

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

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	
	:	
WINSTON HARRIS,	:	
Defendant.	:	NO. 93-06
	:	
	:	

Memorandum and Order

YOHN, J.

March 30, 2000

On July 8, 1994, defendant Winston Harris was convicted by a jury on all four counts of a criminal indictment. The prosecution’s case was based on testimony provided by three agents of the Philadelphia Office of the Pennsylvania Attorney General’s Bureau of Narcotics Investigation (“BNI”), by one fact witness, and by several expert witnesses. Defendant was sentenced to 270 months in prison. He appealed his conviction and sentence, and the Third Circuit affirmed both. Before the court is defendant’s motion for a new trial pursuant to Fed. R. Crim. P. 33 based on newly discovered evidence.¹

¹ On April 7, 1997, Harris filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. *See* Doc. No. 67. Among other things, Harris challenged his sentence for “use” of a firearm under 18 U.S.C. § 924(c)(1) in light of the decision of the Supreme Court in *Bailey v. United States*, 516 U.S. 137 (1995), which post-dated Harris’ conviction and sentencing. On July 1, 1997, Harris’ § 2255 motion was granted as to his *Bailey* argument and denied in all other respects. *See* Order of July 1, 1997 (Doc. No. 72). That order set a date for a resentencing hearing. The hearing was postponed pending resolution of the instant Rule 33 motion. A date for a resentencing hearing is specified in the attached order.

Defendant's motion concerns the trial testimony of the three BNI agents. In 1996, a large number of state criminal prosecutions were dismissed where testimony of BNI officers was a substantial part of the prosecution's case. Defendant argues that newly discovered evidence of those dismissals would probably result in an acquittal in a new trial. Specifically, defendant argues that the new evidence demonstrates that the agents who testified against him at trial made false statements in other investigations and prosecutions, rendering their testimony in this case unreliable and incredible. If granted a new trial to present new evidence related to the credibility of the officers and dismissals of other cases, defendant argues, a jury would probably acquit defendant of the charges against him.

I conclude that the evidence presented by defendant is not of a proper kind to merit a new trial. Further, I conclude that even if the evidence is cognizable, it does not demonstrate the probability of acquittal at a new trial. Finally, I conclude that there is no new evidence of perjury presented and any allegedly false testimony by each officer was known and was not surprising to defendant at his second trial. Therefore, defendant's motion will be denied.

BACKGROUND

On April 1, 1993, a jury convicted defendant on all four counts of an indictment charging him with possession with intent to deliver cocaine base, *see* 21 U.S.C. § 841, possession with the intent to deliver cocaine, *see id.*, possession of a firearm in connection with a drug trafficking offense, *see* 18 U.S.C. § 924(c)(1), and possession of a firearm by a previously convicted felon, *see* 18 U.S.C. § 922(g). *See* Trial Tr. Apr. 1, 1993 at 3-104 to 105 (Doc. No. 29). On June 3,

1994, the Third Circuit vacated defendant's conviction and remanded the case for a new trial on grounds related to jury selection in light of the Supreme Court's subsequent decision in *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 145-46 (1994). Following a second trial, defendant was again convicted by a jury on the same four counts. *See* Trial Tr. July 8, 1994 at 3-51 to52 & 3-75 to76 (Doc. No. 42). In defendant's second trial, four of the prosecution's witnesses testified in relevant substance as follows.

Karen Woods testified to events which occurred in the course of her personal relationship with defendant. She testified that in May of 1992, defendant asked her to rent an apartment in Philadelphia in which defendant would live. *See* Trial Tr. July 7, 1994 at 2-41 to 42 & 2-45 (Doc. No. 62). Woods testified that, over the course of three visits to Philadelphia, she: signed a lease for apartment D14 at 1801 Winchester Avenue in Philadelphia ("the apartment"), falsely representing that she would live there, *see id.* at 2-58; paid deposits for utility services in her name for the apartment, *see id.* at 2-43 to50 & 2-58; helped defendant move furniture from a different apartment to the one in question, *see id.* at 2-51 to53; and gave defendant the keys to the apartment, *see id.* at 2-47 to48. Woods did not return to Philadelphia that year. *See id.* at 2-53.

