IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 03-3009-JWL**
98-20030-01-JWL

DAN ANDERSON,

Defendant.

MEMORANDUM AND ORDER

Dan Anderson brings this motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Doc. 774). Mr. Anderson alleges two grounds for relief. First, he contends that the sentencing court violated his Fifth and Sixth Amendment rights, under the reasoning of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it enhanced his offense level based on facts that were not charged in the indictment or proved beyond a reasonable doubt before a jury. Second, he contends that the government violated his due process rights by failing to disclose third-party threats against a government witness and the fact that a government witness had a prior relationship with federal officials, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

After thoroughly reviewing Mr. Anderson's pleadings and the record, the court finds that he is not entitled to relief as to the majority of his claims.[1] Specifically, the sentencing court

[1]Generally, a court may summarily dismiss a § 2255 petition if the motion and record conclusively show that the petitioner is not entitled to relief. *United States v. Housel*, 2003 WL 84408, at *1 (D. Kan. Jan. 6, 2003) (citing *United States v. Marr*, 856

imposed a term of imprisonment that did not exceed the statutory maximum and, therefore, *Apprendi* is not implicated. Additionally, *Brady* does not require the government to disclose the threat evidence against the government witness because it is not favorable to the defense. The court, however, cannot summarily dismiss Mr. Anderson's claim that the government suppressed evidence that one of its witnesses allegedly had an ongoing relationship with federal officials at the time of trial, in light of his allegations and supporting documents.

BACKGROUND

By the mid-1980s Doctors Robert and Ronald LaHue d/b/a Blue Valley Medical Group ("BVMG" or "Blue Valley") had developed a specialized medical practice that emphasized care to patients in nursing homes and other residential care facilities. *United States v. McClatchey*, 217 F.3d 823, 826-27 (10th Cir. 2000). The practice serviced approximately 3,500 patients in the Kansas City Metropolitan area and resulted in a significant number of hospital referrals. *Id.*

In 1984, the LaHues approached Ronald Keel, an operations Vice President at Baptist Medical Center ("Baptist" or "the hospital"), and proposed that Baptist purchase BVMG in exchange for patient referrals. *Id.* at 827. Mr. Keel brought this proposal to the attention of petitioner Dan Anderson, the Chief Executive Officer of Baptist, and then to the rest of Baptist's administrative staff. *Id.*

Baptist decided not to purchase BVMG but, instead, executed a one-year agreement with

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F.2d 1471, 1472-73 (10th Cir. 1988).

the LaHues to pay each doctor $75,000 per year to act as Co-Directors of Gerontology Services at Baptist. *Id.* According to the testimony of Gerard Probst, Chief Financial Officer at Baptist, the negotiation over the 1985 contract occurred in a "backwards" manner because the parties first established the fee to be paid to BVMG and only thereafter did the parties agree to the services that the LaHues would provide. *United States v. LaHue*, 261 F.3d 993, 997 (10th Cir. 2001). Moreover, "from his and Messrs. Anderson, McClatchey, and Keel's perspective, [the negotiations] were grounded in the hospital receiving patient referrals." *Id.* When the LaHues received their initial payment, "BVMG began referring large numbers of patients to Baptist. *United States v. Anderson*, 85 F. Supp. 2d 1047, 1054 (D. Kan. 1999).

The initial contract evolved into a consulting agreement executed in 1986. *Id.* at 1056. Under the consulting agreement, the LaHues were to assist Baptist in creating and operating an Adult Health Care Clinic at the hospital. Pursuant to the 1985 contract and the 1986 agreement, Baptist paid $75,000 annually to each of the LaHues from 1985 to 1993, with the exception of 1990 when the LaHues each received $68,750. *LaHue*, 261 F.3d at 998. The LaHues failed to perform the majority of the consulting services required under the agreements. In January of 1986, Mr. Keel recommended to Mr. Anderson that Baptist modify the contractual relationship by reducing the fees paid to the LaHues and specifying accurately the services they were required to perform. *Anderson*, 85 F. Supp. 2d at 1056. Mr. Anderson approved the latter recommendation but wanted to "discuss" the recommendation to reduce fees. *Id.* Baptist never reduced the fees. *Id.*

