No_____

Criminal

IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,

RESPONDENT,

V.

RALPH CHAVOUS DUKE,

PETITIONER,

PETITIONERS APPENDIX BRIEF

FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

APPENDICE BRIEF FROM PETITIONER

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I. INTRODUCTION

Petitioner Ralph Chavous Duke, presents his petition herein pursuant to " Fed.Civ.P.R. 15(c)(2)- Relation Back Doctrine ", in light of the previous § 2255, on or about the 4th, day of August, 1993. see U.S. v. DUKE, 50 F.3d 571 (8th Cir. 1995), whereas the understanding of " 15(c)(2) ", has been addressed by the Eighth Circuit and the United States Supreme Court regarding Rule 15, as well as 2254 and 2255 habeas cases, in addition to the aforement-ioned rules and statutes, petitioner has also various aspects of the second and or successive petition through the petition prese-nted relating to the AEDPA STANDARD OF REVIEW AND § 2244, inlight of the foregoing petitioner RALPH CHAVOUS DUKE, with simplicity brings the issues of the previous filed § 2255 once again to the court's attention.

In.....U.S. v. HERNANDEZ, 436 F.3d 851 (8th Cir. 2006), at 856

B. Statute of Limitations

Hernandez's conviction was final on October 31, 2001, ninety day after this court issued its ruling on his direct appeal. Thus, he had until October 31, 2002, to file a § 2255 motion for postc-onviction relief. He timely filed his pro se motion on July 31, 2002. The amended motion, filed on November 12, 2002, was outside the one-year period. As such, any claims raised for the first time in the amended motion had to relate back to the original motion to

be valid under Rule 15(c)(2) of the Federal Rules of Civil Procedure. In the present case Mr. Ralph Chavous Duke, petitioner in the original § 2255 filed within before one-year limitations period had expired files this petition as required by above mentioned rule and is following the precedent established by the Eighth Circuit Court of Appeals.; **and**

Again.....in **U.S.v. HERNANDEZ**, 436 F.3d 851 (8th Cir. 2006), at **856**

[3] When the district court applied Rule 15(c)(2), it was following the precedent established by this court. **See Mandacina v. United States**, 328 F.3d 995, 1000 & n. 3 (8th Cir.), cert. denied, 540 U.S. 1018, 124 S.Ct. 592, 157 L.Ed.2d 433 (2003) (holding that § 2255 proceedings are civil in nature and governed by the Federal Rules of Civil Procedure); **United States v. Craycraft**, 167 F.3d 451, 457 n. 6 (8th Cir. 1999) (same); **see also Ryan v. Clarke**, 387 F.3d 785, 789 (8th Cir. 2004) (holding that the Federal Rules of Civil Procedure govern § 2254 cases because they are civil in nature), cert. denied,----U.S.----, 125 S.Ct. 2526, 161 L.Ed.2d 1119 (2005); **McKay v. Purkett**, 255 F.3d 660, 660-61 (8th Cir.) (per curiam) (same), cert. denied, 534 U.S. 1068, 122 S.Ct. 672, 151 L.Ed.2d 585 (2001). The Supreme Court recently applied Rule 15(c)(2) to an amended § 2254 motion for postconviction relief to determine if it contained claims that related back to the original filing. **See Mayle v. Felix**, ---- U.S. ----, 125 S.Ct. 2562, 2566, 162 L.Ed.2d 582 (2005) (relying in part on 28 U.S.C. § 2242, which states habeas applications may be amended or supplemented as provided in the rules of procedure for civil cases). We have "characterized § 2255

motions as 'the statutory analogue of habeas corpus for persons in federal custody.'" **United States v. Martin**, 408 F.3d 1089, 1093 (8th Cir. 2005) (quoting **Poor Thunder v. United States**, 810 F.2d 817, 821 (8th Cir. 1987)). The Supreme Court's application of Rule 15 to a § 2254 habeas case in **Mayle** reaffirms our application of the Civil Rules to § 2255 cases as correct. **Id.** at 2568-69 (resolving the conflict among circuits on the relation back issue and citing both § 2254 and § 2255 cases, including **Craycraft**); **see also** Rules Governing § 2255 Proceedings Rule 12. Based on the Supreme Court's precedent and that of this court, the district court properly applied Rule 15(c)(2). **Id.** at 857,

[4]

Rule 15(c)(2) states that a claim relates back when it arises out of the same "conduct, transaction, or occurrence" as the original claim.

Claims presented throughout this instant petition by Mr. Ralph Chavous Duke, relates in every rule and statute back to the original § 2255 motion.

In.....**Commonwealth v. Bowie**, 236 F.3d 1083, 1087, (9th Cir. 2001)(reversing murder conviction due to government's knowing use of perjured testimony).

In the government's unbridled zeal to convict Ralph Duke a decade ago, justice became a casualty of our nation's war on drugs. This Court's recognition in 1995 of the government's knowing use of perjury to obtain his conviction only scratched the surface of the widespread governmental subornation of perjury which permeated his trial. **See United States v. Duke**, 50 F.3d 571 (8th Cir. 1995).

Newly discovered evidence demonstrates that the government's investigators and prosecutors in Mr. Duke's case operated in accordance with that ancient Machiavellian maxim: the ends justify the means. For twenty years, Mr. Duke was the target of unsuccessful FBI, IRS, and state and local law enforcement investigations.[1] When several of his relatives were caught in a DEA reverse-sting operation, the government seized the opportunity to manipulate them in order to finally get their elusive target, Mr. Duke.

In their effort to secure Mr. Duke's conviction at any cost, government agents: (1) threatened, coerced and intimidated prosecution witnesses; (2) disregarded, ignored and discouraged statements from prosecution witnesses exculpating Mr. Duke; and (3) suggested, encouraged and orchestrated false testimony by prosecution witnesses inculpating Mr. Duke. His trial thus became a perverse parade of perjury by prosecution witnesses, all with the government's knowledge, consent and blessing.

In Mr. Duke's only other habeas proceeding, this Court acknowledged the government's knowing use of perjury at his trial, but nonetheless affirmed the denial of relief concluding that the perjury demonstrated therein constituted harmless error in light of other evidence. See United States v. Duke, 50 F.3d 571 (8th Cir. 1995). Yet, as can now be shown, that other evidence consists

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[1]See Drug Enforcement Administration, Office of Inspections, Management Review: Utilization of CS-84-036739 (IN-00-S006) at 17 **[hereinafter cited as DEA Chambers Report]**, a copy of which is included in the accompanying appendix filed herein.

primarily of additional knowing governmental perjury. Newly discovered evidence reveals that the perjury previously recognized by this Court was merely the tip of an iceberg of egregious governmental misconduct designed to insure Mr. Duke's conviction.

That misconduct began at approximately 10:30 p.m., on May 17, 1989, when four men were arrested at the Minneapolis Hilton Hotel attempting to purchase 20 kilograms of cocaine from Andrew Chambers, the most notorious undercover informant in the history of the Drug Enforcement Administration. Two of the four men arrested were related to Mr. Duke: his son, Ralph Lamont (Monte) Nunn, and his nephew, Loren Duke. Immediately before their arrest, Nunn and Loren Duke presented Chambers with approximately $120,000. Shortly after their arrest, the police arrested Ralph Duke and executed a search warrant at his home on the following day, May 18, 1989. See United States v. Duke, 940 F.2d 1113, 1116 (8th Cir. 1991).

Ralph Duke was ultimately charged with the following crimes:

(1) Participating in a continuing criminal enterprise to possess and distribute cocaine (count 1);

(2) Aiding and abetting the attempt to possess with intent to distribute twenty kilograms of cocaine on May 17, 1989 (count 2);

(3) Aiding and abetting the possession with intent to distribute smaller quantities of cocaine on various dates (counts 4-8);

(4) Using or carrying a firearm during and in relation to a drug trafficking offense (counts 28-30); and

(5) Conspiring to possess with intent to distribute cocaine (count 32).

See id. at 1115.

After a month long trial, Mr. Duke's jury convicted him of all counts on December 22, 1989. United States District Court Judge David S. Doty sentenced Mr. Duke on June 20, 1990, to concurrent life sentences on counts 1, 2 and 32, concurrent forty year sentences on counts 4-8, and consecutive sentences of thirty years on count 28, and five years on counts 29 and 30. On direct appeal, this Court affirmed all but one of Mr. Duke's convictions and directed Judge Doty to vacate either the CCE or conspiracy conviction on double jeopardy grounds.[2] See id.

Analyzing the sufficiency of the evidence on count 2, the twenty-kilogram transaction, this Court characterized it as "a close question, given only the circumstantial evidence indicating the Nunn purchased the cocaine for Duke with Duke's money . . . ." Id. at 1117. When reanalyzed in light of newly discovered evidence, it is clear that not only is there legally insufficient evidence to sustain Mr. Duke's conviction, the newly discovered evidence actually demonstrates his innocence on count 2. That evidence likewise establishes that he is actually innocent of the other crimes for which he was wrongfully convicted.

On January 6, 1993, Mr. Duke filed his previous Section 2255 motion. Judge Doty denied that motion without an evidentiary hearing on August 16, 1993. This Court subsequently affirmed that denial of post-conviction relief in United States v. Duke, 50 F.3d 571 (8th Cir. 1995). The issue presented six years ago was whether newly discovered evidence of Andrew Chambers's arrest record

[2]Judge Doty vacated the CCE conviction on April 8, 1992.

entitled Mr. Duke to a new trial. Characterizing Mr. Duke's arrest as "largely the result of a reverse-sting operation conducted by the Drug Enforcement Agency (DEA)," this Court observed:

> A key figure in this operation was Andrew Chambers, a DEA undercover informant, who successfully negotiated a drug deal with one of Duke's sons [Monte Nunn] and one of his nephews [Loren Duke]. The undercover deal led to [Ralph] Duke's arrest.

Id. at 574.

Mr. Duke's "main contention" in his previous Section 2255 proceeding was "that newly discovered evidence demonstrate[d] that Chambers, a principal government informant and witness, committed perjury with regard to his criminal record, and further, that the prosecutor failed to inform Duke's trial counsel about Chambers' true background while, at the same time, using false testimony to bolster his credibility." Id. at 576. During the government's opening statement, an Assistant United States Attorney told Mr. Duke's jury that Chambers had never been arrested or convicted. Id. Chambers then testified that he had never been arrested or convicted. Id. Minnesota Bureau of Criminal Apprehension (BCA) Agent Robert Bushman, assigned to a DEA task force, "also testified that Chambers was chosen for their operation because, among other reasons, he was trustworthy and did not have a criminal record." Id.

After this Court affirmed Mr. Duke's conviction on direct appeal in United States v. Duke, 940 F.2d 1113 (8th Cir. 1991), he discovered evidence "that Chambers had been arrested a number of times and convicted once in 1978 . . . [and] in another federal

trial, Chambers admitted that he had lied in court about his criminal record on previous occasions." 50 F.3d at 576. Arguing that Chambers' testimony was "crucial to the prosecution's case," Mr. Duke claimed that the prejudice he sustained "by not having the opportunity to confront Chambers with this type of impeaching evidence" warranted granting him a new trial. Id. This Court analyzed Mr. Duke's claim in terms of whether "his convictions were obtained through prosecutorial misconduct that violated his right to due process." Id.

Noting that the standards for granting a new trial motion based on newly discovered evidence vary depending upon "the amount of prosecutorial misconduct, if any, that occurred in the underlying case," this Court initially reviewed the standard applicable to cases involving no prosecutorial misconduct whatsoever. Id. One of the five requirements imposed under that standard is that "the evidence must be likely to produce an acquittal if a new trial is granted." Id. at 576-77. Contrasting this standard with the one applicable to cases involving the government's failure to disclose favorable evidence to the defense, this Court noted: "A standard more favorable to the defendant is applied, however, if a Brady violation has occurred." Id. at 577 (footnote omitted).

Elaborating on this more favorable standard, this Court stated:

> To prove a Brady violation, a defendant must show that the prosecution suppressed the evidence, the evidence was favorable to the accused, and the evidence was material to the

> issue of guilt or punishment. Evidence is "material" for purposes of the rule in Brady "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule, and it is subjected to the same materiality analysis.

Id. (citations omitted).

This Court then focused on the even more defense-friendly standard applicable to new trial motions based on "newly discovered evidence that a conviction was obtained by the prosecutor's knowing use of perjured testimony." Id. Noting that such convictions "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," this Court observed that "the fact that the testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id. (quoting United States v. Agurs, 427 U.S. 97, 103 (1976), and United States v. Bagley, 473 U.S. 667, 680 (1985)).

This Court further observed that when "the government knowingly, recklessly, or negligently used false testimony, the Agurs 'any reasonable likelihood' standard applies." Id. Yet, before a court will apply this "relaxed standard", a defendant must establish that "(1) the testimony was in fact perjured and (2) the prosecuting officers knew, or should have known, of the perjury at the time the testimony was presented. Id. at 577-78.

Turning to the facts presented in Mr. Duke's post-conviction appeal, this Court concluded that the record "clearly demonstrates that Chambers did in fact perjure himself at Duke's trial when he testified that he had never been arrested or convicted." Id. at 578. Despite observing that there was "no evidence that the prosecution actually knew that Chambers was lying when he testified that he had never been arrested or convicted," this Court nonetheless found that "the prosecution should have known of the falsity of Chambers' testimony." Id. This finding of constructive knowledge resulted in this Court's application of the relaxed "standard for knowing, reckless, or negligent use of perjury . . . to the question of whether Duke is entitled to post-conviction relief." Id.

This Court construed the government to have knowledge of Chambers' perjury due to "the prosecution's misrepresentation of Chambers' criminal record and the concomitant introduction of false testimony." Id. As this Court noted, in response to a specific request for information concerning Chambers' criminal history, the prosecution told Mr. Duke's trial counsel that Chambers had no arrest record. See id. Even through the appeal of Mr. Duke's prior § 2255 proceeding, the government maintained "that it never knew of Chambers' prior arrests." Construing the government to have knowledge of Chambers' arrest record, this Court explained:

> This is unfortunately not the first case we have seen where the government has failed to successfully complete a routine background check. Such carelessness is unacceptable, particularly in light of the technological advances which make record retrieval readily

> accessible. **We strongly condemn the government's haphazard approach to its own trial preparation and to its duty to serve and facilitate the truth-finding function of the courts.**

Id. at 578 n.4 (emphasis added).

Despite finding that the government knowingly used perjured testimony at Mr. Duke's trial, this Court affirmed the denial of habeas relief by holding that there was "no reasonable likelihood that Chambers' false testimony affected the judgment of the jury." Id. at 580. Stated differently, this Court held that the government's "failure to disclose the fact that Chambers gave false testimony about his arrest record was harmless beyond a reasonable doubt." Id. Several factors contributed to this harmless error finding.

First, this Court emphasized that "Chambers testified about events proving only one of eleven counts," the twenty kilogram transaction -- count 2. Id. at 579. This Court viewed "Chambers' testimony with regard to the other counts [as] essentially collateral and cumulative." Id. Second, with respect to count 2, this Court found that "there was considerable evidence, apart from Chambers' testimony, of Duke's involvement in the effort to purchase the twenty kilograms of cocaine from Chambers." Id. That "considerable evidence" consisted entirely of Loren Duke's testimony and Monte Nunn's taped statements to Chambers. See id.

