IN THE COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

vs. : CP-51-CR-0002501-2014
ON REMAND FROM
SUPERIOR COURT NO.
SHERMAN McCOY 598 EDA 2017

CORRECTED MOTION FOR A NEW TRIAL FOLLOWING REMAND FROM SUPERIOR COURT

Defendant, Sherman McCoy, by his attorney, Karl Schwartz, respectfully requests that this Court vacate his judgement of sentence and conviction, and order a new trial, based on the following:

INTRODUCTION

This is a first-degree murder conviction that rests entirely on the alleged confession of the defendant, taken by Detective Phillip Nordo. Nordo has since been indicted for numerous counts of Official Oppression, Securing Execution of Documents by Deception, Involuntary Deviate Sexual Intercourse, Rape, and related charges. The charges against Nordo involve acts of oppression against numerous suspects and witnesses, over several years up to the present. During that period, Nordo committed a variety of criminal acts, including forcing, coercing and conning subjects of his interrogation to sign statements/75-483s that were not true recitations

of what they said.[1] None of these acts were known, or could have been known to McCoy at trial. Had they been known and presented, the trial court – which struggled over the issue of voluntariness even without evidence of Nordo's criminal conduct – would have granted the motion to suppress McCoy's alleged statement. A new trial is warranted.

A second newly discovered fact, revealed to counsel on ***April 24, 2019,*** provides an independent basis to grant a new trial. On that day, for the first time, the Commonwealth revealed that before trial, it applied for and obtained a grant of immunity under 42 Pa.C.S. § 5947, for a key suspect in the murder, Lester Lanier. Because Lanier was the only witness to implicate McCoy in the incident – in a statement to Nordo – and because Lanier's statement was the sole basis for the probable cause to arrest McCoy, defense counsel raised the Commonwealth's failure to call Lanier as a gaping hole in the Commonwealth's case. In response the prosecutor established (through Nordo) that Lanier was not called, because the only way Lanier could have been called would be if he had been granted immunity. 9/26/16 Tr. at 198. The implication was that Lanier, having not been granted

[1] The Commonwealth has provided a large assortment of evidentiary proffers, including witness statements, witness testimony, and a multi-count indictment referencing numerous victims of Nordo's criminal conduct; all tending to prove Nordo's pattern and practice of intimidating and coercing witnesses and suspects. These documents are collectively labeled as "Nordo Disclosure." They are paginated, and are cited as "ND" followed by page number.

immunity, could not be called. But Lanier ***had*** been granted immunity; the prosecutor knew it; indeed, the Commonwealth ***had requested*** it. McCoy's defense counsel had been kept in the dark.[2]

STATEMENT OF THE CASE

1. On September 20, 2016, trial commenced in the Philadelphia Court of Common Pleas in the above-captioned matter. Prior to trial, on the same date, defense counsel litigated a motion to suppress an October 15, 2013 confession allegedly made by McCoy to Philadelphia Police Detective Phillip Nordo. The confession was the only evidence in the case connecting McCoy to the crime.

The Motion to Suppress

2. Trial counsel contended that the statement and the *Miranda* waiver that accompanied it, were neither knowing, intelligent or voluntary. He based his argument in part on McCoy's cognitive impairment, Nordo's conduct during his interactions with McCoy, and Nordo's insistence that he observed no evidence of that impairment. Trial counsel introduced educational and psychological records that revealed consistent diagnoses of Intellectual Disability for McCoy from his young childhood through the time of trial.

[2] The undersigned is in the process of obtaining a Declaration from defense counsel, Jack McMahon, declaring that the immunity order was never disclosed to him.

3. On October 3, 2013, Nordo's trusted civilian informant told him that Lester Lanier and a second male (not McCoy) confessed to her that they were the two shooters in the murder. 9/26/16 Tr. at 90-91; 206; Activity Sheet of October 3, 2013.

