UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CRIMINAL NO. 99-10098- RGS

UNITED STATES OF AMERICA

v.

DAVID TURNER
WILLIAM MERLINO
CARMELLO MERLINO
STEPHEN ROSSETTI

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR A NEW TRIAL

March 4, 2005

STEARNS, D.J.

This is another case in which the Boston office of the Federal Bureau of Investigation (FBI) is accused of undermining a defendant's right to a fair trial by attempting to conceal the identity of one of its confidential informants.[1] Because the information provided by the informant was usable in only a limited sense, and was cumulative of other evidence offered at trial, no violation of the constitutional guarantee of due process occurred, and the motion for a new trial will be denied.

BACKGROUND

In the fall of 2001, after a month-long jury trial, defendant David Turner, together with codefendants Carmello Merlino, Merlino's nephew William Merlino,[2] and Stephen

[1]David Turner is the movant on the motion for a new trial. The court allowed motions filed on behalf of Carmello Merlino and Stephen Rossetti to join in Turner's motion, although neither of these defendants have filed briefs. Defendant William Merlino also seeks a new trial, but on different grounds. His motion will be addressed separately.

[2]I will refer to Carmello Merlino, who is the more significant figure, as Merlino.

Rossetti, were convicted of conspiring to violate the Hobbs Act in connection with the attempted robbery of a Loomis Fargo armored car facility in Easton, Massachusetts. The defendants were also convicted of various firearms offenses, the most serious of which involved the possession of a live hand grenade. On November 5, 2003, Turner was sentenced to a total of 460 months in prison.

While the trial was lengthy, the essentials of the case insofar as the motion for a new trial is concerned can be sketched briefly as follows. Merlino, who over several decades had earned a reputation as a professional criminal, had become a "person of interest to the FBI" in the March 18, 1990 theft of thirteen old master paintings from the Isabella Stewart Gardner Museum in Boston. David Turner, an understudy of Merlino's, was also suspected of having played a part in the robbery. Merlino, who was obsessed with the $5 million reward that had been offered for the return of the paintings, let it be known that he had access, if not to the paintings, at least to the persons who did. Among those in whom he confided was Anthony Romano, a former prison acquaintance for whom he had obtained a job at TRC Auto Electric (TRC) in Dorchester, where Merlino was employed. Unbeknownst to Merlino, Romano was simultaneously working as an informant for the FBI.

How Romano became leagued with the FBI is of some significance to the present motion. In 1996, while still in prison, Romano contacted FBI Special Agent David Nadolski with information regarding the theft of antique books from the John Quincy Adams Library in Quincy, Massachusetts. The tip eventually led to the conviction of the thief and the recovery of the books. In August of 1997, Romano provided Nadolski with information

regarding the Gardner Museum robbery (the information did not implicate either Merlino or Turner). In the fall of 1997, after Romano was released on parole, Nadolski introduced him to Special Agent Neil Cronin, who was then handling the investigation into the Gardner robbery.[3] Romano told Cronin that he believed that Merlino, and possibly Turner, had been involved in the theft of the paintings. He also explained that he had a job working with Merlino at TRC. Cronin asked Romano to "keep his ears open." He also asked him to report any meetings between Merlino and Turner at TRC.

Towards the end of October of 1997, Romano informed Nadolski that Merlino had broached the idea of robbing the Loomis Fargo facility in Easton and had asked Romano to recruit an "insider" to facilitate the scheme. Romano testified that the robbery was a recurring topic of conversation with Merlino during the ensuing year. Romano also continued to feed underworld gossip to Cronin regarding the Gardner Museum robbery. In November of 1998, as Merlino's interest in the Loomis Fargo robbery appeared to grow, Romano agreed to become an "enrolled" FBI informant and to secretly record his conversations with Merlino. He also agreed to Nadolski's suggestion that he feign a connection with an "insider" employee at Loomis Fargo.[4] Over the next two months, Romano recorded some eighteen conversations, mostly with Merlino. The recordings were damning. In broad detail, as Merlino refined the plans for the robbery, he discussed the size of the "crew" that would be needed (Merlino thought at least four to "carry the bags"),

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[3]Cronin died tragically in a vehicle accident in September of 2003. Prior to his death, however, he testified at an evidentiary hearing on Turner's motion for a new trial.