At some point in the summer of 1985, the LaHues approached Mr. Anderson to seek

help in managing their practice. *Id*. at 1055. In response, Mr. Anderson assigned Baptist employee Tom Eckard, who was essentially a marketing specialist, to organize the LaHues' practice. *Id*. Essentially, Mr. Eckard became a liaison between BVMG and Baptist. *Id*. Mr. Eckard worked at BVMG and effectively acted as BVMG's manager, but Baptist always paid Eckard's salary. *McClatchey*, 217 F.3d at 827. "Based on his discussions with Messrs. Anderson and McClatchey, and others, Mr. Eckard understood his primary job responsibility was to maintain Baptist's relationship with Blue Valley in order to ensure the continued flow of patients to the hospital." *LaHue*, 261 F.3d at 998. In 1987, Mr. Probst and Mr. McClatchey recommended that Mr. Eckard be terminated for tax reasons and because his allegiances were beginning to shift, but Mr. Anderson rejected the recommendation because he was concerned that firing Mr. Eckard would "disrupt or create a problem with the relationship between Baptist Medical Center and [BVMG]." *Anderson*, 85 F. Supp. 2d at 1056 (citing testimony of Probst).

In early 1991, Baptist entered into merger negotiations with other hospitals in Kansas City. *Id*. at 1056. Eventually, Baptist was acquired by and became a subsidiary of Health Midwest. *Id.* at 1056-57. In the summer of 1991, an attorney, Mark Thompson, informed Mr. Anderson that the 1986 agreement did not conform with safe-harbor regulations, but could be brought into compliance if the contract were written to require hourly services at a specified rate and if Baptist undertook efforts to extensively document the services actually being performed. *Id.* at 1057.

In late 1991 or early 1992, Mr. McGrath was informed that the LaHues were having difficulty performing some of the services delineated in the contract. *LaHue*, 261 F.3d at

1000. Mr. McGrath discussed this information with Mr. Anderson. *Id.* Mr. Anderson did not dispute the accuracy of the information or otherwise suggest that the LaHues were performing the consulting services. *Id.* Moreover, he made no effort to limit or end the consulting fees he himself had directed. In 1993 and 1994, when it appeared that Baptist would lose the BVMG referrals, Mr. Anderson worked to develop a strategy to replace those patients but did nothing to replace the LaHues' consulting services. *Id.*

In July of 1998, a grand jury returned a superseding indictment charging Mr. Anderson, along with other hospital executives, the LaHues, and two attorneys with conspiracy and substantive violations of the Medicare Anti-Kickback statute. The government alleged that the consulting agreements were shams that merely masked the underlying conspiracy to solicit and receive inducements in exchange for the referral of the LaHues' nursing home patients to Baptist.

During the government's case-in-chief, Ms. Sarah Grim, Baptist's Director of Geriatric Services from 1986 to 1988 testified that Mr. Anderson: "(1) made it clear to her the Baptist Blue Valley relationship was a business deal in which Baptist would pay money to Blue Valley in return for patient referrals; and (2) told her he was very protective of the Baptist Blue Valley relationship, because, in her words, Baptist was 'going to get patients. It was about occupancy.'" *Id.* at 998. Other individuals, including Dixie Flynn, Director of Geriatric and Gerontology Services, and Mr. Eckard testified that the LaHues never performed their consulting services. *LaHue*, 261 F.3d at 999-1000.

On April 5, 1999, a jury convicted Mr. Anderson of one count of conspiracy, in

violation of 18 U.S.C. § 371, and one count of violation of the Medicare Anti-Kickback Statute, in violation of 42 U.S.C. § 1320a-7b(b). The court denied Mr. Anderson's post-trial motion for judgment of acquittal or for new trial on July 21, 1999.

