

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION**

UNITED STATES OF AMERICA,]	
]	
v.]	Case No.: 1:06cr123
]	
MARTIN F. SALAZAR,]	
]	
Defendant.]	

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

I. Introduction

Following a jury trial, Defendant was convicted of two counts in violation of 18 U.S.C. § 1001. Defendant was sentenced on August 1, 2007, and his Judgment of Conviction was entered by the Court on August 7, 2007. Defendant timely filed a Notice of Appeal on August 17, 2007. Defendant files this Motion for New Trial based upon newly discovered evidence while his appeal is pending. The Defendant includes by reference, his pleadings from his prior motion for a new trial submitted to this Court on or about September 10, 2007 as additional support to this motion herein.

II. Statement of Facts

Defendant was convicted of making essentially two false statements. With respect to Count 2, Defendant was convicted of making a false or fraudulent statement with respect to his place of birth in an application for early retirement. Essentially, the Government charged that Defendant misrepresented his date of birth as January 30, 1954, when, in fact, the Government alleged that the Defendant's birth was either January 30 1957 or January 30, 1958. And registered to the Mexican government as Nogales, Mexico.

Subsequent to the trial, Defendant, through his civil remedies consisting of a Equal Employment Opportunity Discrimination complaints filed under Title VII of the Civil Rights Act, did receive new evidence on or about August 3, 2008, in the form of documents that had been in the possession of the Government/Prosecution (See Exhibits A, B, C, D, E, F, G, H and I). That demonstrates that, the Government (through the Department of Energy) submitted the alleged retirement package to the government administration (Office of Personnel Management) with the alleged violation date of birth as January 30, 1954 prior to the defendants filling out the application or submission of the alleged violation.

Defendant also was convicted of misrepresenting his date of birth in an August 26, 2005 retirement application. Defendant attempted to present evidence that to support a defense of “entrapment by estoppel” and produce evidence that, in fact, the Department of Energy selected the January 30, 1954 birthdate with knowledge that it was incorrect, but that it encouraged Defendant to sign the retirement application because it was consistent with his personnel files and allowed Defendant to retire at the earliest date possible, as contemplated by the settlement agreement with the Department of Agency that severed him from service. Again the newly discovered evidence demonstrates that the Government had already submitted the alleged violation date of birth prior to the defendants signing of the retirement package and/or application.

At trial, Doris Hixon, a Human Resources Specialist at the Savannah River Site, testified that human resources did not have information that the January 30, 1954 date of birth was either incorrect or different from his security file. On cross-examination, Defendant’s trial attorney and Hixon engaged in the following colloquy:

Braghirol: There was definitely information possessed by DOE, SRS, at the time of his retirement that the date of his birth was called into question as far as what day it was, correct?

Hixon: Not in the human resources world. Not in our records, no, sir.

Braghirol: You didn't tell an investigator with the IG office you knew the date of birth was an issue?

Hixon: **I don't recall if I did. I may have, I just don't recall it.**

Braghirol: When you say we picked the earliest birth date possible?

Hixon: If I did, I misspoke. We validate on our records. Those records are in personnel – official personnel file, I think is the way it is termed.

Braghirol: So, when you had the records from Ron Bartholomew's office during this investigation with Roger Butler, you said you didn't get to copy the records, you had their file?

Hixon: I had the file for review.

Braghirol: Did you look at it?

Hixon: I looked at it, **but I don't recall seeing anything brought in a discrepancy on his birth date.**

Braghirol: The interview with Marianne O'Connor, that was a big issue, you don't recall it?

Hixon: **I don't recall seeing it in the file, the security file.**

(Trial Transcript Vol. II, 67-68.) However, in another sworn statement to the Merit Systems Protection Board, Doris Hixon admitted that she was aware of the discrepancies in the birth date in 2004, well before August 26, 2005. In her August 14, 2007 sworn statement, Hixon stated:

In addition to the issue as to whether Mr. Salazar had in fact obtained a degree from CSULB, the BRI also questioned Mr. Salazar's place and date of birth. The BRI indicated that Mr. Salazar had previously listed his date of birth as January 30, 1957 and January 30, 1954.