4. Nordo also knew that Lanier had been victimized in a home invasion the day before, allegedly perpetrated by the decedent. *Id.* at 71-79. The home invasion suggested a motive for Lanier. *Id.*

5. On October 8, 2013, Nordo brought Lanier in for questioning. Lanier was being held at a detention facility on another matter. 9/26/16 Tr. at 83. Lanier denied involvement in the murder, and instead implicated McCoy as a shooter.

6. McCoy was brought in to the Homicide Unit on October 15, 2013, and placed in an interview room with a table and chair. He remained there for 10 & ½ hours, from 8:15 pm until 6:45 am the following morning, before being interrogated. *Id.* at 98-102.

7. Nordo arrived at the Homicide Unit and began interrogating McCoy at 6:45 am. *Id.* at 45. Nordo testified that he did not notice that McCoy was in any way slow or anything of the sort. *Id.* at 93. In fact, Nordo insisted that his conversation with Mr. McCoy "was like me and you [defense counsel Jack McMahon] are speaking right now." *Id.* at 108.

8. Nordo testified that he spoke with McCoy for an hour and fifteen minutes before he began to type up a formal statement. 9/20/16 Tr. at 56. At trial Nordo admitted that during this hour-and-fifteen-minute period, he did not administer the warnings until *after* McCoy confessed his involvement in the incident. 9/26/16 Tr. at 99.

9. Nordo testified that he obtained a confession from Mr. McCoy, in which McCoy admitted to knowing about Lanier's and another person's plan to kill the decedent, to "walking fast behind" the decedent just before he was killed, to being in possession of a firearm that he never shot, and to witnessing Lanier and the other person shoot the decedent several times. 9/26/16 Tr. at 11-14.

10. The alleged confession, including biographical information, totals 6 pages. When handed the document for review, McCoy spent 27 minutes with it before returning it to Nordo. 9/20/16 Tr. at 74-75. Nordo testified that he had "an idea" that McCoy – whose literary comprehension was that of a third or fourth grader and whose cognitive ability was in the extremely low range – was in fact reading, because McCoy told him that he could read. *Id.* at 105.

11. Nordo then had McCoy sign the Statement Attestation form. *Id.* at 104. This was done at 10:55 am, over four hours after Nordo began interrogating McCoy. 9/26/16 Tr. at 159. Defense counsel pointed out that the form includes phrases such as "hereby adopt," "verbatim," and "verify." 9/20/16 Tr. at 104. Nordo responded

that he "always explain[s]" the form to defendants (*id.* at 111) and did so in this case. *Id.* at 104. There was no evidence that McCoy gave any response indicating that he understood Nordo's explanation.

12. Although the trial court (Geroff, J.) found that McCoy was cognitively disabled (*id.*,148), and found the decision a "difficult" one (*id.*,181), the court denied suppression.

Failure to Disclose the Immunity Agreement

13. At the pretrial hearing on the defense motion to suppress, Nordo testified that when he brought Lanier in for questioning on October 8, 2013, he "didn't necessarily have an idea that" Lanier had been involved in the murder. 9/20/16 Tr. at 83. Nordo was lying to the Court. As discussed above, five days earlier, Nordo's trusted civilian source revealed to him that Lanier and another man (not McCoy) had confessed to being the two shooters in the case. 9/26/16 Tr. at 90-91; 206; Activity Sheet of October 3, 2013. Nordo's source never mentioned McCoy. *Id.*

14. On February 24, 2014, at the Commonwealth's request, the Hon. Benjamin Lerner, of the Court of Common Pleas, granted Lester Lanier immunity, pursuant to 42 Pa.C.S. § 5497, for his testimony against defendant McCoy during any proceeding relating to the instant charges. Ex. 1. It was not until April 24, 2019,

that the Commonwealth first informed the defense about Lanier's immunity order. Defense counsel at trial was never provided with this information.

