to him; why he used that tactic.

Tr. 4/24/97, 72 – 3. Noting that Sykes had been incarcerated since his arrest in early November 1995, he explained that a mistrial would be a satisfactory remedy only if the Court agreed to release Sykes from custody until he could be retried. *Id.* at 77.

The prosecutor agreed that the jury should never have heard the "pipe-head" comment.

> … [W]ith respect to Mr. Washington, the response I expected, because I had gone over this with Detective Williams, and the response that, in fact, appears in the confessions, in the notes rather, and the typewritten statements of Mr. Washington, is that once … Detective Williams said what he said about Maurice Sykes, and that based on that, I, Detective Williams, have to conclude that it was intentional — that the response to all of that immediately from Mr. Washington was: so you want me to say I was on the steps of the embassy and I accidentally shot the kid. That is all I was attempting to elicit.

Id. at 75. But, she argued, the Court should instruct the jury that Det. Williams's comment "was totally inappropriate, it's irrelevant, they should disregard it." *Id.*

Regardless of what the prosecutor told Det. Williams about the redacted "pipe-head" comment, it is clear from his colloquy with the Trial Judge that Det. Williams understood he could not mention Washington's comment during direct examination, but that he should look for an opportunity later to do so. *See above at 15 - 16.* Alternatively, Det. Williams understood the "pipe-head" comment would prejudice Sykes's right to a fair trial, but he believed that even if he violated the prosecutor's directive not to use the comment, the government would suffer no serious consequences.

Washington's Statement Would Have Been Inadmissible If Sykes Were Tried Separately

The U.S. Supreme Court ruled in *Bruton, supra*, 391 U.S. at 126, that:

> [B]ecause of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of [a codefendant's] confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Washington's statement that Sykes was a "pipe-head" was extremely damaging to Appellant's defense for several reasons. The jury could logically interpret the statement as an admission of involvement in the crime and adoption of Det. Williams's statement that Sykes was involved, along with an assertion that no

one would believe Appellant because he is an addict. In addition, jurors could reasonably conclude that Sykes was a drug addict who would commit a desperate street robbery in the presence of numerous witnesses because he needed money to buy drugs. But the government produced no evidence that Sykes tested positive for narcotics when he was arrested, or that he ever used narcotics.[14]

Appellant's siblings testified that he lived in Washington in October 1995, not in Capitol Heights where he grew up and his codefendants lived. They testified that Sykes was with them in North Carolina when the shooting occurred, not hanging out at Greasy's in Capitol Heights. Testimony from Det. Williams and Ralph Williams established a close personal relationship between Washington and Hancock, but did not establish that such a relationship existed between Sykes and either codefendant. The Grand Jury testimony of Parrott and Sellars confirms the strong relationship between Washington and Hancock, and that Sykes was not part of that relationship. Neither of them testified to having seen Sykes at Greasy's. But, due to the government's *Brady* violation, defense counsel could not call them to testify to those facts. Sykes could neither confront Washington nor call witnesses to testify that he was not involved.

Standard of review

In a joint trial, introduction of a codefendant's statements implicating another defendant is prejudicial *per se* as to the second defendant, unless the codefendant testifies in his own behalf and can be cross-examined by counsel for the defendant who has been implicated. In Sykes's case, as in *Bruton*,

> the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, [were] deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

Id. at 135 – 6.

Although the Court said that curative instructions can be effective to protect criminal defendants in many cases where jurors receive other forms of inadmissible hearsay, this is a "context[] in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* at 135. The Court

[14] Appellant's two arrests in Prince George's county involved distribution charges which eventually were reduced to possession as part of plea agreements.

noted that it would be impossible to determine whether the jury actually credited the inadmissible codefendant statement in reaching a guilty verdict, and a defendant is entitled to a new trial without having to demonstrate that he actually was prejudiced. *Id.* at 136 – 7.

Because Washington's statement was inadmissible against Sykes and was extremely prejudicial to Appellant, and because Det. Williams testified about the "pipe-head" comment in blatant disregard of warnings he had been given, and with full knowledge that it was prejudicial, Sykes is entitled to dismissal of the case. Alternatively, he is entitled to a new trial.

THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING USE OF THE NEWSPAPER ARTICLES AFTER THE GOVERNMENT WITHHELD THEM FROM THE DEFENSE FOR 18 MONTHS IN VIOLATION OF D.C. CRIM. R. 16

The Government violated D.C. Crim. R. 16(a)(1)(C) by failing to disclose before trial information about the newspaper articles Det. Williams claimed Sykes tore up while sitting in an interrogation room at the Homicide Branch November 17, 1995. It did so by failing until the middle of the trial to even disclose to defense counsel the existence of newspaper articles, which had been in its case file for nearly 18 months.

Rule 16(a)(1)(C) states:

> Documents and Tangible Objects. Upon request of the defendant the prosecutor shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Standard of Review

This Court reviews a claim that the Trial Judge failed to impose an adequate sanction for violation of Rule 16(a)(1)(C) for abuse of discretion. *United States v. Curtis*, 755 A.2d 1011, 1014 (D.C. 2000).

> [T]he defendant must demonstrate a relationship between the requested evidence and the issues in the case, and there must exist a reasonable indication that the requested evidence will either lead to other admissible evidence, assist the defendant in the preparation of witnesses or in corroborating testimony, or be useful as impeachment or rebuttal evidence.

Id. at 1014 – 15. In reviewing the sanction a Trial Court imposed for failure to disclose evidence in compliance with the rule, this Court "consider[s] … the reason for nondisclosure, the impact of nondisclosure, and the impact of the proposed sanction on the administration of justice." *Wiggins v. United States*, 521 A. 2^{d} 1146, 1148 (D.C. 1987). In deciding whether the sanction the Trial Court imposed served the ends of justice,

factors to be considered include, "(1) the degree of negligence or bad faith involved, (2) the importance of the evidence lost, and (3) the evidence of guilt adduced at trial." *Cotton v. United States*, 388 A.2d 865, 869 (D.C. 1978).

Appellant is entitled to a new trial if the discovery violation caused prejudice to substantial rights. *United States v. Brodie*, 871 F.2d 125, 130 (D.C. Cir. 1989).

The Government Withheld Material Information in Its Possession Pretrial Until After the Trial Began

Assuming for the sake of argument that Det. Williams testified truthfully about how he acquired the newspaper articles, there is no dispute in this case that they were in the government's possession since Sykes was arrested, and that the detective knew they should have been disclosed to Appellant. Det. Williams testified that he put them in a file which he turned over to the prosecutor while she was presenting the case against Sykes, Washington and Hancock to the Grand Jury. He claimed that he had intended to call the prosecutor's attention to them, but it "slipped my mind." The prosecutor did not dispute Det. Williams's testimony, and this Court should conclude that they were in her possession from at least May 1996 until she disclosed them to defense counsel. Trial counsel made a specific request for Rule 16(a)(1)(C) material in his June 11, 1996 discovery letter to the prosecutor. Before responding to that letter she had an obligation to review the files containing the newspaper articles, but her June 13 letter transmitting discovery materials listed other documents and tangible objects, but not the articles.

The Trial Court Abused Its Discretion in Refusing To Bar Use of the Articles in the Government's Case-in-Chief, or to Declare a Mistrial

Under Rule 16(d)(2), if a party fails to provide required discovery "the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." A necessary predicate for issuing any sanction under the rule is a finding that the discovery violation prejudiced the party deprived of discovery. The decision about what remedy is most appropriate depends on an assessment of the "seriousness of the violation and the amount of prejudice to the defendant." *United States v. Lanoue*, 71 F.3d 966, 97X (1st Cir. 1995) .

A judge considering whether to impose sanctions for violation of Rule 16(a) should "impose the least severe, but effective, sanction." *United States v. Douglas*,[15] 862 F.Supp. 521, 525-6 (D.D.C. 1994)(citing *United States v. Euceda-Hernandez*,[16] 768 F.2d 1307, 1311-12 (11th Cir. 1985). In *Euceda-Hernandez* the Court enunciated a three-step procedure under which a trial judge considering imposition of sanctions should assess the reasons for the Government's delay in providing required discovery, the degree of prejudice to the defendant, and the feasibility of curing the violation by ordering a continuance. *Id.*

There Is No Valid Justification for the Rule 16(a) Violations in This Case

The prosecutor, Det. Williams and the Trial Court recognized that the government had breached its duty to turn over the newspaper articles long before trial.