(Hixon Sworn Statement ¶ 13.) Hixon also clarified:

Because of the inconsistencies raised in the BRI, on or about April 13, 2004, I was interviewed by the Inspector General's office pertaining to an official Office of Inspector General investigation of Mr. Salazar. I provided information concerning Mr. Salazar's false reporting of his place of birth and educational qualifications. **I also informed the investigator of the inconsistency raised in the BRI regarding Mr. Salazar's date of birth.** I did not, however, indicate that HRM&DD questioned Mr. Salazar's January 30, 1954 date of birth. I simply noted the inconsistency found in the BRI.

(Hixon Sworn Statement ¶ 14.) Hixon's statement is under penalty of perjury, much like her testimony. Additionally, and as previously provided to this court. The Director of Human Resources Terry Frizzell also signed off on Defendant's birthdate of January 30, 1954, even though his office had knowledge of the discrepancies in Defendant's birthdate well before this request for personnel action was issued. **Those document too were not provided in discovery.**

If the information in Exhibits A, B, C, D, E F,G, H & I were either produced before trial or testified to at trial, Defendant would have elected to testify to those facts. (Exhibit D, Salazar Aff. ¶¶ 4-5. submitted prior to this court). Defendant's purported testimony as to this allegation is memorialized in his affidavit previously provided to this Court. Additionally, had these fact been known by the Defendant, he would have better grounds and evidence on his affirmative defense of entrapment by estoppel and/or a "mistake of facts" which would have brought a different charge to the jury and or

supported a motion for dismissal, as the new evidence undermines the governments case-in-chief and/or theory.

Defendant has stated discussions with Jean Stump from Human Affairs on August 26, 2005, to execute his early retirement papers and complete the memorialization of the settlement agreement with the DOE that would sever him from employment. Defendant specifically asked Jean Stump if the birthdate was the correct date.

Jean Stump told Defendant that it was correct and was verified through records at human resources. Stump failed to notify the Defendant that the retirement package had **already been sent to OPM prior to this requested signature** and/or that his signature was already affixed to the retirement package, **by someone other than the Defendant**. The Defendant could not have signed the retirement package as alleged by the government case-in-chief argument and as presented to the jury. This goes further to bolster the Defendant's affidavit, and to discredit Stumps affidavit. This matter would have been proven in an evidentiary hearing. And as such, the Defendant requests that an evidentiary hearing be held on these and all matters herein and previously submitted to this court.

Both Doris Hixon and Terry Frizzell at human resources had knowledge of the discrepancies, Defendant was under the impression that the DOE's placement of that date was appropriate, lawful, and with the intent to finalize the settlement agreement at the earliest possible date. (Exhibit D, Salazar Aff. ¶ 6., previously submitted to this court) In this regard, The government had already affixed the signature of the defendant making his post-signature void. And the Defendant would have been entitled to a jury instruction on the affirmative defense of Entrapment by Estoppel.

III. Standard of Determination

To receive a new trial based on newly discovered evidence, a defendant must establish that “(a) the evidence must be, in fact, newly discovered, i.e., discovered since the trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence relied upon must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal.” *United States v. Singh*, 54 F.3d 1182, 1190 (4th Cir. 1995).

Moreover, a district court can entertain a Motion for New Trial while an appeal is pending. In *United States v. Cronin*, 466 U.S. 648, 667, n. 42, 104 S. Ct 2039, 2051, n. 42, 80 L. Ed. 2d 657 (1984), the Supreme Court explained that a denial of a Motion for New Trial for lack of jurisdiction because an appeal is pending is erroneous. A district court has “jurisdiction to entertain a motion for new trial and either deny the motion on its merits or to certify its intention to grant the motion to the Court of Appeals, which then could entertain a motion to remand the case.” *Id.*

Different standards as to the third and fourth showings govern the consideration of new trial motions depending on the grounds for the motion. As described in *Joselyn*, if the basis is that the government has failed to disclose information required by *Brady*, then the more defendant-friendly *Kyles v. Whitley* standard applies. See *Joselyn*, 206 F.3d at 151-52. Under the *Kyles* standard, the defendant must show a "reasonable probability" that had the evidence been disclosed to the defense the result of the proceeding would have been different, and that, in turn, requires an analysis of whether the trial resulted, in the absence of such evidence, in a verdict worthy of confidence. *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