The prosecution offered the testimony of BNI Agent Charles Micewski. Micewski testified that between September 23, 1992, and October 9, 1992, he conducted surveillance of the apartment for several hours a day on his personal time. *See* Trial Tr. July 7, 1994 at 2-4 to 5. In the course of his personal surveillance, he observed defendant enter the apartment five or six times, using a key to do so. *See id.* at 2-5. On one occasion, he alleges that he saw defendant remove a package from the apartment. *See id.* at 2-5. No record or report exists of his

surveillance. *See id.* at 2-6 & 2-10.²

Testimony was also offered by BNI Agent Dennis McKeefery. McKeefery testified that while conducting surveillance of the apartment on October 13, 1992, he saw defendant leave the apartment around 10:00 a.m., place a package in the trunk of a car, and return to the apartment. *See* Trial Tr. July 7, 1994 at 2-12 to 13. McKeefery then testified that, in executing a search warrant for the apartment on October 14, 1992, he searched the apartment and discovered contraband. *See id.* at 2-14 to 23.³

In addition, the prosecution offered the testimony of BNI Agent Edward Egges, who explained that he and several agents and officers executed a search warrant for the apartment on October 14, 1992. *See* Trial Tr. July 6, 1994 at 1-98 to 100. After seeing defendant through the window, the agents knocked on the apartment door and announced their presence. *See id.* at 1-100 to 101. After waiting 30 to 45 seconds without response, the agents forcibly entered the apartment. *See id.* at 1-101. Thereafter, Egges took defendant into custody while McKeefery and others conducted a protective sweep of the apartment. *See id.* at 1-101 to 103. Following the protective sweep, McKeefery began to search for drugs pursuant to the search warrant. *See id.* Egges advised defendant of his constitutional rights, which defendant waived, and Egges proceeded to ask defendant several questions. *See id.* at 1-106 to 109. Defendant, responding to

² I note that Micewski's testimony at defendant's second trial was substantially similar to Micewski's testimony at defendant's first trial. *Cf.* Trial Tr. Mar. 31, 1993 at 2-154 to 157 (Doc. No. 41). The import of this will be explained in Part II.B.3 of this memorandum, *infra*.

³ I note that McKeefery's testimony at defendant's second trial was substantially the same as McKeefery's testimony at defendant's first trial. *Cf.* Trial Tr. Mar. 31, 1993 at 2-139 to 140 (describing surveillance and observations of October 13, 1992) & 2-141 to 148 (describing search of apartment). The import of this observation will be explained in Part II.B.3 of this Memorandum, *infra*.

the questions, said that there were no drugs in the apartment, that there was no money in the apartment, and that there were several firearms in the apartment. *See id.* A search of the apartment resulted in discovery of several firearms, both cocaine and crack cocaine, paraphernalia used for drug production and sale, photos of defendant and others, and personal documents of defendant and others. *See id.* at 1-108 to 118; Trial Tr. July 7, 1994 at 2-14 to 23.^{4 & 5}

Defendant testified at his second trial, and: denied making arrangements for Woods to rent the apartment on his behalf, *see* Trial Tr. July 7, 1994 at 2-107; denied having been at the apartment on more than one prior occasion, *see id.* at 2-115; denied ever having a key to the apartment, *see id.* at 2-120; denied receiving notice of his constitutional rights at arrest, *see id.* at 2-113; and denied any conversation with the agents regarding drugs, money or firearms, *see id.* at 2-113 to 114. Defendant suggested that he had been called to the apartment by Charlene Erwin, a friend. *See id.* at 2-108. Defendant said that Erwin left the apartment for a while, and the agents arrived at the apartment shortly thereafter. *See id.* at 2-108 to 109.