Loren Duke testified that Nunn "told him that the money for the twenty kilos came from his father," Ralph Duke, and "the only reason why he was going to get the stuff was because his dad wanted

it." Id. The taped statements consist of Nunn telling Chambers the following about his father:

(1) He controlled all the dope business in the Twin Cities;

(2) He distributed 75 kilograms of cocaine every month or two;

(3) He felt fine about the deal between Nunn and Chambers;

(4) He might want to get some of the cocaine; and

(5) He usually got his cocaine directly from Colombians.

See id.

In addition to this "considerable evidence" of Mr. Duke's involvement in the 20 kilogram transaction, this Court noted that his trial attorney impeached Chambers's credibility by showing that he "failed to file income tax returns for the previous six years and paid tax on none of the $100,000 he had been paid by the DEA for his undercover work on other cases." Id. This Court also noted that Mr. Duke's lawyer "was also able to suggest bias toward the prosecution because Chambers had been paid over $29,000 for his work in this and other Minnesota prosecutions." Id. Finding that the "jury was well aware of the possibility that self-interest might have influenced Chambers' testimony," this Court concluded that Judge Doty "did not err in denying post-conviction relief based on newly discovered evidence of Chambers' arrest record because it is not reasonably likely that the informant's false testimony affected the judgment of" Mr. Duke's jury. Id.

Since this Court reached that conclusion in 1995, Mr. Duke has discovered extensive additional evidence of the government's knowing use of false testimony, and its failure to disclose

exculpatory evidence, which is reasonably likely to have affected his jury's judgment. After reviewing this newly discovered evidence, this application will demonstrate that Mr. Duke is entitled to bring a second or successive § 2255 motion under the technical requirements of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. This demonstration will include discussions of the AEDPA standard of review and the law governing post-conviction relief based upon the government's knowing use of false testimony and its failure to disclose exculpatory evidence. This application will then urge this Court to authorize the district court to consider Mr. Duke's second or successive § 2255 motion.

Separate and apart from seeking this Court's authorization to file a second or successive § 2255 motion, Mr. Duke moves this Court to recall the mandate issued in United States v. Duke, 50 F.3d 571 (8th Cir. 1995), on the basis that it involved fraud upon the court. By knowingly using false testimony and failing to disclose exculpatory evidence, the government committed a fraud upon the court. Consequently, Mr. Duke alternatively urges this Court to recall its prior mandate and remand to the district court for a full evidentiary hearing to determine the extent of the government's fraud upon the court in this case.

II. NEWLY DISCOVERED EVIDENCE OF THE GOVERNMENT'S KNOWING USE OF PERJURED TESTIMONY AND ITS FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

Since this Court's decision in United States v. Duke, 50 F.3d 571 (8th Cir. 1995), Mr. Duke has discovered extensive additional

evidence reflecting the government's knowing use of perjured testimony at his trial. Much of this newly discovered evidence involves the government's awareness of Andrew Chambers's pattern of committing perjury **prior to** Mr. Duke's trial. This evidence demonstrates **actual** governmental knowledge of Chambers' perjurious history, rather than simply constructive knowledge resulting from its careless failure to conduct "a routine background check." Id. at 578 n.4.

The remainder of this evidence extends far beyond Chambers and involves the government's knowing use of false testimony by other key prosecution witnesses at Mr. Duke's trial. This evidence reveals a pattern of governmental misconduct designed to encourage false testimony implicating Mr. Duke and discourage truthful testimony exculpating him. By ignoring information which exonerated Mr. Duke and rewarding information which helped secure his conviction, governmental agents and prosecutors knowingly, recklessly and negligently manufactured a case against him consisting entirely of false testimony.

The government's use of Chambers at Mr. Duke's trial, despite its actual knowledge of his perjurious history, indicates its shockingly deplorable willingness to use false testimony in order to convict Mr. Duke. This Machiavellian prosecutorial mindset bolsters the credibility of key government witnesses who admit committing perjury at Mr. Duke's trial with the government's knowledge and blessing. It is reasonably likely -- if not certain

-- that their false testimony affected the judgment of Mr. Duke's jury.

A. Andrew Chambers

As the first published opinion documenting Andrew Chambers's perjurious nature, this Court's decision in United States v. Duke, 50 F.3d 571 (8th Cir. 1995), became a catalyst for continuing revelations of extensive governmental misconduct. Citing Duke just last year, the Ninth Circuit observed: "Several federal circuit courts have documented Chambers's questionable credibility in unpublished and published opinions." United States v. Bennett, 219 F.3d 1117, 1121 (9th Cir. 2000). The Bennett court further observed that "several circuit court opinions mention Chambers by name and impugn his credibility." Id. at 1124. In Bennett, the government conceded that it was "reckless" in not disclosing in a wiretap application "the number of times that Chambers perjured himself, lied, had been arrested, and failed to pay income taxes." Id.

In a 1993 unpublished opinion, the Ninth Circuit had previously recognized that "Chambers's credibility [at trial] already was undermined significantly by his trial admission that he had lied in previous cases while testifying as a government witness." United States v. Ransom, 990 F.2d 1264 (Table), 1993 WL 100158, *1 (9th Cir. 1993). That admission occurred during Ransom's June 1988 federal trial in Los Angeles when Chambers admitted testifying falsely about his prior criminal history in United States v. Springer and United States v. Brown, two 1985

federal trials in St. Louis. See DEA Chambers Report at 7-8. In Springer, Chambers falsely "testified that he had never been convicted of any crime in any jurisdiction." United States v. Springer, 831 F.2d 781, 783 (8th Cir. 1987).

In 1998, the Fifth Circuit offered this opinion of Chambers: "It is clear that Chambers is not the most pristine of witnesses. Chambers has been paid over $1,000,000 by the DEA for his testimony in past cases, he cheated on his taxes, and he beat his wife." United States v. Millsaps, 157 F.3d 989, 994 (5th Cir. 1998).

Much of the newly discovered evidence of the extensive governmental misconduct involving Chambers is available only because of the persistent efforts of H. Dean Steward, a former public defender who represented Daniel Bennett, a defendant in United States v. Stanley, a 1996 federal prosecution in Los Angeles. See DEA Chambers Report at 38-39. Steward filed a pretrial discovery motion that outlined Chambers's false testimony in Duke and other cases. Id. at 39. Steward's supporting memorandum included this Court's Duke opinion. Id. at 44. As a result, "the presiding judge issued a sweeping discovery order" compelling the government to disclose "all prior testimony by Chambers, all reports, payment records, criminal history from any state, etc." Id. at 42.

While defending Bennett in the criminal proceedings, Steward also requested information about Chambers directly from the DEA in 1997. Id. at 46. When the DEA denied his requests, Steward filed a FOIA [Freedom of Information Act] action in 1998 seeking

disclosure of DEA records regarding Chambers. Id. In 1999, United States District Court Judge Gladys Kessler ordered the DEA to disclose Chambers's criminal record and DEA payment record to Steward, and to search further for records of case names, numbers and judicial districts where Chambers had testified. Bennett v. Drug Enforcement Admin., 55 F. Supp.2d 36, 43 (D.D.C. 1999).

In support of her ruling, Judge Kessler wrote:

> Plaintiff and his counsel have already conducted significant research on the many instances in which Chambers has perjured himself about his criminal record, and the government's apparent complacency about this conduct. The information uncovered by Plaintiff is very compelling, suggesting extensive government misconduct, and the information sought is necessary to confirm whether Plaintiff's findings are backed by the record. Furthermore, it is clear from the far-reaching and serious consequences of the activities and collaboration of Chambers and the DEA that there is a substantial public interest in exposing any wrongdoing in which these two parties may have engaged. This public interest can only be served by the full disclosure of Chambers' rap-sheet, about which he has frequently testified, although not always truthfully, in open court around the country. . . . Plaintiff's research further suggests that Chambers has earned as much as $4 million for serving as a government informant. Given the compelling evidence Plaintiff has uncovered, suggesting massive government misconduct, the public interest in the disclosure of this information far outweighs any privacy interest Chambers may have.

Id. at 43-43 (footnotes omitted). Judge Kessler cited Duke and Ransom as examples of Chambers' false testimony. See id. at 42 n.6.

On November 22, 1999, while the DEA's appeal of Judge Kessler's ruling was pending before the District of Columbia Circuit Court of Appeals, the National Law Journal published an article about Bennett v. DEA, authored by David Rovella and titled "Some Superinformant: Lies, rap sheet of DEA's million-dollar man start a legal fire."[3] Within two months, on January 16, 2000, the St. Louis Post Dispatch published a front-page Sunday edition story detailing Chambers's career as a DEA informant and his role in extensive governmental misconduct. Written by Michael Sorkin and Phyllis Librach, the article, titled "Top U.S. Drug Snitch is a Legend and a Liar,"[4] ignited a media firestorm which burned across the entire country.

Between February 2000 and May 2001, the St. Louis Post Dispatch published seven additional articles and two editorials regarding Chambers.[5] In addition to the St. Louis Post Dispatch, the Los Angeles Times, Miami Herald, Houston Chronicle, Dallas Morning News, Tampa Tribune, and St. Petersburg Times all published articles concerning Chambers and his involvement in widespread governmental misconduct.[6] An analysis of Bennett v. DEA, authored by Barry Tarlow, also appeared in the March 2000 edition of The

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[3]A copy of this article is included in the accompanying appendix filed herein.

[4]A copy of this article is included in the accompanying appendix filed herein.

[5]Copies of these articles and editorials are included in the accompanying appendix filed herein.

[6]Copies of these articles are included in the accompanying appendix filed herein.

Champion, a journal published by the National Association of Criminal Defense Lawyers.[7] In July 2000, Newsweek magazine published an article about Chambers, written by Andrew Murr and titled "King of the Drugbusters."[8] Even ABC's 20/20 broadcast a segment about Chambers titled "The High Cost of Lying: Nation's Number One Drug Informant Faces Fallout," which included Connie Chung's exclusive interview of Chambers.[9]

Within weeks of Sorkin and Librach's first article, the DEA deactivated Chambers as an informant and launched an internal investigation of his misconduct.[10] Ultimately, that investigation culminated in the DEA Office of Inspections issuing a 157-page report which has not yet been released to the public. Dean Steward, however, obtained a copy of the report in May 2001 as a result of his FOIA request and furnished Mr. Duke with a copy of the report in August 2001.[11] That report demonstrates that the government was fully aware of Chambers's penchant for perjury **more than one year before** Mr. Duke's trial.

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[7]A copy of this article is included in the accompanying appendix filed herein.

[8]A copy of this article is included in the accompanying appendix filed herein.

[9]A transcript of that television broadcast is included in the accompanying appendix filed herein.

[10]See William DeShazo e-mail to Milo Grasman, dated February 2, 2000, a copy of which is included in the accompanying appendix filed herein.

[11]See Declaration of H. Dean Steward, a copy of which is included in the accompanying appendix filed herein.

The DEA Management Review Report reveals that Chambers worked with the DEA from 1984 to 2000 and was paid approximately two million dollars ($2,000,000) by the DEA for his efforts, which included testifying in approximately 25 DEA cases. See DEA Chambers Report at 1, 98, 101. He testified falsely in 16 of those 25 cases -- a 64% perjury rate -- providing false testimony about his arrest record, educational background and payment of income taxes. Id. at 1, 101.

Chambers's first documented instance of perjury occurred in St. Louis, during the April 1985 trial of United States v. Springer, when he denied ever being charged with a crime. Id. at 2, 102. At the time of this false testimony, charges were pending against Chambers in Kentucky for forgery and filing false financial statements. Id. at 102. A DEA agent requested a Kentucky judge to recall any outstanding warrants on Chambers prior to his testifying in Springer. Id.

Three weeks after testifying falsely in Springer, Chambers again committed perjury when he testified in United States v. Brown, another trial conducted in St. Louis. Id. at 6, 103. As in Springer, Chambers falsely testified that he had never been involved in any criminal conduct. Id. at 103.

In June 1988, Chambers testified in United States v. Ransom, a Los Angeles trial. Id. at 7. Several months prior to trial, the prosecutor had requested the DEA to furnish Chambers's criminal history and a list of prior federal cases in which he had testified. Id. at 9. Within a week of that request, the DEA

provided the prosecutor with Chambers' criminal history. Id. After the government elicited that criminal history on direct examination, Chambers admitted on cross-examination that he had testified falsely about his criminal history in both Springer and Brown. Id. at 7-8, 103. Both the DEA case agent and the Assistant United States Attorney immediately notified their superiors when they became aware of Chambers's "prior credibility issues" during his testimony in Ransom. Id. at 9, 103.

Two weeks after testifying in Ransom, Chambers again testified falsely about his criminal history in another Los Angeles trial, United States v. Fuller. Id. at 11, 103. As in Ransom, Chambers admitted in Fuller that he had lied under oath in both Springer and Brown. Id. at 13. Aware of Chambers's "past credibility problems," the Assistant United States Attorney fully disclosed that information to the defense attorneys in Fuller prior to the beginning of trial on June 21, 1988. Id. at 13, 103.

More than seven months passed before Chambers testified in the February 1989 trial of United States v. Floyd, another Los Angeles case. Id. at 15, 103. A month before that trial, the prosecutor furnished the defense with Chambers's criminal history, a list of prior trials at which he had testified, and a list of DEA payments he had received in Floyd. Id. at 13. Due to Chambers's "improprieties," the prosecutor elected not to call him as a witness. Id. at 103. The defense, however, armed with the devastating impeachment material disclosed by the government,

called Chambers as a defense witness and elicited his admission that he had lied under oath in both Springer and Brown. Id.

More than nine months after Floyd and almost eighteen months after Fuller and Ransom, the trial of United States v. Duke began on November 22, 1989. Id. at 16, 104. That was a day for which many Minnesota law enforcement officers had waited for what seemed an eternity. After 20 years of an open -- but unsuccessful -- investigation by the FBI, IRS, and numerous state and local law enforcement agencies, Ralph Duke would finally be brought to justice, thanks to a DEA investigation utilizing superinformant Andrew Chambers. Id. at 17.

When asked on direct examination by Assistant United States Attorney John Hopeman whether he had ever been arrested, Chambers lied and said, "No." Id. at 17, 104. At the time Hopeman asked that question, Chambers had been arrested eleven (11) times. Id. at 17. Yet, unlike the defense attorneys in Fuller and Floyd, Mr. Duke's lawyer could not impeach Chambers because the government failed to disclose his prior criminal history and "credibility issues" (prior instances of perjury and false testimony) to Mr. Duke's lawyer. In 1996, a year after this Court's decision in Duke, Chambers admitted lying under oath at Mr. Duke's trial when testifying in United States v. Millsaps. Id. at 47.

The DEA Management Review Report goes on to chronicle Chambers's persistent pattern of perjury throughout the 1990's, as well as the refusal of several federal prosecutors to use him as an informant or a witness, and the dismissal of numerous cases across

the nation due to "the Chambers controversy." Id. at 77, 82. The report acknowledges the DEA's constitutional obligation to disclose information "useful to impeach the credibility of a government witness," including any information contradicting a witness's testimony. Id. at 101. Further acknowledging that a case agent should always be aware of an informant's complete arrest record, the Chambers Report declares: "It is negligent for [a case agent] to utilize a [confidential source] without being aware of his arrest record." Id. at 106. The report also emphasizes that it is DEA's responsibility to advise prosecutors of "any information they have that would impact the credibility of a [confidential source]," including "Chambers's arrest record and prior instances where he provided false testimony." Id.