15. In its petition for immunity of February 24, 2014, the Commonwealth argues that "[t]he testimony of Lester Lanier is necessary to the public interest," since ***"Lanier witnessed the defendant [McCoy] and others shoot and kill [the decedent].*** *Id.* (emphasis added).

16. Just as Nordo knew this representation was false, so too did the Commonwealth. Nordo's trusted source had confirmed this; and as discussed below, the Commonwealth did an about-face at trial, completely distancing itself from Lanier's accusation.

17. During trial, defense counsel argued that the Commonwealth's failure to call Lanier – whose false accusation against McCoy led to McCoy's arrest and prosecution – was a fatal flaw in the Commonwealth's case. 9/26/16 Tr. at 195-96; 9/27/16 Tr. at 75-77.

18. In response, the prosecutor elicited from Nordo that Lanier was not called, because to call Lanier the Commonwealth would have had to grant him immunity. 9/26/16 Tr. at 197. The prosecutor did not take that opportunity, nor any other opportunity during the trial, to inform defense counsel that the Commonwealth had in fact obtained a grant of immunity for Lanier.

Relevant Procedural History

19. On September 28, 2016, the jury convicted McCoy of First Degree Murder, Conspiracy and PIC. On January 26, 2017, he was sentenced to life without parole on the First Degree Murder conviction, and received no further penalty on the remaining charges.

20. McCoy filed an appeal to the Superior Court in which he raised a number of issues, including a challenge to the voluntariness of his alleged confession and *Miranda* waiver.

21. Shortly before the July 30, 2018 Opening Brief was filed, on July 3, 2018, an article appeared in Phillynews.com, discussing a Philadelphia trial court's dismissal of a murder case based on Nordo's misconduct, which included taking the lead in drafting a statement from a man who had trouble reading and appeared slow intellectually, and simply getting the man to agree to it.

22. After learning that Nordo had allegedly gotten another intellectually impaired man to simply agree to a statement, the undersigned sought a remand to the trial court pursuant to Pa. R. Crim. P. 720(C)). There, McCoy would seek *Brady* discovery relating to Nordo's misconduct and litigate a motion to vacate judgement and grant a new trial. Ultimately, on January 24, 2019, the case was remanded for consideration of the issues relating to Detective Nordo. Thereafter, on February 19,

2019, Nordo was arrested and charged with multiple acts of rape, intimidation of male witnesses and suspects, and related charges.

I. CONCERNING THE NORDO EVIDENCE, MCCOY SATISFIES BOTH THE AFTER-DISCOVERED EVIDENCE STANDARD AND THE *BRADY* STANDARD, AND SHOULD BE AWARDED A NEW HEARING ON HIS MOTION TO SUPPRESS AND A NEW TRIAL

After-Discovered Evidence Standard

23. A defendant who discovers new evidence during the appeal process must raise it promptly and request a remand to the trial judge. *Commonwealth v Rivera*, 939 A.2d 355, 358 (Pa. Super. 2007). Mr. McCoy did so here. He raised the issue in the Superior Court within one month of the *Powell* decision. OB13. Seventeen days later he filed his Motion for Remand.

24. To obtain a new trial based on after-discovered evidence, a defendant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted. *Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008). McCoy satisfies each of these prongs.

25. First, when McCoy was tried in 2016, the defense could not have been aware of Nordo's serial acts of egregious criminal misconduct, not to mention, acts of misconduct relating to shaping and confabulating statements from intellectually