On July 8, 1994, the jury returned a verdict of guilty on all four counts of the indictment. *See* Jury Verdict of July 8, 1994 (Doc. No. 51). On October 11, 1994, Harris was sentenced to

⁴ I note that Egges testimony at defendant's second trial was substantially similar to his testimony at defendant's first trial. *Cf.* Trial Tr. Mar. 31, 1993 at 2-36 to 39 (describing execution of search warrant), 2-40 to 42 (describing warnings given to defendant and statements made by defendant), & 2-55 to 72 (describing discovery of photos, documents, amber drug bottle, driver's license, personal documents, and watches). The import of this observation will be explained in Part II.B.3 of this Memorandum, *infra*.

⁵ On March 26, 1994, defendant filed a motion to suppress physical evidence seized from the apartment and evidence of statements he allegedly made to the agents. *See* Doc. No. 21. During the course of the hearing on the motion on March 29, 1994, defendant withdrew the motion. *See also* Def. Mot. at 16.

270 months in prison. *See* Judgment of October 11, 1994 (Doc. No. 56). On October 21, 1994, Harris filed a notice of appeal with the Third Circuit. *See* Doc. No. 57. The Third Circuit affirmed Harris' judgment on July 3, 1995. *See United States v. Harris*, No. 94-2026 (3d Cir. July 3, 1995).

In 1996, the *Philadelphia Inquirer* published a series of articles about alleged corruption in the BNI. *See* Def. Mot. for New Trial at A-5 to A-57 (Doc. No. 66) ("Def. Mot."). The articles chronicled dismissals of state court prosecutions in which BNI agents were involved. *See id.* On April 7, 1997, defendant filed a Motion pursuant to Fed. R. Crim. P. 33 for a new trial on the basis of newly discovered evidence of agent misconduct in other cases. *See* Def. Mot. at 2-4. The United States filed a response to defendant's motion (Doc. No. 70), to which defendant filed a reply (Doc. No. 71). Additional discovery was conducted. *See* Order of Aug. 25, 1997 (Doc. No. 74). Oral argument was heard on the motion. *See* Oral Argument of Dec. 19, 1997 (Doc. No. 91), *reprinted in* Def. Post-Evidentiary Hr'g Br. & App. at A-128 to A-236 (Doc. No. 99). Defendant submitted his Post-Evidentiary Hearing Brief and Appendix of Documents (Doc. No. 99) ("Hr'g Br." or "Hearing Brief"). Finally, the court conducted a telephone-conference with counsel on February 17, 2000.⁶ After extensive consideration, defendant's motion will be denied.

STANDARD OF REVIEW

⁶ In the telephone conference, counsel for the United States confirmed the government would not file a response to defendant's Hearing Brief.

Defendant bears the burden of persuasion where a motion for a new trial is premised on allegations of newly discovered evidence. *See United States v. Rocco*, 587 F.2d 144, 146 (3d Cir. 1978); C. Wright et al., *Federal Practice & Procedure* § 557 at 316 (1982). Although generally disfavored, *see Wright*, *Federal Practice & Procedure* § 557 at 315, “[a] motion for a new trial is addressed to the trial judge’s discretion.” *See Government of Virgin Islands v. Lima*, 774 F.2d 1245, 1250 (3d Cir. 1985). Trial judges are not to favor either party’s factual account but rather are to assess the weight of the evidence and witness credibility. *See United States v. Patrick*, 985 F. Supp. 543, 551 (E.D. Pa. 1997).

DISCUSSION

Defendant’s motion presents two issues. First, what evidence is before the court in deciding the motion? Second, applying the legal standard for a motion for a new trial to that evidence, do the interests of justice require a new trial? These will be addressed in turn.