At sentencing, the court applied the commercial bribery guidelines resulting in a base offense level of 8. USSG § 2B4.1. The court applied an 11-point enhancement to the base offense level after finding that the value of the bribes paid by Baptist exceeded $800,000 but were less than $1,500,000. USSG § 2F.1.1. The court also applied a 4-point enhancement after finding Mr. Anderson was an organizer or leader of the criminal activity, resulting in a total offense level of 23. USSG § 3B1.1. Mr. Anderson did not have any prior criminal history, resulting in a guideline sentencing range between 46 to 57 months. The court sentenced him to a 51-month term of imprisonment on both counts to be served concurrently, which is less than the 5-year statutory maximum for the offense.

Beginning on June 16, 2000, the South Florida Business Journal published a series of articles discussing corruption in the Medicaid bidding procedures in Florida. The articles indicate that Sarah Grim, CEO of Missouri Patient Care Review Foundation ("MOPRO") at the time, was approached by a lobbyist and offered a $24 million contract involving the Florida Agency for Health Care Administration in exchange for a fee. The article describes Ms. Grim's history in exposing fraud, including her efforts in the early 1990s to investigate an offshore insurance company that was missing $10 million. Ms. Grim states that she terminated that investigation and moved from Florida to Missouri when a pipe bomb exploded outside the guest bedroom window of her condominium. The article further reports that Ms.

Grim was called back to Florida on April 28, 2000, to be questioned about the Florida healthcare contract. The reports claim that "[w]hen Grim travels to Florida on business, she is met by FBI agents and accompanied by them wherever she goes." The government did not disclose this information to the defense at trial.

On March 18, 2001, Ms. Grim filed a lawsuit in the United States District Court for the Western District of Missouri against her former employer (the Missouri Patient Care Review Foundation), the Missouri Hospital Association, and Marc D. Smith, President of the MHA and member of the Board of Directors of MOPRO. She alleges that these defendants threatened and intimidated her because she agreed to testify on behalf of the government in Mr. Anderson's case. In particular, she alleges that she was heavily pressured by MOPRO board members and executives to develop amnesia, to fail to recall critical facts and conversations and to reconsider cooperating with federal prosecutors. After she first testified on February 3, 1999, she contends that Marc Smith informed her that MHA Director Richard W. Brown (who was also president and CEO of Baptist's parent, Health Midwest) was livid over her cooperation and intended to persuade the MHA board to do something about her. Fearing that her job was in jeopardy, Ms. Grim alleges that she called Tanya Treadway, the federal prosecutor, to report Marc Smith's threats. Ms. Grim apparently felt so intimidated that on February 24, 1999, after journeying to Kansas City from her home in Columbia, Missouri, to give further testimony, she abruptly fled her hotel and returned to Columbia. Ms. Grim allegedly only returned after federal agents ordered her to appear to testify. The government failed to disclose this information to the defense.

On June 18, 2001, the Tenth Circuit affirmed Mr. Anderson's conviction after finding that his arguments were foreclosed by the prior panel's decision in *McClatchey*. *LaHue*, 261 F.3d at 1003-04. Mr. Anderson filed a petition for rehearing by the panel and for rehearing en banc. Additionally, on July 24, 2001, the Tenth Circuit granted Mr. Anderson leave to file a supplemental brief challenging his sentence under *Apprendi*. On August 17, 2001, the Tenth Circuit denied Mr. Anderson's petitions and entered a revised opinion, which does not address the *Apprendi* challenge. On August 24, 2001, Mr. Anderson filed a motion to stay the mandate based on the *Apprendi* challenge. The Tenth Circuit denied Mr. Anderson's motion and issued its mandate on August 29, 2001. Mr. Anderson then filed a motion to recall the mandate based again on the *Apprendi* issue. The Tenth Circuit summarily denied the motion on October 25, 2001. The United States Supreme Court denied Mr. Anderson's petition for writ of certiorari on January 7, 2002.

Mr. Anderson filed a § 2255 motion on January 6, 2003. Mr. Anderson alleges that his sentence violates his Fifth and Sixth Amendment rights because the trial court enhanced his offense level based on facts that were neither alleged in the indictment nor decided by a jury beyond a reasonable doubt. Mr. Anderson further alleges that the government violated his Fifth Amendment right to due process by failing to disclose impeachment evidence concerning Ms. Grim's prior relationship with federal law enforcement officials and the alleged threats against her in response to her testimony in the Anderson case.