"[A] principal purpose of discovery is to advise defense counsel what the defendant faces in standing trial; it permits a more accurate evaluation of the factors to be weighed in considering a disposition of the charges without trial." *United States v. Lewis*, 511 F.2d 798, 802 (D.C. Cir. 1975). *See, also, Lanoue, supra*¸ at 976 (Rule 16 contributes to fair administration of justice, providing basis for informed litigation strategy, minimizing undesirable effects of surprise at trial, promoting accurate fact-finding). Because the focus is on protecting the defendant's rights, not punishing the government, it is irrelevant whether a violation of Rule 16 was intentional. *United States v. Rodriguez*, 799 F.2d 649, 654 (11th Cir. 1986). In Sykes's case, however, Det. Williams's failure to inform the prosecutor about the newspaper articles and the prosecutor's failure to review the file in performing her ongoing obligation to provide discovery can only be characterized as bad faith or gross negligence.

Appellant Suffered Very Significant Prejudice as a Result of the Discovery Violations

The Trial Court clearly recognized that if the jury credited Det. Williams's testimony that Sykes surreptitiously tore up and discarded the newspaper clippings, it might use those actions as evidence of con-

[15] In *Douglas, supra*, the Government violated Rule 16 by failing to disclose to defense counsel until several days before trial copies of taped conversations between his client and police, and counsel said a continuance would not help him prepare to meet the force of that evidence. 862 F.Supp. at 526. It does not purport to address whether granting a continuance is an appropriate sanction when the government fails to disclose Rule 16 evidence until mid-trial.

[16] *Euceda-Hernandez*, in which the Court of Appeals ruled that the government could use appellants' statements to investigators even thought the Prosecutor had not disclosed them pursuant to Rule 16(a)(1)(C) to counsel before trial, is factually very different from the case at bar. Defense counsel knew three days before trial that their clients had met with investigators and the "gist" of the conversations. 768 F.2d at 1312-3. In such cases "where the evidence is disclosed before the jury is sworn and the trial begins, a brief continuance, to allow counsel to confer with his client or restructure his trial strategy, will eliminate any prejudice the belated discovery may have worked." *Id.*

sciousness of guilt. Trial counsel asked that the Court bar the government from introducing the evidence, and alternatively, for a mistrial, but the Judge denied the motion, asserting that, based on the government's evidence up to that point in the trial, he would not have found Sykes guilty beyond a reasonable doubt. The Court indicated that the government's case against Sykes would turn heavily on testimony by Ralph Williams, which had not yet been presented. In addition, the Judge had not yet determined the extent to which Sellars's and Parrott's testimony would be presented to the jury.

The Trial Court Failed To Impose Even A Modest Sanction

One of the primary purposes of Rule 16 is to protect the defendant's Sixth Amendment right to a fair trial. Under the circumstances, the Trial Court had an alternative that would have satisfied the ends of justice, preserving Sykes's rights without imposing too harsh a sanction on the government for its knowing failure to comply with Rule 16. It could have precluded the government from introducing the newspaper articles in its case-in-chief, and considered later whether to permit Det. Williams to testify about them in rebuttal, after weighing the probative value of his testimony against the prejudice to Sykes caused by the discovery violation.

In the balance the Trial Court should have noted that the incident Det. Williams described was not direct evidence of Sykes's guilt. Furthermore, the newspaper articles identified Sykes and his codefendants as suspects in the case, providing an innocent explanation for why he might have possessed them 15 days after his arrest. In addition, the detective testified that suspects are searched before being brought to the Homicide Branch and he had ordered Sykes to empty his pockets in the interrogation room, but the government provided no inventory showing that Sykes had the newspaper articles in his possession when he was returned to D.C. from Prince George's County or at any time before Det. Williams took him back to the cellblock after the November 17, 1995 interview.

When balanced against the weakness of the government's evidence, and in light of the prejudice resulting from the *Brady* violation discussed above, it was an abuse of discretion to permit the government to introduce the newspaper articles and Det. Williams's testimony about them in its case-in-chief. Appellant is entitled to a new trial.