I. RECORD EVIDENCE

Defendant’s Rule 33 motion and filings suggested that he would present a great deal of new evidence in support thereof.⁷ Following additional discovery, an evidentiary hearing, and

⁷ In his motion, defendant suggested that the following newly discovered evidence justified a new trial: 1) The “totality of circumstances” surrounding dismissals of numerous cases involving BNI agents demonstrates that those cases were dismissed due to lack of agent credibility, *see Hr’g Br.* at 15; 2) In other cases, state and federal judges have found Egges, Micewski and McKeefery to be incredible, *see id.* at 15; 3) The pre-sentencing comments of

additional filings, defendant had not presented to the court all of the evidence of the nature predicted. In a February 17, 2000, telephone conference with counsel, counsel confirmed that the new evidence before the court consists of the following: 1) Testimony of Micewski at the December 19, 1997, evidentiary hearing; 2) testimony of Charles B. Warner, as regional director of the BNI, at the December 19, 1997, hearing; and 3) an affidavit of Arnold Gordon, as First Assistant District Attorney, signed on September 17, 1998, and submitted on February 17, 2000. Therefore, I will apply the law governing Rule 33 motions to the new evidence presented by defendant.

II. RULE 33 MOTION FOR A NEW TRIAL DUE TO NEWLY DISCOVERED EVIDENCE

Pursuant to Federal Rule of Criminal Procedure 33, “[o]n a defendant’s motion, the court may grant a new trial to that defendant if the interests of justice so require.” *See Fed. R. Crim. P.*

defense attorney Sciolla to Assistant United States Attorney Barbieri speculating as to the reasons an unrelated case was dismissed, *see id.* at 15-16; 4) The testimony of defense attorneys Sciolla and Bridge, as experts, that BNI agents are unreliable and that Micewski is untruthful today and was untruthful in 1993 and 1994, *see id.* at 16; 5) That Micewski offered false testimony at trial, *see id.* at 16-17; and 6) Testimony offered by District Attorney Gordon in *Commonwealth v. Laboy*, that McKeefrey will not be called to testify in future cases. *See Def. Mot.* at 10.

Defendant suggests that the foregoing is admissible as newly discovered evidence of reputation of character for untruthfulness and as evidence of a habit of fabrication in criminal cases. *See Oral Arg. of Dec. 19, 1997, reprinted in Hr’g Br.* at A-202. Defendant urges admissibility of the evidence both as to witness credibility and as substantive evidence to support the defense theory of the case that he was the victim of a fabricated charge. *See id.* at A-202 to A-203. Defense counsel rightly has acknowledged, however, that the evidence is important principally for its impeaching character. *See Def. Mot.* at 13.

33. Case law reveals two different tests for a trial court to apply in reviewing such a motion when premised on newly discovered evidence. Applying either test to the evidence in this case, I conclude that defendant has not met his burden and I will deny the motion.

A. The “Berry Test” For Newly Discovered Evidence

Where a new trial is sought as warranted by newly discovered evidence, the Third Circuit requires a district court to apply the “Berry test,” under which “five requirements must be met before a trial court may order a new trial due to newly discovered evidence:

- (a) the evidence must be in fact newly discovered, i.e., discovered since 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.”

Lima, 774 F.2d at 1250 (denying motion for new trial premised on new affidavits contradicting testimony of material witness).⁸ Under the *Berry* test, I conclude that justice does not require a new trial for defendant for two reasons.

First, despite extensive additional discovery, the evidence defendant has produced is

⁸ The test was articulated in present form in *Johnson v. United States*, 32 F.2d 127, 130 (8th Cir. 1929). The origin of the test, and source of its name, is the case of *Berry v. Georgia*, 10 Ga. 511, 527 (Ga. 1851). See Wright, Federal Practice & Procedure § 557 at 315-16 n.3. The Third Circuit expressly adopted the test from *Johnson* in *United States v. Rutkin*, 208 F.2d 647, 653 (3d Cir. 1953), a case in which the newly discovered evidence was of witness perjury. The test has been applied repeatedly since that adoption. See *United States v. DiSalvo*, 34 F.3d 1204, 1215 (3d Cir. 1994); *Lima*, 774 F.2d at 1250 & n.4; *United States v. Ianelli*, 528 F.2d 1290, 1292-93 (3d Cir. 1976); *United States v. Howell*, 240 F.2d 149, 159 (3d Cir. 1956).

merely impeaching. *See* Def. Mot. at 13. To begin, Micewski’s testimony at the December 19, 1997 evidentiary hearing did not produce an admission or recantation by him. Rather, the hearing demonstrated that, in the court’s judgment, Micewski’s explanation was not credible as lacking detail and documentation. *See generally* Hr’g Br. at A-145 to A-176; *see infra* Part II.B & n.13. Further, Warner’s testimony at the December 19, 1997 hearing established only that Micewski and McKeefery were no longer assigned to “street duty” and that Egges had taken disability retirement. *See* Hr’g Br. at A-142 to A-144. Finally, Gordon’s affidavit demonstrates that “cases in which BNI Agent Dennis McKeefery was a necessary witness were *nolle prossed*.” The affidavit states further that Gordon’s decision was based on “the facts of the case” and that defendant had received all factual information on which Gordon relied in making his decision. At best, the proffered evidence permits only an inference that the agents lack credibility. It is merely impeaching, and insufficient under the *Berry* test. Even the evidence defendant hoped to produce shows only that, based on statements in other cases and inferences from other “bad acts,” each agent possesses a character for untruthfulness which could be made known to the finder of fact. Even if all of defendant’s suggested evidence had been produced and was admissible,⁹ it is insufficient to meet the third requirement of the *Berry* test because it is offered solely for impeachment purposes.¹⁰

⁹ This is a substantial “if,” which must surmount two evidentiary hurdles: Federal Rules of Evidence 404 and 608(a). I do not resolve the admissibility question because, even if proffered and admissible, the newly discovered evidence is insufficient to require a new trial. Moreover, the scope of new evidence submitted in support of the motion was explicitly limited by counsel in the February 17, 2000 telephone conference.

¹⁰ Defendant argues that panels for the Seventh Circuit and Ninth Circuit both have suggested that Rule 33 makes no per se distinction between types of evidence and that situations may exist in which impeachment evidence may be sufficient to demonstrate injustice requiring a

Second, I conclude that impeachment of the agents' testimony fails to meet the fifth *Berry* requirement because it would not probably result in an acquittal. Woods' testimony was sufficient to demonstrate that defendant had control of the premises in which both drugs and firearms were found. *See* Trial Tr. July 7, 1994 at 2-41 to 53. Further, defendant's trial testimony revealed that he knew details about the apartment not likely to be known by the casual visitor. *See id.* at 2-110 (describing window function). In addition, certain of defendant's personal effects were found in the apartment. *See* Trial Tr. July 6, 1994 at 1-115 to 128. Consequently, there is ample evidence in the record supporting a jury finding that defendant constructively possessed the apartment and its contents. Defendant's impeachment evidence falls well short of meeting the burden of the probability requirement.

Applying the *Berry* test to the evidence in this matter, I conclude that defendant has not proven that the interests of justice require a new trial.

new trial. *See United States v. Taglia*, 922 F.2d 413, 415 (7th Cir. 1991); *United States v. Davis*, 960 F.2d 820, 825 (9th Cir. 1992). Of course, I am bound by statements of law from the Third Circuit, not the Seventh or Ninth Circuits. Moreover, both the Seventh and Ninth Circuit panels limited their discussion to factual situations in which the uncorroborated testimony of a material witness on an essential element of the government's case was subsequently shown to be wholly incredible. *See Taglia*, 922 F.2d at 415; *Davis*, 960 F.2d at 825. As a factual matter, defendant's case is distinct. First, the testimony of Egges and McKeefery has not been shown to be wholly incredible or uncorroborated. McKeefery conducted his surveillance and sought his search warrant in reliance on information provided by a credible confidential informant. Egges and McKeefery offered an account of events which is substantially similar in material respects and neither reveals inconsistencies or implausibilities which would render their testimony wholly incredible. The testimony of the officers is also corroborated by the uncontested presence of personal items which link defendant to the apartment, supporting a reasonable inference that the apartment was defendant's. Second, although I do find Micewski's testimony incredible for reasons explained later, it was not essential to the government's case because of Woods' testimony linking defendant to the apartment, demonstrating constructive possession of the contraband items found. The facts of this case do not fall within the narrow exception suggested by the Seventh and Ninth Circuits.

B. The “*Larrison* Test” for Evidence of False Testimony

In his Hearing Brief, defendant for the first time suggests that the court apply the “*Larrison* test” as an alternative to the *Berry* test. See Hr’g Br. at 19. Where newly discovered evidence is of perjury by a material witness in the case under consideration, the *Larrison* test requires the following three-part proof by the defendant on a motion for a new trial:

- “(1) The court is reasonably well satisfied that the testimony given by a material witness is false;
- (2) That without it a jury might have reached a different conclusion; and
- (3) That the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.”

United States v. Meyers, 484 F.2d 113, 116 (3d Cir. 1973) (finding that under either the *Berry* test or the *Larrison* test, a new trial was required in light of a credible recantation of false testimony).¹¹

A prerequisite to a *Larrison* inquiry is that defendant offer new evidence that a material witness committed perjury in this case. Defendant has not done this. Defendant’s evidence reveals no wrongdoing by Egges in this matter. Further, it sheds little light on misconduct by McKeefery in defendant’s prosecution. Even Gordon’s affidavit, which refers to cases of

¹¹ The *Larrison* test is derived directly from the case of *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928). Several Third Circuit panels have applied the *Larrison* test. See *Meyers*, 484 F.2d at 116; *United States v. Massac*, 867 F.2d 174, 178 (3d Cir. 1989) (applying *Larrison* by agreement of parties but denying motion for new trial). However, the Third Circuit has never adopted *Larrison* as the proper test. See *Massac*, 867 F.2d at 178 (observing that *Larrison* has not been adopted formally); *Lima*, 774 F.2d at 1251 n.4 (same). The courts of appeals are divided over the present validity of *Larrison*. See, e.g., *United States v. Huddleston*, 194 F.3d 214, 216 (1st Cir. 1999) (rejecting *Larrison* and discussing circuit split). Because I conclude that defendant’s motion should be denied even under the *Larrison* test, I offer no opinion as to whether the Third Circuit should or would adopt the *Larrison* test.

McKeefery's which were not prosecuted, states that those determinations were based on "the facts of the case." Defendant does not demonstrate that such a determination renders McKeefery beyond belief in this case. In short, defendant offers no evidence that Eggle and McKeefery committed perjury in this matter.

Micewski's trial testimony is more problematic and is the principal focus of defendant's filings. *See* Def. Mot. at 15-16; Hr'g Br. at 3-18. At defendant's trial, Micewski's testimony concerned defendant's constructive possession of the apartment in which contraband was discovered. *See* Trial Tr. of July 7, 1994 at 2-4 to 6. At the December 19, 1997 evidentiary hearing, Micewski was questioned extensively about his pre-search surveillance of the apartment in question. *See id.* at A-145 to A-176. Due to his inability to recall even basic details of his assignment, *see id.* at A-170 to A-176, his failure to seek additional pay for substantial additional work, *see id.* at A-150, and his general failure to document or report his observations, *see id.* at A-158 to A-163, I find that his testimony is incredible and I am reasonably well satisfied that his trial testimony was false. I need not proceed further, however, because defendant has presented no *new* evidence of Micewski's false testimony. Rather, all of the evidence on which I base my assessment was available and presented at defendant's trial: the absence of detail or documentation surrounding Micewski's investigation. *See* Trial Tr. of July 7, 1994 at 2-4 to 10. Although the December 19, 1997 evidentiary hearing provided a more thorough examination of Micewski's testimony, it did not present any new evidence of perjury or false testimony which was not presented at trial.

Therefore, a *Larrison* inquiry is not required because there is no new evidence that any agent committed perjury in this matter. Even if the *Larrison* rule were applied to defendant's

case, however, a new trial is still not required, as follows.

1. False testimony by a material witness.

Applying the *Larrison* test would require an initial determination as to whether a material witness offered false testimony. There is an absence of new evidence concerning false testimony by either Eggle or McKeefery in this matter. Moreover, their trial testimony was generally consistent and credible. Neither their demeanor nor their description of events at trial was incredible. In short, defendant presents no admissible evidence which would reasonably satisfy me that either Eggle or McKeefery offered false testimony in this case. Further, although defendant has reasonably well satisfied me that Micewski offered false testimony in this case, he did so only by calling attention to evidence in existence at the time of his trial, as previously noted.

2. Whether a jury might reach a different conclusion upon consideration of the new evidence.

Because I am not reasonably well satisfied that either Eggle or McKeefery offered false testimony in this matter, I need not reach the question whether the absence of their testimony might produce an acquittal. *See* Wright, Federal Practice & Procedure § 557.1 at 344 (noting that judge need go no further in absence of recantation or proof of false testimony). In addition, although I am reasonably well satisfied that Micewski offered false testimony at trial, that conclusion is not based on any new evidence presented but rather only on a more thorough

development of testimonial inconsistencies and implausibilities identified at trial.¹² The production of new evidence is a prerequisite to a *Larrison* inquiry, and in its absence there is no cause to consider the effect on a jury verdict of an absence of witness testimony.

3. Whether the false testimony was unknown or surprising to defendant.

Even if defendant produced new evidence of false testimony by a material witness the absence of which might lead a jury to return a different result, defendant has not met the third requirement of *Larrison* that “the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial.” *See Larrison*, 24 F.2d at 89-89. The *Larrison* court found an absence of surprise when a witness offered the same testimony at the defendant’s second trial as it had offered at the defendant’s first trial. *See Larrison*, 24 F.2d at 88; *see also United States v. Robinson*, 585 F.2d 274, 279 (7th Cir. 1978) (finding no surprise where thirty days passed between testimony and end of trial and defendant made no effort to further challenge testimony). This case presents a substantially similar situation.

First, I find that defendant was not taken by surprise by the testimony of the respective agents when offered at his second trial. Defendant concedes that “Micewski’s trial testimony, at the two trials, was largely the same.” *See* Def. Hr’g Br. at 11; *see also supra* note 2 and accompanying text. In addition, Egges offered substantially similar testimony as to defendant’s

¹² Moreover, I note that it is quite possible that the jury disbelieved Micewski and still found defendant guilty in light of Woods’ trial testimony that the apartment belonged to defendant and in light of the documents and photographs found in the apartment.

statements about contraband, conditions of the search, and items discovered. *See supra* note 4. Finally, McKeefery offered substantially similar testimony at each trial as to his pre-search observations, the conduct of the search, and the items found. *See supra* note 3. Moreover, it is defendant's burden to prove surprise and he makes no averment that he was unaware of the substance of the testimony offered by any of the agents. Rather, he alleges that he was unaware of the new evidence of the other bad acts. That purported evidence, however, was either not presented or, to the extent it was presented, is woefully inadequate. In light of the prior presentation of substantially similar testimony, and the passage of time between the two trials, I conclude that defendant was not surprised by the agents' testimony at his second trial.¹³

Moreover, defendant cannot contend that he did not know the agents' testimony to be false. Micewski testified that he saw defendant enter and leave the apartment on five or six occasions. *See* Trial Tr. July 7, 1994 at 2-5. Defendant denied having been at the apartment more than once prior to his arrest. *See id.* at 2-115. In substance, Micewski offered a story of events "which directly contradicted defendant Harris' testimony." *See* Hr'g Br. at 21. Where defendant's defense "was to contest [the witness'] story, he cannot claim that he was unaware of

¹³ Further, defendant has not shown that he was unable to meet the testimony. For example, at the evidentiary hearing on this motion, Micewski's credibility was impeached principally by demonstrating that his actions were inconsistent and inexplicable: he could not identify who ordered the surveillance, *see* Oral Arg. of Dec. 19, 1997, *reprinted in* Hr'g Br. at A-149 to A-150, when he conducted the surveillance, *see id.* at A-155, why written reports were not filed, *see id.* at A-150 and A-157 to A-158, why his observations did not inform the search warrant, why he did not seek overtime pay, *see id.* at A-160 & A-162 to A-163, and how he knew for whom he was looking. *See id.* at A-151 to A-152 & A-169 to A-174. As defense counsel observes, "the falsity of his testimony is demonstrated . . . [in part] by objective indicia of falsity . . ." *See* Hr'g Br. at 20. These "objective indicia" were as apparent at the time of the 1994 trial as they were in 1997. Defendant even notes that he suspected Micewski was lying at the time of trial. *See* Def. Mot. at 12. I conclude that defendant has not demonstrated his inability to meet the agents' testimony at the time of trial.

its falsity until after trial.” *See Lima*, 774 F.2d at 1251 n.4. Similarly, defendant denied material elements of the testimony by both Egges and McKeefery. *See supra* at Background. To the extent that defendant alleges their trial testimony was false, defendant should have known at his second trial that their testimony regarding their surveillance and his alleged statements in the apartment was false.

In sum, defendant has produced no new evidence of perjured testimony in this case such that a *Larrison* inquiry is proper. Moreover, I am not reasonably well satisfied that either Egges or McKeefery committed perjury in this case and there is no new evidence to reasonably satisfy me that Micewski committed perjury in this case. Therefore, I do not reach the question whether a jury might reach a different result if defendant had a new trial. Finally, the alleged falsity of the testimony of the agents was neither unknown nor surprising to defendant at his second trial. Therefore, I conclude that defendant has presented no new evidence sufficient to require a new trial under the *Larrison* requirements.

CONCLUSION

Defendant proposed to provide new evidence showing that three BNI agents who testified at his trial offered false statements and testimony in the course of other criminal investigations and prosecutions. He suggested that such evidence would demonstrate that justice requires that he be granted a new trial. Defendant did not produce the evidence he proposed, and instead produced more limited impeachment evidence. Under the *Berry* test for newly discovered evidence adopted by the Third Circuit and advocated by defendant in his motion, the new

evidence does not require a new trial because it is evidence only of witness credibility and, in light of other evidence in the record that defendant constructively possessed the apartment and its contents, I do not conclude that “newly discovered evidence would probably produce an acquittal.”

Even under the *Larrison* test for newly discovered evidence of false statements by a material witness, I conclude that defendant presents no new evidence of perjury by any agent which reasonably well satisfies me that they offered false trial testimony. Further, I conclude that the allegedly false testimony was known by defendant to be false at the time of trial and was not a surprise to defendant at his second trial on the same charges.

Therefore, defendant’s motion for a new trial will be denied. An appropriate order follows.

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

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	
	:	
WINSTON HARRIS,	:	
Defendant.	:	NO. 93-06

Order

And now, this day of March, 2000, upon consideration of defendant’s Motion, Memorandum of Law and App. of Documents *sur* new Trial Motion Based on Newly Discovered Evidence (Doc. No. 66), the United States’ Response thereto (Doc. No. 70), defendant’s Reply in Support of the Motion (Doc. No. 71), defendant’s Post-Evidentiary Hearing Brief and App. of

Documents (Doc. No. 99), as well as oral argument on the motion and a review of trial transcripts (Doc. Nos. 41, 42, 43), it is hereby ORDERED that the motion is DENIED.

In addition, the hearing to resentence defendant is hereby rescheduled for April 24, 2000, at 4:00 p.m., in Courtroom 14B, United States Courthouse, 601 Market Street, Philadelphia, PA 19106.

William H. Yohn, Jr., Judge