STANDARD

Section 2255 entitles a prisoner to relief when the judgment was rendered without

jurisdiction, or the sentence imposed was not authorized by law or otherwise open to collateral attack, or there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack. 28 U.S.C. § 2255. Such relief, however is "not available to test the legality of matters which should have been raised on direct appeal," and "[a] defendant's failure to present an issue on direct appeal bars him from raising the issue in his § 2255 motion, unless he can show cause excusing his procedural default and actual prejudice resulting from the errors of which he complains, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed." *United States v. Warner*, 23 F.3d 287, 291 (10th Cir. 1994).

"The standard of review of Section 2255 petitions is quite stringent," and "[t]he court presumes that the proceedings which led to defendant's conviction were correct." *United States v. Nelson*, 177 F. Supp. 2d 1181, 1187 (D. Kan. 2001)(citing *Klein v. United States*, 880 F.2d 250, 253 (10th Cir.1989)). "To prevail, defendant must show a defect in the proceedings which resulted in a 'complete miscarriage of justice.'" *Id.* (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

Even so, the court must hold an evidentiary hearing on a § 2255 motion "unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *United States v. Galloway*, 56 F.3d 1239, 1240 n. 1 (10th Cir. 1995). To be entitled to an evidentiary hearing, the defendant must allege facts which, if proven, would entitle him or her to relief. *Hatch v. Oklahoma*, 58 F.3d 1447, 1471 (10th Cir.1995), cert. denied, 517 U.S. 1235 (1996). "[T]he allegations must be specific and

particularized, not general or conclusory." *Id.*

DISCUSSION

Mr. Anderson alleges that his sentence violates his Fifth and Sixth Amendment rights under the reasoning of *Apprendi* and that he is entitled to relief because the government failed to disclose material impeachment evidence. The court addresses each issue in turn.

I. The Alleged *Apprendi* Violation

Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Mr. Anderson alleges that his sentence violates the "Fifth Amendment's guarantee of due process of law, and. . .the notice and jury trial guarantees of the Sixth Amendment" because the sentencing court increased his offense level based on facts that were not alleged in the indictment or proved beyond a reasonable doubt before a jury.[2] As discussed below, *Apprendi* is not implicated because the sentencing court imposed a term of imprisonment that did not exceed the statutory maximum.

Initially, the government argues that the issue is foreclosed because Mr. Anderson raised the issue on appeal. Indeed, "absent special circumstances, a § 2255 may not relitigate

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[2] Mr. Anderson argues that *Apprendi* applies retroactively on collateral review despite the fact that the decision "was not handed down until well after Movant was convicted and sentenced by the Court." A federal criminal conviction, however, is not final until the Supreme Court affirms a conviction on direct review, denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. *Clay v. United States*, 123 S. Ct. 1072, 1076 (2003). The Supreme Court decided *Apprendi* on June 26, 2000. Mr. Anderson raised the issue prior to January 7, 2002, the date that the Supreme Court denied his petition for certiorari. As such, the new rule of *Apprendi* was announced before Mr. Anderson's conviction became final, and the court need not address his retroactivity analysis. *See, e.g., Salas v. Hvass*, 2002 WL 373452, at *2 (D. Minn. March 7, 2002) (finding non-retroactivity principle did not apply when conviction and sentence became final after date Supreme Court decided *Apprendi*).

issues that were raised and considered on direct appeal." *United States v. Lipp*, 54 F. Supp. 2d 1025, 1029 (D. Kan. 1999) (citing *United States v. Perez*, 129 F.3d 255 (2d Cir. 1997), cert. denied, 525 U.S. 953 (1998); *United States v. Prichard*, 875 F.2d 789, 791 (10th Cir. 1989) (absent an intervening change in the law, issues disposed of on direct appeal will not be considered on a collateral attack by a § 2255 motion); *Barton v. United States*, 791 F.2d 265, 267 (2d Cir. 1986) (absent special circumstances a § 2255 is not an avenue for relitigating questions raised and considered both by the trial court and on appeal)). Mr. Anderson explains that although he raised the issue in his supplementary brief and prior to the Tenth Circuit's mandate, the Court of Appeals did not consider or address the merits of his claim in any of its opinions. Thus, he contends a fundamental miscarriage of justice would result if the court did not address the substantive merits of his claim in this proceeding.