[4]Nadolski's original plan (which was later abandoned) was to have Romano introduce Merlino to an FBI undercover agent posing as a Loomis Fargo employee.

the need to acquire stolen cars and license plates (car theft was apparently one of Romano's specialties), the pros and cons of taking the Loomis Fargo guards hostage, and the protocols involved in splitting the proceeds of the robbery. On December 1, 1998, Merlino brought up the subject of guns, which he later expanded to include machine guns and grenades. On December 13, 1998, after having discussed the merits and shortcomings of various candidates, Merlino told Romano that he had settled on Turner and Rossetti. On January 6, 1999, Merlino reported that Turner, who had been incommunicado during the previous month, had finally returned his telephone calls. He also told Romano that he and Turner had "cased" the Loomis Fargo facility together in early 1998. Planning continued over the next month, culminating in a pre-robbery meeting of all four defendants and Romano at a restaurant in Dorchester. On February 7, 1999, the appointed day, the defendants were arrested as they converged on TRC, the designated assembly point. Among the items recovered from a car driven by Turner and Rossetti were ski masks, a police scanner, a "clean" cellular telephone, five hand guns, a rifle, and a fully armed fragmentation grenade.

Anthony Romano, as it turned out, was not the FBI's only informant. In early January of 1998, Cronin was introduced by a supervisory agent to Richard ("Fat Ritchie") Chicofsky, an FBI informant who claimed to have information about the stolen Gardner paintings. According to Chicofsky, Merlino had access to the paintings through Carl Benjamin, one of his longtime criminal associates. Between January and July of 1998, Cronin dictated forty FBI 302 reports summarizing information provided by Chicofksy, most of which related to a plan hatched by Merlino to cash in on the $5 million reward for

information leading to the recovery of the paintings. To the extent that Chicofsky's reports of his conversations with Merlino were accurate, Merlino spoke knowledgeably about the robbery (identifying several of the stolen paintings by name and artist). Although on occasion Merlino implied that he had been physically in the presence of at least one of the paintings, it is clear from the totality of the Chicofsky reports that Merlino did not know where the paintings were hidden, but believed that Martin Leppo, an attorney with whom he was acquainted, knew people who did. (Leppo represented two well-known art thieves, Myles Connor and William Youngworth).[5] Merlino's increasing frustration with Leppo also emerges from Chicofsky's account of their conversations. (At one point, Merlino expressed concern that Leppo was trying to exclude him from a share of the reward). By the spring of 1998, Merlino had reluctantly concluded that he had been misled by Leppo, and that neither Connor nor Youngworth had the ability to produce the paintings. On May 4, 1998, Merlino told Chicofsky that the return of the paintings "will happen when it happens." Chicofsky's reports on the subject thereafter dry up with one exception – on July 13, 1998, Chicofsky related a meeting between Merlino and a suspected art thief and a vow on Merlino's part to produce one of the paintings on Thursday that week.[6]

Turner's name figures in five of the Chicofksy reports. On January 7, 1998, Chicofsky speculated that Turner and three other members of Merlino's "crew" had

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[5]It is possible that Connor and Youngworth were seeking to swindle the Museum of the reward money, and were using Leppo as an intermediary to give the hoax a veneer of credibility.

[6]Despite the report, Cronin took no special measures to keep track of Merlino's movements.

"possibly" participated in the Gardner robbery. The following day, Chicofsky expressed the fear that Merlino would have Turner kill him or his daughter if Merlino thought he had done anything that might undermine the scheme to collect the reward. On March 25, 1998, Chicofsky submitted two reports mentioning Turner. In the first, Chicofsky reported that Merlino had promised to organize a meeting with Leppo and Turner to discuss the return of the paintings. In the second, Chicofsky reported that Turner's share of the reward would come from the $2 million that had been allocated to Leppo. In the last of the reports mentioning Turner, dated April 3, 1998, Chicofsky reported being asked by Turner if he (Chicofsky) would "be willing to do something with me, [to] work with me?" Chicofksy interpreted this remark as an allusion to the return of the paintings.