A further application of these two basic standards -- the Kyle "verdict worthy of confidence" standard and the Rule 33 "actual probability" of acquittal standard -- was addressed in United States v. Huddleston, 194 F.3d 214 (1st Cir. 1999). The question there was what standard to apply to a new trial motion which alleged that the prosecutor had unwittingly used perjured testimony. See 194 F.3d at 221-22. Huddleston rejected earlier cases in this circuit suggesting that in such a situation, it may be appropriate to apply a lower standard, announced in Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), that a defendant need only show that the newly discovered evidence "might" produce a different result. See Larrison, 24 F.2d at 87; see also United States v. Natanel, 938 F.2d 302, 313 (1st Cir. 1991). Instead, Huddleston held that when a defendant grounds a motion for a new trial in a criminal case on a claim that he has newly discovered perjury on the part of one or more government witnesses, the conviction nonetheless should stand unless the force of the newly discovered event (i.e., the fact and nature of the perjury) and the content of the corrected testimony are such that an acquittal probably would result upon retrial.

194 F.3d 221 (emphasis added). Huddleston expressly reserved for another day the question of the standard to be used as to claims of knowing or reckless use by the government of perjured testimony. See id.

We resolve that question as, we believe, Supreme Court precedent requires us to do. Although González does not categorize knowing use of perjured testimony as a Brady type error, we think it is sufficiently analogous that the Brady error rule should apply to claims of knowing use of perjured testimony.

The risk that a conviction was brought about by the government's knowing use of perjury goes to the concerns about fairness of the trial that animated Kyle. Obtaining a

conviction by presenting testimony known to be perjured "is inconsistent with the rudimentary demands of justice." Mooney v. Holohan, 294 U.S. 103, 112 (1935); accord Giglio v. United States, 405 U.S. 150, 153 (1972). In Napue v. Illinois, 360 U.S. 264 (1959), a pre-Brady case, the Supreme Court said a new trial is required if "the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury." 360 U.S. at 271. The Supreme Court has several times referred to the prosecution's knowing use of perjured testimony as a category of Brady error, see, e.g., Strickler v. Greene, 527 U.S. 263, 280-81 (1999); United States v. Agurs, 427 U.S. 97, 103-04 (1976), while also repeating the standard that "a conviction . . . must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," id. at 103. In United States v. Bagley, 473 U.S. 667 (1985), the Court noted that this rule had earlier been stated as a branch of the harmless error test, but it may be as easily stated as a materiality standard. See 473 U.S. at 679. And recent decisions about Brady errors which did not involve knowing use of perjured materials continue to recognize that such errors are properly analyzed under Brady, employing the "reasonable likelihood" of acquittal standard. See Strickler, 527 U.S. at 298-99 (Souter, J., concurring in part and dissenting in part); Kyles, 514 U.S. at 433 n.7 (citing Agurs, 427 U.S. at 103).

In sum, a court's choice among the standards for analyzing new trial motions depends upon the ground for the new trial motion. First, for the non-Brady Rule 33 motion where a defendant seeks a new trial based on newly discovered evidence (other than evidence that an adverse witness testified falsely) the inquiry is whether that evidence, in actual probability would result in acquittal if a new trial were granted. That test is also used where a new trial motion is premised upon alleged new evidence that a conviction was obtained by perjured testimony when the government's use of that

testimony was unwitting. In that situation, Huddleston requires the defendant to meet the "actual probability of acquittal" standard.

The second category involves the different types of Brady violation cases, where it is alleged that the government withheld exculpatory evidence. There, a defendant must show that there is a "reasonable probability" that the missing evidence would have changed the result. In contrast, the "reasonable likelihood that the false testimony could have affected the judgment of the jury". Although the Supreme Court has not described whether there is a difference between the "reasonable likelihood" and "reasonable probability" standards, we believe they are equivalent. In the end, both standards are concerned with whether defendants received a fair trial resulting in a verdict worthy of confidence. See Strickler, 527 U.S. at 298 (concurring opinion); see also Webster's Third New Int'l Dictionary 1310 (1993) (defining "likelihood" as "probability").

The false statement must be material to the proceedings. A false statement is material if it has "a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Kungys v. United States*, 485 U.S. 759, 770 (1988)(denaturalization proceeding). The testimony need not have actually influenced, misled or impeded the proceeding. For example, potential interference with the grand jury's line of inquiry suffices to establish materiality, because of the grand jury's broad investigative function. *United States v. Williams*, 993 F.2d 451, 455 (5th Cir. 1993); *United States v. Gribben*, 984 F.2d 47, 52 (2d Cir. 1993). The government need not prove the legitimacy of the grand jury's investigation which led to the testimony, only the pertinence of the particular testimony to the grand jury's investigation. *United States v. Regan*, 103 F.3d 1072 (2d Cir. 1997). A similarly broad construction of materiality is appropriate in the context of false declarations made in connection with civil depositions. *United States v. Kross*, 14 F.3d 751, 754 (2d Cir.),

cert. denied, 115 S.Ct. 99 (1994); *United States v. Holley*, 942 F.2d 916, 924 (5th Cir. 1991), *cert. denied*, 510 U.S. 821 (1993). *But see United States v. Adams*, 870 F.2d 1140, 1146-48 (6th Cir. 1989)(false statement must tend to affect the outcome of the underlying civil suit for which the deposition was taken). The statement may be material to any proper matter of inquiry, including collateral matters that might influence the outcome of decisions before the tribunal, such as determining credibility issues. *United States v. Kross*, 14 F.3d at 755. Materiality is not negated merely because the tribunal did not believe the testimony or sought cumulative information. *United States v. Reilly*, 33 F.3d 1396, 1419 n.20 (3d Cir. 1994). Furthermore, testimony may be material even if it relates to events as to which the statute of limitations has run, since the grand jury may have legitimate reasons to inquire about such events aside from an expectation of returning an indictment charging those events as crimes. *United States v. Chen*, 933 F.2d 793, 797 (9th Cir. 1991); *United States v. Nazzaro*, 889 F.2d 1158, 1165-66 (1st Cir. 1989).

In *United States v. Gaudin*, 115 S.Ct. 2310, 2320 (1995), a unanimous United States Supreme Court held that in a prosecution under 18 U.S.C. § 1001 the jury must determine "beyond a reasonable doubt [the defendant's] guilt of every element of the crime with which he is charged." Previously, courts had interpreted dicta in *Sinclair v. United States*, 279 U.S. 263, 299 (1929), to classify materiality as a question of law decided by the court.

Here the reason for this citation is that the perjury of Hixon and Knowles would lead to add the doubtful conviction had it been told the truth on one of the counts. Hixon and Knowles were two of the Agencies significant witnesses since they both witnessed the settlement agreement and provided guidance for the retirement package.

To answer your possible question that Hixon is just "recanting" here is what is found: Recantation was never a defense to perjury in the common law, and is not a complete defense in a Section 1621 prosecution. *United States v. Norris*, 300 U.S. 564, 573-74 (1937). Recantation in such cases is relevant only as to whether the defendant intended to make a willfully false statement. *Id.*

Section 1623(d), however, makes recantation a bar to a perjury prosecution in certain cases that meet either three or four requirements. First, the recantation must be made "in the same continuous court or grand jury proceeding" in which the original false declaration was made. Second, the recantation must unambiguously admit that the prior statement was false. A request to clarify or supplement testimony is not enough to satisfy the statutory requirement. Finally, recantation bars prosecution only if the admission occurs at a time when the false declaration has "not substantially affected the proceedings, and it has not become manifest that such falsity has been or will be exposed." *United States v. Fornaro*, 894 F.2d 508, 511 (2d Cir. 1990); *United States v. Scivola*, 766 F.2d 37, 45 (1st Cir. 1985); *United States v. Moore*, 613 F.2d 1029, 1039 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980). Thus, if the witness has knowledge that the false testimony "has been or will be exposed," no effective recantation can thereafter be made. *United States v. Denison*, 663 F.2d 611, 615 (5th Cir. 1981). Similarly, if the grand jury has acted in reliance upon the false testimony, no recantation is possible. The United States Court of Appeals for the Eighth Circuit, however, viewed the last two requirements in the disjunctive when it allowed a defendant an opportunity to show *either* that the proceedings were not substantially affected *or* that the falsity will be exposed. *United States v. Smith*, 35 F.3d 344, 347 (8th Cir. 1994). Because recantation is a jurisdictional bar to prosecution, Fed.R.Crim.P. 12(b)(2).

IV. Argument

A. The Government's withheld documents of its submittal to the administrating agency (OPM) Is Newly Discovered Evidence Warranting a New Trial

At the outset, it should be noted that **the following information was NOT provided in criminal trial discovery**, and now only provided to the Defendant on or about July 31, 2008 (See Exhibit A) through a civil proceedings under Title VII of the Civil Rights Act. The Defendant had no knowledge that information existed showing that the Agency separated the Defendant on July 18, 2005 (See Exhibit B) and submitted the “completed retirement package to OPM”¹ on or about July 19, 2005 (See Exhibit C), several weeks before the defendant allegedly signed the retirement package. And despite requests that the government provide all relative material facts, failed to do so. These very documents comes directly from the organization and persons that had the primary responsibility of bringing these charges in regards to the alleged violations, and/or testified differently from the facts herein, and where they were intimately aware of its existence, but failed to provide it in discovery or affirm its existence when questioned under oath. An evidentiary hearing on a Motion for New Trial, is material to the issues involved, and should be Ordered. Such evidence would likely have produced an acquittal and/or dismissal of the charges themselves. The evidence provided, and in control of the government from its inception, clearly demonstrates their intent and submission of the alleged violations that were actually committed by the government itself¹.

¹. It should be noted that a search for the original retirement application could not be found when queries were made to the OPM General Counsel's office that currently has the originals in their possession.

The government and/or the government agents were the ones who are "responsible for interpreting, administering, or enforcing the law defining the offense. The absence of this critical information would have yielded a dismissal, and at the very least a charge to the jury of entrapment by Estoppel, and/or provided for an affirmative defense of the charges altogether. The failure of the government to provide exculpatory evidence is violation of Brady and Giglio and in that light alone should warrant a new trial.

In *United States v. Nichols*, 21 F.3d 1016, 1018 (10th Cir. 1994). There must be "an 'active misleading' by [a] government agent," and "actual reliance by the defendant[,]" which is "reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation." *Id.* Moreover, the government agent must be one who is "responsible for interpreting, administering, or enforcing the law defining the offense." *United States v. Gutierrez-Gonzalez*, 184 F.3d 1160, 1167 (10th Cir. 1999).

Here the government agents were responsible for the interpretation, administration, and or enforcing of the laws defining the offense, in particular to light that Lucy Knowles was a Special Assistant to the U.S Attorney's office when she solidified the settlement agreement and advised all parties that the settlement agreement was legal.

Determining whether the government is estopped from a prosecution is generally a mixed issue of law and fact. "We review mixed questions under the clearly erroneous or de novo standard, depending on whether the mixed question involves primarily a factual inquiry or the consideration of legal principles." *United States v. Kinslow*, 105 F.3d 555, 557 (10th Cir. 1997) (internal quotation marks omitted). Here, we assume Defendant's

version of the facts and review the issues *de novo* as a matter of law. And as here, the governments actions are the primary factual inquiry.

A claim of entrapment by estoppel is at heart a due process challenge. In *Raley v. Ohio*, 360 U.S. 423, 426 (1959), the Supreme Court held that the conviction of a defendant "for exercising a privilege which the State had clearly told him was available to him" was an "indefensible sort of entrapment by the State," violative of due process. *Accord Cox v. Louisiana*, 379 U.S. 559, 571 (1965). To convict a citizen following such an "active misleading" would be to dispense with the basic requirement that citizens receive fair warning of what actions are criminal. *Raley*, 360 U.S. at 438. The evidence provided in the Defendants exhibits clearly define the government's intent when they were predisposed to require that the defendant validate the date of birth that was submitted prior to his signature assuming that the defendants signature was ever entered at all.

The defendant may offer evidence that he/she honestly, albeit mistakenly, believed he/she was performing the crimes charged in the indictment in cooperation with the government. More than an affirmative defense, this is a defense strategy relying on a "mistake of fact" to undermine the government's proof of criminal intent, the mens rea element of the crime. *United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363-68 (11th Cir. 1994); *United States v. Anderson*, 872 F.2d 1508, 1517-18 & n.4 (11th Cir.), *cert. denied*, 493 U.S. 1004 (1989); *United States v. Juan*, 776 F.2d 256, 258 (11th Cir. 1985). The defendant must be allowed to offer evidence that negates his/her criminal intent, *id.*, and, if that evidence is admitted, to a jury instruction on the issue of his/her intent, *id.*, and if that evidence is admitted, he is entitled to a jury instruction on the issue of intent. *United States v. Abcasis*, 45 F.3d 39, 44 (2d Cir. 1995); *United States v. Anderson*, 872 F.2d at 1517-1518 & n. In *Anderson*, the Eleventh Circuit approved the district court's

instruction to the jury that the defendants should be found not guilty if the jury had a reasonable doubt whether the defendants acted in good faith under the sincere belief that their activities were exempt from the law. And as proven the Government intention was clearly to have the defendant unknowingly agree with the date of birth already provided to OPM in their instructions to have the Defendant provide the likewise date in cooperation with the government as codified in the settlement agreement. It should be noted that the government never informed the defendant that there were set requirements for an early out retirement. And again it is the government who is responsible for the interpretation, administration and enforcement of the alleged violations of law.

Taken together, the limitations articulated in *Sorrells* and *Lanzetta* provided the theoretical basis for the defense that would become known as entrapment by estoppel. In a broad sense, *Sorrells* stands for the proposition that a government may not constitutionally convict a defendant when that government, by its **actions**, led the defendant to commit a crime he was not predisposed to commit. The Government in its actions shows that they were predisposed to provide a date of birth that they had already submitted to the OPM, in its actions to satisfy the Settlement Agreement

More importantly, the failure of the government to withhold exculpatory evidence here and as previously demonstrated during the trial, warrants a new trial or dismissal altogether. In No. 06-20885 On appeal from the United States District Court for the Southern District of Texas the United States' opposition to appellant Jeffrey K. Skilling's motion to file supplemental brief the government correctly argues and was granted relief on this very matter where: The issue that Skilling seeks to address in his supplement brief should be addressed in a motion for a new trial. Skilling seeks to file a supplemental brief to argue that the Fastow notes contain material exculpatory information that should have been produced prior to trial under *Brady v. Maryland*, 373

U.S. 83 (1963), and its progeny. That issue. has never been addressed by the district court and should be the subject of a motion for a new trial under Federal Rule of Criminal Procedure 33.

United States v. Sipe, 388 F.3d 471, 479 (5th Cir. 2004). In short, "Brady challenges present fact-based judgments that cannot be adequately first made on appellate review." United States v. Gonzalez, 436 F.3d 560, 580 (5th Cir. 2006). For that reason, the Court has held that it is "impossible" for a court of appeals to review a Brady claim in the first instance ; instead, "Brady challenges must be brought to the district court's attention, winnowed by the trial judge, and made part of the record through a motion for new trial." *Id.*; see also United States v. Infante, 404 F.3d 376, 387-88 (5th Cir. 2005) (considering Brady claim raised in motion for a new trial); United States v. Wall, 389 F.3d 457, 464 (5th Cir. 2004)

To this end, the government violated the essence of Brady and Giglio when they failed prior and herein to disclose exculpatory evidence in their possession. And where this new evidence also demonstrates that the government witnesses perjured their testimony's to coincide with their illegal actions, In that:

- (1) The government has an obligation under Brady v. Maryland to provide exculpatory evidence to a criminal defendant. To establish a Brady violation, the evidence must be (1) favorable to the accused because it is either exculpatory or impeachment material; (2) suppressed by the government, either willfully or inadvertently; and (3) material or prejudicial. *Benn v. Lambert*, 283 F.3d 1040, 1052-53 (9th Cir. 2002) the government has a duty to disclose Brady material even in the absence of a request by the defense. See *Kyles v. Whitley*, 514 U.S. 419, 433 (1995). For purposes of Brady, materiality is measured "in terms of suppressed

evidence considered collectively, not item by item.” Id. At 436. That is, the reviewing court should assess the “cumulative effect” of the suppressed evidence Id. At 421.

- (2) Impeachment evidence is exculpatory evidence within meaning of Brady. See Giglio, 405 U.S. at 154; see also United States v. Bagley, 473 U.S. 667, 676 (1985). Brady/Giglio information includes “material...that bears on the credibility of a significant witness in the case.” United States v. Brimel-Alvarez, 991 F.2d 1452, 1461 (9th Cir. 1993), amending 976 F.2d 1235 (9th Cir. 1988)) (alteration in original). Impeachment evidence is favorable Brady/Giglio material “when the reliability of the witness may be determinative of a criminal defendant’s guilt or innocence.” Id. At 1458 (citing Giglio, 405 U.S. at 154); see also United States v. Serv. Deli inc., 151 F.3d 938, 943 (9th Cir. 1998).
- (3) “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.”

Fla. App 2 Dist 1968

Willful use of false testimony upon matters from state witnesses by public prosecutors to be perjured testimony is ground for post-conviction relief.

33 West F.S.A. Rules of Criminal Procedure, rule 1.850

Fla. App 3 Dist 1979 34 West’s F.S.A. Rules of Criminal Procedure,

rule 3.850 Hernandez v. State 368 So. 2d 606 Fla. 1970

472 So. 2d 882 Defendant is entitled to relief from judgment when state,

although not soliciting false evidence, allows false evidence to go

uncorrected when false evidence appears. Fla. App 4 Dist. 1970 Denson v. State 257 So. 2d 581

Allegation that prosecution knowingly used perjured testimony is sufficient to warrant relief on motion to vacate sentence.

33 F.S.A. RCrp 1.850

B. The New Evidence and the August 14, 2007 Statement of Doris Hixon Negates Her Testimony at Trial and supports that she committed nothing less than perjury.

At trial, Doris Hixon had no recollection whether the Department of Energy had information regarding a discrepancy regarding Defendant's date of birth following the BRI security investigation. Surprisingly, some seven months later, Hixon now has complete knowledge and specifically remembers that in April, 2004 she knew of the discrepancies in Defendant's date of birth and **"also informed the investigator of the inconsistency raised in the BRI regarding Mr. Salazar's date of birth."** (Exhibit B, Hixon Sworn Statement ¶ 14. as submitted prior to this Court) Notwithstanding her knowledge regarding the discrepancy in the date of birth, she apparently failed to document the employment records so that when Jean Stump, another Human Resources Specialist at the Savannah River Site, reviewed the personnel records, she would not have chosen the incorrect January 30, 1954 date of birth. It should be noted that Jean Stump verified Defendant's date of birth with personnel file records that Hixon failed to supplement on July 26, 2005, one month prior to Defendant's alleged false representation. However the new evidence shows that the retirement package had an affixed signature which was not that of the Defendant. This verification appears on the same document as Defendant's alleged false representation. (Exhibit C, Retirement Documents. As submitted prior to this Court). Moreover the new evidence shows that

these same persons submitted the retirement package weeks before the defendant signed it. (See exhibits B and C), and received by OPM on or about July 19, 2005.

Hixon's sworn statement, in and of itself, would not produce an acquittal. However, her sworn statement is inconsistent with her statement at trial and now also inconsistent with the records of fact. As an inconsistent statement, a jury would have had the authority to entirely disregard her testimony as not credible. As a result, the Government would have no direct evidence of the alleged false statement, because she was the witness who authenticated the document and explained the significance of the document to the jury. Without Hixon's testimony remaining credible, Defendant's conviction is in question. By disregarding Hixon's testimony as not credible, Defendant would have been acquitted, and/or the Court may have had sufficiency or been in a better posture to grant a motion to dismiss.