Assuming, without deciding, that his *Apprendi* challenge is not procedurally barred, Mr. Anderson is entitled to no relief. In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. 2348 (emphasis added). "Apprendi is not implicated, however, where judges find facts increasing the mandatory minimum sentence below the maximum sentence for the crime committed. *United States v. Bennett*, 329 F.3d 769, 778 (10th Cir. 2003) (citing *Harris v. United States*, 536 U.S. 545, 565, 569-70 (2002); *United States v. Sullivan*, 255 F.3d 1256, 1265 (10th Cir .2001), cert. denied, 534 U.S. 1166 (2002)). "[F]acts guiding judicial discretion below the statutory maximum need not be alleged in the indictment,

submitted to the jury, or proved beyond a reasonable doubt." *Id.* (citing *Harris*, 536 U.S. at 565, 569-70).

Here, the court relied on facts that were not alleged in the indictment, submitted to the jury or proved beyond a reasonable doubt to enhance Mr. Anderson's base offense level under the Sentencing Guidelines. In the end, he received a 51-month term of imprisonment, which does not exceed the five-year maximum for his offense. 18 U.S.C. § 371; 42 U.S.C. § 1320a-7b. Therefore, *Apprendi* is not implicated. While Mr. Anderson contends that the Tenth Circuit has incorrectly interpreted and applied the reasoning of *Apprendi*, the court is nevertheless bound by this Tenth Circuit precedent. *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir.1996) (district court is bound by Tenth Circuit precedent unless and until it is overruled by the Tenth Circuit en banc or superseded by a contrary Supreme Court decision); *United States v. Spedalieri*, 910 F.2d 707, 709 n.2 (10th Cir. 1990) (same). As such, the court denies Mr. Anderson's requested relief on these grounds.

II. Alleged Brady Violations

Mr. Anderson argues that the government violated his due process rights under the mandate of *Brady* by: (1) failing to disclose that Ms. Grim had reported that individuals were harassing and intimidating her based on her decision to testify on behalf of the government; and (2) failing to disclose that she had a prior relationship with federal law enforcement officials. The court analyzes each claim separately.

A. Witness Intimidation

Mr. Anderson argues that the government's knowledge that Ms. Grim "felt intimidated

and threatened by a person (Smith and/or Brown) closely aligned with Mr. Anderson and the other hospital defendants" was probative of her bias towards Mr. Anderson. The government contends that Ms. Grim's allegations of intimidation and harassment were not favorable to the defendant and that the evidence was not material in light of evidence independent of Ms. Grim's testimony.

Brady provides that the suppression of "evidence favorable to an accused. . .violates due process where the evidence is material either to guilt or to punishment." *Id.* at 87. "To establish a Brady violation, a habeas petitioner must show that '(1) the prosecutor suppressed evidence; (2) the evidence was favorable to the defendant as exculpatory or impeachment evidence; and (3) the evidence was material.'" *Knighton v. Mullin*, 293 F.3d 1165, 1172 (10th Cir. 2002) (quoting *Gonzales v. McKune*, 247 F.3d 1066, 1075 (10th Cir. 2001), vacated in part on other grounds, 279 F.3d 922, 924 (10th Cir.2002) (en banc), petition for cert. filed, (U.S. May 7, 2002) (No. 01-10243)). "Generally, evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (citations omitted). The Supreme Court has further held that the duty to disclose exculpatory evidence "encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)). However, "impeachment Brady material will only require a new trial if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Scott v. Mullin*, 303 F.3d 1222, 1231-32 (10th Cir. 2002) (internal quotations omitted).