That Cronin was interested in Merlino as a potential intermediary in the recovery of the paintings was no secret to anyone, including Merlino. In early January of 1998, after Cronin was introduced to Chicofksy, he obtained an immunity letter from the United States Attorney assuring both Merlino and Chicofsky that nothing learned from them about the missing paintings would be used against them in a prosecution. Cronin the same day delivered the letter in person to Merlino. Cronin met with Merlino on three occasions (in November of 1997, and in January and April of 1998) in the effort to enlist his cooperation.[7] Merlino – who had a preternatural obsession with informants – was almost certainly aware of the fact that Chicofsky was communicating directly with Cronin. Moreover, in all probability, Merlino was using Chicofsky as a conduit to Cronin. Nor was

[7]Agent Nadolski accompanied Cronin during the first and last of these meetings (which occurred on April 22, 1998). According to Nadolski's trial testimony, Merlino told Cronin that if he knew where the paintings were he would tell.

the fact of Chicofsky's existence kept a complete secret from the defense. In answering Turner's discovery requests, the government disclosed that on a number of occasions an "official FBI source" had provided information connecting Merlino to the Gardner paintings. Turner never sought to compel the production of any of this information or the disclosure of the identity of the "official source." Where the government went wrong was in stating that none of this information referenced Turner, when in fact, as previously indicated, five of the Chicofksy 302 reports did.[8] This failure to disclose information that Turner argues was exculpatory forms the basis of the motion for a new trial.[9]

DISCUSSION

To follow Turner's argument, it is necessary to have an understanding of his entrapment defense. Entrapment, as defined in the law, requires a showing by a defendant that a corrupt inducement offered by a government agent (and not his own predisposition) instigated the crime. See United States v. Espinal, 757 F.2d 423, 425 (1st

[8]Cronin testified at the December 2002 hearing that in gathering discovery at the request of the prosecutors he had not consulted the Chicofsky reports directly, but had instead run Turner's name through the FBI's indices. To cause a name to appear in the indices, it must first be underlined by the agent compiling the 302 report. Cronin for whatever reason had not underlined Turner's name in the five Chicofsky reports in which it appeared, and according to his testimony, did not independently recall the references to Turner.

[9]To a lesser extent, Turner complains that references to Chicofsky were also deleted from the reports provided to Nadolski by Romano. These deletions are not vigorously pressed by Turner in his briefs, most probably because for the most part they simply corroborate the fact that Chicofsky was at TRC on the days he claimed he was in his reports to Cronin. The government had submitted the unredacted reports to the court for *in camera* review and had obtained the court's permission to excise Chicofsky's name. Nadolsky testified plausibly that he did not consider the references to Chicofsky as relevant to any theory of entrapment as Romano was not privy to any of Chicofsky's conversations with Merlino.

Cir. 1985). This "entry level" burden requires a defendant to produce "hard evidence" supporting claims of both government inducement *and* the absence of predisposition. United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988); United States v. Gendron, 18 F.3d 955, 960 (1st Cir. 1994).[10] Turner, of course, could point to no direct inducement, as he had no dealings of a substantive nature with Romano or any other government agent. Whatever inducement that was supplied came rather from Merlino in his efforts to recruit Turner as a member of the conspiracy. There is authority, however slight, recognizing a claim of indirect or vicarious entrapment where a defendant has succumbed to a government-inspired inducement that is communicated through an unsuspecting intermediary. See United States v. Valencia, 645 F.2d 1158, 1168-1169 (2d Cir. 1980). But see United States v. Bradley, 820 F.2d 3, 8 (1st Cir. 1987) (declining to follow Valencia absent evidence of express instructions originating from the government encouraging the intermediary to apply pressure to the defendant).[11] The theory Turner advanced at trial

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[10]The fact that a defendant is targeted for solicitation without any evidence of a prior disposition on his part to commit a crime does not, without more, make out a claim of entrapment. See United States v. Espinal, 757 F.2d 423, 426 (1sdt Cir. 1985); United States v. Jenrette, 744 F.2d 817, 824 n.13 (D.C. Cir. 1984); United States v. Jannotti, 673 F.2d 578, 608-609 (3d Cir. 1982) (en banc). Cf. Jacobson v. United States, 503 U.S. 540, 557 (1992) (O'Connor, J., dissenting, questioning whether lower courts might misread the majority's opinion to impose a requirement that the government have a reasonable suspicion that a defendant is disposed to criminality *before* undertaking an investigation); United States v. Kussmaul, 987 F.2d 345, 349 (6th Cir. 1993) ("Jacobson does not prohibit the Government from inducing bad people to commit crimes; it simply strengthens the requirement that the Government prove that its agents did not induce the defendant's criminality.").