The Chambers Report concludes that the government first became aware that Chambers had testified falsely on June 9, 1988, when he admitted while testifying in Ransom that he had lied under oath in Springer and Brown. Id. at 107. After United States v. Fuller, the June 21, 1988, trial in which the prosecutor was aware of Chambers's "past credibility problems" and fully disclosed that information to the defense prior to trial, the report recognizes that "it was the responsibility of DEA to ensure that future prosecutors were informed of credibility issues surrounding Chambers." Id. at 106.

Mr. Duke's trial occurred almost eighteen (18) months after Fuller. In light of the recent revelations contained in the Chambers Report, it is far too late in the day for the government

to claim that it was unaware of Chambers's "past credibility problems" at the time of Mr. Duke's trial. The DEA was constitutionally obligated to disclose that information to Mr. Duke's prosecutors, who were likewise constitutionally obligated to disclose that information to his defense attorney. The only reasonable explanation for their failure to discharge their constitutional duties is the "law enforcement propensity to avoid negative information about an informant." Id. at 44. Yet, turning a blind eye to such information only compounds the harm of the constitutional violation and reveals the win-at-all-costs mentality of the agents and prosecutors involved in Mr. Duke's case.

B. Additional Government Witnesses

Andrew Chambers was not the only government witness who committed perjury at Mr. Duke's trial with the government's knowledge and consent. An investigation conducted since this Court's decision in United States v. Duke, 50 F.3d 571 (8th Cir. 1995), reveals the government's knowing use of false testimony by key witnesses whose perjured testimony previously led this Court to characterize Chambers's perjury as "harmless error." Id. at 580. That characterization cannot survive this extensive newly discovered evidence of the government's knowing use of perjured testimony and its concomitant failure to disclose exculpatory evidence.

1. Loren Duke

Loren Duke (Ralph Duke's nephew) was one of the government's key witnesses who testified falsely at Ralph Duke's trial. Loren

Duke testified that Monte Nunn (Ralph Duke's son) "told him that the money for the twenty kilos came from his father," Ralph Duke, and "the only reason why he was going to get the stuff was because his dad wanted it." Id. at 579. It was this testimony and Nunn's taped statements to Chambers which resulted in this Court's 1995 harmless error finding. See id. at 579-80. Loren Duke now admits that this testimony was false and that the government knew it was false at the time of the trial.

At approximately 10:00 p.m. on May 17, 1989, Loren Duke, Monte Nunn, Anthony Turner and Larry Hutchinson drove to the Minneapolis Hilton Hotel to purchase 20 kilograms of cocaine from Andrew Chambers. See Loren Duke Transcript at 2, 5.[12] See also United States v. Duke, 940 F.2d 1113, 1116 (8th Cir. 1991). They had pooled approximately $117,000 from various people to purchase the cocaine from Chambers. See id.; Loren Duke Transcript at 3. None of this money belonged to Ralph Duke. Id. In fact, Ralph Duke knew nothing about Nunn's 20 kilogram deal with Chambers. Id.

Loren Duke and his three companions were arrested before any exchange of drugs or money. Id. at 5. DEA Special Agent Carey and Assistant United States Attorney Hopeman subsequently interviewed Loren Duke, who refused to reveal the sources of the $117,000. Id. at 6. Nevertheless, Loren Duke told the prosecutor and case agent that Ralph Duke was not involved in the 20 kilo transaction. Id. He told them that none of the money was Ralph Duke's, that the

[12]A copy of Loren Duke's transcribed interview is included in the accompanying appendix filed herein.

drugs were not being purchased for Ralph Duke, and that Ralph Duke knew absolutely nothing about the 20 kilo deal. Id.

Agent Carey and AUSA Hopeman, however, refused to accept that Ralph Duke was not involved in the transaction. Id. at 7. They wanted Loren Duke to say that it was Ralph Duke's money being used to purchase drugs for Ralph Duke and his Duke Gang. Id. at 8. Loren Duke told them that no Duke Gang existed. Id. at 3, 8. Undeterred, the case agent and prosecutor threatened Loren Duke by telling him that if he refused to implicate Ralph Duke in the 20 kilo deal, he would go to prison for 30 years and they would indict his parents, who would also go to prison. Id. at 8. After discussing this dilemma with his parents, Loren Duke agreed to cooperate with the prosecution by telling them what they wanted to hear. Id. His parents supported his decision. Id. at 8.

Loren Duke was not the only government witness to testify falsely against Ralph Duke in order to obtain a sentence reduction. Id. at 12. The government offered to cut sentences in half in exchange for testimony implicating Ralph Duke. Id. For example, in order to shorten his sentence, a drug dealer named David Youman falsely testified that he bought drugs from Ralph Duke in Loren Duke's garage. Id. at 11.

a. Claude Duke

Claude Duke, Loren Duke's father, corroborates his son's claims. Within hours of his arrest, Loren Duke told his father that it was Monte Nunn's deal and Ralph Duke had nothing to do with

it. See Claude Duke Transcript at 34-35.[13] When the government executed a search warrant at Claude Duke's home, Agent Carey and AUSA Hopeman were present. Id. at 9. The prosecutor requested Claude Duke to come to his office the next day, at which time Hopeman falsely claimed to have evidence that Claude Duke was involved in narcotics. Id. at 10-11. Hopeman also told Claude Duke that his son was part of a 20 kilo transaction in which Ralph Duke was **not** involved. Id. at 14.

AUSA Hopeman further informed Claude Duke that his son was facing 20 years and he wanted Claude to convince Loren to cooperate in a prosecution of Ralph Duke. Id. 14-15. After several meetings with Hopeman, Claude Duke met with his son, who again told him that Ralph Duke was not involved in the 20 kilo transaction. Id. at 15. Loren Duke told his father that it was Monte Nunn's deal, that Nunn and his friends pooled the buy money, and that Ralph Duke was not even aware of the deal. Id. at 17.

When Claude Duke later told the prosecutor what his son had said, AUSA Hopeman told him that he had indictments waiting for Claude, his wife, his brother, and his other son (Marcel Duke). Id. at 19. Hopeman also threatened to give each of them 20 years unless Loren Duke cooperated with the government's prosecution of Ralph Duke. Id. at 19-24. Furthermore, Hopeman promised to release Claude's elderly brother as soon as Loren agreed to cooperate. Id. at 32.

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[13]A copy of Claude Duke's transcribed interview is included in the accompanying appendix filed herein.

When Claude Duke again met with his son, he encouraged Loren to tell Hopeman what he wanted to hear in order to protect his parents, his brother, and his 70-year-old uncle. Id. at 24-25. Reluctantly acquiescing to his father's plea, Loren Duke falsely admitted to Hopeman that Ralph Duke's money was involved and the drugs were being purchased for Ralph Duke. Id. at 26. Once Loren Duke changed his story to protect his family members, the government released Claude Duke's brother and dropped all charges against him. Id. at 30-33.

Like Loren Duke, many other government witnesses repeatedly told the case agent and prosecutor that Ralph Duke was not involved. Id. at 46. Nevertheless, they were all threatened with 20 years and promised significant sentence reductions only if they incriminated Ralph Duke. Id. at 27-28. These witnesses, like Loren Duke, ultimately succumbed to the government's coercion and agreed to testify falsely against Ralph Duke. Id. at 27-28, 37-40.

b. Marcel Duke

Marcel Duke corroborates both Loren and Claude Duke. He confirms that no Duke Gang or organization ever existed. See Marcel Duke Transcript at 6.[14] He also confirms that Ralph Duke played absolutely no role in the 20 kilo transaction arranged by Monte Nunn and Andrew Chambers. Id. at 2. Nunn organized the deal and had several people contribute to the buy money. Id. at 1. Although Ralph Duke did not contribute to the buy money, Marcel

[14]A copy of Marcel Duke's transcribed interview is included in the accompanying appendix filed herein.

Duke did. Id. at 1-2. As a result, the government charged him with aiding and abetting. Id. at 3.

When AUSA Hopeman interviewed Marcel Duke, the prosecutor was aware that none of the buy money came from Ralph Duke. Id. at 5. Nevertheless, the government threatened him and other witnesses that the only way they could avoid serving 20 year prison terms was to implicate Ralph Duke. Id. Although Marcel Duke struck a plea bargain, the government refused to honor it because they claimed he was lying when he refused to implicate Ralph Duke. Id. at 4-5.

Marcel Duke lived with his best friend, Scott Tredwell, a drug dealer who did not even know Ralph Duke. Id. at 2. Nevertheless, the government also coerced him into falsely testifying that he purchased drugs from Ralph Duke on four occasions. Id. at 2-3.

c. Andre Duke

Andre Duke, another of Claude Duke's sons, similarly corroborates Loren, Claude, and Marcel Duke. The government seized Andre Duke's house, claiming that he was Ralph Duke's nominee for its purchase. See Andre Duke Affidavit at 2.[15] When Andre Duke met with AUSA Hopeman, he threatened to indict Andre and his parents if Loren Duke refused to testify that Ralph Duke was involved in the 20 kilo transaction. Id. at 5-6. Hopeman alternatively promised to release all of Andre and Claude Duke's seized property once Loren agreed to cooperate. Id. at 6. The

[15]A copy of Andre Duke's affidavit is included in the accompanying appendix filed herein.

government returned Andre's house once his brother, Loren, agreed to lie for the prosecution. Id. at 3.

Loren Duke told both Andre Duke and the prosecutor that none of the buy money belonged to Ralph Duke. Id. at 4, 10. Monte Nunn also told Andre Duke that none of the buy money belonged to Ralph Duke. Id. at 8. Nevertheless, Loren and other government witnesses succumbed to the government's coercion and committed perjury at Ralph Duke's trial in order to prevent indictment and imprisonment of their family members. Id. at 11-12.

d. F. Clayton Tyler

F. Clayton Tyler, an attorney who represented Ralph Duke on direct appeal, further corroborates Loren Duke's claim that the government was aware that Ralph Duke was not involved in the 20 kilo transaction. While listening to oral arguments in a co-defendant's appeal, he heard Assistant United States Attorney Denise Reilly tell this Court that one of Ralph Duke's co-defendants had informed her that Mr. Duke was **not** involved in the 20 kilo deal. See F. Clayton Tyler Affidavit at 1.[16]

2. Anthony Turner

On May 17, 1989, Anthony Turner was arrested at the Minneapolis Hilton Hotel along with Monte Nunn, Loren Duke and Larry Hutchinson. See Anthony Turner Affidavit at 3-5.[17] Ralph Duke was not involved in the 20 kilo transaction and did not

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[16]A copy of F. Clayton Tyler's affidavit is included in the accompanying appendix filed herein.

[17]A copy of Anthony Turner's affidavit is included in the accompanying appendix filed herein.

contribute to the buy money. Id. at 5, 7. No Duke Gang or organization ever existed. Id. at 11. While in custody, Turner learned that people were falsely implicating Ralph Duke in order to reduce their penalties. Id. at 6. Despite his innocence, Ralph Duke was convicted upon lies extracted from frightened kids who were threatened by prosecutors. Id. at 10.

For example, Loren Duke told Anthony Turner that he would get both of them out of trouble by falsely testifying against Ralph Duke. Id. at 8. Loren Duke told Turner that the only way out was to blame everything on Ralph Duke, whom the government was out to get. Id. The government had threatened to prosecute Turner to the full extent of the law, unless he agreed not to testify for anyone charged in the case. Id. at 8-9. In exchange for his agreement, Turner received a 38-month sentence. Id. at 9.

3. Ralph Lamont (Monte) Nunn

The claims made by Anthony Turner, Loren Duke and his family members, are further corroborated by Ralph Duke's son, Monte Nunn. Nunn confirms that he orchestrated the 20 kilo transaction with Andrew Chambers, and his father had absolutely no involvement in that deal. See Vincent Carraher 1998 Affidavit at 1.[18] Specifically, Ralph Duke did not contribute to the buy money (which Nunn raised among his friends), did not give Nunn any advice concerning the transaction, and was not even aware of the deal as

[18]A copy of Vincent Carraher's September 18, 1998, affidavit is included in the accompanying appendix filed herein.

Nunn had not spoken to his father in the two weeks preceding Nunn's arrest. Id.

Nunn further confirms that a Duke Gang never existed and Scott Tredwell never bought any drugs from Ralph Duke. Id. Both the prosecutors and case agents were aware that Ralph Duke was **not** involved in the 20 kilo deal. Id. at 2. Nevertheless, they coerced government witnesses to testified falsely against Ralph Duke by threatening to indict them and their relatives, and give them long prison terms, if they refused to implicate Ralph Duke. Id. at 2. Monte Nunn, however, refused to testify against his father and ultimately received a lengthy prison sentence. Id. at 1-2.

In a hearing conducted in Judge Doty's chambers on December 6, 1989, during Ralph Duke's trial, co-defendant Monte Nunn told Judge Doty that he no longer wished to participate in the trial because he had been unable to reach a plea agreement with the government. See Nunn Hearing Transcript at IX-2 to 3, 6-7.[19] During that hearing, Nunn told Judge Doty that when he told his lawyer the truth about what happened his lawyer told him: "You can't say that. The Government doesn't want you to say that." Id. at IX-9.

As the hearing continued it became obvious that Nunn was experiencing psychological problems. Id. at IX-14. Consequently, Judge Doty ordered him to submit to a psychiatric examination and recessed the trial. Id. at IX-16 to 21. Shortly after trial

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[19]A copy of the transcript of this hearing conducted on December 6, 1989, is included in the accompanying appendix filed herein.

recessed, Nunn attempted suicide and was ultimately severed from Ralph Duke's trial. Id. at IX-23.

4. Danny Givens

Danny Givens was a drug dealer who contributed $16,000 towards the buy money raised in Nunn's 20 kilo deal with Andrew Chambers. See Danny Givens Transcript at 8.[20] Givens also confirms that none of the buy money belonged to Ralph Duke. Id. at 3, 10. Despite being aware of Givens's involvement in the 20 kilo transaction, the prosecutors never charged him with that offense. Id. at 9, 19. Instead, he was indicted in an unrelated case and testified as a government witness in order to receive a reduced sentence. Id. at 4, 11.

Although Nunn discussed the 20 kilo transaction with Givens for two weeks preceding his arrest, he never said anything about his father contributing any buy money. Id. at 12-13. In fact, Nunn never wanted his father to know that he was selling drugs. Id. at 17. Moreover, neither Scott Tredwell, Andre Phillips, Kevin Walker, David Youman, Loren Duke, nor Marcel Duke ever bought any drugs from Ralph Duke. Id. at 14-20. Marcel Duke told Givens that Ralph Duke was not involved in the 20 kilo deal. Id. at 21. Larry Hutchinson, who was arrested on May 17, 1989, at the Minneapolis Hilton Hotel, along with Nunn, Turner and Loren Duke, likewise told Givens that he was shocked when the government implicated Ralph Duke in that transaction. Id. at 20.

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[20]A copy of Danny Givens's transcribed interview is included in the accompanying appendix filed herein.

5. Theryl Dugas

Theryl Dugas, one of Ralph Duke's codefendants, was charged with aiding and abetting and maintaining a stash house. See Theryl Dugas Transcript at 1.[21] Dugas confirms that no Duke Gang or organization ever existed. Id. at 8, 22. Dugas learned that while several people contributed to the buy money for Monte Nunn's 20 kilo transaction with Andrew Chambers, none of the money belonged to Ralph Duke. Id. at 3-4. When Dugas met with DEA Special Agent Carey and Assistant United States Attorney Hopeman, he told them that Ralph Duke was **not** involved in that deal. Id. at 12.