Neither party disputes that the government did not disclose the threat evidence in this case. The question is whether the evidence was favorable to the petitioner and, if so, whether it was material. Mr. Anderson asserts that the evidence of witness intimidation was beneficial to the defense because it is probative of Ms. Grim's bias toward the petitioner. While non-defendant third parties (Mr. Brown and/or Mr. Smith) allegedly made the threats, Mr. Anderson explains that it would be unreasonable to conclude that Ms. Grim would have interpreted the threats as separate and isolated from Mr. Anderson and the other defendants. Thus, Mr. Anderson's theory is that the defense could (and would) have introduced this evidence to prove Ms. Grim's bias toward petitioner. The court disagrees and finds that this evidence was, on balance, detrimental to the defense.

Had the prosecution or government intimidated or threatened Ms. Grim to compel her testimony, then that evidence would certainly have been beneficial to the defense. That, however, was not the case. Instead, the threats came from third parties whom Mr. Anderson admits (and advocates) could reasonably be associated with himself and the other Baptist defendants. In *United States v. Smith*, 629 F.2d 650, 651 (10th Cir.), cert. denied 449 U.S. 994 (1980), the Tenth Circuit announced that "[e]vidence of threats to a prosecution witness is admissible as showing consciousness of guilt if a direct connection is established between the defendant and the threat." *See also United States v. Esparsen*, 930 F.2d 1461, 1476 n.16 (10th Cir. 1991), cert. denied 502 U.S. 1036 (1992) (evidence of a defendant's threat to a prosecution witness is properly admissible to show consciousness of guilt relevant to motive, intent, plan, and knowledge under Rule 404(b)). Even if the government could not directly

connect the threats to Mr. Anderson, the admission of the evidence would have been prejudicial to his defense because the jury would have likely inferred such a connection. *See, e.g., United States v. Thomas*, 86 F.3d 647, 654 (trial court committed reversible error by admitting evidence that government witness had been threatened by co-defendant and unidentified third-parties because probative value was more than substantially outweighed by the danger of unfair prejudice). In fact, the Third Circuit has explained that even though threat evidence may be relevant to show consciousness of guilt, it constitutes "a striking example of evidence that 'appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish,' or otherwise may cause a jury to base its decision on something other than the established propositions in the case.'" *United States v. Guerrero*, 803 F.2d 783, 786 (3d Cir. 1986) (addressing physical threats to witness and family) (quoting *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980)).

Viewed in this light, the probative value of the threat evidence in this case (to establish Ms. Grim's bias against Mr. Anderson) is at best marginal, and the evidence is highly prejudicial given that it would tend to establish petitioner's consciousness of guilt. As such, the threat evidence is not favorable to the defense and the government was not required to disclose the information under the reasoning of *Brady*. *See United States v. Sneed*, 34 F.3d 1570, 1581 (10th Cir. 1994) (finding that suppressed material did not constitute a Brady violation when, among other facts, it was not exculpatory or beneficial to the defense). As

such, the court denies relief on these grounds.[3]

B. Prior involvement with the FBI

Mr. Anderson argues that the government failed to disclose that Ms. Grim had an ongoing relationship with federal law enforcement officials at the time of his trial. In support of his claim, he cites to a June 30, 2000 article published in the South Florida Business Journal, wherein the reporter states that "[w]hen Grim travels to Florida on business, she is met by FBI agents and accompanied by them wherever she goes." Mr. Anderson further contends that this evidence, in combination with Ms. Grim's ongoing cooperation with fraud investigations, is probative of her bias and credibility.

The government does not otherwise suggest that it disclosed this information or that it was not favorable to the defense. Instead, it argues that the statement in the South Florida Business Journal refers to a time period post-dating the Anderson investigation and trial, and therefore could not have been subject to disclosure. However, after reviewing the article, the court finds that the statement is ambiguous as to the relevant time period. That is, the article does not specify whether the FBI began escorting Ms. Grim before or after the time of the Anderson trial.