[11]Apart from the First Circuit, at least three other circuits have declined to follow Valencia. See United States v. Hollingsworth, 27 F.3d 1196 (7th Cir. 1994); United States v. Washington, 106 F.3d 983 (D.C. Cir. 1997); United States v. Squillacote, 221 F.3d 542 (4th Cir. 2000).

was that the FBI had used Romano to coerce Merlino into pressuring him to participate in the robbery with the thought that the prospect of a lengthy prison sentence would provide him with the necessary incentive to cooperate with the Gardner investigation.

The court, perhaps giving too much weight to Valencia, and too little to Bradley, gave the following vicarious entrapment instruction to the jury.

> Most typically, entrapment entails inducement applied by the government or a government agent directly upon the defendant. Inducement or persuasion applied upon the defendant by a codefendant, not acting as a government agent, ordinarily does not qualify as entrapment.
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> Inducement applied by a codefendant to a defendant may qualify as entrapment under certain conditions. Such a defense is known as vicarious entrapment. The defendants David Turner and Stephen Rossetti have both raised an entrapment defense of this sort. . . . Inducement by a codefendant constitutes vicarious entrapment by the government if the following three elements exist: (1) a government agent specifically identified the defendant as the desired target of inducement or pressure; (2) the government agent encouraged the codefendant to induce or pressure the defendant to commit the crime, or the government agent's handlers condoned the use of coercive inducements or pressure by the codefendant; and (3) the codefendant, in fact, applied pressure or an improper inducement to overcome the defendant's reluctance to become involved. Even where there is such indirect or vicarious inducement, there is no entrapment if the defendant was predisposed to commit the crime.
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> As with a conventional defense of entrapment, the government bears the burden of disproving vicarious entrapment beyond a reasonable doubt. It can discharge that burden by proving that any of the three requisite elements of vicarious entrapment were lacking, that is, either: (1) that the government agent, in this case, Anthony Romano, did not specifically identify the particular defendant as a desired target of inducement or pressure; or (2) that Romano did not specifically instruct the codefendant, in this case, Carmello Merlino, to induce or pressure David Turner or Stephen Rossetti to commit the crime; or (3) that Carmello Merlino did not in fact induce or pressure either defendant to commit the crime using the very tactics requested by Romano. With respect to the first two elements, if the government proves either that Carmello Merlino on his own initiative solicited David Turner and Stephen Rossetti to join the criminal scheme, even if in

> doing so he used tactics that would constitute an improper inducement, or that Romano merely suggested to Carmello Merlino that he solicit the particular defendant, unaccompanied by a further suggestion that Merlino engage in conduct that would constitute improper inducement, then you must reject the defense of vicarious entrapment.
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> As for the predisposition prong, as I instructed you with respect to the conventional entrapment defense, if the government proves that a particular defendant was predisposed to commit the offense there was no vicarious entrapment.

Turner theorizes that the Chicofsky reports would have been material to his vicarious entrapment defense for the following reasons.

> To prevail, it was incumbent upon Turner to establish that the government targeted him because they believed he could facilitate the return of the paintings stolen from the Gardner Museum. If the jury truly believed that the government was targeting Turner, it was the theory of the defense, then (1) the jury could reasonably conclude that Agents Cronin and Nadolski instructed Romano to raise Turner's name to Merlino, (2) the jury could reasonably conclude that the agents instructed Romano to encourage Merlino to induce Turner to participate in the conspiracy, and (3) the jury could reasonably conclude that the agents would condone the use of coercive inducements or pressure by Romano and Merlino.
> . . .
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> In sum, the theory of the defense was that there existed a direct causal link between the depth of the agents' desire to target and prosecute Turner and the likelihood of the jury reasonably concluding that the defendant satisfied the first two elements of the vicarious entrapment defense: (1) that the government agents (Cronin and Nadolski and Romano) specifically identified the defendant as the desired target of inducement or pressure and (2) that the government agent (Romano) encouraged the codefendant (Merlino) to induce or pressure the defendant to commit the crime, or his government handlers (Cronin and Nadolski) condoned the use of coercive inducements or pressure by the codefendant. That is precisely the reason that the richly detailed documents suppressed by the government become so critical and material to this case – they would have allowed the defendant to establish a detailed evidentiary basis to conclude that the agents truly believed, in November 1998, that Turner could facilitate the return of the paintings – a