The case agent and prosecutor then diagramed a triangle of possible sentences, placing Ralph Duke at the top with a life sentence and explaining a domino effect which would result from others below him agreeing to testify against Ralph Duke. Id. at 12-14. They also told Dugas how others, including Loren Duke, would testify against Ralph Duke. Id. at 13. Even though everyone involved in the 20 kilo deal told the case agent and prosecutor that Ralph Duke was **not** involved in the transaction, the government's goal was to obtain Ralph Duke's conviction. Id. at 14.

To achieve that goal, the government elicited Scott Tredwell's false testimony that he bought drugs from Ralph Duke. Id. at 7-9. Tredwell, a drug dealer, purchased his drugs exclusively from Terri Glass, and Loren and Marcel Duke. Id. at 8. After testifying

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[21]A copy of Theryl Dugas's transcribed interview is included in the accompanying appendix filed herein.

against Ralph Duke, Tredwell told his close friend Dugas that he had lied in order to obtain a reduced sentence. Id. at 25-26. The government similarly elicited David Youman's false testimony that he bought drugs from Ralph Duke. Id. at 15-17. Youman, another close friend of Dugas, told him that the government coerced him to testify falsely against Ralph Duke by threatening him with a life sentence if he did not implicate Ralph Duke. Id. 15-16.

6. Arcel Magee

Arcel Magee likewise confirms that no Duke Gang or organization ever existed. See Arcel Magee Transcript at 4.[22] He also corroborates Theryl Dugas's statements. Prior to Ralph Duke's trial, Scott Tredwell told Magee that he was trying to get out of his own charges any way he could. Id. at 2. Tredwell further informed Magee that although Ralph Duke was not involved in the 20 kilo deal, the government insisted that Tredwell falsely implicate Ralph Duke. Id. at 3. Tredwell ultimately succumbed to the government's coercion and testified falsely against Ralph Duke. Id. at 5.

7. Joseph Ballard

Another government witness to testify at Ralph Duke's trial was his nephew, Joseph Ballard, who similarly confirms that no Duke Gang ever existed. See Joseph Ballard Transcript at 4.[23] He also corroborates Loren Duke's claim that none of the buy money for the

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[22]A copy of Arcel Magee's transcribed interview is included in the accompanying appendix filed herein.

[23]A copy of Joseph Ballard's transcribed interview is included in the accompanying appendix filed herein.

20 kilo transaction belonged to Ralph Duke. Id. at 10. Ballard resided at Ralph Duke's home and was employed as a construction worker for Steven Bjorklund, Duke's former brother-in-law. Id. at 1-2. Despite living with Ralph Duke, Ballard never heard him discuss drugs. Id. at 5.

On three to five occasions, Ballard transported cars for Ralph Duke from California to Minnesota for sale. Id. at 2-3. Contrary to his testimony at trial, Ballard never transported drugs in any of these cars. Id. at 3, 8. In fact, on April 27, 1989 (three weeks before Ralph Duke's arrest), the police stopped Ballard and his brother, Jeffrey, in Faribault, Minnesota, and seized their vehicles. Id. at 3. Although the police thoroughly searched the vehicles, they found no drugs and released the Ballard brothers the next day. Id.

Before Joseph Ballard was released from custody, DEA Agent Carey put a gun to his head and accused him of transporting drugs for his uncle, Ralph Duke. Id. at 4. Approximately two months later (four to five weeks after Ralph Duke's arrest), Joseph Ballard was rearrested and told by DEA Agent Carey that he would do 30 years for "big time transporting" of drugs. Id. at 7. Joseph Ballard ultimately agreed to testify falsely against his uncle in order to avoid a lengthy prison sentence. Id. at 8-9. Telling the government what his lawyer said it wanted to hear, Joseph Ballard falsely testified that he transported drugs and money for Ralph Duke in his vehicles. Id. at 8-10.

a. Harry Ballard

Joseph Ballard's father, Harry, has been employed as a Ramsey County Sheriff's Deputy for more than 30 years. See Harry Ballard Transcript at 1.[24] He likewise confirms that no Duke Gang ever existed. Id. at 14. Deputy Ballard also confirms that the police stopped his sons, Joseph and Jeffrey, in Faribault a couple weeks before Ralph Duke's arrest. Id. at 2-4. Deputy Ballard recalls that DEA Agent Carey was involved in the seizure of the vehicles his sons were driving. Id. at 4. His son, Joseph, was living with Ralph Duke (his former brother-in-law) and transporting cars -- not drugs -- for him from California. Id.

According to Deputy Ballard, Ralph Duke was involved in the car business -- not the drug business. Id. at 9. Nevertheless, many government witnesses falsely implicated Mr. Duke at trial in order to reduce their sentences. Id. at 11. One such witness was Deputy Ballard's son, Joseph, who falsely testified that he transported drugs and money for his uncle. Id. at 12.

b. Jeffrey Ballard

Joseph Ballard's brother, Jeffrey, also confirms that no Duke Gang ever existed. Id. at 5. See Jeffrey Ballard Transcript at 5.[25] According to Jeffrey, Ralph Duke allowed Joseph to live with him because Duke was concerned about the young man staying out of trouble. Id. at 4. Neither Jeffrey nor Joseph ever transported

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[24]A copy of Harry Ballard's transcribed interview is included in the accompanying appendix filed herein.

[25]A copy of Jeffrey Ballard's transcribed interview is included in the accompanying appendix filed herein.

drugs or money for Mr. Duke; instead, they drove four or five expensive cars from California to Minnesota for resale and were reimbursed their expenses. Id. at 2. Like his brother and father, Jeffrey also recalls that DEA Agent Carey was involved in seizing cars from Joseph and him in Faribault a few weeks before his uncle's arrest. Id. at 3-4.

c. Jacqueline Ballard

Joseph Ballard's sister, Jacqueline, similarly confirms that no Duke Gang ever existed. See Jacqueline Ballard Transcript at 5.[26] She also corroborates Jeffrey Ballard's claim that Ralph Duke was trying to straighten out their brother, Joseph. Id. at 5-6. Like her brothers, Jacqueline Ballard states that her uncle, Ralph Duke, would travel to California where he purchased expensive cars for resale in Minnesota. Id. at 3-4. He would have other people, including her brothers, drive the cars to Minnesota and reimburse them for their expenses. Id. at 4. Neither of her brothers ever transported drugs or money in these cars. Id.

During Ralph Duke's trial, Jacqueline Ballard received a telephone call from her brother, Joseph. Id. at 7. He sounded as if he was under pressure and "stressed out." Id. He told his sister that the government was threatening to give him 30 years in prison. Id.

d. Steven Maxwell

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[26]A copy of Jacqueline Ballard's transcribed interview is included in the accompanying appendix filed herein.

Steven Maxwell likewise confirms that no Duke Gang ever existed and Ralph Duke was a car jockey, who bought and resold vehicles. See Steven Maxwell Transcript at 1-3.[27]

8. David Yeoman

Like many of the other government witnesses who testified against Ralph Duke, David Yeoman also confirms that Mr. Duke was **not** involved in Monte Nunn's 20 kilo transaction with Andrew Chambers. See David Yeoman Transcript at 9.[28] None of the buy money belonged to Ralph Duke; Nunn and his friends pooled the buy money between themselves. Id. at 2, 10.

Yeoman also was not involved in the 20 kilo deal. Id. at 2. He was arrested approximately one month later on an unrelated cocaine sale. Id. at 3. Nevertheless, the government implicated Yeoman in Ralph Duke's case and wanted Yeoman to testify against him. Id. at 3-4. A DEA agent told Yeoman: "We're putting everybody in this pot and we're going to stir it up and see what we come up with." Id. at 4.

The government threatened to give Yeoman ten years, and to indict and imprison his mother and pregnant girlfriend, if he refused to testify against Ralph Duke. Id. at 7-8. His attorney told Yeoman how other government witnesses (including Loren Duke, Marcel Duke and Scott Tredwell) were going to testify against him and advised Yeoman that he would receive ten years unless he

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[27]A copy of Steven Maxwell's transcribed interview is included in the accompanying appendix filed herein.

[28]A copy of David Yeoman's transcribed interview is included in the accompanying appendix filed herein.

testified against Ralph Duke. Id. at 4-5. Consequently, Yeoman falsely testified that he bought drugs from Ralph Duke. Id. at 6. Yeoman actually purchased the drugs from Loren Duke. Id. Ralph Duke was neither present at, nor otherwise involved in, Yeoman's drug transaction with Loren Duke. See Affidavit of David Yeoman.[29]

III. THE AEDPA STANDARD OF REVIEW

A. The Legal Standard

On April 24, 1996, President Clinton signed into law the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, which significantly amended Title 28 United States Code Section 2255. See Pub. L. No. 104-132, 110 Stat. 1214, 220-21 (1996). Pursuant to this legislation, a federal inmate must apply to the court of appeals for authorization to file in the district court a second or successive motion for postconviction relief. See 28 U.S.C. §§ 2244(3)(A) & 2255. The court of appeals must authorize the filing of the second or successive petition if "the application makes a prima facie showing that" it contains:

> newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found movant guilty of the offense.

Id. §§ 2244(3)(C) & 2255.

The Seventh and Ninth Circuits have defined this requisite prima facie showing as "simply a sufficient showing of **possible** merit to warrant a fuller exploration by the district court."

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[29]A copy of David Yeoman's affidavit is included in the accompanying appendix filed herein.

Bennett v. United States, 119 F.3d 468, 469 (7th Cir. 1997) (emphasis added); Woratzeck v. Stewart, 118 F.3d 648, 650 (9th Cir. 1997) (same). According to these courts, "[i]f in light of the documents submitted with the application, it appears reasonably likely that the application satisfies the stringent requirement for the filing of a second or successive petition, we will grant the application." Bennett, 119 F.3d at 469-70; Woratzeck, 118 F.3d at 650.

The AEDPA also establishes a one-year limitation period which runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 18 U.S.C. § 2255. To satisfy this due diligence standard, an applicant must demonstrate "some good reason why he or she was unable to discover the facts supporting the motion before filing the first habeas motion." In re Boshears, 110 F.3d 1538, 1540 (11th Cir. 1997). Because defendants are presumed to have conducted a reasonable investigation of all facts surrounding their prosecution, a simple claim that the applicant did not actually know the facts underlying his or her claim fails to satisfy the due diligence requirement. Id. Instead, when evaluating an application to file a second habeas petition, a court of appeals asks "whether a reasonable investigation undertaken before the initial habeas motion was litigated would have uncovered the facts applicant alleges are 'newly discovered.'" Id.

If due diligence is shown, the court of appeals must then identify the facts underlying the claim and accept them as true for

purposes of evaluating the application. Id. at 1541. The next step in the court's analysis is to determine whether those facts establish a constitutional error. Id. If such error is shown, the court of appeals evaluates those facts in light of the evidence as a whole and determines whether the applicant would not have been convicted if those facts had been known at the time of trial. Id.

Denying a motion for an order authorizing petitioner to file a second habeas application under 28 U.S.C. § 2254, in Denton v. Norris, 104 F.3d 166, 167 (8th Cir. 1997), this Court observed that the AEDPA "is merely an elaboration on traditional abuse-of-the-writ doctrine." But see Wainwright v. Norris, 121 F.3d 339, 340 (8th Cir. 1997)(AEDPA "discards the pre-Act concept of 'abuse of the writ' in favor of more restrictive standards"). Despite holding that the AEDPA does not violate Article I, Section 9, Clause 2, of the Constitution (prohibiting suspension of the writ of habeas corpus), this Court envisioned that "[t]here may be circumstances in which the statute should not be literally and woodenly applied." Id. at 167 n.2.

Quoting United States v. Addonizio, 442 U.S. 178, 185 (1979), and Hill v. United States, 368 U.S. 424, 428 (1962), this Court recently affirmed that constitutional error remains a basis for collateral attack if it constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997). Under the traditional abuse-of-the-writ doctrine, the miscarriage of justice exception required the existence of newly discovered evidence of

actual innocence to support the claim of constitutional error. Id. at 741.

In Shaw v. Delo, 971 F.2d 181, 184 (8th Cir. 1992), a case decided under the traditional abuse-of-the-writ doctrine prior to the adoption of the AEDPA, this Court recognized that generally a habeas petitioner must establish cause for failing to include newly discovered evidence in a prior habeas petition. Such cause is established by showing that some external impediment, such as governmental interference or the reasonable unavailability of the claim's factual basis, prevented counsel from constructing or raising the claim. Id. If unable to show cause for failing to include newly discovered evidence in a prior habeas petition, the claim may nonetheless be considered only if the failure to consider it would be a miscarriage of justice -- an exception which applies only if the petitioner is actually innocent. Id. at 185.

Denying a motion for authorization to file a successive Section 2254 petition in McDonald v. Bowersox, 125 F.3d 1183, 1186 (8th Cir. 1997), this Court noted that an applicant must explain why newly discovered evidence could not have been discovered previously at the time he filed his initial habeas petition. Similarly denying a motion to file a second Section 2254 petition in Vancleave v. Norris, 150 F.3d 926, 929 (8th Cir. 1998), this Court commented that claims not presented in initial habeas petitions should be dismissed unless "their factual predicate could not have been discovered previously through the exercise of due diligence and, if proved, they would establish petitioner's

innocence." According to Vancleave, "[t]his is a more restrictive standard than the cause and prejudice/actual innocence standard for excusing abuse of the writ under prior law." Id.

Likewise denying an application for authorization to file a second habeas petition in Roberts v. Bowersox, 170 F.3d 815, 816 (8th Cir. 1999), this Court held that such authorization will occur only if: (1) the factual predicate for the new claim could not have been discovered previously through the exercise of due diligence, and (2) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

B. Application to Case at Bar

Mr. Duke's application for authorization to file a second or successive Section 2255 motion makes a prima facie showing that the newly discovered evidence of the government's knowing use of false testimony, viewed in light of the evidence as a whole, establishes by clear and convincing evidence that no reasonable jury would have convicted him. See 28 U.S.C. §§ 2244(3)(C), 2255. In light of the documents contained in the accompanying appendix filed herein, establishing the widespread knowing use of governmental perjury, Mr. Duke has shown "possible merit" which warrants "a fuller exploration by the district court." Bennett, 119 F.3d at 469-70; Woratzeck, 118 F.3d at 650. Accordingly, his application "satisfies the stringent requirement for the filing of a second or

successive petition," and should, therefore, be granted. Bennett, 119 F.3d at 469-70; Woratzeck, 118 F.3d at 650.

Mr. Duke's application for authorization to file a second or successive Section 2255 motion also complies with the AEDPA's one-year limitation period which runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 18 U.S.C. § 2255. Mr. Duke was unable to discover the facts supporting this application before filing his initial habeas motion. The government's constructive knowledge of Chambers's perjured testimony, recognized by this Court 22 years ago, barely scratched the surface of the government's awareness of his pattern of committing perjury prior to Mr. Duke's trial. Evidence of that awareness became available to Mr. Duke in August 2001, when Dean Steward furnished him with a copy of the 157-page DEA Chambers Report, which Steward obtained in May 2001 pursuant to a FOIA request and has not yet been released to the public.[30]

While Mr. Duke's investigator, Vincent Carraher, continued to interview witnesses concerning the government's knowing use of perjury at Mr. Duke's trial by witnesses other than Andrew Chambers,[31] the St. Louis Post Dispatch published its January 16, 2000, story exposing Chambers's career as a DEA informant and his role in extensive governmental misconduct. That article ignited an

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[30]See Declaration of H. Dean Steward, a copy of which is included in the accompanying appendix filed herein.

[31]See Vincent Carraher's November ___, 2001, affidavit included in the accompanying appendix filed herein.

18-month nationwide media firestorm which culminated in the DEA Chambers Report. While that firestorm raged, new information continued to be reported about Chambers's perjurious history and the DEA's pending investigation into the extent of the government's misconduct. In light of the DEA Chambers Report, it is unlikely that any additional evidence will be discovered about Chambers's pattern of perjury and the government's awareness of it.

The newly discovered evidence of Chambers's perjury **prior to Mr. Duke's trial**, and the government's awareness of it, could not have been discovered through the exercise of due diligence prior to the time he filed his initial Section 2255 motion. That newly discovered evidence, critical to corroborating other government witnesses who claim they also committed perjury with the government's knowledge and consent, was unavailable to Mr. Duke (and remains unavailable to the public) until he received a copy of the DEA Chambers Report in August 2001. Because this application is filed within one year of the date on which Mr. Duke obtained a copy of the DEA Chambers Report, it complies with the AEDPA's one-year limitation period.

Had Mr. Duke filed this application prior to obtaining a copy of the DEA Chambers Report, it would have been necessary for him to file successive applications when additional evidence of Chambers's perjury and the government's awareness of it became available. These separate filings would have resulted in piecemeal litigation and needless procedural complications, which would have frustrated the efficient administration of justice. See Armine v. Bowersox,

128 F.3d 1222, 1229 (8th Cir. 1997). Furthermore, the filing of successive applications under these circumstances could be viewed as violating the spirit -- if not the letter -- of the AEDPA. Therefore, Mr. Duke has complied with the AEDPA's one-year limitation period by filing this application within one year of discovering, through the exercise of due diligence, the facts supporting his claim that the government knowingly used false testimony to obtain his conviction.

For purposes of evaluating Mr. Duke's application, this Court must accept as true the newly discovered evidence and determine whether it establishes a constitutional error. In re Boshears, 110 F.3d at 1541. The government's knowing use of perjured testimony by numerous key witnesses at Mr. Duke's trial, and its concomitant failure to disclose exculpatory information, is not only a constitutional error but "a fundamental defect which inherently results in a complete miscarriage of justice." Embrey, 131 F.3d at 740. Moreover, when the newly discovered evidence of the government's knowing use of false testimony is viewed in light of the evidence as a whole, it becomes clear that Mr. Duke would not have been convicted if that evidence had been known at the time of trial.

No reasonable jury would have found Mr. Duke guilty had it known that the government's key witnesses were committed perjury in order to avoid prosecution, obtain sentence reductions, and prevent the prosecution and imprisonment of their family members. No reasonable jury would have convicted Mr. Duke had it known that

those witnesses initially told the case agent and prosecutor that Mr. Duke was **not** involved in his son's 20 kilo transaction with Chambers or any other drug dealing. No reasonable jury would have returned a guilty verdict against Mr. Duke had it known of the coercive methods utilized by the government to pressure its witnesses into testifying falsely against him.

No reasonable jury would have credited **any** prosecution evidence had it known that, in their effort to secure Mr. Duke's conviction at any cost, government agents: (1) threatened, coerced and intimidated prosecution witnesses; (2) disregarded, ignored and discouraged statements from prosecution witnesses exculpating Mr. Duke; and (3) suggested, encouraged and orchestrated false testimony by prosecution witnesses inculpating Mr. Duke. Any reasonable jury would have acquitted Mr. Duke had it known that his trial was little more than a perverse parade of perjury by prosecution witnesses, all with the government's knowledge, consent and blessing.

Consequently, the newly discovered evidence of the government's knowing use of false testimony at Mr. Duke's trial, and its concomitant failure to disclose exculpatory evidence, establishes by clear and convincing evidence that no reasonable factfinder would have found Mr. Duke guilty. See 18 U.S.C. §§ 2244(3)(C), 2255. His application, therefore, makes the prima facie showing required under the AEDPA and this Court must enter an order authorizing the district court to consider his second or successive Section 2255 motion. See id.

IV. THE GOVERNMENT'S KNOWING USE OF PERJURED TESTIMONY

A. Supreme Court Cases

The habeas petitioner in Mooney v. Holohan, 294 U.S. 103 (1935), alleged that he was convicted in state court based on the prosecution's knowing use of perjured testimony and deliberate suppression of impeachment evidence. Despite denying leave to file an original habeas petition with the Supreme Court due to the petitioner's failure to exhaust state remedies, the Mooney Court declared that the requirement of due process is not satisfied:

> if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Id. at 112. See also United States v. Agurs, 427 U.S. 97, 103 n.7 (1976) (quoting Mooney).

The habeas petitioner in Pyle v. Kansas, 317 U.S. 213 (1942), similarly alleged the knowing use of perjury and deliberate suppression of favorable evidence. Reversing an order denying habeas relief, the Court held that allegations that government agents coerced and threatened various witnesses to testify falsely "charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody." Id. at 216 (citing Mooney).

Relying on Mooney and Pyle, the Court likewise granted habeas relief in Alcorta v. Texas, 355 U.S. 28 (1957), due to a violation of the petitioner's due process rights by the prosecution's knowing use of perjured testimony. Similarly, in Napue v. Illinois, 360 U.S. 264 (1959), the Court reversed the denial of habeas relief to a state inmate who alleged the knowing use of perjured testimony. At the petitioner's murder trial, a state witness testified that he received no promise of consideration in exchange for his testimony. The prosecutor, however, had promised to recommend a reduction of the witness's sentence in exchange for his testimony. Furthermore, the prosecutor did nothing to correct the witness's false testimony. The Court held that the prosecutor's failure to correct testimony which he knew was false violated due process.

The Napue Court reasoned that due process is violated not only when the government knowingly introduces false evidence, but also when it fails to correct unsolicited false evidence. Id. at 269.

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Id.

Quoting People v. Savvides, 136 N.E.2d 853, 854-55 (N.Y. 1956), the Napue Court declared:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon the defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Napue, 360 U.S. at 270-71.

Savvides held that a conviction based on perjury cannot stand because "[t]he administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach." Savvides, 136 N.E.2d at 854. Accordingly, the Napue Court reversed the denial of habeas relief because it concluded that the perjured testimony "may have had an effect on the outcome of the trial." Napue, 360 U.S. at 272.

In Miller v. Pate, 386 U.S. 1 (1967), **a case involving a second habeas petition**, the Court likewise granted habeas relief due to the prosecution's knowing use of false evidence at trial. Citing Mooney, Pyle, Alcorta, and Napue, the Court reaffirmed the principle that due process cannot tolerate a conviction obtained by the knowing use of false evidence. Id. at 10-11.

In Giglio v. United States, 405 U.S. 150 (1972), the Court reversed the denial of a new trial motion based on newly discovered evidence that the prosecution failed to disclose a promise of immunity to a government witness in exchange for cooperation. An Assistant United States Attorney, who conducted the grand jury

proceedings, promised the witness immunity in exchange for grand jury and trial testimony. A different Assistant United States Attorney tried the case and had been assured by the other prosecutor that no promises of immunity had been made to the witness. Id. at 152-53.

Nevertheless, the Giglio Court reversed the defendant's conviction and ordered a new trial, reasoning that a "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Id. at 153 (quoting Mooney, 294 U.S. at 112). The Giglio Court emphasized that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" Id. at 154 (quoting Napue, 360 U.S. at 271).

In order to establish a constitutional violation arising from the knowing use of false evidence, a habeas petitioner must show: (1) the testimony was actually false; (2) the prosecution knew or should have known the testimony was false; and (3) the false testimony was material. Napue, 360 U.S. at 269. The knowledge of law enforcement officers is imputed to prosecutors. See Kyles v. Whitley, 514 U.S. 419, 433 (1995). False testimony is material if there is any reasonable likelihood that, when coupled with other evidence properly presented at trial, it could have affected the jury's judgment. See Napue, 360 U.S. at 271-72. If a constitutional violation is shown, the court must review the record to determine whether the admission of the false testimony was harmless. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). The

knowing use of perjured testimony is harmless only if it had no substantial and injurious effect or influence in determining the jury's verdict. Id.

The testimony of Andrew Chambers and other key government witnesses was actually false, the prosecution knew (or should have known) it was false, and the false testimony was material because it was reasonably likely to have affected the jury's verdict. Unlike the government's knowing use of Chambers's false testimony about his arrest record, recognized by this Court in Mr. Duke's initial Section 2255 appeal, the newly discovered evidence of extensive additional knowing government perjury cannot be deemed harmless because it had a substantial and injurious effect or influence in determining his jury's verdict.

B. Eighth Circuit Cases

As this Court recognized in Crismon v. United States, 510 F.2d 356, 357 (8th Cir. 1975), the knowing use of perjured testimony is cognizable under Title 18 United States Code Section 2255. The petitioner bears the burden of proving the government's knowledge at the time of the perjured testimony. Id.

Affirming a conviction and holding the alleged perjury of a government witness to be harmless in United States v. Runge, 593 F.2d 66 (8th Cir. 1979), this Court declared:

> Knowing us of perjured testimony requires that a conviction be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Where the use of known perjury involves prosecutorial misconduct, it constitutes "corruption of the truth-seeking function of the trial process." The government may be

> responsible even if the prosecutor did not actually know the testimony was perjured, but should have known, or if he or she did not elicit false testimony, but allowed it to go uncorrected when it appeared. Even false testimony which merely impeaches a witness' credibility may require a new trial.

Id. at 73 (citations omitted).

Affirming the denial of a Section 2255 motion in Lindhorst v. United States, 658 F.2d 598 (8th Cir. 1981), this Court emphasized that "[u]nlike the stricter standard of materiality used in new trial motions based on the discovery of new evidence or failure of the prosecution to disclose favorable evidence, knowing use of perjured testimony requires that a conviction be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 602 (quoting Runge and citing Agurs, Giglio, and Napue).

In United States v. Nelson, 970 F.2d 439 (8th Cir. 1992), this Court similarly noted:

> In order to obtain a new trial based on the allegation of the use of perjured testimony, [a defendant] must prove: 1) that the prosecution's case includes perjured testimony, 2) that the prosecution knew or should have known of the perjury, and 3) that there was a reasonable likelihood that the false testimony could have affected the judgment of the jury.

Id. at 443 (citing Agurs).

Likewise, in United States v. Jordan, 150 F.3d 895 (8th Cir. 1998), this Court reiterated that:

> "The government may not use or solicit false evidence, or allow it to go uncorrected." United States v. Martin, 59 F.3d 767, 770 (8th Cir. 1995). In order to prove that the

> government used false testimony, [a defendant] must establish that: (1) the government used perjured testimony; (2) the prosecution knew or should have known of the perjury; and (3) there is a reasonable likelihood that the perjured testimony could have affected the jury's judgment. United States v. Payne, 119 F.3d 637, 645 (8th Cir. 1997).

Jordan, 150 F.3d at 900.

C. Materiality Standards

Affirming convictions despite claims of government perjury in United States v. Stofsky, 527 F.2d 237, 243 (2d Cir. 1975), the Second Circuit observed: "The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction."

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995), illustrates the difference between the materiality standards applicable to Brady violations and governmental perjury. Characterizing the perjury standard as a "more defense-friendly standard of materiality," the Eleventh Circuit emphasized that Agurs requires a conviction to be set aside if there is "any reasonable likelihood that the false testimony **could have** affected the judgment of the jury." Id. at 1110 (quoting Agurs & emphasis in original). Brady's materiality standard, the "reasonable probability of a different result," is "substantially more difficult for a defendant to meet. . . ." Id. at 1110 n.7. The rationale underlying Agurs's lower materiality standard is that the knowing use of perjured testimony "involves prosecutorial misconduct and a corruption of the truth-seeking function of the trial." Id. at 1110.

In United States v. Gonzalez, 90 F.3d 1363, 1368 n.2 (8th Cir. 1996), this Court similarly characterized the Agurs materiality standard as "a standard of materiality more favorable to the accused" than Brady's typical materiality standard. Quoting Kyles and Agurs, this Court emphasized that when the prosecution knowingly uses perjured testimony, a conviction must be set aside if there is any reasonable likelihood that the false testimony affected the verdict. Id.

Likewise, in Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir. 1993), the Fifth Circuit characterized the knowing use of perjury materiality standard as "considerably less onerous" than the Brady materiality standard. Vacating the denial of a **second Section 2254 habeas petition** and remanding for an evidentiary hearing regarding the government's alleged use of perjured testimony, the Fifth Circuit declared:

> While we are cognizant of the toll habeas wreaks on finality, we are also concerned that both fairness and the appearance of fairness be preserved, especially in light of the punishment assessed. In our criminal justice system the prosecutor has at his disposal the substantial resources of the government as well as considerable other advantages. In exchange, that system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction.

Id. at 496 (footnotes omitted).

D. Informant-Witnesses

In United States v. Endicott, 869 F.2d 452 (9th Cir. 1989), the Ninth Circuit recognized:

> There exists a constitutional obligation on prosecutors to report to the defendant and to the court whenever government witnesses lie under oath. Furthermore, when the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility warrants a new trial irrespective of the good faith or bad faith of the prosecution.

Id. at 456 (citation omitted).

Further addressing the scope of the government's obligation to disclose exculpatory information in Carrigar v. Stewart, 132 F.3d 463 (9th Cir. 1997), the Ninth Circuit observed:

> [T]he government cannot satisfy its Brady obligations to disclose exculpatory evidence by making some evidence available and claiming the rest would be cumulative. Rather, the government is obligated to disclose "**all** material information casting a shadow on a government witness's credibility."

Id. at 481-82 (citations omitted & emphasis in original).

Sitting en banc in Carrigar, the Ninth Circuit vacated the denial of a **second or successive habeas petition** due to alleged Brady and Giglio violations. The court warned of the dangers typically associated with rewarding informants with leniency, and emphasized the resulting duties and obligations of both prosecutors and investigators in such case. See id. at 479-82. Focusing on the government's obligation to disclose information affecting the credibility of informant witnesses, the Carrigar court declared:

> Material evidence required to be disclosed includes evidence bearing on the credibility of government witnesses. The need for disclosure is particularly acute where the government presents witnesses who have been granted immunity from prosecution in exchange for their testimony. We have previously recognized that criminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witnesses.

Id. at 479 (citations omitted).

Quoting from its opinion in United States v. Bernal-Obeso, 989 F.2d 331, 331-34 (9th Cir. 1993), the Ninth Circuit reiterated that informants granted immunity are:

> [b]y definition . . . cut from untrustworthy cloth[,] and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom. . . . Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. . . . Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery. This responsibility includes the duty as required by Giglio to turn over to the defense in discovery **all** material information casting a shadow on a government witness's credibility.

Carrigar, 132 F.3d at 479 (emphasis in original).

In Bernal-Obeso, a case cited by this Court in United States v. Duke, 50 F.3d 571, 578 n.4 (8th Cir. 1995), the Ninth Circuit vacated drug convictions and remanded for a determination of whether a government informant lied about his prior criminal

record, and whether the government fulfilled its Brady and Giglio obligations. The informant, a government witness, had been paid $12,000 by the DEA for his work on the case. 989 F.2d at 332. Acknowledging that it might "be dealing with the 'tip of an iceberg' of other evidence that should have been revealed," the court concluded that "resolution of this matter is best served by the light of a hearing, not the darkness of an assumption on appeal." Id. at 333 (citation omitted).