impaired suspects. This evidence could not have been obtained prior to the conclusion of the trial. Second, the Nordo evidence is not cumulative. There was no evidence presented at trial that touched on the issue of Nordo's willingness to intimidate, influence, and coerce suspects, nor his pattern and practice of doing so. Third, the Nordo evidence would not be used solely to impeach. In *Commonwealth v. Rivera*, 939 A.2d 355, 357 (Pa. Super. 2007), following the appellant's trial, the police laboratory technician who performed a drug analysis introduced at trial, had been charged with stealing drugs from the lab. The Superior Court held that these accusations did "much more than simply impeach the testimony" of the witness, and called into "serious question" the substance of her testimony. *Id.* at 359. The Court asked "[w]ho knows whether [her testimony] was or was not a truthful rendition of her "so-called" expert testimony." *Id.* The numerous allegations of Nordo's improper and criminal interactions with suspects and witnesses, as well as Judge Anhalt's finding that he used his own words instead of the witness's words in an alleged statement, poses the identical question in this case: "Who knows whether Nordo's testimony was or was not a truthful rendition" of his encounter with Mr. McCoy? Fourth, Mr. McCoy's confession was the only evidence of guilt. Accordingly, there is a likelihood of a different result had the Nordo evidence been introduced.

***Brady v. Maryland* Standard**

26. The separate *Brady* analysis is similar, although not identical to the final after-discovered evidence prong. The *Brady* standard, however, is less stringent, requiring the defendant to prove only that had the evidence been disclosed, there is reasonable probability of a different result. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (the "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.").

27. *Brady* applies to suppression hearings. *See Nuckols v. Gibson*, 233 F.3d 1261, 1266-67 (10th Cir. 2000) (where defendant alleged *Miranda* violation, *Brady* violation found where "prosecution withheld evidence that would have allowed defense counsel the means to test [police officer's] credibility"). "The suppression of material evidence helpful to the accused, whether at trial ***or on a motion to suppress***, violates due process if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *United States v. Gamez-Orduno,* 235 F.3d 453, 461 (9th Cir. 2000) (emphasis added). *See also Smith v. Black*, 904 F.2d 950, 965-66 (5th Cir. 1990) (upon the "state's failure to disclose material evidence prior to a suppression hearing[,] the

appropriate assessment for *Brady* purposes [is whether nondisclosure] affected the outcome of the suppression hearing."

28. Failure to disclose *Brady* material requires a new hearing and trial where "'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Simmons v. Beard*, 590 F.3d 223, 233 (3d Cir. 2009) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985). Materiality is established where the nature and quality of that evidence would have created a reasonable probability of a different result by raising a reasonable doubt about the defendant's guilt. *See United States v. Agurs*, 427 U.S. 97, 112 (1976) ("It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed"); *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (prejudice exists where there is a reasonable probability that new evidence would lead the jury to have a reasonable doubt about defendant's guilt).

The Nordo Evidence Presents a Reasonable Likelihood of a Different Result

29. Under both the after-discovered evidence and *Brady* standards, the evidence of Nordo's rampant misconduct warrants a new trial. Judge Geroff struggled with the decision on the motion to suppress even in the absence of evidence of Nordo's pattern and practice. 9/20/16 Tr. at 181. Even the trial colloquy demonstrated a degree of impairment that caused the judge to remark "I know you

have some problems understanding," (*id.* at 6) and required him to allow counsel to consult with McCoy following basic questioning. For example, McCoy was asked whether he was under the "influence of drugs or alcohol or prescribed medication?" 9/20/16 Tr. at 4. Misunderstanding that question, McCoy responded that he was under the influence of "K2 and weed." *Id.* Counsel was called upon to clarify the answer, and did so. *Id.* McCoy was then asked whether his medications for multiple sclerosis interfere with his ability to understand things, to which he initially responded "They don't understand." *Id.* at 6. Once that answer was clarified, McCoy was asked if the Commonwealth had made a plea offer in the case. *Id.* at 7. In response, he indicated that he did not understand that question. *Id.* Again, he was permitted to consult privately with counsel so that this question could be explained in a way that he could comprehend.

30. The abundant evidence that now exists of Nordo's chronic practice of coercing and confabulating statements of witnesses and defendants, proffered here and incorporated in this pleading, would have created a reasonable probability of a different result; that is, suppression of the statement. Although the attached Nordo Disclosure ("ND") leaves little doubt that the Commonwealth was aware of Nordo's criminal activity since at least 2005, even if it had not been, *Kyles* makes clear that *Brady* is violated when exculpatory evidence known only to the police (in this case Nordo) is withheld. 514 U.S. at 437. Nordo failed to disclose these practices – many

of which predated McCoy's trial – and thus, McCoy was unable to utilize the exculpatory evidence during the motion to suppress and at trial.

31. When Judge Geroff denied suppression, he was not aware of Nordo's egregious serial acts of intimidation and rape of witnesses, nor was he aware of Nordo's practice of influencing witnesses, and shaping and confabulating their statements. That changed for Judge Geroff last month, in another Nordo case in which Nordo was alleged to have shaped a statement, resulting in a murder conviction. Judge Geroff, when apprised of the Nordo *Brady* material in that case, vacated a murder conviction. https://www.philly.com/news/overturned-philadelphia-murder-convictions-philip-nordo-larry-krasner-20190121.html (last checked February 12, 2019).

32. In addition to Nordo's 2017 suspension, and Feburary 19, 2019 arrest, and the sheer multitude of acts of official oppression, the Philadelphia Court of Common Pleas (Anhalt, J.), recently dismissed all charges in the case of *Commonwealth v. Powell,* in which Nordo took an incriminatory statement from co-defendant Quinton Jones, who the court found to be "very slow intellectually," under strikingly similar circumstances to those under which Nordo secured Mr. McCoy's alleged confession. ND181. Nordo asserted his Fifth Amendment right and refused to participate in the pretrial proceeding in which the charges were dismissed on due process grounds. ND176.

33. The evidence at the pretrial hearing in *Powell* established that Nordo made phone calls and unauthorized visits to incarcerated Commonwealth witnesses and placed money on their prison accounts. ND175; ND177. Nordo also had unauthorized contact with a judge, seeking the pretrial release of an incarcerated witness. ND177. He lied about prior relationships with various witnesses, whom he claimed to have met only in the course of his investigation of Powell and codefendant Jones. *Id.* One of these witnesses can be heard, on recorded prison phone calls, telling Nordo that he loves him and referring to the detective as "Coach." ND177.

34. Many of the animating considerations informing Judge Anhalt's ruling apply to McCoy's interrogation.

35. Jones (the co-defendant in Powell), like McCoy, is limited intellectually. *See* ND174-75 (demonstrating that Jones received Social Security disability for "limited intellect"). After viewing Jones' videotaped confession, Judge Anhalt concluded that his alleged statement was "Nordo's words" not Jones'.

> And Quinton Jones appears to be very slow intellectually, admits to being on drugs or having problems reading or something like that, and it's all very suspect. [] And really, the words that are coming out of this statement are Nordo's words, not Mr. Jones, he is kind of like going along with it. It's very uncomfortable to watch in terms of the—it's just a suspect statement.

ND178. McCoy's interaction with Nordo was not videotaped; however, Nordo's insistence to Defense Attorney McMahon that that his conversation with McCoy

"was like me and you are speaking right now," 9/20/16 Tr. at 108, is equally "uncomfortable" to consider, let alone accept, in light of McCoy's Intellectual Disability. So too is Nordo's confidence that McCoy understood the terms in the Statement Attestation, in the absence of any indication from McCoy that he did, and Nordo's certainty that McCoy was actually reading and understanding the 6-page statement for the 27 minutes he spent with it.

36. Both Jones and McCoy were held in custody for prolonged periods of time before their alleged statements were reduced to writing, in Jones' case for 17 hours (ND276), in McCoy's case, for 10 & ½ hours. 9/20/16 Tr. at 99-102. For a person with a "diminished ability to understand and process information[and] engage in logical reasoning," *Atkins*, 536 U.S. at 320, being held as Mr. McCoy was, through the dead of night, would certainly make such a cognitively disabled person more susceptible to suggestion.