contention that was categorically denied by the agents at trial.[12]

Turner's Opening Brief, at 5-7.

LEGAL STANDARDS

The suppression by the government "of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). To establish a Brady violation, a defendant must demonstrate three things. "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." Strickler v. Greene, 527 U.S. 263, 281-282 (1999).

Prejudice and materiality are the reverse sides of the same coin. In United States v. Bagley, 473 U.S. 667 (1985), the Court found a single standard of materiality sufficient to cover all cases of prosecutorial nondisclosure regardless of a defense request or its degree of specificity. "[E]vidence is material [that is, requires a new trial if undisclosed by the prosecution] 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

[12]As Turner acknowledges, there is one further aspect to this line of reasoning. Because there is nothing in the recorded conversations that suggests that Romano applied any pressure to Merlino to offer an inducement to Turner, a jury would also have to be convinced that Romano was instructed by the FBI to apply pressure to Merlino only when a conversation was not being recorded.

[of the trial]." Id., at 682. Under Bagley, "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. . . . 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." Kyles v. Whitley, 514 U.S. 419, 434 (1995). Bagley, in other words, is not a "sufficiency of the evidence" test, that is, a defendant "need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict," but rather whether in the overall context of the trial, "the 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 434-435. While the standard of materiality applied in a Brady context is more favorable to a defendant than the usual Rule 33 standard,[13] that is not to say that proof of a Brady violation leads inexorably to a new trial. See United States v. Conley, 249 F.3d 38, 45 (1st Cir. 2001) ("While the Brady standard is easier to satisfy, both tests require that the defendant show some degree of prejudice to win a new trial."). If the undisclosed evidence is merely cumulative of other evidence in the record, no meaningful Brady violation occurs, and a motion for a new trial will not be granted. Spence v. Johnson, 80 F.3d 989, 995 (5th Cir. 1996). See also Norton v. Spencer, 351 F.3d 1, 5 (1st Cir. 2003), citing

[13]In the usual Rule 33 context, newly discovered evidence "must create an actual probability that an acquittal would have resulted if the evidence had been available." United States v. Sepulveda, 15 F.3d 1216, 1220 (1st Cr. 1993).

Commonwealth v. Tucceri, 412 Mass. 401 (1992). "Similarly, when the testimony of the witness who might have been impeached by the undisclosed evidence is strongly corroborated by additional evidence supporting a guilty verdict, the undisclosed evidence generally is not found to be material." United States v. Sipe, 388 F.3d 471, 478 (5th Cir. 2004). "[T]here is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler, 527 U.S. at 281.

The duty to discharge the obligation to produce Brady material rests with the prosecutor as the advocate for the State. That the prosecutor is personally blameless for the withholding of exculpatory evidence has no bearing on the determination of materiality and prejudice. A prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. See also United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant."); United States v. Alvarez, 86 F.3d 90d, 905 (9th Cir. 1996) ("We see little justification and much danger both to the prosecutor's reputation and the quality of justice her office serves for a prosecutor not to review personally those materials directly related to the investigation and prosecution of the defendants."); United States v. Perdomo, 929 F.2d 967, 971 (3d Cir. 1991) ("[T]he availability of [Brady] information is not measured in terms of whether the information is easy or difficult to obtain but by whether the information is in the possession of some arm of the state.").