The government further contends that it had no knowledge of the relationship at the time of petitioner's trial. Mr. Anderson explains that this begs the question as to whether the

[3] Mr. Anderson also contends that the government should have disclosed the fact that the FBI ordered Ms. Grim to return to testify because of the "coercive" effect of such a command. Ms. Grim, however, was subject to a subpoena, so any coercion is more appropriately attributed to the court's order.

government fulfilled its obligation to affirmatively investigate Ms. Grim's prior relationship with the FBI. Thus, Mr. Anderson explains that it "is unclear whether the government is arguing that the prosecution team involved in Mr. Anderson's case had no knowledge whether Grim had a prior relationship with law enforcement before the trial, or whether, as a matter of fact based upon diligent review at the time, the United States of America had no information that Grim had a prior relationship with law enforcement authorities." This distinction is significant. Here, the FBI and the Department of Justice assisted the prosecution in Mr. Anderson's trial. "For purposes of Brady, '[k]nowledge by police or investigators is. . .imputed to the prosecution.'" *Smith v. Sec'y of New Mexico Dept. of Corr.*, 50 F.3d 801, 824-25 (10th Cir. 1995). "The concept of constructive or imputed knowledge implies a concomitant duty to seek out *Brady* material from other government agencies working with the prosecution." *Chandras v. McGinnis*, 2002 WL 31946711, at *7 (E.D.N.Y. Nov. 13, 2002). As the Supreme Court has stated recently, "the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (citing *Kyles*, 514 U.S. at 437). The court cannot dispose of Mr. Anderson's argument summarily, based on the current state of the record.

Finally, the government argues that Ms. Grim's testimony generally was not material.[4] Specifically, the government argues, without citing to any specific evidence in the record, that

[4] The government actually makes this argument in response to Mr. Anderson's claim that the "threat evidence" should have been disclosed. The materiality argument, however, applies equally to this impeachment evidence.

the documents, the testimony of Tom Eckard and Gerard Probst, and the admissions of the defendant himself, render Ms. Grim's testimony immaterial. Mr. Anderson, however, contends that Ms. Grim "supplied the most critical testimony in the record concerning Movant's purported "intentions" or "goals" with respect to the Baptist/Blue Valley relationship. While the government believes that the "jury would have convicted the defendant even if Ms. Grim had never testified," the relevant inquiry 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). After reviewing the record, it is clear that Ms. Grim's testimony was, at a minimum, detrimental to Mr. Anderson's defense. Thus, the court is not prepared (at this stage of the proceedings) to find that the impeachment evidence is immaterial without fully resolving the significance of Ms. Grim's prior relationship with federal officials, if such a relationship did in fact exist. The court believes that the more prudent course is to first determine the exact nature of the alleged impeachment evidence at an evidentiary hearing and then decide its materiality.

Mr. Anderson's allegations and his supporting documentation prevent the court from summarily dismissing this *Brady* claim. *United States v. Lopez*, 100 F.3d 113, 119 (10th Cir. 1996) (the district court must conduct evidentiary hearing "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief."). As such, the

court finds that an evidentiary hearing on the issue is appropriate.[5]

CONCLUSION

Mr. Anderson's term of imprisonment does not violate the Fifth and Sixth Amendment under the reasoning of *Apprendi* because it does not exceed the statutory maximum. Moreover, the government did not violate the due process protections articulated in *Brady* as to the "threat evidence" because it was not favorable to Mr. Anderson's defense. The court, however, is required to hold an evidentiary hearing on the alleged *Brady* violation as it pertains to Ms. Grim's prior relationship with federal officials.

IT IS THEREFORE ORDERED BY THE COURT that Mr. Anderson's motion to vacate his sentence pursuant to § 2255 (Doc. 774) is denied in part.

IT IS FURTHER ORDERED that an evidentiary hearing will be held on August 18, 2003 at 9:30 a.m.

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[5] Mr. Anderson also requested discovery on this issue. Rule 6(a) of the Rules Governing Section 2254 Proceedings in the United States District Courts permits discovery upon a showing of good cause. Subsection (b), however, requires that requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced. Rules Governing Section 2255 Proceedings in the United States District Courts 6(b). The purpose of this rule is to "advise the judge of the necessity for discovery and enable him to make certain that the inquiry is relevant and appropriately narrow." Rules Governing Section 2254 Proceedings in the United States District Courts, 6(b) advisory committee notes. Because Mr. Anderson did not comply with Rule 6(b), the court will not grant his general request for discovery at this juncture.

IT IS SO ORDERED this 2nd day of July, 2003.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge