

submissions on this point. As there is no dispute about the underlying facts, we now proceed to consider the question the Court of Appeals remanded to us.

As our Court of Appeals noted, "[w]hen faced with a motion to reopen, the district court's primary focus should be on whether the party opposing reopening would be prejudiced if reopening is permitted." Id. at 8, quoting United States v. Kithcart, 218 F.3d 213, 220 (3d Cir. 2000). In its canvass of the jurisprudence, the Court of Appeals panel, again quoting the (second) Kithcart opinion, stated that:

In Kithcart II, we placed emphasis on the need for an adequate explanation of the failure to present the relevant evidence earlier. "In order to properly exercise its discretion the district court must evaluate that explanation and determine if it is both reasonable and adequate to explain why the government initially failed to introduce evidence that may have been essential to meeting its burden of proof." Kithcart II, 218 F.3d at 220. In that case we reversed the district court's decision to reopen the suppression hearing on remand because "the government offered absolutely no explanation for its initial failure to present the additional witnesses at the original suppression hearing, nor did the district court demand an explanation. Id. at 217.

Id. at 9.

With respect to the threshold question of prejudice, although the Government in its memorandum stresses prejudice to it from granting a motion to suppress as an inevitable

consequence of failing to reopen the hearing,¹ it glides by the obvious prejudice to Coward of having been convicted on evidence that should not have been admitted against him. Indeed, Coward has been in full custody since September 14, 2000. But as Coward's counsel correctly points out, "were the only issue to be prejudice to Mr. Coward, there would have been no reason whatsoever for a remand (if the Government averment of no prejudice, one pressed before the Court of Appeals, were meritorious)", Def.'s Rep. at 3. The primary issue at the heart of this remand is the reasonableness of the Government's arguments and evidence in favor of reopening the suppression hearing.

We therefore turn our attention to consider whether the Government has offered a "reasonable and adequate" explanation for why it failed to produce evidence that would have satisfied its burden of proof.

In the Court of Appeals, the Government offered two reasons for this failure: "(1) a mistake due to the 'relative inexperience' of the prosecutor, and (2) the acquiescence of the judge." Id. at 10. The Court of Appeals quickly dispatched the chutzpah of this second reason:

As for the judge's misplaced acquiescence to the government's faulty interpretation of the law, the government may not shift the blame to the District Court for its own failure to

¹ The Government's contentions in this regard largely decry the consequences of the exclusionary rule, a lament that Mapp v. Ohio, 367 U.S. 643 (1961) made a dead horse.

advise the court of the applicable law and to bear its burden of proof on a clearly established requirement. At oral argument, government counsel restated its argument, making clear that the government was not suggesting that the court somehow induced the government's failure to submit the missing evidence.

Id.

The sole "excuse and apology" that the Government now offers is that "it did not present the available evidence because the prosecutor, mistakenly, did not believe she had to." Govt.'s Mem. at 15. The Government explains this mistake by citing the prosecutor's alleged inexperience:

As the government has stated, the trial prosecutor, Kathleen Rice, was inexperienced in this type of suppression matter. Although she served eight years in the Kings County (N.Y.) District Attorney's Office, and therefore, as the Third Circuit suggested, was appropriately chosen to try this case, she had more limited experience as a federal prosecutor. She had joined this office just over a year before the Coward suppression hearing, and this was her first such hearing in this office.

Id. at 16, n. 5.

Although it did not dispose of this argument, the Court of Appeals was not bashful about heaping ashes on it:

We note that the prosecutor's "inexperience" did not prevent the government from selecting her to handle the obligations of a criminal trial and, indeed, she secured Coward's conviction. Moreover, there is testimony at the suppression hearing suggesting that the prosecutor was familiar with the controlling precedent on this issue.

Slip Op. at 10.

While the panel's comments are unanswerable, the Government's explanation, detailed in note 5 of its memorandum before us, contains an unstated, and very odd, premise. In minimizing trial counsel's eight years of service in the Kings County, New York, District Attorney's Office, the Government seems to suggest that the Fourth Amendment, and the Supreme Court's jurisprudence under it, does not (somehow) apply in Brooklyn as it does in federal district court in Philadelphia, and therefore Ms. Rice could not have been expected to be familiar with controlling law.

Not only is the Government's unstated premise eyebrow-raising, it also ignores the daily reality that the United States Attorney (and his predecessor) has elected to make his office -- and therefore this Court -- an adjunct of state law enforcement through Operation Ceasefire. Thus, far from presenting a professional disability, the prosecutor's state court experience makes her doubly qualified to represent the Government in its chosen role as an arm of the local District Attorney. If there were any doubt on this point, it would be removed by the United States Attorney's recruitment of Special Deputy Assistants from the Philadelphia District Attorney's Office to try the gun cases that are now our daily grist in this courthouse.

The Government's explanation thus distills to the admission of a naked mistake. While it is certainly true that Homer nodded and lawyers and judges err, the ultimate question here is what to do when prosecutors fall short in suppression

hearings. As our Court of Appeals made clear in its canvass of the jurisprudence, the Government bears the burden of providing "a reasonable explanation for failure to present" what the Government concedes was readily available evidence. It has not carried that burden, and offers merely a bald excuse with no limiting principle in a case where the prosecutor chosen was especially qualified to represent the Government.

Under all of these circumstances, we therefore decline the Government's request that we reopen the suppression hearing.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
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ALFONZO COWARD :
 : CRIMINAL NO. 00-88

ORDER

AND NOW, this 4th day of September, 2002, upon remand from the United States Court of Appeals, and consistent with the direction of that Court, and upon consideration of the Government's memorandum in support of its request to reopen the suppression hearing, and the defendant's opposition thereto, and for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

1. The Government's request to reopen is DENIED;
2. The defendant's motion to suppress is GRANTED; and
3. The Government shall advise the Court by September 12, 2002 as to whether it desires to retry the defendant without the evidence derived from the September 23, 1998 stop of his vehicle.

BY THE COURT:

Stewart Dalzell, J.