Appellant Was Denied His Fifth Amendment Right To Testify in His Own Defense

The District of Columbia is unique in placing the burden on the Trial Court to protect the defendant's right to testify in his own defense. *Boyd, supra.* The D.C. Court of Appeals rejected the so-called demand rule, under which a defendant is considered to have waived the right by failing during trial to express his desire to testify. *Id.* at 677. The Court went further, stating that it will not presume that a waiver occurred in the absence of evidence in the record "demonstrating 'an intentional relinquishment or abandonment of a known right or privilege.' " *Id.* at 674 – 5 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)").

Standard of Review

Unlike the federal courts and most states, which place that burden on trial counsel and consider failure to advise a client to be ineffective assistance under the Sixth Amendment,[17] this jurisdiction views denial of the right to testify as a structural defect in the trial process which violates the Fifth Amendment. The right of a criminal defendant to testify in his own defense is so central to our criminal justice process that denial of that right calls into question the fundamental fairness of the trial. *Boyd, supra*, at 677.

In *Rock v. Arkansas*, 483 U.S. 44, 51, 107 S. Ct. 2704, 97 L. Ed. 2[d] 37 (1987), the Supreme Court ruled that "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.' " (quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S. Ct. 2525, 45 L. Ed. 2[d] 562 (1975)). "In fact, the most important witness for the defense in many criminal cases is the defendant himself." *Id.* at 52. "Even more fundamental to a personal defense than the right of self-representation, which was found to be 'necessarily implied by the structure of the Amendment,' is an accused's right to present his own version of events in his own words." *Id.* (citation omitted). The High Court concluded that the right is grounded in the Fifth and Fourteenth amendment due process clauses and the Sixth Amendment rights to present a defense and compulsory process.

Like the right to represent oneself, it is either honored or it is denied. *See McKaskle v. Wiggins,* 465 U.S. 168, 177-78 & n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)(harmless error doctrine designed to ensure

---

[17] *See, e.g., United States v. Tavares*, 100 F.3[d] 995 (D.C. Cir. 1996).

objectively correct trial outcomes is inapplicable to denial of right of self-representation and other rights designed to serve individual dignity interests); *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705 (1967)("constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."); *State v. Rosillo,* 281 N.W.2d 877, 878-79 (Minn. 1979)(stating that "the right to testify is such a basic and personal right that its infraction should not be treated as harmless error."). A defendant must prevail if he demonstrates by a preponderance of the evidence that he did not knowingly, intelligently and voluntarily waive his right to take the stand in his own defense. *Boyd, supra*, at 677.

Sykes Met His Burden of Proving Denial of His Right To Testify

Sykes demonstrated by much more than a preponderance of the evidence that he did not knowingly, intelligently and voluntarily waive his right to testify. The record is devoid of indications that the Trial Court held a *Boyd* inquiry and Grimm testified that he consulted codefendants' counsel and none of the defense lawyers could recall the Judge asking the defendants if they wanted to testify. In addition, the government conceded after a thorough search of its files and inquiry to the Court Reporter Service that no transcripts were missing.

Nonetheless, after stating that it based its decision to deny Appellant's new trial motion in part on "the court's own recollection of the events that occurred during the trial," the Judge said

> … although the court is relieved by not having to decide this case exclusively on whether or not the defendant was advised of his right to testify by the court, the court is confident that the advisement was administered. The court reaches this conclusion despite the absence of a transcript that verifies that the *Boyd* inquiry was conducted. Why a transcript cannot be produced by the court's Court Reporting and Recording Division is a mystery…. [T]here have been many instances when transcripts or parts of transcripts could not be produced despite the fact that the proceedings were conducted. … The court believes this is one of those situations.

R (01-CO-1407) 60, 6 (citation and footnote omitted).