37. In both cases, the way in which the *Miranda* warnings were administered raised serious questions. In McCoy's case, Nordo wrote McCoy's alleged responses to the *Miranda* questions for him. 9/20/16 Tr. at 55. In Jones' case, although Nordo first had contact with Jones at 9:17 p.m., he did not provide Miranda warnings until over five hours later. ND277; ND279.

38. Nordo conducted lengthy unrecorded discussions with both of these two cognitively impaired men before typing up their purported statements. *See*

ND274; ND277-78 (Jones "statement" begins to be typed up five hours after initial contact with Nordo); NT, 9/20/16 at 56 (McCoy "statement" begins to be typed up following one hour and 15 minutes of conversation with Nordo). In McCoy's case, this pre-documentation discussion included an alleged confession to involvement in the crime, ***before*** any *Miranda* warnings were administered. *See* NT, 9/26/16 at 99 (Q: "[Y]ou gave the warnings, as you said to Mr. McCoy. Correct? A: "Absolutely, after he told me he was involved in the crime."). According to Nordo's preliminary hearing testimony, Jones originally gave a different version of the events in question, which was consistent with his innocence. ND274. However, Nordo did not contemporaneously reduce Jones' initial, exculpatory statement to writing. ND278. Thereafter, between 2:00 a.m. and 3:00 a.m., Nordo testified that he talked to Jones "again". *Id.* Only then, at 2:55 a.m., over five hours after his initial contact at 9:17 p.m., did Nordo give Jones *Miranda* warnings and begin to type the formal statement. *Id.*

39. Nordo's habit of questioning suspects without giving them Miranda warnings repeated itself several times during the investigation that led to McCoy's arrest. Even after his source told Nordo that Lanier confessed to shooting the decedent, Nordo questioned Lanier without warnings. 9/26/16 Tr. at 96-97. The same source also told Nordo that a second person also confessed. That person was

Rashawn Mack. After Nordo instructed other officers to bring Mack in, he also questioned Mack without warnings. 9/26/16 Tr. at 140, 142.

40. Finally, in both cases, there were long periods between the administering of the *Miranda* warnings and the completion of the alleged formal written statement. *See* ND276-77 (13 hours for Mr. Jones); 9/26/16 Tr. at 159 (approximately 4 & ½ hours for McCoy).

Impact of Nordo Evidence on Trial

41. For the same reasons set forth above at ¶¶ 30-40, even if the alleged confession had been admitted, there is a reasonable probability that McCoy would have been acquitted. No twelve jurors, presented with the evidence of Nordo's multiple instances of official coercion, sexual brutalization and confabulation of statements and confessions – in addition to the circumstances discussed at ¶¶ 30—40 – would have found the alleged confession to be reliable.

In a case wholly reliant upon the integrity of the interrogating officer – ***integrity which the prosecutor vouched for***[3] **-** this wealth of highly relevant and highly disturbing evidence of pattern and practice compels the grant of a new trial.

[3] *See* 9/27/16 Tr. at 11 (citing Nordo's "20-plus years" and assuring the jurors that he does not "manipulate" his subjects)

II. THE COMMONWEALTH'S FAILURE TO DISCLOSE THE LANIER IMMUNITY AGREEMENT VIOLATED BOTH *BRADY* AND *NAPUE,* AND SEPARATELY WARRANTS A NEW TRIAL

42. There may be any number of reasons why a prosecutor might have chosen not to call Lester Lanier: The Commonwealth may have been unable to locate him; or may have decided that he would make a poor witness; or may have feared that defense counsel could have gotten Lanier to admit to being the killer. But the reason could not have been, as the prosecutor asserted, because Lanier needed immunity. 9/26/16 Tr. at 197. He already had immunity. The prosecutor knew it, since the immunity order was in his file, and immunity had been granted over two-and-one-half (2 & ½) years earlier. When the prosecutor suggested otherwise, and kept trial counsel in the dark about the immunity order, he violated *Brady v. Maryland,* 373 U.S. 83 (1963) and *Napue v. Illinois,* 360 U.S. 264 (1959).

The *Brady* and *Napue* Standards

43. [McCoy incorporates here his discussion of *Brady,* as set forth above at pp. 10-12.]

44. Additionally, a prosecutor who fails to correct testimony that he knows to be false violates due process. *Napue v. Illinois,* 360 U.S. 264 (1959). A more defense-friendly materiality standard than *Brady* applies when the prosecutor knowingly conveys, or fails to correct, false information to the jury. When that occurs, the proper materiality standard is that of *Bagley,* 473 U.S. at 678-79 & n.9,

and *United States v. Agurs*, 427 U.S. 97, 103 (1976), which require the Commonwealth to show that the error is *harmless beyond a reasonable doubt*. *See United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (quoting *Agurs*) (when the prosecutor knowingly conveys false information to the jury, the falsehood is material "if there is any reasonable likelihood" it "could have affected the judgment of the jury," requiring the government to show "harmless[ness] beyond a reasonable doubt").

45. Here, McCoy is entitled to a new trial either under *Brady* or the more relaxed standard of *Napue*.

The Commonwealth Violated *Brady*

46. Trial counsel presented evidence and argument that because this prosecution was initiated on the word of a witness like Lester Lanier, it should not be trusted. He argued that Lanier's motive, self-interest, and confession to Nordo's civilian witness, all rendered highly suspect the Commonwealth's faith in Lanier's accusation that McCoy shot the decedent.

47. The prosecutor countered by insisting that the Commonwealth never had any faith in Lanier's accusations against McCoy. *See* 9/27/16 Tr. at 110 ("That is one thing counsel and I can agree on. Lester Lanier did not tell the truth to Detective Nordo."). Indeed, in closing argument the prosecutor ran from the Commonwealth's earlier assertion in the immunity petition that McCoy was the

shooter.[4] Instead, he argued that McCoy was only liable as an accessory. *Id.* at 137-140.

48. The prosecutor could only deny trial counsel's charge that the Commonwealth relied on Lanier's accusation "hook-line-and-sinker," because the prosecutor suppressed from trial counsel the immunity petition (by suggesting it simply did not exist). Defense counsel never learned that his defense was corroborated by an immunity petition sitting in the prosecutor's file.

49. The suppression of this *Brady* material allowed the Commonwealth to falsely undermine McCoy's defense, by insisting in closing argument that all-along no one, least of all the Commonwealth, thought "that the words that go down on paper from Lester Lanier [were] the truth." *Id.* at 110. Had trial counsel obtained this *Brady* evidence, he would have been able to prove his theory that the Commonwealth's prosecution was built on a falsehood; a falsehood that even the Commonwealth had to acknowledge in closing argument.

The Commonwealth Violated *Napue*

50. The prosecutor also violated *Napue*. He did so by presenting evidence that Lanier needed (and by implication did not yet have) immunity to testify. 9/26/16

[4] As noted above, that representation was that "Lanier witnessed the defendant [McCoy] and others shoot and kill [the decedent]." The Commonwealth's representation could only have been based on Lanier's statement, as there was no other proof of it.

Tr. at 197. In fact, Lanier had been granted immunity two-and-one-half (2 & ½) years earlier. The prosecutor's representation to the contrary was both false and prejudicial.

51. The defense position, as argued in closing, was that

> [the Commonwealth did not] want to put Lester Lanier on the stand. They [did not] want to put him on the stand. They [did not] want to subject him to examination because that might add to finding out what the truth is. That may help you [the jury] decide what the truth is, to listen to him and get to see him, get to feel him and me ask him questions. You might have a better idea of what happened in this case.

9/27/16 Tr. at 76. But that reasonable and plausible theory was obliterated by the Commonwealth's deceit regarding immunity. According to the Commonwealth, the simple reason that Lanier was not called was that he needed immunity and did not have it. It had nothing to do with the fact that he would have made a terrible witness and might have decimated the Commonwealth's case. Defense counsel, unaware that Lanier had been granted immunity, had no effective response to this.