Nor is it relevant that the Chicofsky reports were not exculpatory in the sense that they were not supportive of any claim of actual innocence on Turner's part. Turner's theory is that the effort expended in the deployment of Chicofksy would have contradicted Cronin's testimony that by April of 1998 he had largely lost interest in Merlino (and by extension Turner) as a person with possible knowledge of the location of the Gardner paintings. "Favorable evidence includes not only evidence that tends to exculpate the accused, but also evidence that is useful to impeach the credibility of a government witness." In re United States (Coppa), 267 F.3d 132, 139 (2d Cir. 2001).

While it is tempting to cut matters short by simply concluding that the court erred by permitting Turner to inject a theory of vicarious entrapment into the case, and that any conceivable damage done by the withholding of the Chicofsky reports was therefore immaterial, there is some force to Turner's "law of the case" argument. The court having signaled prior to the trial a willingness to give a vicarious entrapment instruction, it is possible that the court channeled Turner's defense in this direction at the expense of some other tactical option (including perhaps the negotiation of a guilty plea). Cf. Ellis v. United States, 313 F.3d 636, 647-648 (1st Cir. 2002). This being said, it is appropriate to address the issue of whether the Chicofsky reports, had they been disclosed, would have bolstered Turner's entrapment defense in some material way.[14] The reports themselves, of course,

[14]Chicofsky was said to have made other statements favorable to Turner's entrapment defense in a hearsay affidavit filed by an attorney who claimed to have spoken with him about his relationship with Cronin and Nadolski. The court refused to consider these statements unless Chicofsky was willing to affirm them under oath (which he was not).

are hearsay and would have been inadmissible at trial.[15] Nor based on Chicofsky's adamant assertion of his Fifth Amendment privilege when subpoenaed by Turner to testify at a post-trial evidentiary hearing, is it likely that Chicofsky would have agreed to testify at trial, or if he had been willing to do so, what by way of competent testimony he could have offered.[16] (It would seem that the most that Chicofsky would have been permitted to say is that saw Merlino and Turner together on occasion at TRC and had been instructed by Cronin to report such sightings when they occurred). The theory, it will be recalled, is that Chicofsky's reporting would have reinforced a belief on Cronin's part that Turner had access to the paintings. This belief in turn would have strengthened Cronin's motive for entangling Turner in the robbery as a means of coercing his cooperation. To the extent that Cronin or Nadolski were to deny at trial that any such motive was at play, the reports might then be usable to impeach the denial.[17]

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[15]This is not, of course, dispositive. Admissibility is not a prerequisite of materiality under Brady. Sellers v. Estelle, 651 F.2d 1074, 1077 n.6 (5th Cir. 1981). See Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) (""[W]e think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.").

[16]On the other hand, that Chicofksy in all probability would have refused to testify at trial if called as a witness has no bearing on the Brady analysis. The impeachment value of Chicofsky's identity as an informant stemmed more from that fact than from any statement he is alleged to have made. Cf. United States v. Jackson, 345 F.3d 59, 71 (2d Cir. 2003) ("It is thus clear that Brady and its progeny may require disclosure of exculpatory and/or impeachment materials whether those materials concern a testifying witness or a hearsay declarant.").

[17]Turner's statement in his "Opening Brief" that the jury's verdict "necessarily rested upon their assessment of the two lead agents' credibility" is simply not true. The government did not call Cronin, and Nadolski's testimony was largely confined to corroborating Romano's testimony. The convictions rather rested on Romano's testimony, corroborated as it was by the powerfully incriminating tape recordings, and the defendants'

The problem with this scenario is that it ignores both the substance of the reports and what actually transpired at the trial with respect to the Gardner robbery. First, nothing that Chicofsky reported lent itself to the view that Turner had any actual knowledge about the location of the paintings, or that Turner was involved with the paintings in November of 1998, when Merlino began to seriously plan the Loomis Fargo robbery.[18] (The suggestion in Turner's initial brief that the Chicofksy 302 reports indicate that Merlino was relying on Turner to produce the paintings – thereby making Turner an even more valuable prize in the eyes of the FBI – is not supported by any fair reading of the reports. To the extent that the reports are believable, they make it clear that Merlino was depending on Leppo and not Turner to act as the go-between.)[19] The most that can be inferred from the reports is that Merlino, perhaps as tribute for Turner's participation in the original robbery, intended to include Turner in the divvying up of the reward offered for their return.

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own actions in assembling with an arsenal of weapons on the day chosen for the robbery.

[18]In one of its briefs, the government "concedes" that the reports might be construed to suggest that Turner did know where the paintings were hidden. The concession to my mind is too generous as there is no evidence that Cronin, who is the alleged deus ex machina in the plot, believed that to be the case. To the extent that Cronin harbored the belief that any of the actors could play a role in the recovery of the paintings, his attention was clearly focused on Merlino, as evidenced by the three visits he paid to Merlino seeking his cooperation. And even if Cronin had given some credence to Chicofsky's professed conviction that Turner's opaque statement in April of 1998 about "working with me" was an allusion to the Gardner paintings, that was the last time that Chicofsky mentioned Turner.

[19]I also do not agree that the reports undermine or impeach Cronin's testimony that by April of 1998 he had concluded that Merlino did not know the location of the paintings. The point is important as it would have made no sense for Cronin to concoct the Loomis Fargo robbery six or seven months later as a means of pressuring Merlino into revealing their hiding place.

Second, that the FBI considered Turner a possible suspect in the Gardner robbery was no secret to the jury and was testified to by both Cronin and Nadolski.[20] A summary of their testimony is succinctly laid out by the government in its main brief and is worth quoting in its entirety.

> Special Agent Cronin testified to all of the following at trial: that at his first meeting with Anthony Romano on October 5, 1997, Romano stated that it was his belief that Turner and/or Carmello Merlino might have possession of the Gardner Museum paintings [Tr.15:79]; that at that same meeting he told Romano that he was interested in the "comings and goings" of Turner and "any information Mr. Romano could gather with respect to Mr. Turner" [Tr.15:82, 96]; that at some point on or after October 5, 1997, he told Special Agent Nadolski "that if Turner was facing serous criminal charges, he might be motivated to give [Special Agent Cronin] information regarding the Gardner Museum robbery" [Tr.15:93]; that he conducted surveillance of Turner on one or more occasions between October 1997 and November 1998, [Tr.15:82-83]; that he was "keeping tabs on the inserts that Agent Nadolski was preparing with respect to the comings and goings of Mr. Turner" [Tr.15:83]; that he "thought it was a possibility that Mr. Turner could possibly assist in the recovery of the stolen paintings" [Tr.15:88]; that he went to interview Turner and Carmello Merlino on the day of their arrests in connection with the Loomis Fargo investigation because he knew that they would be under "extraordinary pressure" "and that would motivate them" to disclose any information they had about the Gardner Museum investigation; and, that at those arrest interviews he may have made clear to Turner and Merlino that "if they returned the paintings, they might get some leniency with respect to" the Loomis Fargo case [Tr.15:93]. Special Agent Nadolski corroborated much of that testimony in his own examination and provided additional information of a similar ilk. [See, e.g., Tr.13:141 (at the meeting on October 5, 1997, Special Agent Cronin told Romano that he wanted

[20]Cronin testified at trial that he had no information that Turner had access to the paintings. (This is the testimony that Turner argues he could have challenged with the Chicofsky 302 reports). While this statement was not true to the extent that Chicofsky's 302 reports constituted "information," I credit Cronin's testimony that he personally did not believe, that is, did not believe that any credible information supported the idea that Turner knew the location of the paintings (although he did believe that Turner had participated in the Gardner robbery). Had Cronin been of such a belief, it stands to reason that he would have approached Turner in an attempt to elicit his cooperation as he did with Merlino on three occasions.

> Romano to report on the comings and goings of Turner); Tr.14:7 (at that same meeting, Romano stated that he knew Turner and Carmello Merlino "had something to do with the Gardner Museum"); Tr.13:142-146 (from October, 1997 to November, 1998 Romano reported the comings and goings of Turner at TRC on a number of occasions); Tr.14:46-47 (Special Agents Cronin and Nadolski interviewed Turner on the day of his arrest because they realized he would have the greatest motivation at that time to provide information regarding the Gardner Museum investigation)].

Government's Brief, at 14-15.