The second basis given for denying the motion was Grimm's testimony, which the Trial Court credited over that of Appellant and Washington. *Id.* at 7. The Judge added that Sykes's *pro se* motion supported the conclusion that Grimm advised him of his rights and he decided not to testify. *Id.* at 8. Sykes testified that he and Grimm discussed issues to be considered in deciding whether to testify, and the quoted portions of the *pro se* motion merely indicated that Appellant wrestled with the benefits and liabilities associated with the decision. *Id.* They do not support the proposition that Sykes decided not to testify. Furthermore, *pro se* motions

like Sykes's are held to a less stringent standard than formal pleadings drafted by lawyers. *Pettaway v. United States*, 390 A.2d 981, 984 – 5 (D.C. 1978)("We have a duty to be indulgent of *pro se* pleadings."); *Gibson v. United States*, 388 A.2d 1214, 1217 n. 8 (D.C. 1978); *Bettis v. United States*, 325 A.2d 190, 193 (D.C. 1974)("standards applicable to a *pro se* motion are considerably more lax than the standards to be applied where counsel is involved."); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

Next, the Trial Court noted that Sykes had been convicted twice before in Prince George's County. Citing *Kelly v. United States*, 590 A.2d 1031, 1034 (D.C. 1991), it said "a defendant's previous experience in the criminal justice system evidenced that he was 'aware of his right to testify and take the stand in his own defense.' " Appellant testified that in both of his prior cases he decided long before trial to plead guilty to lesser charges. He had never been tried before, and it is unlikely that his lawyers in the Maryland cases discussed in detail the right to testify.

Again citing *Kelly* at 1034 n. 2, the Court pointed out that Sykes had three lawyers between arraignment and trial and "it is 'beyond question' that the defendant was capable of making his objections known to the court and maneuvering within the legal system." Order at 10. The key difference between this case and *Kelly* is that Sykes retained all of his lawyers through sentencing while Kelly had appointed counsel. Twice before trial, Kelly made sufficient legal arguments to convince the Trial Court to appoint new counsel. Sykes's first effort to make arguments to the Court was his *pro se* motion for a new trial filed about a month after he was convicted.

Finally, the Trial Judge noted that Sykes wrote numerous letters to him and has filed many pleadings. Most of the documents cited were dated after Appellant's conviction. Simultaneously with the Order denying Appellant a new trial, the Judge issued a second Order incorporating into the record several letters received from Sykes in chambers and kept in the chambers file.[18] Only one of them predated Appellant's conviction, and because post-conviction counsel did not know about them they were not addressed in the § 23-110 proceeding. Because the Trial Court denied Appellant the opportunity in the § 23-110 proceeding to respond concerning the letters, this Court should not consider them as evidence supporting denial of the motion.

---

[18] Only a few of these letters has been incorporated into the Record on Appeal.

The evidence adduced in the hearing demonstrated by at least a preponderance of the evidence that Sykes wanted to testify in his own defense, and that he informed trial counsel of that desire. Trial counsel told him the Judge would provide an opportunity before the end of the trial for him to express his desire to testify, but the Trial Court never held a *Boyd* inquiry. Because Appellant did not knowingly, intelligently and voluntarily waive his Fifth Amendment right to testify, this Court should vacate his conviction and order a new trial.

THE LINEUP WAS UNCONSTITUTIONALLY SUGGESTIVE AND ADMISSION OF IGNATIEV'S TENTATIVE IDENTIFICATION WAS HIGHLY PREJUDICIAL TO SYKES

The lineup in which Sykes stood December 14, 1995 was unduly suggestive in several respects, but the most egregious was that Appellant was the only individual in shackles, and they were clearly visible to witnesses. Because the shackles identified Sykes as the person in the lineup who police believed committed the crime, admission into evidence of Ignatiev's tentative identification violated Appellant's Fifth Amendment rights.

The Supreme Court has noted several times that

> the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.

United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). It added that "A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification." *Id.* "[T]he dangers for the suspect are particularly grave when the witness' opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest." *Id.* Furthermore, the "impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in … robbery prosecutions and present a particular hazard that a victim's understandable outrage may excite vengeful or spiteful motives." *Id.* at 230.

In *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), the Court noted that the phrase "a very substantial likelihood of irreparable misidentification"

> was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally

> well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence.

It went on to say "unnecessarily suggestive [identification procedures] are condemned for the further reason that the increased chance of misidentification is gratuitous." *Id.* at 199. In determining, based on the totality of the circumstances, whether a particular lineup created a constitutionally unacceptable risk of misidentification, this Court must consider the opportunity the witness had to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the description the witness gave at the time of the crime of the criminal, the degree of certainty the witness showed in making the lineup identification, and the lapse of time between the crime and the identification. *Id.* at 199 – 200. Another factor the Court should consider in this case is that Ignatiev is a Bulgarian national who had little exposure in his 53 years to individuals of African descent.