52. While it was certainly tactically advantageous for the prosecutor to conceal from the defense Lanier's grant of immunity, it was a misrepresentation that violated due process and *Napue,* and prejudiced the defense. Had defense counsel not been deceived, he would have been able to establish that the Commonwealth declined to call Lanier for the very reasons he suggested, and not for any want of immunity.

* * * * *

53. One final point: The immunity petition reflected and perpetuated Nordo's perjurious testimony that the Commonwealth "didn't necessarily have an idea" that Lanier was involved in the murder (i.e., he was just a witness). In that regard, the *Brady*/After-Discovered evidence of Nordo's misconduct and deceit is highly relevant to both McCoy's defense as it relates to the false representation in the immunity petition and to this claim (i.e., suppression of the immunity petition). Thus, the formerly undisclosed Nordo evidence provides a separate and distinct basis for the grant of a new trial. It would have supported a defense theory that a prosecution based on the twin pillars of Lanier (with his background) and Nordo (with his) should not be credited by the jury.

54. On these bases alone, and the due process violations they present, a new trial is required.

III. ALTERNATIVELY, A NEW TRIAL SHOULD BE GRANTED IN THE INTEREST OF JUSTICE

55. For all of the reasons set forth in Sections I & II of this Motion, McCoy has established his right to a new trial.

56. However, if this Court should determine that under the Pennsylvania standard for after-discovered evidence, and/or under *Brady* and *Napue*, he has not, McCoy respectfully contends that a new trial is warranted in the interest of justice. A trial court has an "immemorial right to grant a new trial, whenever, in its opinion,

the justice of the particular case so requires." *March v. Philadelphia & West Chester Traction Co.*, 132 A. 355, 356 (Pa. 1926). "This concept of 'in the interest of justice' is merely a recognition of the trial court's discretionary power to ensure the fairness of the proceedings [and] the scope of a trial court's discretionary powers to deal with the factual circumstances it confronts is broad." *Commonwealth v. Powell*, 590 A.2d 140, 1243-44 (Pa. 1991).

57. At a minimum, this Court knows that the only evidence tying McCoy to the incident in this case is the testimony of a detective with as florid a history of coercing and confabulating confessions as any police official in recent memory. This Court also knows that a member of this Court, before this history was exposed, found that this practice extended to leading a cognitively challenged witness to say what the detective wanted him to say; and that after it was exposed, a second member of this Court (the trial judge below) found that Nordo shaped another interrogee's statement. As discussed above, the parallels between the former case and this case are striking, and at the very least deserve to be re-visited at a new hearing on a motion to suppress and trial, where all of the relevant evidence can be developed and presented.

CONCLUSION

Based on all of the foregoing reasons, McCoy has made the necessary showing to warrant vacating his convictions and sentence, and to be granted a new trial. Had Judge Geroff heard the abundant evidence of Nordo's utter willingness to intimidate and brutalize witnesses and suspects, and shape and confabulate their statements, especially in the case of a cognitively impaired person, he would have granted suppression. Had the jury heard the same evidence, it would have discarded Nordo's testimony in its entirety. A new trial should be granted.[5]

Respectfully Submitted:

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Dated: April 30, 2019

[5] For several months the Homicide File in this case has been missing. It was only very recently discovered, and only produced for the District Attorney's Office yesterday, April 29, 2019. Based on discussions with the prosecutors, it appears that there may be additional *Brady* material yet to be disclosed. The undersigned has requested that the Commonwealth, as quickly as possible, provide that additional *Brady* material. The Commonwealth has agreed to do so.

VERIFICATION

The facts set forth in the foregoing are true and correct to the best of the undersigned's knowledge, information and belief, and are verified subject to the penalties for unsworn falsification to authorities under Pennsylvania Crimes Code Section 4904 (18 Pa.C.S. §4904).

s/*Karl Schwartz*___
Karl Schwartz, Esq.

Date: April 30, 2019