The only thing the Chicofksy reports would have established beyond what the jury already knew is that Cronin had asked not one (Romano), but two informants to report on any visits by Turner to Merlino at TRC. This information is exculpatory in Turner's view because it might have persuaded the jury that Cronin was convinced that he knew where the Gardner paintings were hidden and therefore had a strong motive to instruct Romano to pressure Merlino to entice him into the Loomis Fargo conspiracy. There are two problems with the argument. The first, of course, is there is no evidence that Romano ever pressured Merlino to do anything or that Merlino ever pressured or improperly (in the legal sense) induced Turner into participating in the robbery.[21] The second problem lies in the fact that no amount of motive on the FBI's part would overcome the evidence that Turner was a willing and enthusiastic participant in the conspiracy. As the court concluded well over a year ago when the issue involving the undisclosed Chicofsky 302 reports was first raised by Turner:

> [t]he Loomis Fargo robbery had been conceived by Merlino long before he

[21]As the government notes, Merlino in a conversation recorded by Romano on January 6, 1999, stated that he had no intention of telling Turner about the details of the developing plan to rob the Loomis Fargo facility unless Turner first indicated that he wanted to take part.

had been approached by Romano with the suggestion of an "insider" contact at the Loomis Fargo facility and visions of a multi-million dollar heist. Indeed, according to Merlino, Turner had accompanied him to the facility on a surveillance mission long before Romano appeared on the scene. Nor was there any evidence (other than Turner's sloth in returning telephone calls) to suggest any lack of willingness on his part to join in the robbery. . . . There is no evidence that Merlino threatened Turner or offered any inducement other than a proportional share of the proceeds of what Merlino had been led to believe would be a particularly lucrative robbery. Nor is there evidence that Romano or his FBI handlers were privy to any undue pressure brought by Merlino on Turner (indeed the evidence is that there was none). The most that can be said is that Romano may have endorsed and encouraged Merlino's idea of including Turner as a member of the brigandage. It is the absence of any evidence to suggest that Turner was not predisposed to commit the robbery that led to the court's observation that the entrapment instruction, even under the most expansive view of Rogers, was more generous than Turner deserved. See United States v. Rodriguez, 858 F.2d 809, 814 (1st Cir. 1988) (explaining that a defendant's entry level burden to be entitled to an entrapment instruction requires the production of "hard evidence" supporting a claim both of government inducement and the absence of predisposition).

Against this background, I see no reason to revisit the subject of attempting to elicit testimony from the reluctant Chicofsky. Even assuming that Chicofsky could be persuaded to waive his Fifth Amendment privilege and testify, in Turner's most hopeful vision, Chicofsky would only provide further confirmation that the FBI believed that Merlino had access to the stolen Gardner paintings. The FBI's suspicion that Merlino had played a pivotal role in the Gardner robbery was fully aired at the trial as a possible motive for attempting to ensnare Merlino (and Turner) into the Loomis Fargo plot. Chicofsky's testimony would thus, at best, have been merely cumulative of evidence already before the jury, and given Chicofsky's record on unreliability, more likely hurtful than helpful to Turner's defense.

. . .

Turner's defense at trial was entrapment. The defense was laid out for the jury and rejected. That Turner was a "person of interest" to the FBI was not a state secret, and in the light most favorable to Turner, may explain the FBI's satisfaction at his enlistment by Merlino as an accomplice in the Loomis Fargo robbery. But no amount of motive on the FBI's part can overcome the fact that Turner was fully predisposed to commit the crime.

Memorandum and Order of September 4, 2003, at 4-5, 6. Nothing that has since been

said or disclosed persuades me differently.[22]

ORDER

For the foregoing reasons, Turner's motion for a new trial is DENIED. To the extent that Merlino and Rossetti seek similar relief, that relief is also DENIED.

SO ORDERED.

/s/ Richard G. Stearns

_____
UNITED STATES DISTRICT JUDGE

[22]Turner also objects to the fact that the government failed to produce a file documenting an ATF investigation into several murders in which Turner was deemed a suspect. Turner has failed to offer a coherent theory of how this material would have been deemed exculpatory in the eyes of the jury. The most that is said is that the ATF investigation was ginned up by Cronin as an additional means of applying pressure on Turner to cooperate in the Gardner investigation. Turner has produced no evidence that there is any truth to this assertion.