Standard of Review

Under *Neil*, this Court must determine whether the unduly suggestive lineup created "a very substantial likelihood of misidentification." If it did, the Court must reverse on Fifth Amendment due process grounds the Trial Court's decision to admit the out-of-court identification over defense counsel's strenuous objection on grounds that it was unduly suggestive and unreliable. In doing so the Court applies harmless error analysis. *Chapman, supra*. As the Supreme Court stated, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. That means, that Appellant is entitled to a new trial unless this Court can say there is no reasonable possibility that admission of the unconstitutional lineup identification might have contributed to Sykes's conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86 – 87, 84 S. Ct. 229, 11 L. Ed. 2^{d} 171 (1963).

Failure To Suppress the Out-of-Court Identification Was Not Harmless Error

Ignatiev testified that his assailants approached from behind and that he blacked out during the attack by the shorter man. He admitted on cross-examination that he told investigators shortly after the crime that he did not have a good memory for faces and they should ask Kitanov and Enchev to describe the shorter assailant. The description he gave police, of a man with a dark complexion, a round face, swollen cheeks and round eyes, was so stereotypical that it would match a large universe of young African American males.

At the lineup about three weeks after the crime, Ignatiev took a considerable amount of time and walked up to the glass, where he could easily see that Sykes was shackled and the other participants were not. He then took more time before saying "I think No. 4." He testified that he realized that he had selected the wrong person in the lineup including Washington and he discussed his uncertainty about the identifications with the other Bulgarian witnesses as they left police headquarters.

The prosecutor did not ask Ignatiev to make an in-court identification and this Court should conclude that he would not have been able to do so.

When defense counsel moved to suppress the lineup identification, citing the visibility of the shackles and Ignatiev's lack of certainty about the identification, in denying the motion the Trial Court responded:

> In reference to the leg irons, obviously I can't say what he could see once he got up on the platform. But, as I recall, … he didn't, once he got up on the stage, say No. 4; and he didn't, once he walked back, immediately say No. 4.
>
> He still went back and pondered the issue as to whether or not the defendant was in fact … the alleged culprit. And, I think that … undermines the suggestion that he saw leg irons, and … because he saw leg irons that he focused on the defendant; and, therefore, made an identification of him.
>
> I think if that were the case, it seems to me the more consistent course with that would have been when he went up there, he saw the leg irons, and he said, "Oh, leg irons. It is No. 4." or , he immediately walked back and said, "No. 4."

Tr. 1/14/97, 235.

The Judge's intuition might be quite accurate about the reactions a person who grew up in the United States would exhibit under such circumstances. But anyone familiar with the works of such noted authors as Aleksandr Sozhenitsyn,[19] Arthur Koestler,[20] and Andrei D. Siniavskii (pseud. A. Tertz)[21] would question the Judge's assessment as applied to a 53-year-old Bulgarian government employee who lived most of his life under communist rule. In a communist country it would have been customary, if a witness was asked to identify a suspect, for the police to provide subtle hints about who they wanted the witness to identify. Similarly, it would have been customary for the witness to pick the "right" person without acknowledging the subtle hints. Ignatiev might well have viewed the presence of leg irons on Sykes as such a hint, and to avoid the appearance that he had taken the hint he walked away from the window to a place where he could not see them before saying "I think No. 4."

---

[19] *Cancer Ward*, Dial (1968); *First Circle*, Harper & Row (1968); *Gulag Archipelago*, Harper & Row (1973).
[20] *Darkness at Noon*, 1940, Bantam Books, Reissue edition (1984).
[21] *The Trial Begins: The Soviet State versus "Abram Tertz" and "Nikolai Arshak,"* Harper & Row (1966).

In any event, defense counsel objected to admission of the unduly suggestive, highly prejudicial lineup identification, which was equivocal at best, and the government's other evidence against Sykes was very weak. On this record it would be impossible for the Court to conclude that the due process violation arising from admission of the lineup identification was harmless beyond a reasonable doubt. *Chapman, supra*, at 24. *See Gilbert v. California*, 388 U.S. 263, 273, 87 S. Ct. 1951, 18 L. Ed. 2[d] 1178 (1967).

APPELLANT'S SENTENCE IS UNCONSTITUTIONAL AND IS NOT SUPPORTED BY EVIDENCE

The Trial Court sentenced appellant on one count of first-degree felony murder while armed, two counts of attempted robbery while armed, one count of possession of a firearm during a crime of violence or dangerous offense, and carrying a pistol without a license. If the Court concludes that Appellant is not entitled to a new trial, it should decide his sentence is unconstitutional because one count of attempted armed robbery merged into the felony murder conviction. *See Catlett v. United States*, 545 A.2d 1202, 1218 – 9 (D.C. 1988).

The government may proceed to trial on alternative theories, in this case one count of attempted armed robbery involving Mihailov and another involving Ignatiev, and each of those charges may carry an associated felony murder count. If the jury convicts on both felony murder counts the Trial Court is not required, before appeal, to decide which underlying felony merges with the felony murder conviction. But because the felony murder conviction must merge with the underlying felony, Appellant "cannot remain sentenced, either consecutively or concurrently, for both felony murder and the underlying felony." *Id. See, also, Adams v. United States*,502 A.2d 1011, 1026 (D.C. 1986)(citing *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed 2[d] 715 (1980)). In cases like the one at bar, this Court must remand with instructions to "vacate the conviction for felony murder or the conviction for the underlying felony, whichever the trial court deems more suitable to effectuate its original sentencing plan. *Adams, supra*, at 1027 (citing *Garris v. United States*, 491 A.2[d] 511, 514 (D.C. 1985)(*Garris II*)).

Appellant's conviction for carrying a pistol without a license in violation of D.C. Code § 22-3204(a) is unsupported by evidence in that the government offered no evidence during trial that Washington's accomplice actually or constructively possessed the revolver Washington used to shoot the decedent. In fact, the government provided no evidence that the accomplice knew before Washington shot the victim that he was armed.

“To support a conviction for carrying a pistol without a license on an aiding and abetting theory of liability, there must be a showing of ‘[s]ome conduct by an alleged accomplice of an affirmative character in furtherance of the act of carrying the pistols by the ... principals.’ ” *McCoy v. United States*, 760 A.2d 164, 186 (D.C. 2000)(quoting *Halicki v. United States*, 614 A.2d 499, 503 (D.C. 1992)). Evidence that Washington’s accomplice participated in the larger scheme to rob Mihailov and Ignatiev is insufficient to support conviction of the accomplice for aiding and abetting Washington in carrying a pistol without a license. *Id.*

In its instructions to the jury at the beginning of the trial, the Trial Court incorrectly stated that “an aider and abettor is legally responsible for the principal’s use of a weapon during an offense if the aider and abettor had actual knowledge that some type of weapon would be used or if it was reasonably foreseeable to the aider and abettor that some type of weapon was required to commit the offense.” Tr. 4/11/97, 47. It gave an identical instruction at the conclusion of the trial. Tr. 4/30/97, 117. This instruction, which focuses on commission of the attempted armed robbery, rather than on commission of the crime of carrying a pistol without a license, clearly does not comport with the holding in *McCoy, supra*.

In her final argument the prosecutor told jurors,

> And, when Maurice Sykes beat Mr. Ignatiev trying to get his watch and kept beating him, he was assisting and acting together with and aiding and abetting Gary Washington in his plan. The plan was to commit a robbery, quite clearly.
>
> And, when Mr. Washington pulled the trigger and shot and killed Evgeny Mihailov, that action, the murder of that young man, was a reasonable and foreseeable consequence of trying to rob somebody with a gun.

Tr. 4/29/97, 873 – 4. That statement is accurate regarding aiding and abetting the armed robbery of Mihailov, but not regarding aiding and abetting carrying a pistol without a license.

Because the government failed to offer evidence that Sykes knew Washington was armed, that he participated in the crime of carrying a pistol without a license as something he wished to bring about, and that he intentionally acted in furtherance of that crime, his conviction on that charge must be vacated.

For the same reason, Sykes cannot be convicted of possession of a firearm during a crime of violence or dangerous offense in violation of § 22-3204(b), a possessory weapons offense defined in the same statute. Under the statute the term “possession” has its ordinary legal meaning, and a person can be convicted only if the government proves that the defendant had actual or constructive possession of a weapon. To prove constructive possession the government must provide evidence that the defendant knew the weapon’s location,

had the ability to exercise dominion and control over it, and intended to exercise such dominion and control. *See, e.g., Smith v. United States*, 684 A.2d 307, 308 n. 2 (D.C. 1996); *Taylor v. United States*, 662 A.2d 1368, 1372 (D.C. 1995); *Earle v. United States*, 612 A.2d 1258, 1265 (D.C. 1992).

In *Smith, supra*, this Court affirmed a defendant's conviction as an aider and abettor to possession of a firearm during a violent crime because the government provided proof of constructive possession of a gun, as well as that the defendant had aided and abetted the armed assault committed by her son with the gun. *Id.* at 312 – 13. Because the government offered no direct evidence or circumstantial evidence from which jurors could have inferred that Washington's accomplice knew he was armed, much less that the accomplice had the ability to exercise dominion and control over the weapon, Sykes could not be convicted of possession of a firearm during a crime of violence or dangerous offense. *See, e.g., White v. United States*, 763 A.2d 715, 725 (D.C. 2000).

Finally, although the evidence might be sufficient to convict Appellant for the attempted robbery of Ignatiev, it is insufficient to convict him of the enhanced offense of attempted robbery of Ignatiev while armed. The government's evidence was that two men followed Ignatiev as he returned to the embassy. The shorter man attacked Ignatiev only with his hand at the base of the steps and the taller man proceeded up the steps toward the three younger men. No witness saw a gun until the taller man pointed it at Mihailov and demanded the jacket and money. Under the government's theory of the case, Sykes was the principal in the attempt to rob Ignatiev and Washington was the principal in the attempt to rob and murder of Mihailov.

D.C. Code § 22-3202[22] states in relevant part:

> (a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm …
>
> (1) May, if such person is convicted for the first time of having so committed a crime of violence … be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to, and including, 30 years for all offenses … and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years …

By its terms the statute requires the government to prove that the principal was armed with a firearm or had one readily available when he committed the underlying offense. If the principal is armed, an accomplice can be convicted as an aider and abettor to armed robbery if it was "reasonably foreseeable [to the accomplice]

[22] This statute has been recodified as D.C. Code § 22-4502.

that some type of weapon was required." *Ingram v. United States*, 592 A.2d 992, 1003 (D.C. 1991). *See, also, Morriss v. United States*, 554 A.2d 784, 789 (D.C. 1989)(accomplice is liable for any criminal act which in the ordinary course of things was the natural and probable consequence of the crime"); *Abrams v. United States*, 531 A.2d 964, 971 (D.C. 1987).

Assuming for the sake of argument that Sykes was involved in the alleged crimes, he was not in actual or constructive possession of a firearm. Furthermore, the government introduced no evidence that he knew Washington was armed, and therefore he cannot be considered to have had a gun readily available when he initiated the attack on Ignatiev. By initiating the unarmed attack on Ignatiev it is evident that he did not believe a weapon was required. He cannot be held liable for the Washington's actions on the steps that were not reasonably foreseeable acts and were not the natural and probable consequences of his unarmed attack on Ignatiev.

Therefore, the evidence supports only a conviction for robbery and the enhanced sentence imposed under § 22-3202 must be vacated.

CONCLUSION

For the reasons stated above and any others that may appear to the Court following oral argument, Appellant respectfully requests that the Court vacate his conviction. Alternatively, if the Court determines that he is not entitled to dismissal of the charges or a new trial, the Court should remand the case with instructions to resentence Appellant.

Respectfully submitted,

____

Robert S. Becker, Esq.
D.C. Bar No. 370482
PMB # 155
5505 Connecticut Avenue, N.W.
Washington, D.C. 20015
(202) 364-8013
Attorney for Maurice A. Sykes
(*Appointed by the Court*)

CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Maurice A. Sykes, certify that on July 1, 2003 I served a true copy of the attached Appellant's brief due by first-class mail on counsel listed below.

____

Robert S. Becker

John R. Fisher
U.S. Attorney's Office
555 Fourth Street, N.W.
Washington, D.C. 20001