Recognizing that "[t]he use of informants to investigate and prosecute persons engaged in clandestine criminal activity is fraught with peril," the Bernal-Obeso court warned: "A prosecutor who does not appreciate the peril of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system." Id. Noting that "[o]ur judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating the risk of sending innocent persons to prison," the Ninth Circuit also warned:

> Criminals caught in our system understand they can mitigate their own problems by becoming a witness against someone else. Some of these informants will stop at nothing to maneuver themselves into a position where they have something to sell.

Id. at 334. See also United States v. Montgomery, 998 F.2d 1468, 1472 (9th Cir. 1993)("The Government must know that an eager informer is exposed to temptations to produce as many accuseds as possible at the risk of trapping not merely an unwary criminal but sometimes an unwary innocent as well.")

Accordingly, the Bernal-Obeso court declared that "relevant evidence bearing on the credibility of an informant-witness" must be disclosed to both defense counsel and the jury. 989 F.2d at 335. Previously, in United States v. Brumel-Alvarez, 976 F.2d 1235, 1244 (9th Cir. 1992), the Ninth Circuit similarly recognized that evidence that an informant-witness lied to the government during its investigation is relevant to his credibility and must be disclosed to the jury.

Recently, in Commonwealth v. Bowie, 236 F.3d 1083 (9th Cir. 2001), the Ninth Circuit again warned that a "prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system. . . ." Id. at 1089 (quoting Bernal-Obeso). Reversing a murder conviction due to the government's knowing use of perjured testimony, the Bowie court commented:

> Never has it been more true than it is now that a criminal charged with a serious crime understands that a fast and easy way out of trouble with the law is not only to have the best lawyer money can buy or the court can appoint, but to cut a deal at someone else's expense and to purchase leniency from the government by offering testimony in return for immunity, or in return for reduced incarceration. . . .
>
> [B]ecause of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to "get" a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value,

> setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot. . . .
>
> Such false testimony and false evidence corrupts the criminal justice system and makes a mockery out of its constitutional goals and objectives. Thus, although the truthful testimony of accomplice witnesses will continue to be of great value to the law, rewarded criminals also represent a great threat to the mission of the criminal justice system. It is just as constitutionally unacceptable for the government to put a guilty person in prison on the basis of false evidence as it is to have an innocent person suffer the same fate.

Id. at 1095-96.

As demonstrated by the newly discovered evidence presented in this application, Mr. Duke's prosecutors completely ignored their constitutional duty to disclose all material information casting a shadow on the credibility of their witnesses. Specifically, they failed to disclose:

(1) Andrew Chambers's pattern of committing perjury in federal drug prosecutions conducted years before Mr. Duke's trial;

(2) Statements made to prosecutors and case agents by government witnesses which exculpated Mr. Duke and were diametrically inconsistent with their trial testimony;

(3) Offers of sentence reductions made by prosecutors and case agents to government witnesses in exchange for their agreement to testify falsely against Mr. Duke; and

(4) Threats made by prosecutors and case agents to indict and imprison friends and family members of government witnesses unless they falsely implicated Mr. Duke.

All of this information materially affected the credibility of the government's witnesses at Mr. Duke's trial and should have been

disclosed to his attorney, his jury and United States District Court Judge David S. Doty.

Yet, rather than disclosing this material information, the prosecution actively encouraged its witnesses to testify falsely against Mr. Duke and thereby knowingly manufactured factually contrived evidence in its unbridled zeal to secure his conviction at any cost. The government's deplorable conduct compromised the truth-seeking function of Mr. Duke's trial, corrupted the criminal justice system, and made a mockery of its constitutional goals and objectives. Justice, however long delayed, demands that this Court grant Mr. Duke's application for authorization to file a second or successive Section 2255 motion.

E. Imputed Governmental Knowledge

Vacating the denial of a habeas petition alleging the knowing use of perjured testimony in Williams v. Griswold, 743 F.2d 1533, 1542 (11th Cir. 1984), the Eleventh Circuit recognized that knowledge of the police that a government witness's testimony is false is imputed to the prosecutor. In United States v. Antone, 603 F.2d 566, 569-70 (5th Cir. 1979), the Fifth Circuit likewise imputed the knowledge of state law enforcement officers to federal prosecutors, concluding that the prosecutors should have known that a government witness committed perjury at trial.

Similarly, citing Giglio, the Ninth Circuit has held that prosecutors are ultimately responsible for the nondisclosure of evidence affecting the credibility of government witnesses, even if that nondisclosure was the fault of government agents other than

prosecutors. See United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989). "[W]hether the nondisclosure is a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government." Id.

Quoting its opinion in United States v. Butler, 567 F.2d 885, 891 (9th Cir. 1978), the Ninth Circuit reaffirmed that:

> [T]he prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if such promises by other government agents were unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure.

Endicott, 869 F.2d at 455. See also Butler, 567 F.2d at 892 (Ely, J., concurring)("Even if the United States Attorney's office were totally ignorant of the agents' activities and deceptions, the Government still remained responsible for any and all of their actions"). Citing Agurs, the Endicott court reasoned that "it is the character of the evidence, not the character of the prosecutor, that determines whether nondisclosure constitutes constitutional error." Id.

As a federal district court recently recognized in Bragg v. Norris, 128 F. Supp.2d 587, 604-05 (E.D. Ark. 2000), "a defendant's due process rights can be violated when the prosecutor was not, but should have been, aware that a State's witness was lying." Granting a habeas petition due to the government's knowing use of perjured testimony, and its concomitant failure to disclose favorable evidence to the defense, the Bragg court observed that

"when considering 'knowing' use of perjured testimony, courts may decline to draw a distinction between the police agents and prosecutors and focus instead upon the 'prosecution team' which includes both the investigative and prosecutorial arms." Id. at 605 (citations omitted).

Consequently, whether Mr. Duke's prosecutors or merely their investigating agents were aware of the government witnesses' false testimony is a distinction without a constitutional difference. The perjured testimony presented at Mr. Duke's trial was knowingly used by the government if **any** member of the prosecution team was aware of it.

Failure by DEA members of the prosecution team to disclose Andrew Chambers's pattern of perjury in federal prosecutions occurring years before Mr. Duke's trial is inconsequential. Failure by investigative agents to inform prosecutors of statements made by government witnesses which exculpated Mr. Duke and were patently inconsistent with their trial testimony is likewise inconsequential. Failure by investigative agents to notify prosecutors of any offers to reduce sentences, or threats to indict and imprison friends and family members, of government witnesses is similarly inconsequential.

Whether or not Mr. Duke's prosecutors were actually aware of such material information affecting the credibility of their witnesses, the knowledge of all prosecution team members is imputed to them and constitutionally obligated them to disclose that information to the defense, the jury and the court. Their failure

to discharge that obligation violated Mr. Duke's rights to due process of law, confrontation of his accusers and a fair trial.

F. Ministers of Justice

Reversing a conviction due to prosecutorial misconduct in Berger v. United States, 295 U.S. 78 (1935), the Supreme Court declared:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all: and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

Reversing the grant of habeas relief due to ineffective assistance of counsel, based upon a defense attorney's refusal to present perjured testimony, in Nix v. Whiteside, 475 U.S. 157 (1986), the Court emphasized that the "special duty of an attorney to prevent and disclose frauds upon the court derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice."

Noting that lawyers who cooperate with planned perjury are subject to criminal prosecution for suborning perjury and disciplinary proceedings, including disbarment or suspension, the Nix Court observed that "the responsibility of an ethical lawyer , as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is" to prevent perjury. Id. at 174. "No system of justice worthy of the name can tolerate a lesser standard." Id.

In United States v. Kojayan, 8 F.3d 1315, 1325 (9th Cir. 1993), the Ninth Circuit reversed drug convictions due to prosecutorial misconduct (including a Brady violation) and observed that the remedy for serious prosecutorial misconduct includes dismissing an indictment with prejudice. Elaborating on the lessons of Berger and Nix, the Kojayan court recognized:

> Prosecutors are subject to constraints and responsibilities that don't apply to other lawyers. While lawyers representing private parties may -- indeed, must -- do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. As Justice Douglas once warned, "[t]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial."

Id. at 1323 (citations omitted). See also Donnelly v. DeChristoforo, 416 U.S. 637, 648-49 (1974)(Douglas, J., dissenting).

Vacating the denial of a second or successive habeas petition in Kirkpatrick v. Whitley, 992 F.2d 491, 496 (5th Cir. 1993), and remanding for an evidentiary hearing regarding the government's use of perjured testimony, the Fifth Circuit similarly recognized that our criminal justice "system reposes great trust in the prosecutor to place the ends of justice above the goal of merely obtaining a conviction."

Reversing a conviction for making false statements to a federally insured bank in order to obtain loans in United States v. LaPage, 231 F.3d 488 (9th Cir. 2000), the court held that the prosecutor's knowing use of perjured testimony violated due process. Addressing the prosecutor's special role, as a minister of justice, to prevent perjury, the Ninth Circuit commented:

> All perjury pollutes a trial, making it hard for jurors to see the truth. No lawyer, whether prosecutor or defense counsel, civil or criminal, may knowingly present lies to a jury and then sit idly by while opposing counsel struggles to contain this pollution of the trial. The jury understands defense counsel's duty of advocacy and frequently listens to defense counsel with skepticism. A prosecutor has a special duty commensurate with a prosecutor's unique power, to assure that defendants receive fair trials. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one."

Id. at 492 (footnote omitted) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

In United States v. Butler, 567 F.2d 885 (9th Cir. 1978), the Ninth Circuit reversed the denial of a new trial motion based on newly discovered evidence of the government's knowing use of

perjured testimony. In his concurring opinion, Judge Ely eloquently elaborated upon the paramount role a federal prosecutor plays as a minister of justice:

> The Government, and particularly the United States Attorney's office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. "[T]he interest of the prosecution is not that it shall win the case, but that it shall bring forth the true facts surrounding the commission of the crime so that justice shall be done. . . ."
>
> . . .
>
> If there is any one characteristic that glorifies our Government, it is the penchant for justice, uniformly and impartially administered. The attainment of justice has ever been the ultimate aim and purpose of honorable men. The United States Attorneys, vested with such dignity and power, are especially entrusted with the duty to protect the interests of all people, including, of course, the legitimate rights of those accused of crime in the federal courts. There is no consideration, including zeal or inexperience, that can affect this transcendent obligation. And if, during a criminal trial and subsequent hearings, federal officers sit quietly acquiescent while one of their witnesses, to their knowledge, repeatedly perjures himself in incriminating the accused, the juridical idealism of our democracy is undermined and subverted.

Id. at 893-94 (Ely, J., concurring)(citations & footnote omitted).

As demonstrated by the newly discovered evidence presented herein, Mr. Duke's prosecutors wholly abdicated their role as ministers of justice in their unbridled zeal to secure his conviction. They actively encouraged witnesses to testify falsely against Mr. Duke and completely disregarded their constitutional obligation to disclose to the defense evidence materially affecting

the credibility of government witnesses. They undermined and subverted the juridical idealism of our democracy and ignored their paramount duty to ensure that justice is done. They deprived Mr. Duke of a fair trial in order to tack his skin to the wall.

G. Willful Blindness

The Constitution forbids prosecutors from turning a blind eye in order to remain deliberately ignorant of perjured testimony by government witnesses. Prosecutors are obligated to disclose evidence affecting the credibility of government witnesses notwithstanding their deliberate efforts to remain ignorant of such evidence. As the Ninth Circuit has recognized:

> The prosecutor's actual awareness (or lack thereof) of exculpatory evidence in the government's hands, however, is not determinative of the prosecution's disclosure obligations. Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf. Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned. The disclosure obligation exists, after all, not to police the good faith of prosecutors, but to ensure the accuracy and fairness of trials by requiring the adversarial testing of all available evidence bearing on guilt or innocence.

Carrigar v. Stewart, 132 F.3d 463, 479-80 (9th Cir. 1997)(citations omitted).

Reversing racketeering convictions due to perjury by a government witness in United States v. Wallach, 935 F.2d 445, 457 (2d Cir. 1991), the Second Circuit noted that "the prosecutors may have consciously avoided recognizing the obvious -- that is, that

[their witness] was not telling the truth." In Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984), the Seventh Circuit likewise observed that "a prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of a case."

As the Ninth Circuit recently stated in Commonwealth v. Bowie, 236 F.3d 1083 (9th Cir. 2001):

> A prosecutor's "responsibility and duty to correct what he knows to be false and elicit the truth," requires a prosecutor to act when put on notice of the real possibility of false testimony. This duty is not discharged by attempting to finesse the problem by pressing ahead without a diligent and a good faith attempt to resolve it. A prosecutor cannot avoid this obligation by refusing to search for the truth and remaining willfully ignorant of the facts.

Id. at 1090-91 (citation and footnote omitted).

Echoing the message of Berger, the Bowie court stressed:

> The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice. It is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial.

236 F.3d at 1089 (quoting Commonwealth v. Mendiola, 976 F.2d 475, 486 (9th Cir. 1992)). Quoting from Nix, the Ninth Circuit further emphasized the "special **duty of an attorney to prevent and disclose** frauds upon the court [which] derives from the recognition that perjury is as much a crime as tampering with witnesses or jurors by way of promises and threats, and undermines the administration of justice." Bowie, 236 F.3d at 1089 (emphasis added in Bowie). See

also id. at 1095 (recognizing "the duty of the prosecution to protect the trial process against fraud").

Reversing a murder conviction due to the government's knowing use of perjured testimony, the Bowie court concluded:

> What appears clearly from this record is a studied decision by the prosecution not to rock the boat, but instead to press forward with testimony that was probably false . . . and to not develop any evidence or information that would either hurt their case or damage the credibility of their conniving witnesses. . . . [T]he record in this case establishes bad faith as a matter of law on the part of the [government] in refusing to investigate the potentially exonerating evidence that its own witnesses were conspiring to commit perjury. What emerges from this record is an intent to secure a conviction of murder even at the cost of condoning perjury. This record emits clear overtones of the Machiavellian maxim: "the end justifies the means," an idea that is plainly incompatible with our constitutional concept of ordered liberty.

236 F.3d at 1091 (citing Rochin v. California, 342 U.S. 165, 169 (1952).

As demonstrated by the newly discovered evidence presented herein, Mr. Duke's prosecutors and their investigative agents were initially told by numerous government witnesses that Mr. Duke was **not** involved in Monte Nunn's 20 kilo transaction with Andrew Chambers, or other drug dealing activity. This put them on notice of the real possibility that the contrary testimony by these witnesses, which the government obtained in exchange for reduced sentences and agreements not to prosecute their friends and relatives, was false. Nevertheless, the prosecutors attempted to finesse this problem by pressing ahead without conducting a

diligent and good faith effort to investigate the exculpatory information provided by their witnesses.

By refusing to search for the truth and attempting to remain deliberately ignorant of the facts, Mr. Duke's prosecutors turned a blind eye to the false testimony they actively elicited from their witnesses and disregarded their duty to protect the trial process against fraud. Mr. Duke's prosecutors were so intent on securing his conviction that they were willing to condone widespread perjury by government witnesses. Believing that the end justified the means, their Machiavellian mentality directly resulted in their knowing use of false testimony to convict Mr. Duke.

