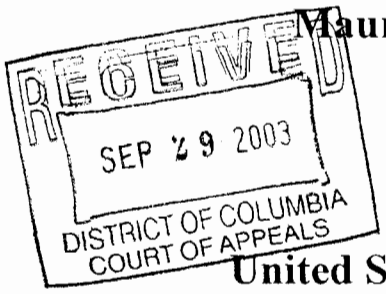
IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

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



Maurice A. Sykes,
Appellant,

v.

United States of America,
Appellee.

On Appeal From The
Superior Court of the District of Columbia
Criminal Division – Felony Branch
F 9723-95

APPELLANT'S SUPPLEMENTAL BRIEF

Submitted by:

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QUESTIONS PRESENTED

1. Whether Appellant was denied due process of law by the Government's intentional failure to disclose the identity of exculpatory and impeaching witnesses, and ensure their presence at trial.
2. Whether the Trial Court abused its discretion by allowing the Government to introduce evidence of ripped newspaper articles and the fact that Sykes had destroyed the articles in a surreptitious manner while in police custody, where this evidence was not disclosed to the defense until the middle of trial.
3. Whether Appellant was denied his Sixth Amendment right to confront the witnesses against him when Detective Williams, a Government witness, testified to inadmissible, extrajudicial statements made by Appellant's co-defendant.
4. Whether Appellant was denied due process of law when the Trial Court failed to suppress the unduly suggestive and unreliable lineup identification.
5. Whether Appellant was denied his Fifth and Sixth Amendment right to testify on his own behalf, in the absence of knowing, voluntary, and intelligent waiver.
6. Whether there was insufficient evidence to convict Appellant of aiding and abetting felony murder, carrying and pistol without a license, and possession of a firearm during a crime of violence or dangerous offense. And, whether Appellant must be re-sentenced because two of the offenses for which he was convicted merged upon sentencing.

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STATEMENT OF THE CASE

Appellant, Maurice Sykes (hereinafter "Sykes"), was arrested on November 2, 1995 in Capitol Heights, Maryland on a warrant issued by the Superior Court of the District of Columbia, charging him with *inter alia*, one count of felony-murder while armed. R. 3.[1] Sykes was returned to the District on November 17, 1995 and presented in the Superior Court the following day. R. 1, 1. The Honorable Shelley Bowers found probable cause that Sykes committed the charged offense and held him without bond. Sykes' co-defendants, Gary Washington and Shon Hancock, were arrested on similar warrants in Capitol Heights on November 4, 1995.

On December 14, 1995, defendants Washington and Sykes appeared in separate police lineups. In the first lineup, one witness positively identified Washington as the assailant who shot the decedent on the steps of the Bulgarian Embassy. Tr. 12/4/96, 89. In the second lineup, a different witness who spoke only Bulgarian[2] tentatively identified Sykes as his attacker.[3] Tr. 12/20/96, 92. No other witnesses, including the one who positively identified Washington, identified Sykes as one of the assailants. *Id.* at 78-79.

On May 8, 1996, the Government filed an indictment charging all three defendants with: (1) 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 22-3203 (Counts C and D); two counts of first degree felony-

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[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 the 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.

[2] Witness Ignatiev responded through a Bulgarian interpreter during the December 14th lineup.

[3] Witness Ignatiev stated, "I think it's number 4." Tr. 4/15/97, 313.

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 on May 10, 1996.

In a letter dated June 11, 1996, Mr. Bernard Grimm (hereinafter "Grimm"), Sykes' trial counsel, served a specific *Brady* request on the Government seeking the names of witnesses who failed to identify Sykes in the December 14th lineup, as well as other exculpatory and impeaching information. R. 27, 1. Prosecutor Mary Incontro (hereinafter "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. Grimm filed a motion to compel disclosure but the Court never made a ruling. R. 26.

On November 26, 1996, Grimm filed a motion to suppress the victim's tentative lineup identification because it was unduly suggestive and unreliable. R. 44-46. Grimm argued that on the night of October 23, 1995, the victim gave only a general description of his attacker and Sykes was the only individual in the lineup that matched that general description. Moreover, Grimm argued that Sykes was only one of three individuals in the lineup within the age range described by the witness on the night of the incident. In a hearing, Grimm further argued that the lineup was unduly suggestive because Sykes was the only person wearing leg shackles, and the victim would have seen them as he walked

back and forth to the viewing window. Tr. 1/14/97, 234. Despite persuasive argument on the issue, the Court denied the motion to suppress. *Id.* at 237.

In a motions hearing commencing on December 16, 1996, Grimm moved to sever Sykes' case from his co-defendants' based on the fact that Washington and Hancock gave statements to the police shortly after their arrests inculpating Sykes. Citing *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620 (1968), and *Aikens v. United States,* 679 A.2d 1017 (D.C. 1996), Grimm argued that the introduction of the co-defendants' statements in a joint trial, inadmissible against Sykes, would be highly prejudicial to Sykes. Grimm further argued that redacted versions of the statements would not protect Sykes' Sixth Amendment right to confront his accusers. R. 42. After reviewing redacted versions of the co-defendants' statements, the Court denied the motion to sever, but concluded that the Government could not introduce a portion of Hancock's statement that implicated Sykes in the crime. Tr. 3/28/97, 38; 4/7/97, 26.

The Government's case against Sykes rested heavily on the testimony of confidential informant Ralph Williams, who claimed to have overheard the defendants recount the crime at approximately 11:00 p.m. on the night of the shooting. In a hearing on April 7, 1997, Grimm notified the Court that he had received a letter from Incontro identifying two individuals, Wayne Sellers and Tony Parrot, who the informant claimed were present when the defendants implicated themselves in the crime. Sellers and Parrot testified in front of the Grand Jury on May 2, 1996 and their testimony considerably contradicted the testimony given by Ralph Williams to the Grand Jury months earlier. Tr. 4/7/97, 7-8. Grimm argued that the Government had violated its obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and its progeny, by one, failing to

identify these witnesses prior to the eve of trial, and two, failing to ensure their presence at trial through subpoena. Incontro acknowledged that she had not subpoenaed either witness and investigators could not locate either one. *Id.* at 8-9. Incontro represented that she did not disclose the witnesses' identities earlier because their testimony impeached the informant, it did not exculpate Sykes. *Id.* at 9. However, *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S. Ct. 763, 766 (1972) requires disclosure anytime a material Government witness can be impeached. The Honorable Judge Walton ruled that the Government should have informed the defense of Sellers and Parrot earlier and ensured their presence at trial through subpoena. *Id.* at 10. Nevertheless, Judge Walton denied Sykes' motion to dismiss based on the Government's severe *Brady* violation. Tr. 4/11/97, 5.

The trial of *United States v. Gary Washington, Shon Hancock and Maurice Sykes* commenced on April 9, 1997. The Government presented its case through the testimony of eight civilian witnesses and seven law enforcement witnesses. Only two of the civilian witnesses implicated Sykes in the crime: Ralph Williams, the Government's confidential informant seeking to work off a 10-year mandatory-minimum prison term for drug distribution in Prince George's County, Maryland, and Panayot Ignatiev, the witness who tentatively identified Sykes in the December 14, 1995 lineup, but failed to make an in-court identification of Sykes.

On April 17, 1997, eight days into the trial, Incontro informed the Court that Detective Todd Williams had found, the day before, evidence and she wished to introduce it in the Government's case against Sykes. Tr. 4/17/97, 282. Incontro told the Court that on November 17, 1995, Sykes allegedly ripped up two newspaper articles,

related to the shooting and his arrest, that were in his possession while sitting in an interrogation room at the District of Columbia Homicide Branch, and discarded them in a trash basket. *Id* at 283. Detective Williams retrieved the ripped articles, taped them together, and placed them in the case file. *Id.* Grimm strongly objected to the admission of the articles by arguing that the Government had violated D.C. Crim. R. 16(a)(1)(C) in failing to disclose the material before trial, despite numerous requests and an insufficient explanation for why the articles were not disclosed in a timely manner. Despite the violation and the substantial prejudice to Sykes, the Court allowed the Government to introduce the articles. Tr. 4/21/97.

Sykes' case consisted of the testimony of his brother, Michael Sykes, and his sister, Michelle McCoy. Both witnesses testified that Sykes was in North Carolina attending his great grandmother's funeral when the homicide occurred. Before the defense rested, limited portions of the Sellers and Parrot Grand Jury testimony were read to the jury. Tr. 4/29/97, 817-826.

Upon conclusion of trial, Judge Walton granted motions by Sykes and Hancock for judgments of acquittal on the first-degree premeditated murder counts because the Government's evidence indicated that their intentions were only to commit robbery. *Id.* at 817.

On May 6, 1997, the jury convicted Washington of two counts of attempted robbery while armed, one count 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. The jury convicted Sykes of two counts of attempted robbery while armed, one count 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. The jury continued to deliberate the charges against Hancock and on May 8, 1997, the Court declared a mistrial when it still had not reached a verdict. Tr. 5/8/97, 9.

Sykes filed a *pro se* motion for a new trial on June 11, 1997 asserting that Grimm had provided ineffective representation at trial. R. 95. The Court ultimately granted Grimm's motion to withdraw and extended the time for newly retained counsel to file a new trial motion on Sykes' behalf. Tr. 6/10/97, 9.

On October 10, 1997, Sykes was sentenced to 30 years to life 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, was 35 years to life. R. 101. Sykes filed a timely notice of appeal on November 7, 1997. R. 133.

In an Order dated December 7, 1997, the Court gave newly retained counsel thirty days to file a supplemental new trial motion and the Government thirty days to respond. R. 114. That same day, the Court issued a separate Order holding that it lacked jurisdiction to consider Sykes' post-conviction motion under Rule 33 because the time for

filing expired before Sykes had filed the *pro se* motion. R. 115. On January 2, 1998, Sykes filed a second *pro se* motion to vacate his sentence. R. 118.

In an Order dated February 18, 1998, the Court directed the Government to respond to Sykes' two *pro se* motions after retained counsel had failed to file any motions on his behalf. R. 125. In its response, the Government argued that Grimm had provided effective representation of Sykes and Sykes had not demonstrated prejudice by his attorney's performance, even if it was deficient. R. (99-CO-785), 17. In a footnote, the Government argued that Sykes had not indicated during trial that he wished to testify. *Id.* at 26 n. 18.

In an Order dated March 19, 1999, the Court denied Sykes' D.C. Code 23-110 motions, without a hearing. R. (99-CO-785), 7, 9. The Court rejected Sykes' argument that he was deprived his Fifth Amendment right to testify. However, the Court noted that it was unable to definitively determine whether it advised Sykes of his right to testify. *Id.* at 5 n. 4. Sykes filed a timely notice of appeal on April 22, 1999. R. (99-CO-785), 32.

On November 6, 2000, Sykes, through counsel, filed a motion to vacate the Order denying D.C. Code § 23-110 relief. R. (01-CO-1407), 17. Sykes argued that the Trial Court did not conduct a *Boyd* Inquiry to determine whether he wanted to testify. The motion contained two affidavits: One from Sykes asserting that he had expressed to counsel a desire to testify, and one from co-defendant Washington stating that Sykes had expressed a desire to testify to him during trial. *Id.* On November 14, 2000, the Government filed a report stating that it had reviewed all trial transcripts and it was unable to find, on the available record, that a *Boyd* Inquiry had been conducted by the Court." R. (01-CO-1407), 5, 18. At the Court's direction, the Government filed an

opposition to the motion to vacate, and Sykes subsequently filed a reply. R. (01-CO-1407), 28, R. (01-CO-1407), 33.

On May 15th and 23rd 2001, the Court held a hearing to determine whether Sykes had knowingly, voluntarily and intelligently waived his right to testify at trial, and, whether a *Boyd* Inquiry was in fact conducted. At that hearing, Sykes testified that he repeatedly told Grimm, during different stages of the trial, that he wanted to testify to be clear that he had no participation in the crime. Tr. 5/15/01, 31. Sykes also testified that Grimm never reviewed with him questions he would ask on direct examination and questions the prosecutor would ask on cross-examination. *Id.* at 37-38. Co-defendant Washington testified that Sykes had told Grimm that he wanted to testify. *Id.* at 12. In response to the Court's inquiry as to whether he recalled a *Boyd* Inquiry, Washington stated, "to the best of my recollection, I don't believe I was asked whether or not I wanted to testify." *Id.* at 29. Grimm testified that he reminded Sykes that he had the ultimate option of testifying at trial but never recalled any communication by Sykes that he actually wanted to testify. *Id.* at 94, 98-99. When asked by the Court whether there had been a *Boyd* Inquiry, Grimm testified that he had "no memory of it." Tr. 5/15/01, 101, 5/23/01, 21.

On October 21, 2001 the Court issued an Order denying Sykes' motion to vacate. R. (01-CO-1407), 15, 60. And on November 5, 2001, Sykes filed a timely notice of appeal. R. (01-C0-1407).

On June 26, 2003, Sykes retained the Law Office of Bruce A. Johnson, Jr., LLC to represent him in his direct appeal to this Honorable Court.

STATEMENT OF FACTS

On October 23, 1995, at approximately 9:15 p.m., Evgeny Mihailov was shot and killed on the front steps of the Bulgarian Embassy in Washington D.C.[4] Tr. 4/14/97, 162. According to witnesses on the embassy steps at the time of the shooting,[5] the incident began as two African-American males approached Panayot Ignatiev[6] from behind as he stood on the street in front of the embassy.[7] *Id.* at 156. Immediately after noticing the two men behind him, Ignatiev felt a sharp blow to his head, and the men began assaulting him. Tr. 4/15/97, 297-298. Soon after the assault began, the taller assailant[8] climbed the steps of the embassy, and, brandishing a firearm from his coat pocket, demanded money from several younger Bulgarian males who had been sitting on the steps. *Id.* at 160. The shorter assailant continued to assault Ignatiev with his bare hands. *Id.* at 299.[9] The taller assailant also demanded the decedent, Mihailov, give up his leather jacket. *Id.* at 160. The decedent refused, telling his friends that he did not believe the gun was loaded. *Id* at 162. Upon Mihailov's refusal to give up his jacket, the taller assailant fired one shot in the air and Mihailov lunged toward the locked embassy door. *Id.* At that moment, the buzzer to the embassy door rang and the taller, armed assailant fired a second shot at Mihailov. *Id.* As soon as the second shot was fired, both assailants fled from the location. *Id* at 162-163. Witnesses reported that the assailants ran towards a metallic-gold

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[4] The Bulgarian Embassy is located at 1621 22nd Street, N.W., Washington, D.C 20008.
[5] Velio Kitanov lived at the Bulgarian Embassy and was on the embassy steps at 9:15 p.m. on October 23, 1995. Tr. 4/14/97, 152-154. Peter Enchev did not live at the embassy but was on the embassy steps at the time of the shooting. Tr. 4/16/97, 12-13.
[6] Ignatiev, 53, arrived in Washington D.C. from New York at approximately 8:00 p.m. on October 23, 1995. He was sent to Washington D.C. to make repairs to the Bulgarian Embassy.
[7] Ignatiev was standing at the intersection of 22nd and R Streets examining the embassy structure.
[8] The taller assailant was described by witnesses on the embassy steps as between 20-30 years old, having a small head, large lips and wearing a knee-length leather jacket. Tr. 4/15/97, 299-300.
[9] The shorter assailant was described by Ignatiev as short, between 20 and 30 years old, having large "characteristic" eyes, full cheeks and not thin. Tr. 4/15/97, 300.

Chevrolet Caprice parked around the corner from the embassy.[10] Tr. 4/16/97, 135-137. The assailants jumped in the back of the vehicle which immediately sped away at a high rate of speed. *Id.*

Later that same evening, Officer Anthony Patterson took witnesses Kitanov, Enchev and Ignatiev to the corner of 22nd Street and Decatur Street, N.W.,[11] to conduct a "show-up" of three male suspects Metropolitan Police had apprehended in the area. Tr. 4/14/97, 193. After being shown the suspects one-by-one, all three witnesses confirmed that none of these men had been involved in the shooting one hour earlier. *Id.* at 194.

On October 27, 1995, investigators[12] showed witnesses Kitanov and Enchev photo arrays at the embassy to ascertain whether they could identify anyone from the shooting.[13] Tr. 4/14/97, 194. Neither Kitanov nor Enchev recognized any of the persons depicted in the photographs as being involved in the incident. Tr. 4/14/97, 194; 4/16/97, 84-85.[14]

On October 28, 1995, Detective Todd Williams and Sergeant Joseph McCann received information[15] that the vehicle involved in the shooting was located on the 900 block of Balboa Avenue in Capitol Heights, Maryland.[16] Tr. 4/18/97, 72-73. Detective Williams drove witness Mary Sherman-Willis[17] through the 900 block of Balboa Avenue

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[10] Approximately 20-30 minutes before the incident, Kitanov noticed a large orange car drive in front of the embassy and turn right on R Street, going the wrong way down a one-way street. Tr. 4/14/97, 152-154.
[11] Located approximately two blocks from the Bulgarian Embassy.
[12] Detectives Todd Williams and Anthony Patterson conducted the photo-array.
[13] Ignatiev was shown a photo array which included Hancock but not Washington or Sykes and he was unable to identify anyone as being involved in the shooting.
[14] The photo-array shown to Kitanov and Enchev included a picture of Gary Washington but not Shon Hancock or Maurice Sykes. Tr. 4/23/97, 122.
[15] The information police received regarding the location of the suspect vehicle was given by confidential informant Ralph Williams. Tr. 4/25/97, 206.
[16] The vehicle located at the 900 Block of Balboa Avenue was a gold, metallic Chevrolet Caprice with Maryland tags registered to Shon Hancock. Tr. 4/21/97, 565-566.
[17] Mary Sherman Willis resided at the intersection of R and 22nd Streets, N.W., Washington, D.C., approximately one-half block from the Bulgarian Embassy. On the night of October 23, 1995, Ms. Willis

first to see whether she could confirm the identification of the vehicle. Tr. 4/21/97, 564. After driving past the suspect vehicle twice, Willis told Detective Williams, "that looks like it, the color is right." *Id* at 565. Immediately after the Williams/Willis drive-by, Sergeant McCann drove Kitanov through the same block of Balboa Avenue. Tr. 4/18/97, 73. As McCann's mercury sable approached the suspect vehicle for the second time, Kitanov yelled, "oh my god, oh my god, get me out of here, that's him." *Id* at 74. Moments later, Kitanov told McCann that he had just seen the shooter from the night of October 23, 1995. *Id* at 76.

On November 2, 1995, Maurice Sykes was arrested on Brenner Street in Capitol Heights, Maryland in connection with the murder of Evgeny Mihailov.[18] Detective Williams participated in that arrest. Tr. 4/18/97, 448.

On November 4, 1995, Detective Williams and Sergeant McCann received information regarding the location of the suspect vehicle identified by the witnesses on October 28, 1995. Tr. 4/18/97, 379-380. Williams and McCann followed the vehicle from Southeast Washington, D.C. to Prince George's County, Maryland where a stop of the vehicle was ultimately made. *Id.* Defendants Washington and Hancock were in the vehicle and were placed under arrest pursuant to existing arrest warrants. *Id* at 380.

On November 6, 1995, Washington and Hancock were transferred to Washington, D.C. whereupon Detective Williams conducted an interview with Washington. Tr. 4/21/97, 600. Washington told Williams that he was not involved in the crime and only knew what Sergeant McCann had told him two days earlier after his arrest. *Id.* at 601-

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heard two gun shots and witnessed a "mustard-gold" vehicle stop in front of her window. She witnessed two African-American males running from the embassy, enter the rear doors of the vehicle stopped in front of her home, and drive off at an excessive speed. Tr. 4/16/97, 155-157.

[18] Arrest warrants were issued for all three defendants on October 30, 1995.

602. Williams told Washington that, "regardless of what the other witnesses say, we talked to Mo, and he said Gary was the shooter, that he planned to shoot the kid." Tr. 3/25/97, 263-264. Washington responded, "I'm not going to say anything because Mo is a pipe-head and I will take my chances in court." Tr. 4/24/97, 71-72. Williams later admitted under oath that Sykes (Mo) had never said anything to the police implicating Washington and had told Washington the lie as a technique to get him to admit to the shooting. *Id.*

On November 17, 1995, Sykes was returned to the District of Columbia and placed in an interrogation room at the Metropolitan Police Homicide Branch by Detective Williams. Tr. 4/18/97, 450. Unbeknownst to Sykes, Detective Williams was observing him by video monitor. *Id* at 468. Through the video monitor, Williams noticed Sykes remove papers from his pocket, tear them up, place the pieces in a trash basket, and slide the basket away from where he was seated. *Id* at 450. After interviewing Sykes and taking him back to the cellblock, Williams returned to the interrogation room and retrieved the ripped papers from the trash. *Id* at 452. Later that day, Williams taped the papers back together and discovered that they were two newspaper articles related to shooting and arrest of the three defendants. *Id.* At trial, Williams said that he found the articles "interesting" but not worthy of noting in a report.[19] *Id.* at 457. He further stated that he mentioned the articles to other police officers but did not bring them to the prosecutor's attention until April 16, 1997, approximately sixteen months later.[20] *Id.* at

[19] Detective Williams never questioned Sykes about the newspaper articles. Tr. 4/18/97, 477.
[20] Detective Williams admitted to going over the evidence against each defendant with the prosecutor on numerous occasions yet failed to mention the newspaper articles once. Tr. 4/18/97, 476.

454. Williams could not vouch for the articles' chain of custody[21] nor did he submit them for fingerprinting analysis after retrieving them from the trash. *Id.* at 458-459, 465.

On December 14, 1995, Sykes stood in a line-up at the Metropolitan Police Headquarters.[22] Tr. 4/15/97, 309. Ignatiev was called to attend the line-up in order to determine whether he could identify anyone involved in the Bulgarian Embassy shooting. *Id.* Ignatiev, communicating through an interpreter, tentatively identified Sykes as his attacker after approximately two minutes stating, "I think it's number 4." *Id* at 429. Ignatiev failed to use any words indicating that he was certain of his identification. *Id.* at 332. In a recorded statement given a few days following the crime, Ignatiev told Detective Williams that the police should interview the younger Bulgarians because he did not have a good memory for faces. *Id.* at 336. No other witnesses, including a witness who positively identified Washington as the shooter,[23] identified Sykes as one of the assailants. Tr. 12/20/96, 78-89.

On May 8, 1996, the United States of America filed an indictment charging Gary Washington, Shon Hancock and Maurice Sykes with *inter alia,* felony-murder while armed, in violation of D.C. Code §§ 22-2401 and 22-3202. Trial commenced on April 9, 1997.

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[21] Detective Williams placed the articles in the second homicide jacket which contained information related to robberies and stick-ups in addition to the Bulgarian Embassy homicide. Tr. 4/17/97, 479.

[22] The line-up that included Sykes was the second line-up conducted that day. The first line-up involved Gary Washington.

[23] Kitanov identified Washington in the first line-up but identified someone other than Sykes in the second line-up.

SUMMARY OF THE ARGUMENT

Sykes was denied due process of law when the Government violated its obligation under *Brady v. Maryland* to disclose information regarding exculpatory and impeaching witnesses. Approximately eleven months prior to trial, Wayne Sellers and Tony Parrot testified before the Grand Jury. That testimony contradicted the testimony given by the Government's key witness, informant Ralph Williams. The Government failed and refused to disclose the identities of Sellers and Parrot before the eve of trial and further failed to ensure the witnesses' presence at trial. The Government knew the location of the witnesses and failed to provide their location to defense counsel or subpoena them for trial. There is a reasonable probability that had the identities of Sellers and Parrot been disclosed to the defense pre-trial, and had the witnesses testified at trial, Mr. Sykes' trial would have ended in a different result. Despite this egregious violation, the Court allowed Ralph Williams to testify for the Government, and permitted the defense to read limited, redacted versions of the Sellers and Parrot Grand Jury testimony into evidence. This remedy was wholly inadequate.

The Trial Court abused its discretion by failing to impose an appropriate sanction on the Government for its violation of D.C. Crim. R. 16(a)(1)(C). This was not the Government's only discovery violation.

On April 17, 1997, eight days after trial commenced, the Government informed the Court and defense counsel, for the first time, that it wished to introduce, in its case-in-chief, newspaper articles related to the embassy shooting and Sykes' arrest allegedly recovered from Sykes on November 17, 1995 by Detective Williams, as well as evidence that Sykes had ripped the articles while in police custody. The Government failed to

provide the Court with a sufficient explanation for the seventeen month non-disclosure as the articles were in the Government's possession since their recovery from Sykes on November 17, 1995. Defense counsel had requested this information numerous times while it remained in the prosecutor's file. The Court admitted the articles into evidence, despite the Government's egregious violation. The Government's violation severely prejudiced Sykes as defense counsel was precluded from addressing the articles, or sufficiently attacking Williams' credibility in the opening statement. Counsel was further precluded from conducting fingerprint analysis on the articles. As a result of the Government's violation of its obligation under the discovery rules, Sykes was denied his Sixth Amendment right to receive a fair trial.

Sykes was denied his Sixth Amendment right to confront witnesses against him when the Government's witness testified to inadmissible extra-judicial statements made by co-defendant Washington. On November 6, 1995, Detective Williams obtained a statement from Washington following his arrest which inculpated Sykes. Sykes' counsel, citing *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620 (1968), moved to sever the trial based on Washington's extrajudicial statements. That motion was denied, however, the Court ruled that portions of Washington's statements were inadmissible against Sykes. On April 24, 1997, Detective Williams testified for the Government. On re-direct, Williams testified that on November 6, 1996, "Washington said he wasn't going to say anything because Mo was a pipe-head, and he would take his chances in Court." The comment severely prejudiced Sykes in that it associated him with co-defendant Washington and led the jury to conclude he was a drug addict who would commit a desperate street robbery in the presence of numerous witnesses because he needed money

to buy drugs. Despite the Court's acknowledgment that Williams was grossly negligent in making the statement, it failed to declare a mistrial after Grimm's motion. Instead, it provided a cautionary instruction to disregard the testimony, which only served to highlight the testimony.

Sykes was denied due process of law when the Court failed to suppress the highly suggestive and unreliable lineup identification. The lineup was suggestive in that of the seven suspects in the lineup, Sykes was the shortest and the only one with visible leg shackles on. Additionally, Sykes was only one of three persons within the age range described by the witness. The Government's evidence was insufficient to suggest that the lineup identification was reliable. The witness had no opportunity to view his attacker during the assault because he was unconscious. Further, during the time that the witness was not unconscious he held his arm over his face to block on-coming blows. The lighting was poor, the attackers approached the witness from behind, and the stressful nature of the event lend itself to an unreliable identification. Hours after the incident, the witness told the police that they should ask the other witnesses for descriptions of the assailants because he did not have a "good memory for faces." At the lineup on December 14, 1996, the witness made a tentative, qualified identification of Sykes. None of the other six witnesses identified Sykes as being involved in the incident.

Sykes was denied his Fifth and Sixth Amendment right to testify on his own behalf. Sykes has proven by a preponderance of the evidence, post-conviction, that he did not knowingly, voluntarily and intelligently waive his absolute right to testify. First, neither the Court nor defense counsel has any record of a *Boyd* Inquiry being conducted at trial. Second, Sykes and co-defendant Washington testified at a hearing in May 2001

that Sykes unequivocally expressed his desire to testify to his counsel on numerous occasions. Finally, based on a totality of the circumstances, Sykes did not knowingly, voluntarily and intelligently waive his right to testify.

The evidence presented by the Government in its case-in-chief was insufficient to support Sykes' conviction. Specifically, the Government failed to introduce any evidence that Sykes aided and abetted co-defendant Washington in the underlying felony, which led to the murder of Mihailov. The Government also failed to present any evidence that Sykes knew, or should have known, that Washington was armed. Therefore, Sykes could not be convicted of carrying a pistol without a license or possession of a firearm during a crime of violence or dangerous offense. Based on the Government's evidence, Sykes could only be convicted of assault on Ignatiev. Notwithstanding the insufficient evidence to support Sykes' conviction, his sentence must be vacated because one count of attempted armed robbery merges with felony murder.

ARGUMENT

I. THE GOVERNMENT'S *BRADY* VIOLATION UNDULY PREJUDICED SYKES' RIGHT TO PRESENT A DEFENSE

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, 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 purposes of challenging the testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 1924 (1967).

The Government has an obligation to bring forth exculpatory evidence which may assist the accused in presenting a complete defense. Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-1197 (1963). This is true because society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when an accused is treated unfairly. *Id.* at 87.

Regardless of whether or not the information is requested by the defense, the Government's suppression of favorable material evidence is constitutional error "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Blackley*, 986 F. Supp. 600, 601 (D.C. Cir. 1997)(quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1997)). A reasonable probability is shown when the Government's evidentiary suppression undermines confidence in the outcome of trial. *Farley v. United*

States, 767 A.2d 225, 228 (D.C. 2001)(quoting *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S. Ct. 1555 (1995).

In *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S. Ct. 763, 766 (1972), the Supreme Court expanded the *Brady* doctrine to include evidence bearing on the credibility of Government witnesses. "When reliability of a given witness may well be determinative of guilt or innocence, non-disclosure of evidence affecting credibility falls within this general rule. *Id.* at 154. The Government's duty of disclosure encompasses impeachment evidence as well as exculpatory evidence. *See Bagley*, 473 U.S. at 676.

In the instant case, the Government withheld important exculpatory and impeaching information from Sykes, in violation of *Brady*. Because the *Brady* violation was so egregious, and deprived Sykes from presenting a complete defense, he is entitled to the reversal of his conviction.

A. THE GRAND JURY TESTIMONY OF WAYNE SELLERS AND TONY PARROT WAS EXCULPATORY AND IMPEACHING, AND THEREFORE CONSTITUTED *BRADY* MATERIAL

On December 7, 1995, confidential informant Ralph Williams testified in front of the Grand Jury. It is undisputed that Williams was a convicted felon, pending a sentence on drug distribution charges at the time of his testimony. Williams testified that on the night of October 23, 1995, he was gambling with Wayne Sellers and Tony Parrot at "Greasy's" house on Brenner Street in Capitol Heights. Gr. J. 12/7/95, 3-4. Williams told the Grand Jury that while he was gambling with Sellers and Parrot, Washington, Sykes and Hancock appeared and told all three of them that they had just been involved in a shooting on 16th Street over a black leather jacket. *Id.* at 4-6. According to Williams, Washington admitted to shooting a kid and Sykes admitted to hitting an older

man in an attempt to get his watch. *Id.* Williams said that Washington was wearing the jacket when he came to Greasy's house and ultimately sold it to Sellers that night after everyone tried it on. *Id.* at 8. However, there was no evidence that Sellers actually had the jacket in his possession.

On May 2, 1996, eleven months before trial, the Government called Wayne Sellers and Tony Parrot to testify in front of the Grand Jury. Sellers testified at the Grand Jury that he learned about the embassy shooting from a newspaper article, not from any of the defendants. Gr. J. 5/2/96, 61-62. Sellers recalled that he had bought a leather jacket from Washington while gambling at Greasy's house with Parrot, but neither Ralph Williams nor Sykes were present at the time of the transaction. *Id.* at 63, 69. Sellers could not recall the exact date that he bought the jacket but stated that he had not seen Sykes since approximately "a month or so" before purchasing the jacket from Washington. *Id.* at 65.

Tony Parrot testified to the Grand Jury that he was acquainted with all three defendants. Parrot also said that he knew Ralph Williams and had been to Greasy's in the past. However, Parrot denied being present at Greasy's on the night of October 23, 1995. Gr. J. 5/2/96 at 46-47. He told the Grand Jury that he, like Sellers, had learned about the embassy shooting from reading the newspaper, and at no time did the defendants ever discuss a robbery, assault, or homicide in his presence. *Id.* at 8. Parrot indicated that he had not seen Sykes in several years. *Id.* at 10.

The Grand Jury testimony of Sellers and Parrot was clearly *Brady* material because there is a reasonable probability that, had the testimony been disclosed to the defense before trial, the result of the proceeding would have been different. *See Farley,*

767 A.2d at 228 (citing *Edelin v. United States*, 627 A.2d 968, 971 (D.C. 1993)). Sellers and Parrot both confirmed that Williams' testimony was fabricated. Given that Williams was the Government's key witness with questionable credibility, the Grand Jury testimony of Sellers and Parrot was material to Sykes' case.

B. THE GOVERNMENT VIOLATED ITS OBLIGATION UNDER *BRADY* BY FAILING TO DISCLOSE THE IDENTITIES OF EXCULPATORY AND IMPEACHING WITNESSES

On April 7, 1997, Incontro served a letter on defense counsel identifying Sellers and Parrot as material witnesses. The letter stated that they were present at Greasy's on the night of October 23, 1995 when the conversation between the defendants and Ralph Williams took place. Incontro acknowledged to the Court that the testimony given by Sellers and Parrot to the Grand Jury fell within the *Brady/Giglio* doctrine, but because the testimony only impeached Williams' credibility, the Government was under no obligation to disclose their identities before trial. Tr. 4/7/97, 9. The prosecutor further claimed to have withheld the identities to protect the informant's safety.

In *Blackley,* 986 F. Supp. at 601, the Court ruled that the "Government had an ongoing burden to provide material exculpatory evidence whenever it discovers that it has such information in its possession." *See also, United States v. Grossman*, 843 F.2d 78 (2nd Cir. 1988); *United States v. LeRoy*, 687 F.2d 610, 619 (2nd Cir. 1982) ("rationale underlying *Brady* is...to assure that the defendant will not be denied access to exculpatory evidence only known to the Government"). Eleven months had passed between the testimony and the disclosure of the witnesses' identity. Further, the letter served on defense counsel only acknowledged that the witnesses existed, it did not give substantive details of their testimony. R. 27, 3.

There was no justification for the withholding of Sellers' and Parrot's identity until the eve of trial. The prosecutor received a specific *Brady* request from defense counsel on June 11, 1996, ten months prior to the eventual disclosure. Accordingly, the prosecutor was bound to alert defense counsel that this information existed but that she was not going to disclose it due to safety concerns. Instead, the prosecutor responded that she "acknowledged and will fulfill my obligation to provide *Brady* and *Giglio* information to you in a timely fashion." R. 27,3. Fulfilling the Government's *Brady* obligation on the eve of trial was hardly timely.

> "Although there is...no duty to provide defense counsel with unlimited discovery of everything know to 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 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." *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 2400 (1976)

Prior to April 7, 1997, Incontro never raised concerns about the informant's safety with the trial judge *ex parte*. According to *Jencks* material provided by the Government, Williams was a paid informant who received $3,500 for his testimony against the defendants and $2,100 of that amount was specifically earmarked for relocation expenses. Tr. 4/25/97, 174. Incontro claimed that she withheld the identities of Sellers and Parrot for safety concerns yet paid the informant to move to a safer area.

The Grand Jury testimony of Sellers and Parrot directly contradicted the Government's only real witness and therefore required to be provided to defense counsel Deprived of this evidence pre-trial, defense counsel was precluded from conducting an investigation to corroborate these witnesses' testimony and from mounting a significant attack on Ralph Williams' credibility in the opening statement. 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. *See Blackley*, 986 F. Supp. at 605 (citing *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976).

C. THE GOVERNMENT VIOLATED ITS OBLIGATION UNDER *BRADY* TO ENSURE SELLERS' AND PARROT'S PRESENCE AT TRIAL

The Trial Court conceded that under *Brady* and its progeny, the Government had an obligation to not only disclose the identities of Sellers and Parrot, but to take reasonable steps to ensure their presence at trial. Tr. 4/28/97, 106. This was true because "the Government obviously had greater control over the situation than did the defense." *Id.* On numerous occasions, the prosecutor represented to the Court that she simply could not locate the witnesses, but had taken all reasonable steps to do so. However, the Government never proffered what steps were actually taken to locate the witnesses.

The Government had the perfect opportunity to subpoena both Sellers and Parrot on May 2, 1996 when they testified before the Grand Jury because there were pending court dates at that time. *Id.* at 108. More significantly, the Government had to know where Sellers was located throughout trial because he was incarcerated. According to Prince George's County Circuit Court Records, Sellers was convicted of *inter alia* possession of a firearm on October 25, 1996 and sentenced to one year incarceration. He was detained in Upper Marlboro, Maryland but was subsequently transferred to Hagerstown, Maryland on October 31, 1996. On April 15, 1997, Sellers was picked up by federal agents in Hagerstown on a writ and returned on April 19, 1997, whereupon he was released. *See attached affidavit of Phillip Hatcher, Appellant's private investigator.*

A search of local jail records would have disclosed to the prosecutor that Sellers was incarcerated in the area.

When the *Brady* issue was first brought to the Court's attention, Incontro said nothing about Sellers' incarceration in Hagerstown. She simply indicated that the Government was unable to locate the *Brady* witnesses but would continue to try. The Court, recognizing the importance of these witnesses to the defense, granted a continuance so that all necessary steps could be taken to locate the witnesses. The defense declined because the Court refused to condition the continuance upon Sykes' release pending the investigation. On April 23, 1997, the prosecutor stated that she knew Sellers was locked up in Hagerstown and had applied for a writ to have him brought to D.C. However, the Marshals at D.C. Jail had released him days earlier following notification from Hagerstown that he had in fact reached his release date, albeit six months early.

D. THE TRIAL COURT FAILED TO FASHION AN APPROPRIATE REMEDY FOR THE GOVERNMENT'S *BRADY* VIOLATION

The Court recognized the prejudice Sykes suffered as a result of the Government's failure to first, identify the *Brady* witnesses in a timely manner, and second, to take reasonable measures to ensure their presence at trial. The Court should have therefore excluded the testimony of Ralph Williams. Instead, it fashioned a remedy which permitted the defense limited use of the exculpatory witnesses' Grand Jury testimony. After redactions by the Government, defense counsel was allowed to introduce approximately fifty lines of testimony.

Appellate courts have longed recognized that 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 assists the finder of fact in evaluating the witnesses' credibility. 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 the instant case, substantially redacted portions of the Grand Jury testimony simply did not have the same force as real testimony, and allowing counsel to argue a piece of paper to the jury was simply inadequate.

In a case where the only evidence against Sykes was the testimony of Ralph Williams and Ignatiev's tentative identification, testimony from Sellers, if not Parrot, would have likely changed the outcome of the case. *Brady* is first and foremost a post-trial remedy, and the penalty for failing to disclose material exculpatory evidence relevant to a finding of guilt or punishment is the setting aside of a conviction on appeal. *See Blackley*, 986 F.Supp, at 607.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO IMPOSE AN ADEQUATE SANCTION ON THE GOVERNMENT FOR ITS VIOLATION OF D.C. CRIM. R. 16(a)(1)(C)

The Government violated D.C. Crim. R. 16(a)(1)(C) by failing to disclose that ripped newspaper articles regarding the shooting were allegedly recovered from Sykes while in police custody, until midway through trial. On June 11, 1996, Grimm made a specific request for anything seized from his client. Tr. 4/17/97, 285. Moreover, the fact that Sykes surreptitiously destroyed articles amounted to a statement which required pre-

trial disclosure. Incontro failed to disclose the articles despite this specific request, and numerous other discovery requests by counsel within the sixteen months that the articles were in the Government's possession. The requests required the Government to disclose information related to the articles in a timely manner. D.C. Crim. R. 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 of 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 trial, or were obtained from or belong to the defendant.

Notwithstanding the violation, an insufficient explanation by the Government for the violation, and severe prejudice suffered by Sykes as a result of the violation, the Court failed to impose an appropriate remedy. Instead, the Court admitted the articles into evidence over strong objection by defense counsel.

The Government conceded that the articles fell within the ambit of required disclosure and the Court recognized the importance of the articles, noting that "it is highly unlikely that someone who was involved in this event would have two articles regarding the event in their possession and would be seeking to destroy them." Tr. 4/18/97, 493. Not only were the seized articles discoverable under D.C. Crim R. 16(a)(1)(C), the fact that Sykes allegedly ripped up the articles constituted a statement by the defendant, which clearly required disclosure under *Jencks v. United States*, 353 U.S. 657, 666-667, 77 S. Ct. 1007, 1012 (1957).

As is the initial determination of the evidence's discoverability, the imposition of sanctions against a party who failed to comply with discovery is within the discretion of the Trial Court. *Cotton v. United* States, 388 A.2d 865, 869 (D.C. 1978); (*Donald*) *Lee v.*

United States, 385 A.2d 159, 163 (D.C. 1978). If a party fails to comply with a discovery request, the Court may respond by ordering discovery, granting a continuance, prohibiting introduction of the undisclosed evidence, or entering "such other orders as it deems just under the circumstances. *Wiggins v. United States*, 521 A.2d 1146, 1148 (D.C. 1987). In considering the imposition of sanctions, the Court must consider a number of factors including the reason for non-disclosure, the impact of non-disclosure, and the impact of the proposed sanction on the administration of justice. *See Cotton, supra*.

This Court reviews a claim that the Trial Court 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). Sykes is entitled to a new trial because the discovery violation caused prejudice to his substantial rights to receive a fair trial. *United States v. Brodie*, 871 F.2d 125, 130 (D.C. Cir. 1989).

A. THE GOVERNMENT FAILED TO PROVIDE A SUFFICIENT EXPLANATION FOR ITS FAILURE TO DISCLOSE MATERIAL EVIDENCE

On April 17, 1997, Incontro acknowledged that she was aware the ripped newspaper articles were in the Government's possession. She said that she had "seen the articles in the file a year and a half ago but did not pay much attention to them at the time..." Tr. 4/17/97, 293. This information was in the Government's possession at least three hundred days prior to the date trial commenced.

Detective Williams failed to provide the Court with an adequate explanation for his failure to disclose the ripped newspaper articles to the prosecutor. When questioned by defense counsel, Williams said that he found the incident regarding the articles so

"interesting and unusual" that he did not need to memorialize it in any way, even though that would have been standard procedure. Tr. 4/18/97, 471-473. When asked why it took him approximately eighteen months to disclose the ripped articles to the prosecutor, Williams responded, "it slipped my mind." *Id.* at 474.

The quest for the truth is undercut as much by governmental negligence as by intentional acts. *See Cotton*, 338 A.2d at 870 (quoting *United States v. Perry*, 471 F.2d 1057, 1063 (D.C. Cir. 1972)). The type of sanction may vary with the degree of culpability found. *Id.* Detective Williams acknowledged that he recognized the articles immediately as potential evidence in the case against Sykes. Tr. 4/18/97, 462. However, he failed to bring them to the prosecutor's attention after running into her an hour after his discovery. *Id.* at 484. Williams also admitted that he never asked Sykes about the articles after his discovery. *Id.* at 477. Williams did not deny that his failure to disclose the articles amounted to gross negligence.

B. SYKES SUFFERED SUBSTANTIAL PREJUDICE AS A RESULT OF THE GOVERNMENT'S VIOLATION OF D.C. CRIM. R. 16(a)(1)(C)

A necessary predicate for issuing any sanction under the Rule is a finding that the discovery violation prejudiced the party deprived of the 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, 975 (1st Cir. 1995).

Sykes was prejudiced by the Government's discovery violation in two specific ways. First, Grimm was denied the opportunity to address the articles in his opening statement. This was important because Sykes emphatically denied the articles ever being

in his possession. Grimm noted that in a case where the Government's only evidence against Sykes was a drug-dealing informant and a single eye-witness who gave a tentative identification, he would have spent half the opening addressing the articles and attacking Detective Williams' credibility. Tr. 4/17/97, 287. Being able to buttress the argument that Williams was not a credible witness with information related to the articles was critical to Sykes' defense because Sykes denied ever having the articles in his possession.

Second, Grimm was denied the opportunity to fingerprint the articles. While the Court did suggest the articles undergo fingerprint analysis after they were disclosed, analysis at that point would have been futile because the articles were contaminated. Williams stated that he had failed to take any steps to preserve the evidence even though he understood that using plastic gloves to handle such evidence was correct procedure. Tr. 4/23/97, 195-196.

C. THE TRIAL COURT FAILED TO IMPOSE ANY SANCTION ON THE GOVERNMENT FOR ITS DISCOVERY VIOLATION

The Court acknowledged that it faced a serious dilemma as a result of the Government's discovery violation. The Court ultimately admitted the articles, basing its decision on the fact that "another human life was taken, and therefore, highly probative evidence should not be excluded." Tr. 4/18/97, 496. In the end, the Court provided no remedy for Sykes and excused the Government's grossly negligent, if not intentional, discovery violation.

In an attempt to offer Sykes some recourse for the violation, the Court allowed Grimm to re-open with a limiting instruction to the jury as to why counsel was permitted

to re-open. This remedy was inadequate because it would have signaled to the jury that there was new, severely damaging evidence against Sykes. Recognizing the "red flag" another opening statement would have raised, defense counsel declined the Court's offer.

The Court had an alternative that would have satisfied the ends of justice, preserving Sykes' Sixth Amendment right to a fair trial without imposing a severe sanction upon the Government. The Court should have excluded the articles in the Government's case-in-chief and considered later whether to permit Detective Williams to testify to them on rebuttal, after weighing the probative value of his testimony against the prejudice to Sykes caused by the violation. Instead, the Court's ruling condoned and reinforced the Government's failure to turn over the newspaper articles to the defense in a timely manner.

III. SYKES WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES AGAINST HIM BY THE GOVERNMENT'S INTRODUCTION OF INADMISSIBLE EXTRAJUDICIAL STATEMENTS

The Sixth Amendment provides an accused the right to confront the witnesses against him. A major reason underlying the constitutional confrontation rule is to give a defendant charged with a crime an opportunity to cross-examine the witnesses against him. *See Bruton, supra,* 391 U.S. at 127 (quoting *Pointer v. State of Texas*, 380 U.S. 400, 85 S. Ct. 1065 (1965)).

In *Bruton,* the Supreme Court noted the danger in admitting an extrajudicial statement by one defendant inculpating another co-defendant in a joint trial: "Because 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 co-

defendant's confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." *See Id.* at 126.

In a motions hearing spanning several days, Grimm moved to sever the trial based on extrajudicial statements made by co-defendant Washington to Detective Williams, which inculpated Sykes. On March 25, 1997, that motion was denied. Tr. 3/25/97, 283. However, the Court ruled that portions of those extra-judicial statements were inadmissible against Sykes. *Id.* at 287-288.

At trial, Sykes was denied his Sixth Amendment right to confront his accuser when Detective Williams testified to the inadmissible portions of Washington's extra-judicial statements, causing the jury to conclude that Sykes was a drug addict and someone who was more likely to commit the crime for which he was charged. Tr. 4/24/97, 72. After Williams' severely prejudicial testimony, the Court gave a cautionary instruction to the jury admonishing it to disregard the statement as irrelevant. 4/25/97, 127. This instruction, at best, highlighted the inadmissible statement.

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell." *See Bruton*, 391 U.S. at 129 (quoting the dissenting opinion in *Delli Paoli v. United States*, 352 U.S. 232, 247, 77 S. Ct 294, 319 (1957)).

Because the Court failed to sever the trial originally, and failed to declare a mistrial, upon Grimm's motion, after the jury heard the "pipe-head" comment, Sykes is entitled to a new trial. The Government should not have the windfall of having the jury be influenced by evidence against a defendant, which as a matter of law they should not consider but they cannot put out of their minds. *See Delli Paoli,* 352 U.S. at 248.

A. THE "PIPE-HEAD' COMMENT WAS INADMISSIBLE AND SEVERELY PREJUDICED SYKES' ABILITY TO RECEIVE A FAIR TRIAL

On November 6, 1995, Detective Williams obtained a statement from co-defendant Washington inculpating Sykes. In an interview, Williams told Washington that, "regardless of what the other witnesses say, we talked to Mo [Sykes], and he said Gary was the shooter, that he planned to shoot the kid." Tr. 3/25/97, 263-264. Washington responded, "I'm not going to say anything because Mo is a pipe-head and I will take my chances in court." Tr. 4/24/97, 72. Williams later admitted under oath that he had lied to Washington, and Sykes had never said anything to the police implicating Washington in the crime. 4/23/97, 203. Williams used lying as a technique to get Washington to confess to the shooting. 4/24/97, 71.

On April 21, 1997, the Government disclosed the existence of newspaper articles allegedly recovered by Detective Williams from Sykes while in custody. Tr. 4/21/97, 534-538. Because the Government violated D.C. Crim. R. 16(a)(1)(C) in failing to disclose the articles to Grimm until mid-trial, the Court held that Grimm had the right to query Williams concerning the false representations made to Washington on November 6, 1995. *Id.* at 536. The Court held that providing Sykes the opportunity to attack Williams' credibility was the only way to afford Sykes a fair trial. *Id.* at 538. Pursuant to the Court's ruling, the Government prepared redacted statements from the conversation between Williams and Washington, for Williams' in-court testimony. Incontro noted that she would "make sure that we are eliciting only what the Court has indicated may be elicited." *Id.* at 544. All parties understood that the "pipe-head" comment was inadmissible as prejudicial.

On April 24, 1997, Detective Williams testified for the Government. When asked about the false representations made to Washington on re-direct examination, Williams said that he "lied to Washington so that he would admit his responsibility in the shooting." Tr. 4/24/97, 71. The prosecutor followed by asking Williams: "Once you said what you said about Mr. Sykes, to Mr. Washington, what was his response?" *Id.* Williams responded, in front of the jury, that "Washington said he wasn't going to say anything because Mo was a pipe-head, and he would take his chances in court." *Id* at 72. Grimm immediately objected, noting that there was nothing in his cross-examination that would have prompted the prosecutor to ask the follow-up question. *Id.* at 72-73.

Detective Williams' testimony added substantial, perhaps even critical weight to the Government's case in a form not subject to cross-examination, since Washington never took the stand. Sykes was thus denied his constitutional right of confrontation. *See Bruton*, 391 U.S. 127-128.

It is clear from the colloquy between the Court and Williams that Williams understood the "pipe-head" comment had been redacted and that he was not to mention it under any circumstances. It is also clear that Williams appreciated the prejudice that Sykes suffered as a result of him testifying to the "pipe-head" comment. Tr. 4/24/97, 79-80. Williams also knew that if he violated the prosecutor's directive not to use the comment, the Government would suffer no serious consequences. *Id.* at 79. The prosecutor agreed that Williams' testimony was inappropriate and irrelevant. *Id.* at 75.

Regardless of Williams' intent, the "pipe-head" comment severely prejudiced Sykes. First, it gave the impression that Sykes and Washington knew each other and were therefore more likely to be involved in a crime together. Second, and more

important, the jury could reasonable conclude from the comment 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.

B. THE TRIAL COURT FAILED TO PROVIDE SYKES WITH AN ADEQUATE REMEDY

The Court acknowledged that Williams was grossly negligent in making the "pipe-head" comment, knowing that it had been redacted by the Government. 4/25/97, 107. However, the Court declined to declare a mistrial stating that: "Mr. Sykes has not been prejudiced to the extent that he could not receive a fair trial." *Id.* at 101-102. Instead, the Court gave a cautionary instruction to the jury: "I am striking from the record the Detective's testimony that Gary Washington allegedly told him that Maurice Sykes was a "pipe-head...Therefore, that testimony is no longer before you and you must conclude that the statement was never made." *Id.* at 127. The Court's instruction only served to highlight the statement.

The Supreme Court has noted that a cautionary instruction to the jury, such as the one given in the instant case, is an inadequate remedy for the admission of inadmissible statements in a criminal trial. In his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 453, 69 S. Ct. 716, 723 (1949), Mr. Justice Jackson stated "the naïve assumption that prejudicial effects can be overcome by instructions to the jury...all practicing lawyers know to be unmitigated fiction." The Court articulated this principle two years earlier in *Blumenthal v. United States*, 332 U.S. 539, 559-560, 68 S. Ct. 248, 257-258 (1947): "An important element of a fair trial is that juries consider only relevant and competent evidence bearing on the issue of guilt or innocence."

Other authorities have commented on the jury's inability to ignore inadmissible and prejudicial statements at trial. It has even been suggested that "the limiting instruction actually compounds the jury's difficulty in disregarding the inadmissible hearsay." *See Bruton*, 391 U.S. at 129, n.4 (quoting *Broader, The University of Chicago Jury Project*, 38 Neb.L.Rev. 744, 753-755 (1959)). In amending Rule 14 of the Federal Rules of Criminal Procedure, the Advisory Committee on Rules explained:

> "A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase that prejudice...The purpose of the amendment is to provide a procedure whereby the issue of possible prejudice can be resolved on the motion for severance."

Because the Court failed to grant Sykes' motion for severance pretrial, and failed to grant his motion for mistrial after Detective Williams testified to the highly prejudicial inadmissible statement, Sykes is now entitled to a new trial.

IV. SYKES WAS DENIED DUE PROCESS WHEN THE TRIAL COURT FAILED TO SUPPRESS THE HIGHLY SUGGESTIVE AND UNRELIABLE LINEUP IDENTIFICATION

Police lineups must not violate defendants' Fifth Amendment right to due process of law. *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127 (1969). In *United States v. Wade*, 388 U.S. 218, 228, 87 S. Ct. 1926, 1936 (1967), the Supreme Court held:

> "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....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 the witnesses for pre-trial identification."

In determining whether a defendant was denied due process at trial by the admission of an unduly suggestive and unreliable lineup, the reviewing court must apply harmless error analysis. *Chapman v. California*, 386 U.S. 18, 23, 87 S. Ct 824, 828 (1967). That is, before a constitutional error can be held harmless, the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* Accordingly, Sykes is entitled to a new trial unless this Court declares that there was no possibility that the admission of the unconstitutional lineup identification contributed to his conviction. *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S. Ct. 229, 231 (1963).

This Court has held that a challenge to the admissibility of pre-trial identifications requires a two-part analysis: (1) Whether the identification procedure was unnecessarily suggestive and conducive to irreparable misidentification, and, if so, (2) whether the identification resulting there from was reliable under the totality of the circumstances. *Jackson v. United States*, 623 A.2d 1262, 1267 (D.C. 1993) (quoting *Henderson v. United States*, 527 A.2d 1262, 1267 (D.C. 1987); *Stewart v. United States*, 490 A.2d 619, 622 (D.C. 1985)).

A. THE IDENTIFICATION PROCEDURE WAS UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPERABLE MISIDENTIFICATION

An identification is suggestive when the police conduct it in such a way that the witness' attention is directed to a particular individual. *Anderson v. United States*, 364 A.2d 143, 144 (D.C. 1976); *Skinner v. United States*, 310 A.2d 231, 233 (D.C. 1973). In *Anderson*, the Court noted that the first lineup was unduly suggestive because the defendant was taller than any of the other potential suspects. *See Anderson,* 364 A.2d at 144.

In the instant case, Detective Williams took a statement from Ignatiev within forty-eight hours of the shooting. In that statement, Ignatiev decribed his attacker as short, with swollen cheeks and round eyes. R. 4/15/97, 339-340. Ignatiev also described his attacker between 20 and 30 years of age. Tr. 12/20/96, 57. At the lineup conducted approximately seven weeks after the shooting, Sykes was the shortest suspect despite the fact that Ignatiev had described his attacker as short weeks earlier. *Id.* at 79. Moreover, Sykes was only one of three individuals within the declared age range. *Id.* It is also important to note that the lineup in which Sykes stood contained seven suspects, including Sykes, whereas the lineup in which Washington stood contained nine suspects.

There is one factor above all others that made the Sykes' lineup unduly suggestive and likely to produce a misidentification: He was the only potential suspect wearing leg shackles, which were visible to Ignatiev through the viewing window. Tr. 12/20/96, 83.

B. THE IDENTIFICATION RESULTING FROM THE SUGGESTIVE LINEUP WAS UNRELIABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES

The central question is whether, under the totality of the circumstances, the identification was reliable even though the confrontation procedure was suggestive. The factors to be considered in evaluating the likelihood of misidentification include: (1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witnesses' degree of attention; (3) the accuracy of the witnesses' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *Neil v. Biggers*, 490 U.S. 188, 199-200, 93 S. Ct. 375, 386 (1972). In *Jackson, supra,* this Court articulated two additional factors to be considered in evaluating the likelihood of misidentification: (1)

The lighting conditions at the time of the crime; and (2) The stimuli operating on the witness at the time of the observation. *See Jackson*, 623 A.2d at 589.

Because the incident began as Ignatiev was approached from behind, he had no opportunity to view the attackers. Tr. 4/15/97, 297. Moreover, the incident ended as shots were fired and the assailants fled from the embassy at a high rate of speed. *Id.* at 302. At no point, either before or after the assault, did Ignatiev have a clear view of either assailant. Likewise, Ignatiev had practically no opportunity to observe his attackers during the assault. Seconds after feeling the assailants behind him, Ignatiev was struck hard on the head and fell unconscious. *Id.* at 297-301. After coming around, he found himself on the ground, laying on his side, with his left arm over his head to fend off oncoming blows. *Id.* at 299. Where there is no opportunity to observe the attacker, the identification cannot be reliable. *See Neil v. Biggers, supra*, 409 U.S. at 199-200.

Two days after the shooting, Ignatiev could only give a vague and general description of his attacker to investigators. *Id.* at 338-342. In a recorded statement, Ignatiev described the shorter of the two assailants as having a dark complexion with a round face and large "characteristic" eyes. *Id.* at 300. This description lacked any specificity and could have matched thousands of African-American males in the District of Columbia. Further, Ignatiev acknowledged to Detective Williams that he did not get a good look at either of the two assailants' faces. *Id.* at 336. Ignatiev advised Williams that the police should ask the younger Bulgarians for descriptions of the attackers because he did not have a "good memory for faces." *Id.*

At the December 14th lineup, Ignatiev identified Sykes as his attacker, but that identification was tentative. *Id.* at 313. Ignatiev never indicated that he was certain that

Sykes was the person involved in the assault. Instead, he walked back and forth to and from the window, and after taking approximately two minutes stated, "I think it was number four." *Id.* at 313-314. It is important to note that none of the other six witnesses, including the witness that identified co-defendant Washington as the shooter, identified Sykes at the December 14th lineup. Tr. 12/20/96, 78-79.

The time between the shooting and the lineup was approximately seven weeks, a factor that should weigh in Sykes' favor. Because a long period of time had not lapsed between the incident and the confrontation, the Government cannot claim the time lapse as a reason for the tentative identification. The simple fact remains that Ignatiev was unable to identify his attacker immediately after the incident and only identified Sykes at the lineup because of the lineup's suggestive nature. Further, it is reasonable to conclude that Ignatiev was unable to identify his attacker at the time of trial because he was never asked to make an in-court identification.

Considering the *Jackson* factors together, it is clear that they too weigh in Sykes' favor. The incident occurred at approximately 9:45 p.m. in late October. It was dark at this point in the evening and there was no evidence presented by the Government that lights illuminated the area where Ignatiev was attacked. With respect to the stimuli operating against the victim at the time of the incident, Ignatiev, a 53 year-old Bulgarian national, unquestionably experienced extreme trauma while being attacked.

Given the nature of the lineup itself and the totality of factors leading up to the identification, this Court must conclude that the due process violation was not harmless beyond a reasonable doubt.

V. SYKES WAS DENIED HIS CONSTITUTIONAL RIGHT TO TESTIFY ON HIS OWN BEHALF AT TRIAL

In *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S. Ct. 2525, 2533 n. 15, (1975), the Supreme Court held 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."

The Fifth and Fourteenth Amendments' guarantee that no one shall be deprived of liberty without due process of law includes the right to be heard and to offer testimony: "An opportunity to be heard is basic to our system of jurisprudence." *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S. Ct. 2704, 2711 (1987) (citing *In re Oliver*, 333 U.S. 257, 273, 68 S. Ct. 499, 507 (1948)).

The right to testify is also found in the Sixth Amendment's Compulsory Clause, which grants a defendant the right to call witnesses in his favor. *See Rock*, 483 U.S. at 52 (quoting *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 1922-1923 (1967)). The most important witness for the defense in many criminal cases is the defendant himself. *Id.* A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness." *See Faretta*, 422 U.S. at 819.

Finally, the opportunity to testify is a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. "The Fifth Amendment's privilege against self-incrimination is fulfilled only when an accused is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will...The choice of whether to testify in one's own defense...is an exercise of the constitutional privilege." *See Rock*, 483 U.S. at 53 (quoting *Harris v. New York*, 401 U.S. 222, 230, 91 S. Ct. 643, 648 (1971) and *Malloy v. Hogan*, 378 U.S. 1, 8, 84 S. Ct. 1489, 1493 (1964)).

A personal and fundamental right will be deemed waived only if there is record evidence demonstrating "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938). Courts have often required the trial judge to engage the defendant in a colloquy to ensure that the waiver of such rights is knowing and intelligent. *See Id.* at 465. This is true because courts have a "serious and weighty responsibility to determine whether there is an intelligent and competent waiver by the accused." *See Id.* at 495.

This Court concluded in *Boyd v. United States*, 586 A.2d 670, 677 (D.C. 1991), that the defendant's right to testify is a constitutional right in which the *Johnson v. Zerbst* standard must apply. The Court held that the record must be clear that the defendant waived the right knowingly and intentionally. 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. *See Id.*

A. SYKES HAS DEMONSTRATED POST-CONVICTION THAT HE DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS ABSOLUTE RIGHT TO TESTIFY

Sykes has demonstrated by a preponderance of the evidence that he did not knowingly, voluntarily and intelligently waive his absolute right to testify. First, the record is void of any evidence indicating that the Court conducted a *Boyd* Inquiry to ensure that Sykes waived his right to testify. At the May 2001 hearing, Grimm testified that none of the defense counsel could recall the Court conducting a *Boyd* inquiry during the trial. Tr. 5/15/01, 101. Co-defendant Washington also testified at that hearing that he was not asked whether or not he wanted to testify. *Id.* at 29.

Second, Sykes affirmatively expressed a desire to testify on numerous occasions to his attorney. At the 2001 hearing, Sykes testified that from the beginning, he told Grimm that he wanted to testify in order to confirm the testimony of his alibi witnesses. Tr. 5/15/01, 31. He believed it would be extremely damaging to his case if others testified concerning his location at the time of the crime and he did not. During trial, Sykes passed Grimm a note indicating that he needed to testify because there was no other way to rebut the "false allegations" regarding the "pipe-head" comment and the ripped newspaper articles. *Id.* at 33. Sykes also expressed a desire to testify to Grimm after the testimony of Ralph Williams was presented to the jury. *Id.* at 15.

Washington corroborated Sykes' testimony concerning his desire to testify. Washington said that he first became aware that Sykes wanted to testify during Sergeant McCann's testimony. *Id.* at 11. During McCann's testimony, Sykes became agitated and told Grimm that he wanted to testify. *Id.* at 12. Washington recalled that on a separate occasion, Sykes threw his note pad at Grimm's chair in order to reinforce his desire to testify. *Id.* at 13. Finally, Washington testified that "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 to talk to Mr. Grimm about him testifying." *Id.* at 17, 25.

After stating that it based its decision to deny Sykes' new trial motion on the Court's own recollection of the events that occurred during the trial, and not on the testimony presented by Sykes, Washington and Grimm, the Court noted that it reached the conclusion "...despite the absence of a transcript that verifies that the *Boyd* Inquiry was conducted..." R (01-CO-1407), 60, 6 (citation and footnote omitted).

B. SYKES DID NOT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVE HIS ABSOLUTE RIGHT TO TESTIFY ABSENT A *BOYD* INQUIRY

This Court, in *Hunter v. United States*, 588 A.2d 680 (D.C. 1991) and *Kelly v. United States*, 590 A.2d 1031 (D.C. 1991), noted that whether a defendant has validly waived his right to testify depends on the particular circumstances of each case. Through its holdings, this Court articulated several determinative factors in deciding that the defendants had knowingly, voluntarily and intelligently waived their right to testify. Those factors included: (1) Defendant's prior encounters with the criminal justice system; (2) Defendant's willingness and ability to communicate with the Court on his own behalf; (3) Discussions between defendant and counsel regarding testifying at trial; (4) The number of counsel appointed to represent defendant during his case; and (5) Defendant's complaints post-conviction regarding not testifying at trial. *See Kelly*, 590 A.2d at 1033-1035.

Prior to 1995, Sykes had two previous encounters with the criminal justice system. In both cases, Sykes' attorney negotiated a favorable plea agreement on his behalf, bypassing the need to go to trial. It follows then that before 1995, Sykes was ignorant to trial proceedings because he had never watched or participated in one. Sykes' prior encounters with the criminal justice system simply cannot support the argument that he knowingly, voluntarily and intelligently waived his right to testify.

While it is true that Sykes wrote several letters to the Court during the course of the proceedings, none of the correspondence related to his desire to testify at trial. Rather, the letters sent to the Court addressed his dissatisfaction with counsel. Sykes

should not be penalized for seeking assistance from the Court when his interests were not being properly represented by counsel.

Early in the working relationship, Grimm and Sykes discussed the possibility of testifying at trial. However, at no time did counsel inform Sykes that he had the absolute right to testify. Although Grimm told Sykes early that they would eventually decide whether to testify, counsel never prepared him for that event. Simply discussing the possibility of testifying should not constitute a waiver of the absolute right to do so.

In denying Sykes' motion for a new trial, the Court cited *Kelly* at 1034 n. 2, in pointing out that Sykes had three lawyers between arraignment and trial and that "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 Court's reasoning is misplaced because in this case, unlike *Kelly*, Sykes retained all of his attorneys from trial through sentencing, whereas Kelly had court appointed counsel throughout the proceedings.

Post-conviction, Sykes has complained about the denial of his absolute right to testify at trial. While he may have done so in an unconventional manner, there can be no doubt that the issue was in fact raised on multiple occasions. The Government responded to this very issue raised in Sykes' post-conviction motions.

Sykes has demonstrated by more than a preponderance of the evidence that he did not knowingly, voluntarily, and intelligently waive his right to testify at trial. According, this Court must grant Sykes a new trial so that he may be afforded the opportunity to testify on his own behalf.

VI. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SYKES' CONVICTION

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SYKES' CONVICTION FOR FELONY MURDER BASED ON AIDING AND ABETTING

On May 6, 1997, the jury convicted Sykes of *inter alia,* first-degree felony murder while armed and two counts of attempted armed robbery. Tr. 5/6/97, 18-19. The verdict was against the weight of the evidence. At best, the Government presented evidence to support a conviction of assault on Ignatiev. Because the Government failed to prove beyond a reasonable doubt that Sykes aided and abetted Washington in the armed robbery of Mihailov, his conviction must be reversed.

The felony murder clause of D.C. Code § 22-2401 imposes liability solely on the person who does the killing. Other participants in the felony are exposed to first-degree murder liability only by virtue of the aiding and abetting statute, D.C. Code § 22-105. Hence, felony murder liability for an accomplice must be determined in accordance with common law concepts of vicarious liability. *Christian v. United States*, 394 A.2d 1, 48 (D.C. 1978) (citing *United States v. Heinlein*, 160 U.S. App. D.C. 157, 167 (1979)).

In order to convict an accomplice of felony murder, the Government must prove two elements: (1) The accomplice at least aided and abetted the principal in the underlying felony, and (2) The principal's act that resulted in the killing was either within the scope of the "common purpose" shared by principal and accomplice or was the "natural and probable consequence" of an act in furtherance of the shared purpose. *Marshall v. United States*, 623 A.2d 551, 562 (D.C. 1992).

The elements of aiding and abetting are: (1) That the offense was committed by someone; (2) that the accused participated in the commission; and (3) that he did so with guilty knowledge. *West v. United States*, 499 A.2d 860, 865 (D.C. 1985) (citing *Byrd v.*

United States, 364 A.2d 1215, 1219 (D.C. 1976); *Blango v. United States*, 335 A.2d 230, 235 (D.C. 1975)).

Sykes' conviction for felony murder cannot stand because the Government failed to introduce evidence that Sykes participated, or intended to participate, in the attempted armed robbery of Mihailov. This Court noted in *Christian, supra,* 394 A.2d at 48, that intent to commit the underlying felony must be proven.

The record is void of evidence that Sykes, in any way, confronted Mihailov while he was accosted by Washington, or that Sykes assisted Washington in the commission of his robbery of Mihailov. In fact, there is no evidence that Sykes was even on the embassy steps at any point during the incident. At no time during the robbery did Sykes communicate, verbally or physically, with Washington, or act in a manner to aid or abet Washington. Moreover, the Government failed to prove that Sykes knew, or had reason to know, that Washington possessed a firearm and planned to use that firearm during the robbery of Mihailov. At best, the Government's evidence showed that Sykes and Washington participated in two separate and distinct crimes after Washington abandoned the assault on Ignatiev and climbed the embassy steps. There can be no criminal responsibility on the part of an accomplice if the homicide is a fresh and independent product of the killer's mind, outside of, or foreign to the common design. *See Christian,* 394 A.2d at 48 (citing *Heinlein*, 160 U.S. App. D.C. at 168).

According to the Government's evidence, the incident began as a spontaneous assault on Ignatiev, who was standing alone in the street in front of the embassy. Tr. 4/14/97, 156. The Government presented evidence that Washington and Sykes approached Ignatiev from behind and began to assault him. *Id.* at 299. Seconds after the

assault began, Washington climbed the embassy steps, pulled the firearm from his coat pocket, and demanded money from Mihailov and the others. *Id.* at 160. At the same time, Sykes concentrated solely on Ignatiev, beating him continuously with his fists while until Washington's gun discharged.

At the moment Washington ceased assaulting Ignatiev and climbed the embassy steps, he transcended the common purpose shared by him and Sykes and acted independently for purposes of felony murder liability. When one of the parties to a felony commits a killing outside of the scope of the felonious crime which the parties undertook to commit, the aider and abettor of the felony cannot be convicted of felony murder. *Butler v. United States*, 614 A.2d 875, 886 (D.C. 1992).

B. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT SYKES' CONVICTION FOR CARRYING A PISTOL WITHOUT A LICENSE OR POSSESSION OF A FIREARM DURING A CRIME OF VIOLENCE OR DANGEROUS OFFENSE BASED ON AIDING AND ABETTING

Sykes' conviction for carrying a pistol without a license, in violation of D.C. Code § 22-3204(a), is not supported by the evidence, and therefore must be vacated. The Government failed to offer any evidence that Washington's accomplice actually or constructively possessed the firearm used to shoot Mihailov. In fact, the Government failed to offer any evidence that Sykes knew, or should have known, that Washington 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 some conduct by an alleged accomplice of an affirmative character in furtherance of the act of carrying the pistol by the...principal must be established." *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)). "The Government may not rely on evidence of Appellant's participation in the larger scheme...as support for the conviction." *Id.*

There is no evidence that Sykes, in any way, facilitated the initial acquisition of the weapon in Washington's coat pocket when the incident began, or that he played any role in the continued dominion and control over the weapon. In *Jackson v. United States,* 395 A.2d 99, 104 (D.C. 1978), this Court reversed an Appellant's conviction for carrying a pistol without a license based on aiding and abetting because there was no showing that Appellant had "convenient access" to the pistol. *See Halicki,*614 A.2d at 503. The record indicates that two separate and distinct crimes were committed by Washington and Sykes, at two separate locations. The assault on Ignatiev, committed by Sykes, was effectuated without a weapon.

For the same reason, Sykes cannot be convicted of possession of a firearm during a crime of violence or dangerous offense, in violation of D.C. Code § 22-3204(b). Under the statute, the term "possession" has its ordinary legal meaning, and a defendant 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 or control over it, and intended to exercise such dominion and control. *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).

The Government offered no direct or circumstantial evidence from which the jury could have concluded that Sykes knew a weapon was involved before it was drawn on

Mihailov. It follows that Washington's accomplice could not have had the ability or intent to exercise dominion or control over the weapon during the incident.

C. SYKES' SENTENCE WAS WRONGLY ENHANCED UNDER D.C. CODE § 22-3202

Committed D.C. Code § 22-3202, is a sentence enhancement statute for crimes committed while armed with a firearm. An unarmed accomplice can be convicted of aiding and abetting an armed robbery...and can then be sentenced under the mandatory-minimum and optional-maximum provisions of D.C. Code § 22-3202(a)(1), for crimes committed while armed. *Ingram v. United States*, 592 A.2d 992, 1002 (D.C. 1991). In *Ingram*, this Court adopted the standard that the "natural and probable consequence" of the alleged accomplice's actions will not lead to complicity with an armed offense unless the accused could reasonably foresee a weapon would be required. *Id.* at 1003.

Because there is no evidence that Sykes knew, or had reason to know, that Washington possessed a firearm and Sykes did not participate in the underlying felony which led to the murder of Mihailov, the enhancement penalty imposed upon Sykes cannot stand. Sykes did not aid or abet Washington in the armed robbery of Washington as it was separate and distinct from the assault on Ignatiev. Further, Sykes did not "reasonably foresee that a weapon would be required to effectuate the assault on Ignatiev because he did not possess a weapon nor did Washington withdraw the weapon upon approaching Ignatiev from behind.

D. SYKES MUST BE RE-SENTENCED BECAUSE ONE COUNT OF ATTEMPTED ARMED ROBBERY MERGED WITH THE SENTENCE FOR FELONY-MURDER

On October 10, 1997, the Court sentenced Sykes on *inter alia,* one count of first-degree felony murder while armed and two counts of attempted robbery while armed. This Court must determine that the sentence cannot stand because one count of attempted armed robbery merged with the felony murder conviction. *Catlett v. United States*, 545 A.2d 1202, 1218-1219 (D.C. 1988). Therefore, Sykes "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 (1980)). Therefore, in the instant case, 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. *See Adams, supra,* at 1027 (citing *Garris v. United States*, 491 A.2d 511, 514 (D.C. 1985)).

CONCLUSION

For the reasons stated above, and any others that may appear to this Honorable Court through oral argument, Appellant, Maurice A. Sykes, respectfully requests this Honorable Court vacate his conviction.

Respectfully Submitted,

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Attorney for Appellant

AFFIDAVIT OF PHILLIP B. HATCHER

The undersigned hereby certifies the following:

1. I am a competent adult, over 18 years of age.

2. I am a private detective, licensed and bonded, for Anchor Investigations located at P.O. Box 460, Upper Marlboro, Maryland 20773.

3. I conduct investigations for the Law Office of Bruce A. Johnson Jr., LLC on a regular basis.

4. On or about August 15, 2003, I was contacted by the Law Office of Bruce A. Johnson, Jr., LLC to track inmate housing history for Wayne Curtis Sellers, inmate number X0120348, for the period of October 25, 1996 to April 19, 1997.

5. Through various resources available to me, including the Records Department at the Prince George's County Corrections Department and the Maryland Reception Diagnostic and Classification Center, I was able to track Mr. Sellers' location in several State of Maryland Correctional Institutions, during the above-stated time period.

6. On or about October 25, 1996, Mr. Sellers was convicted of, *inter alia*, possession of a firearm, and sentenced to one year incarceration.

7. Mr. Sellers was first incarcerated in Upper Marlboro, Maryland.

8. On October 31, 1996, Mr. Sellers was transferred to Hagerstown, Maryland.

9. On April 15, 1997, Mr. Sellers was picked up by federal agents in Hagerstown, Maryland on a writ and returned to Hagerstown, Maryland on April 19, 1997, whereupon he was released from incarceration.

I do solemnly declare and affirm under the penalties of perjury that the matters and facts set forth herein are true to the best of my knowledge, information and belief.

Phillip B. Hatcher
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Crystal L. Fadely 9/26/03

CRYSTAL L. FADELY
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires June 11, 2005

DISTRICT OF COLUMBIA COURT OF APPEALS

MAURICE SYKES	)	
	)	
v.	)	APPEAL NO.: 01-CO-1407
	)	
UNITED STATES OF AMERICA	)	

CERTIFICATE OF COUNSEL

APPELLATE COUNSEL

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