C. Defendant's Affirmative Defense of Entrapment by Estoppel Would Likely Have Resulted in an Acquittal.

At trial, Defendant requested a jury charge as to the affirmative defense of Entrapment by Estoppel. The Court denied this request because Defendant did not put forth affirmative evidence to establish that the Government condoned the use of the January 30, 1954 birthdate. "A criminal defendant may assert an entrapment-by-estoppel defense when the government affirmatively assures him that certain conduct is lawful, the defendant thereafter engages in the conduct in reasonable reliance on those assurances, and a criminal prosecution based upon the conduct ensues." *United States v. Aquino-Chacon*, 109 F.3d 936, 938-9 (4th Cir.1997) (citing *Raley v. Ohio*, 360 U.S. 423, 438-9, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959)). To assert the defense, a defendant "must demonstrate that there was 'active misleading' in the sense that the government actually told him that the proscribed conduct was permissible." *Id.* at 939 (citations omitted).

In the case at bar, if Hixon would have testified as she did in her affidavit, Defendant would have testified as to his conversation with Jean Stump regarding his birthdate on his retirement application, particularly because Hixon and likely Frizzell were aware of the birthdate discrepancies as personnel officers in the human resources department and because Defendant does not know his actual birthdate. (Exhibit D, Salazar Aff. ¶¶ 4-5. previously submitted to this court) With Stump indicating that the birthdate is correct for the purposes of retirement, Defendant reasonably relied on her assurances in signing his retirement papers with the DOE as contemplated by the settlement agreement. (Exhibit D, Salazar Aff. ¶ 6. submitted prior). However the fact that the retirement papers were submitted potentially without the defendant signature at all or potentially forged by the government, would also go to the intent of the government to mislead the Defendant and also go to a misconduct and malicious prosecution, but at this venture would have also clearly demonstrated and supported his affirmative defenses.

D. The New Evidence Negates the testimony of Lucy Knowles and where a jury could have found her testimony less than credible.

At trial Lucy Knowles stated that she had no involvement with the gathering of evidence or the prosecution of the case. The new evidence provided by the OPM shows differently. In fact, it demonstrates where Knowles presented herself as having authority of several facets of the government, where in fact she has none. She first represents herself as working for the Inspector General's office (See exhibit D); she then is recorded to be representing the interest of the US Attorney's office (See Exhibits E and F); She then is shown as the contact for the agency (See Exhibit G); She is also noted as preparing a settlement agreement for OPM (See Exhibit H); and then she is also shown to improperly stating that she is acting on behalf of the HR Director and is corrected in a letter from that Director to OPM (See Exhibit I). **All these inconsistencies of fact where withheld by the Government.** As Lucy Knowles was an important figure in question,

her credibility would have been nothing less than perjury and/or impeached, however the jury was not able to hear this evidence because it was again not provided in discovery. As with the information above this too falls under those same provision as cited above in violation of Brady and Giglio. The fact that Knowles willfully and knowingly perjured her testimony would have went to the credibility that Knowles did in fact knowingly directed the defendant to sign the retirement papers with the date of Birth of January 30, 1954, as alleged by the defendant, and further goes to bolster the Defendants affidavit submitted prior to this court. Additionally, the defendant recalls that Knowles also required that the defendant agree and sign to the terms which included that he use the date of birth chosen by the government. **This document was not provided by the government in discovery**, but IS mentioned in Roger Butlers testimony. The fact that this exculpatory evidence was withheld would have led to a different charge and view of Knowles testimony and raised a reasonable doubt as well.

It is the defendants contention that other exculpatory evidence may have been withheld: as much, if not all, of the evidence provided to the US Attorney's office was transmitted through Lucy Knowles office and control. In fact, the defendant contends that the latest of three birth registration submitted into evidence to this court at trial, may have come from Knowles directly as opposed to the custodian of record. If this matter bears out, it will not only further bolster the Defendants affirmative defenses and go further to undermine the Governments case-in-chief, but mostly goes to the fact that Knowles testimony is perjured, and the potential exist that the evidence presented by her may have been tampered while in her control, she is NOT removed from such acts as she has demonstrated that she has falsified her authority, documents, and position on many occasion and this one is not isolated.

V. Conclusion

For the above reasons, Defendant is entitled to a new trial.

RESPECTFULLY SUBMITTED, this 28th day of August 2008

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