H. Reversible Error

In United States v. Young, 17 F.3d 1201 (9th Cir. 1994), the Ninth Circuit reversed a drug trafficking conviction due to the government's unwitting use of false evidence at trial. In United States v. Foster, 874 F.2d 491 (8th Cir. 1988), this Court similarly reversed convictions due to a prosecutor's failure to correct false testimony by government witnesses concerning promises made to them in exchange for their testimony. Likewise, in United States v. Bigeleisen, 625 F.2d 203 (8th Cir. 1980), this Court reversed cocaine distribution convictions due to a prosecutor's failure to correct false testimony by a government witness regarding an offer of leniency in exchange for testimony.

United States v. Boyd, 55 F.3d 239 (7th Cir. 1995), involved the prosecution of the leaders of Chicago's infamous "El Rukin"

street gang for a variety of extremely serious federal offenses, including the large scale distribution of heroin and cocaine. After a four-month jury trial, the defendants were convicted and received life sentences. They subsequently filed new trial motions based on the government's failure to reveal to the defense drug use and drug dealing by government witnesses during trial, and unusual favors granted to these witnesses by the government -- including contact and conjugal visits, telephone privileges, and gifts. Finding that significant prosecutorial misconduct occurred both before and during trial, the district court granted their new trial motions. On appeal, the Seventh Circuit affirmed due to a combination of the government's knowing use of perjured testimony and its failure to disclose exculpatory evidence to the defense.

The Seventh Circuit analyzed the prejudicial impact of the undisclosed evidence, which involved only the credibility of the government witnesses, by asking the following two questions:

> Is there some reasonable probability that the jury would have acquitted the defendants on at least some of the counts against them had the jury disbelieved the essential testimony of these witnesses? And might the jury have disbelieved that testimony if the witnesses hadn't perjured themselves about their continued use of drugs and (or) if the government had revealed to the defense the witnesses' continued use of drugs and the favors the prosecution had extended to them?

Boyd, 55 F.3d at 245.

Answering the first question affirmatively, notwithstanding the fact that the government witnesses' testimony was corroborated by other evidence at trial, the court of appeals reasoned:

> [H]ad their testimony been disbelieved the defendants would have had to be acquitted on most counts. It is true that the government introduced a number of **taped conversations** that were highly incriminating of the defendants, but these tapes were translated by [a government witness] and their meaning was thus conveyed to the jury through his testimony. If the jury hadn't believed him, it would not have been impressed by the tapes. And without the tapes, the testimony of [the government witnesses] was essential on most of the counts which the defendants were convicted.

Id. (emphasis added).

The Seventh Circuit also answered the second question affirmatively, concluding that despite significant impeachment of the government witnesses by extensive cross-examination, there remained some probability that the jury would have disbelieved them had it known of their perjury at trial. Id. at 245-46. Accordingly, the court of appeals affirmed the district court's order granting the defendants a new trial due to the government's knowing use of perjured testimony and its failure to disclose exculpatory impeachment evidence to the defense.

As in Boyd, there is a reasonable probability that Mr. Duke's jury would have acquitted him on most -- if not all -- of the counts against him had his jury disbelieved the essential testimony of the government's witnesses. Despite the introduction of taped conversations between Monte Nunn and Andrew Chambers that implicated Mr. Duke in their 20 kilo transaction and other drug dealing activities, Chambers translated these tapes and their meaning was therefore conveyed to the jury through his testimony. Had the jury learned of Chambers's pattern of committing perjury in

other federal trials and therefore disbelieved him, it would not have been impressed by the tapes.

Without those tapes, the false testimony of the remaining government witnesses was essential on most -- if not all --of the counts which Mr. Duke was convicted. On his direct appeal, this Court acknowledged that the sufficiency of the evidence connecting Mr. Duke with the 20 kilo deal was "a close question, given only the circumstantial evidence indicating that Nunn purchased the cocaine for Duke with Duke's money . . . ." United States v. Duke, 940 F.2d 1113, 1117 (8th Cir. 1991). On his prior Section 2255 appeal, this Court held that the government's knowing use of Chambers's perjured testimony about his criminal history was harmless error because "there was considerable evidence, apart from Chambers' testimony, of Duke's involvement in the effort to purchase the twenty kilograms of cocaine from Chambers." United States v. Duke, 50 F.3d 571, 580 (8th Cir. 1995). Yet, that "considerable evidence" consisted entirely of Loren Duke's testimony and Monte Nunn's taped statements to Chambers. See id.

Without the taped conversations between Nunn and Chambers, Loren Duke's testimony was the only evidence of Ralph Duke's involvement in the 20 kilo transaction. As the newly discovered evidence presented herein reveals, however, Loren Duke's testimony was false and the prosecutors knew it was false when they elicited it. Moreover, as in Boyd, despite the significant impeachment of Chambers at trial previously recognized by this Court, there remains some probability that Mr. Duke's jury would have

disbelieved him (and his translation of the tapes) had it known of his pattern of committing perjury in other trials.

I. Tip of the Iceberg

Reversing the denial of a Section 2255 motion in Lindhorst v. United States, 585 F.2d 361 (8th Cir. 1978), this Court held that the district court had erred in concluding, without an evidentiary hearing, that the government did not knowingly use perjured testimony at trial. Government witnesses in Lindhorst had executed affidavits admitting that they committed perjury at trial and alleging that the government was aware of their perjury. This Court ruled that the government's opposing affidavits were not sufficient to support a grant of summary judgment against the petitioner and ordered the district court to conduct an evidentiary hearing in order to determine whether the government had knowingly used perjured testimony at trial. See also Williams v. Griswold, 743 F.2d 1533 (11th Cir. 1984)(vacating order denying habeas relief and remanding for evidentiary hearing on whether government knowingly used perjured testimony at trial).

The newly discovered evidence of perjury by government witnesses at Mr. Duke's trial reflects a "campaign of deception and perjury" by government agents and prosecutors aimed at securing Mr. Duke's conviction at any cost. See United States v. Butler, 567 F.2d 885, 892 (9th Cir. 1978)(Ely, J., concurring). By failing to disclose to the defense these witnesses' initial statements which exculpated Mr. Duke, the government committed a "sin of silence." Id. When these witnesses later testified inconsistently at trial,

inculpating Mr. Duke in exchange for promises of leniency, "the Government's sin of silence was transformed into an affirmative presentation of perjury." Id. The continued silence of the government agents and prosecutors at trial constituted an "abdication of their duty to the court and the parties to correct" the fraud they had perpetrated upon Mr. Duke, his jury, the district court, the federal criminal justice system, and the United States Constitution. See id.

In United States v. Shaffer, 789 F.2d 682 (9th Cir. 1986), the Ninth Circuit affirmed a district court order granting a new trial due to a Brady violation. Quoting United States v. Griggs, 713 F.2d 672, 674 (11th Cir. 1983), the Ninth Circuit noted:

> [I]f the arguably exculpatory statements of witnesses . . . were in the prosecution's file and not produced, failure to disclose indicates the "tip of an iceberg" of evidence that should have been revealed under Brady.

Shaffer, 789 F.2d at 690.

Vacating drug convictions and remanding for a determination of whether a government informant lied, and whether the government fulfilled its Brady and Giglio obligations, in Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993), the Ninth Circuit similarly acknowledged that it might "be dealing with the 'tip of an iceberg' of other evidence that should have been revealed." The court concluded that under such circumstances, "resolution of this matter is best served by the light of a hearing, not the darkness of an assumption on appeal." Id.

As in Griggs, Shaffer, and Bernal-Obeso, the newly discovered evidence presented herein reflects only the "tip of an iceberg" of the government's knowing use of perjury to secure Mr. Duke's conviction. Only the light of an evidentiary hearing on Mr. Duke's Section 2255 motion will reveal the true depth and breadth of that iceberg. Accordingly, the interests of justice compel this Court to grant his application for an order authorizing the district court to consider his second or successive Section 2255 motion.

V. THE GOVERNMENT'S FAILURE TO DISCLOSE EXCULPATORY EVIDENCE

A. Supreme Court Cases

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court ruled that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor." The Court offered the following rationale for its ruling:

> The principal of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."

Id. Thus, Brady recognized that a prosecutor's suppression of favorable evidence "does not comport with standards of justice." Id. at 88.

Thirteen years later, in United States v. Agurs, 427 U.S. 97 (1976), the Supreme Court clarified Brady by discussing three situations in which a Brady claim could arise -- each involving the discovery after trial of information known to the prosecution but not the defense. Initially focusing on the situation illustrated by Mooney v. Holohan, the Supreme Court stated:

> [T]he undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.
>
> . . .
>
> In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.

Agurs, 427 U.S. at 103-04 (footnotes omitted).

The second situation, illustrated by Brady, involves a pretrial request by the defense for specific evidence. In this situation, due process is violated by the prosecution's failure to disclose the requested evidence only if it is material -- or in other words, might have affected the trial's outcome. See id. at 104.

The third situation, illustrated by Agurs, involves only a general request for Brady or exculpatory material, or no request at all. See id. at 107. Even in this situation, the Court recognized

the potential for evidence to exist which "is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 110. A prosecutor's failure to disclose such evidence is material in this third situation and violates due process only if when viewed in the context of the entire record, the suppressed evidence creates a reasonable doubt of the defendant's guilt. See id. at 112.

Ultimately, the Supreme Court reinstated a murder conviction in Agurs, concluding that the prosecution's failure to disclose the victim's arrest record did not violate due process because: (1) there was no indication of perjury; (2) the defense had not specifically requested the arrest record; and (3) the evidence was not material. Nevertheless, in his dissenting opinion, Justice Marshall warned: "One of the most basic elements of fairness in a criminal trial is . . . that the State in its zeal to convict a defendant not suppress evidence that might exonerate him." Id. at 116 (Marshall, J., dissenting).

Almost a decade later, in United States v. Bagley, 473 U.S. 667 (1985), the Court extended Brady to impeachment evidence. The defendant in Bagley had requested disclosure of any deals, promises or inducements made by the government to its witnesses. The prosecution disclosed none because it was unaware that its investigating agents had agreed to pay certain witnesses for their testimony. Several years after trial, the defendant discovered this and filed a Section 2255 motion to vacate his sentence.

Citing Napue v. Illinois, the Bagley Court observed that impeachment evidence constitutes evidence favorable to an accused "so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." 473 U.S. at 676. Constitutional error arises from a prosecutor's failure to disclose such evidence only if the impeachment evidence is material -- in other words, its nondisclosure "undermines confidence in the outcome of the trial." Id. at 678.

Noting that the Brady rule is rooted in cases involving the government's knowing use of perjured testimony, the Bagley Court reiterated "the well-established rule that 'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside is there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" Id. at 678 (quoting Agurs) & 679 n.8 (citing Mooney, Pyle and Napue). The Court also reaffirmed that "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id. at 680. Thus, "the standard of review applicable to the knowing use of perjured testimony is equivalent to the Chapman harmless-error standard." Id.

Quoting Agurs, the Bagley Court also reaffirmed that this lower materiality standard is justified because the knowing use of "perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.'" Id. When there is no allegation of

perjury however, a higher materiality standard applies (regardless of whether it is a no request, general request, or specific request situation):

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Id. at 682.

Ten years after deciding Bagley, the Supreme Court granted habeas to a convicted murderer due to a Brady violation in Kyles v. Whitley, 514 U.S. 419 (1995). Acknowledging that a prosecutor's Brady obligation to disclose favorable evidence to the defense "turns on the cumulative effect of all such evidence suppressed by the government," the Kyles Court stressed that the prosecution is responsible for that effect "regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." Id. at 421. The Court concluded that habeas was warranted because "the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result. . . ." Id. at 422.

As in Bagley, there was no allegation of perjury in Kyles and, therefore, Augurs's higher materiality standard applied. See id. at 433 n.7. After reviewing Brady, Agurs, and Bagley, the Kyles Court examined four aspects of this higher materiality standard. See id. at 434-37. Focusing initially on Bagley's "reasonable probability" language, the Court explained:

> [A] showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculpate the defendant).
>
> . . .
>
> Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different verdict is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

Kyles, 514 U.S. at 434 (quoting Bagley).

When analyzing whether a reasonable probability of a different result exists, a court must consider how competent counsel could have used the undisclosed favorable evidence to make such a result reasonably probable. Among the factors a court must consider are how competent counsel could use such evidence to impeach the integrity of the government's investigation and demonstrate the possibly fraudulent manner by which the government obtained its evidence. See id. at 446-49.

Mr. Duke's trial counsel could have used the undisclosed favorable evidence to impeach the integrity of the government's investigation and demonstrate the fraudulent manner by which the government obtained its evidence. Had Mr. Duke's jury learned that the government used Andrew Chambers as a witness despite being

aware that he had committed perjury in other federal trials, it would have doubted the credibility of all of the government's evidence. Furthermore, had Mr. Duke's jury learned that numerous government witnesses initially exculpated Mr. Duke, and ultimately agreed to implicate him due to the prosecution's promises to reduce their sentences and threats to indict and imprison their friends and relatives, it would have disbelieved all of the government's evidence. This impeachment of the integrity of the government's investigation, and demonstration of the fraudulent manner by which the government obtained its evidence, undermines confidence in the outcome of Mr. Duke's trial and reveals a reasonable probability of a different result had the prosecution honored its duty to disclose favorable evidence to the defense.

Distinguishing Bagley's materiality standard from a sufficiency of the evidence test, the Kyles Court further explained that a defendant is not required to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough evidence left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient basis to convict." Id. at 434-35. Rather, a Brady violation is shown if the undisclosed favorable evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 435.

Kyles also clarified that once a reviewing court finds constitutional error arising from the prosecution's nondisclosure

of favorable evidence, there is no need for further harmless error review; a Brady violation which meets the higher materiality standard imposed in Augurs is harmful by definition. Id. at 435-36. Moreover, the Court instructed that materiality be analyzed "in terms of suppressed evidence considered collectively, not item by item." Id. at 436.

Emphasizing that "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police," Kyles reaffirmed the duty of prosecutors to establish procedures and regulations aimed at insuring that all relevant information concerning a case is communicated to every lawyer dealing with it. Id. 437 & 438 (citing Giglio).

Only two years ago, in Strickler v. Green, 527 U.S. 263 (1999), the Supreme Court again emphasized that for Brady purposes prosecutors are charged with knowledge of any favorable evidence known to others acting on the government's behalf in a case, including investigating agents. See id. at 275 n.12. Elaborating on this principle, the Strickler Court stated:

> [T]he [Brady] rule encompasses evidence "known only to police investigators and not to the prosecutor." In order to comply with Brady, therefore, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in this case, including the police."

Id. at 280-81. Consequently, if **any** of the government's investigating agents were aware of Andrew Chambers's pattern of perjury in other federal trials, or of the threats and promises

made to government witnesses to coerce them into falsely implicating Mr. Duke after they had initially exonerated him, his prosecutors are charged with knowledge of that favorable evidence.

Citing Brady, Agurs, Bagley, Kyles, Mooney, Pyle, and Napue, the Strickler Court declared:

> [These cases] illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. at 281 (quoting Berger).

Summarizing Brady and its progeny, Strickler identified three components of a true Brady violation. First, the evidence must be favorable to the accused -- either exculpatory or impeaching. Second, the evidence must have been suppressed by the government -- either willfully or inadvertently. Third, the accused must have been prejudiced by the nondisclosure of the evidence -- "there is a reasonable probability that the suppressed evidence would have produced a different verdict." Id. at 281-82.

The newly discovered evidence presented herein reveals that the government willfully failed to disclose both exculpatory and impeaching evidence to Mr. Duke. Furthermore, Mr. Duke was prejudiced by that nondisclosure because there is a reasonable probability that its disclosure would have produced a different verdict. Therefore, Mr. Duke has successfully demonstrated a true

Brady violation and is entitled to an order from this Court authorizing the district court to consider his second or successive Section 2255 motion.

B. Eighth Circuit Cases

In United States v. Librach, 520 F.2d 550 (8th Cir. 1975), this Court reversed a conviction due to a Brady violation because the government failed to disclose that its witness was in protective custody and had received subsistence payments. The Librach court held that evidence of payments of nearly $10,000 to a witness provided "an incentive to change his testimony is favorable and material to the defense and that its suppression requires a new trial." Id. at 554 (footnote omitted).

In Reutter v. Solem, 888 F.2d 578 (8th Cir. 1989), this Court likewise reversed the denial of a habeas petition and ordered a new trial due to a Brady violation. In Reutter, the government failed to disclose that one of its witnesses had applied for sentence commutation and was scheduled to appear before the parole board a few days after testifying at the petitioner's trial.

C. Other Federal Cases

Similarly reversing the denial of habeas relief due to a Brady violation in Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989), the Seventh Circuit posited that knowledge of the suppressed evidence may have "pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit." Also granting habeas relief due to a Brady violation in Lindsey v. King, 769 F.2d 1034, 1042 (5th Cir. 1985), the Fifth Circuit noted that

the nondisclosed evidence "carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the cases." Affirming a grant of habeas in Ballinger v. Kerby, 3 F.3d 1371 (10th Cir. 1993), the Tenth Circuit held that the government's failure to disclose an exculpatory photograph which would have impeached a prosecution witness' testimony constituted a Brady violation.

Likewise affirming a grant of habeas relief due to a Brady violation in Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991), the First Circuit quoted the district court's opinion recognizing that "unbridled prerogative powers of government were abolished in England by Magna Carta in 1215 A.D. and in America by the Constitution's Bill of Rights. . . ." Id. at 12-13. See also Ouimette v. Moran, 762 F. Supp. 468, 479 (D.R.I. 1991). Characterizing the petitioner's trial as one "based upon prosecutorial concealment and not upon disclosure," the First Circuit echoed the district court's view that "[t]hese discredited practices not only do violence to constitutional notions of due process, they do violence to fundamental notions of justice and fair play which all free people should enjoy." 942 F.2d at 13; 762 F. Supp. at 479. The newly discovered evidence presented herein reveals that Mr. Duke's trial was similarly based upon prosecutorial concealment rather than disclosure.

Affirming a grant of habeas relief due to a Brady violation in United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985), the Seventh Circuit observed that "the purposes of

Brady would not be served by allowing material exculpatory evidence to be withheld simply because the police, rather than the prosecutors, are responsible for the nondisclosure." Two other Seventh Circuit opinions, United States v. Young, 20 F.3d 758, 764 (7th Cir. 1994), and Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984), warn that "a prosecutor's office cannot get around Brady by keeping itself in ignorance, or compartmentalizing information about different aspects of the case."

Reversing the denial of habeas relief in Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964), the Fourth Circuit commented:

> Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. "The cruelest lies are often told in silence."

Id. at 846 (footnote omitted).

Reversing the denial of a habeas petition in Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969), the Fifth Circuit likewise noted that "[t]he cruelest lies are often told in silence." The Smith court explained that if investigating agents allow prosecutors to elicit inculpatory evidence at trial without informing the prosecutors of other evidence which contradicts the

witness's testimony, the agents deceive not only the prosecutors, but the defendant, the jury and the court, as well. See id. Consequently, because a trial is equally tainted by an agents' nondisclosure as it is by a prosecutor's nondisclosure, a prosecutor's duty to disclose is not excused by the deception of investigating agents. See id.

In United States v. Butler, 567 F.2d 885 (9th Cir. 1978), the Ninth Circuit reversed the denial of a motion for a new trial based on the prosecution's failure to disclose the existence of promises made to a government witness in exchange for his cooperation -- even though the prosecutors were entirely unaware of the promises made by the investigating agents. The Butler court explained:

> The prosecutor is responsible for the nondisclosure of assurances made to his principal witnesses even if such promises by other governmental agents were unknown to the prosecutor. Since the investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutor, were guilty of nondisclosure.

Id. at 891. In his concurring opinion, Judge Ely accuses the investigating agents of committing a "sin of silence" by failing to inform the prosecutors of the exculpatory impeachment evidence. See id. at 892 (Ely, J., concurring).

Similarly, in Pina v. Henderson, 586 F. Supp. 1452 (E.D.N.Y. 1984), the district court granted habeas relief due to a Brady violation which occurred because the investigating agents failed to communicate exculpatory evidence to the prosecutors. As the district court recognized:

> A prosecutor can at least rethink the case and redirect the inquiry if the evidence against a defendant is ambiguous. If he is unaware of the evidence, the possibility of a miscarriage of justice is enhanced. . . . One of the greatest dangers of convicting the innocent arises from police focusing on the wrong person and then ignoring exculpatory evidence and leads.

Id. at 1456.

Hence, Mr. Duke's prosecutors were constitutionally obligated to disclose information about Andrew Chambers's pattern of perjury in other federal trials, even if only the DEA was aware of it. See Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (emphasizing duty of prosecutor "to learn of any favorable evidence known to others acting on the government's behalf"); Bragg v. Norris, 128 F. Supp.2d 587, 606 (E.D. Ark. 2000)(prosecutor's Brady obligations extend to evidence known only to police). The government could not avoid its Brady obligations by compartmentalizing that information within the DEA in an effort to keep the prosecutors uninformed about Chambers's perjurious history.

Likewise, Mr. Duke's prosecutors were constitutionally obligated to disclose their witnesses' initial statements exonerating Mr. Duke, as well as the government's promises and threats which coerced them into testifying falsely against Mr. Duke, even if only a single investigating agent was aware of such favorable evidence. The government's failure to disclose exculpatory material to Mr. Duke cannot be justified by an "sin of silence" committed by either the DEA or any of the investigative agents on the prosecution team. Accordingly, the interests of

justice compel this Court to grant Mr. Duke's application pursuant to " Federal Civil Judicial Procedure and Rules 15(c)(2)-Relation Back Doctrine ", motion applicable to a previously filed § 2255.

VI. WITHOLDING OF EXCULPATORY EVIDENCE

In.....U.S. **v. Duke**, 50 F.3d 571 (8th Cir. 1995), **at 579**, [19],

[19] Duke's nephew, Loren Duke (Loren), testified that Duke's son, Ralph Nunn (Nunn), told him that the money for the twenty kilos came from his father. On May 17, 1989, Nunn told Loren that someone (Chambers) was in town with twenty kilos and "that his father told him to go get the twenty kilos because he wanted to buy them.", also **see. United States v. Duke**, 940 F.2d at 1117-18; and **see U.S. v. Hammer**, 940 F.2d 1141 (8th Cir. 1991), **at 1144, inpart:**

The United States District Court for the District of Minnesota had no role in determining whether McCaleb would be charged in Minnesota. That decision was made only by the United States Attorney, and no guilty plea will ever be entered by McCaleb in this case. As a result, the statistics compiled by the Sentencing Commission will never show the disparity wrought here by the government's favorable treatment of McCaleb or in countless similar cases throughout the country.[4] I well understand that the government must offer a benefit in order to get cooperation from offenders. This practice, however, results in substantial disparities among similarly situated offenders. The Sentencing Commission's statistics never measure such gross disparities and thus present only an illusion of precision and accuracy.

I also understand that the prosecutor needs broad charging discretion. I cannot agree, however, that this authority should be without limit under a guidelines system of sentencing. Because there is no over-sight on

charging decisions, McCaleb, a major participant, may well serve less time than anyone other than the very minor participants. This is wrong. The court and the public should be aware of what is being done in McCaleb's case and others like it.

McCaleb is not the only major participant who escaped a sever sever sentence. The case of Loren Duke also illustrates how the prosecutor's charging decisions affect the sentence imposed.

at id., 1144,

> " McCaleb and Plukey Duke were the two major players in this drug conspiracy. Both distributed large amounts of cocaine for a long period of time. Although he has no prior criminal history, Plukey Duke will serve two life sentences for his crimes. In contrast, McCaleb has an extensive criminal history but will be subject to, at most, a forty-year preguidelines sentence. Because McCaleb cooperated with the government by testifying against Plukey Duke, "

The Workman court also indicated that in order for fraud upon the court to occur, "an officer of the court must have intentionally or recklessly failed to disclose information to the court that would have result of deceiving it." Id. Ultimately, the Sixth Circuit ruled that a material dispute of fact regarding whether a witness was coerced which

entitles the movant to a full evidentiary hearing to determine whether the prosecution committed a fraud on the district court.

The newly discovered evidence presented herein reveals conduct: (1) on the part of the officers of the court; (2) that was directed to the judicial machinery itself; (3) that was intentionally false, willfully blind to the truth, or in reckless disregard for the truth; (4) that was a concealment by those under a duty to disclose; and (5) that deceived the district court. The government's fraud upon the court casts a dark shadow over the prosecution's intentions and raises questions concerning the legitimacy of Mr. Duke's inherently unreliable conviction due to the prosecution's intentional wrongdoing.

As in **Workman**, this newly discovered evidence of government witnesses being coerced into testifying falsely entitles Mr. Duke to a full evidentiary hearing to determine whether the prosecution committed a fraud upon the district court, **see United States v. Duke**, 50 F.3d 571 (8th Cir. 1995), Mr. Duke's previous § 2255.

And..... **United States v. Duke**, 50 F.3d 571 (8th Cir. 1995), **at** 573,

I. BACKGROUND

The facts of this case are set out in detail in this court's opinion on Duke's direct appeal. **See United States v. Duke**, 940 F.2d 1113 (8th Cir. 1991). We, therefore, provide only a summary of the facts. The indictment charged Duke with 32 counts of narcotics and firearms violations. After a one-month trial, Duke was convicted of participating in a continuing criminal enterprise to posses and

distribute cocaine, aiding and abetting the attempt to posses with intent to distribute 20 Kilograms of cocaine, other similar instances of aiding and abetting with regard to smaller amounts, three counts of using and carring weapons in connection with drug offenses, and conspiracy to posses with intent to distribute cocaine. Duke was sentenced to three concurrent life sentences and lesser consecutive sentences. On direct appeal, this court remanded the case with instructions to vacate either the continuing criminal enterprise conviction or the conspiracy conviction on double jeopardy grounds, but affirmed in all other respects. **See id at 1121.**

However, in this instant motion pursuant to Federal Civil Judicial Procedure and Rules, regarding 15(c)(2)-Relation Back Doctrine, the petitioner Mr. Ralph Chavous Duke also relates back to the **" three counts of using or carrying weapons in connection with drug offenses ".**

And in.....**BAILEY v. UNITED STATES,**(1995) 516 US 137, 133 L Ed 2d 472, 116 S.Ct 501, at p. 475,

Weapons and Firearms § 1 - use - concealment

7. "Use" of a firearm, for purposes of 18 USCS § 924(c)(1)-which requires the imposition of specified penalties on a person who uses or carries a firearm during and in relation to any crime of violence or drug trafficking crime-does not extend to encompass the concealment by an offender of a gun nearby to be at the ready for an imminent confrontation; if the gun is not disclosed or

mentioned by the offender, then the gun is not actively employed and is not"used"within the meaning of § 924(c)(1). see U.S. v. DUKE, 940 F.2d 1113 (8th Cir. 1991), at 1118-19, inpart

B. Firearm Convictions

[5] Duke's argument that the pistol with silencer, charged in count 28, was not used during and in relation to the conspiracy is little better.; and

[7] Duke's argument has more merit as to count 28 because his acts of firing the weapon occured sometime in 1988.

And in.....BAILEY v. UNITED STATES, (1995) 516 US 137, 133 L Ed 2d 472, 116 S.Ct 501, at p. 476,

Held:

1. Section 924(c)(1) requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense. Evidence of the proximity and accessibility of the firearm to drugs or drug proceeds is not alone sufficient to support a conviction for "use" under the statute.

Under the "use and carry prong" of BAILEY, petitioner Mr. Ralph Chavous Duke's conviction cannot be supported and ultimately has to be "vacated".

And in.....U.S. v. RICHARDSON, 439 F.3d 421 (8th Cir. 2006),

at 421,

2. Criminal Law, key 29(15)

The allowable unit of prosecution for a weapons possession offense is one incident of possession, regardless of whether a defendant satisfies more than one statutory classification, possesses more than one firearm, or possesses a firearm and ammunition. 18 U.S.C.A. § 922(g).; and id. at 423,

United States v. Valentine, 706 F.2d 282, 292-94 (10th Cir. 1983) (applying Bell to hold that simultaneous possession of more than one weapon constituted only one offense); United States v. Frankenberry, 696 F.2d 239, 244-45 (3rd Cir. 1982)(applying Bell to hold that the receipt of multiple firearms comprised only one offense); United States v. Oliver, 683 F.2d 224, 232-33 (7th Cir. 1982)(applying Bell to hold that the simultaneous receipt of a firearm and ammunition comprised only one offense). see U.S. v. Duke, 50 F.3d 571 (8th Cir. 1995), at 573- I. BACKGROUND, regarding "three counts of using or carring weapons in connection with drug offenses", petitioner Mr. Ralph Chavous Duke's conviction as to multiple possession of firearms cannot be supported as charged for (1) pursuant to " 18 U.S.C. § 922(g) ", petitioner Mr. Ralph Chavous Duke, has to have been convicted in any court of law exceeding a term of imprisonment of one year to be concidered felon in possession ", nowhere in petit ioner's record's, transcript's or grand jury indictment has it been established Mr. Ralph Chavous Duke, committed any crimes for which he has been imprisoned.

And in.....**Mesarosh v. United States**, 1956, 352 U.S. 1, 77 S. Ct 1, 1 L.Ed.2d 1, the Supreme Court reversed convictions because they were tainted by the testimony of a paid informer of the government who was later accused by the government of perjury in other cases. In **United States v. Chisum, supra**, this court applied the Mesarosh principle to a case in which another of the defendants in Mendelsohn had testified. We held there that the revelation subsequent to **Chisum's** trial of Agent Saiz's illegal behavior tainted **Chisum's** conviction, and we reversed the conviction for a new trial. **See also United States v. Miramon**, 9 Cir., 1971, 443 F.2d 361; **United States v. Davis** 10 Cir., 1971, 442 F.2d 72, 74. Once again we are faced with a case in which, as in **Chisum, Miramon and Davis**, one of the defendants in **Mendelsohn** testified. It is therefore necessary for us to consider carefully the role that Watson's testimony played at **Williams'** trial. **see. United States v. Duke**, 50 F.3d 571 (8th Cir. 1995).

Wherefore, in light of the physical evidence, documents, transcript's, affidavit's, exhibit's and cases presented herein, Petitioner Ralph Chavous Duke, humbly pray's upon the Honorable Court to correct the " **Error Of Its Ways** ", for the violation's of the petitioner's **5th, 6th, 8th, and 14th Constitutional Amended Right's**, and " **Release Petitioner** " in the alternative " **Grant Petitioner Ralph Chavous Duke A New Trial** ",.

Date: 2/25/08 ,2008

Respectfully Submitted,

By, Ralph Chavous Duke

Ralph Chavous Duke,pro se.
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