

HERMAN JOSHUA WALLACE**NUMBER: 10-73-6820 SECTION: III****VERSUS****19TH JUDICIAL DISTRICT COURT****STATE OF LOUISIANA****PARISH OF EAST BATON ROUGE****STATE OF LOUISIANA****COMMISSIONER'S REPORT ON BRADY CLAIM FOLLOWING REMAND**

The Defendant-Applicant, hereinafter referred to as the Defendant, was indicted in 1972, along with Co-Defendants Albert Woodfox, Gilbert Montegut, and Chester Jackson, for the murder of Angola Prison guard, Brent Miller. Albert Woodfox's trial was severed from the others on a grant of a change of venue. The other three proceeded to trial in January 1974. All four of the Defendants were initially represented by Mr. Charles Garretson, despite his acknowledged advice to them about the dangers of a conflict.¹ On the second day of trial, Co-Defendant Chester Jackson, in total surprise to his lawyer, stated he wished to testify for the State in this matter.² Mr. Garretson moved to withdraw as his counsel, and the Court appointed Mr. Stacy Moak, instantler, to represent Mr. Jackson, whose trial for murder was then reassigned to a later date. After a trial by jury in this case, on January 10, 1974, the Defendant was found guilty as charged, while his co-defendant, Gilbert Montegut, was acquitted. Mr. Wallace is currently still serving life imprisonment without parole, probation, or suspension of sentence. Some 10 months after trial, in October 1974, Mr. Jackson pled guilty to the reduced charge of manslaughter and was sentenced to the maximum 21 years at hard labor. He died in 1988 while still in prison. Mr. Woodfox was convicted at a separate trial, but had his conviction overturned. He was retried and convicted in 1998.

For reasons unknown, the Defendant did not appeal until almost 18 years later, when the Court granted an out of time appeal. His appeal was denied. Writs were denied by the Supreme Court in 1993, when his conviction and sentence became final.³

While awaiting a decision from the Supreme Court, the Defendant filed his first substantive application for post conviction relief on November 30 1992, which was denied on January 20, 1993. Subsequently, the Defendant filed fourth & fifth identical applications for post conviction relief on May 28, 1993 and June 9, 1993, which were also

¹ See 12/12/97 PCR hearing Tr. pp. 3-5.

² See cross-examination of Chester Jackson by Garretson in Wallace trial.

³ See *State v. Wallace*, 92-1576 (La. 1993).

denied. The First Circuit, following review, remanded two issues to this Court for evidentiary hearing – (1) the conflict of interest claim raised on appeal initially, (based upon the multiple representations by Mr. Charles Garretson) and (2) a claimed Brady violation concerning the testimony of Jackson against the Defendants based on an alleged “deal” between the State and Jackson to accept a plea of manslaughter, which Jackson appeared to deny during the trial.⁴

Prior to any hearings, the Defendant filed a lengthy “Supplemental” PCR “brief” in 1996, raising additional issues desired to be heard on the 1993 application, including the current Brady claim alleging favorable treatment and promises to the State’s star witness, Hezekiah Brown.⁵ The Commissioner found the supplement to contain issues not part of the remand order of the First Circuit, and denied review as untimely and improperly before the Court.⁶ On that 1993 application, evidentiary hearings were held in 1997 and 1998. The Trial Court finally denied the 1993 claims on September 30, 1998, and an application for writs was also denied.⁷

The instant (sixth) application for post conviction relief was filed on September 19, 2000. One of the claims involved an alleged newly discovered Brady violation based on prejudice caused by the State’s failure to disclose promises and favors allegedly made to its witness, Hezekiah Brown, which if disclosed would likely have undermined the verdict or impeached Mr. Brown’s testimony. The Court denied the application, finding it untimely. The First Circuit affirmed the dismissal of all claims except the Brady violation involving Brown, and remanded the matter to this Court. The Order required this Court to first consider any objection that the State was prejudiced by the delay in filing this application. If it was not prejudiced, this Court was to hear the merits of the Brady claim involving alleged promises and favors to Hezekiah Brown.

In response to the First Circuit’s Order, a status conference was held with Counsel for both parties present. After discussions, the State was given until June 5, 2006 to file a procedural objection of prejudice based on the delay in raising the claim. If the objection was filed, a hearing was to be scheduled in accordance with the remand and the holding in *St. ex rel Medford v. Whitley*, as ordered by the First Circuit.⁸ Counsel was notified that if no procedural objection was timely filed, the matter would be set for

⁴ See *State v. Wallace*, 96-KW-1419 (1st Cir. 1997) in the record, and R. 454.

⁵ See Brief in the record.

⁶ See Transcript of April 28, 1998 PCR hearing for Commissioner Bergeron’s oral ruling.

⁷ See writ denial in record dated 3/29/99.

⁸ 666 So2d 652 (La. 1996).

hearing on the merits at Louisiana State Penitentiary. No objections or procedural motions were filed by either party. Thereafter, the matter was set for hearing on the merits of the Brady claim at Louisiana State Penitentiary on September 20, 2006 without objection.

At the hearing, the Defendant was present with Counsel, Mr. Nick Trenticosta, Mr. Scott Fleming, and Ms. Susan Herrera. The State was represented by Mr. Dale Lee. Mr. Trenticosta initially objected that the hearing was not "public." The Court noted on the record that several members of the press, including national and local, and others who were not identified to the court, were present in the courtroom. Mr. Trenticosta noted that the Defendant's family was not in the Courtroom, and after discussion with LSP security, the Defendant's family and others were allowed to fill the courtroom to what appeared to be the capacity of approximately 20-30 people. Mr. Trenticosta's objection, if not resolved, was then overruled and the matter proceeded to hearing on the merits. Documentary evidence was admitted without objection and the testimony of one witness was taken.⁹ Both the documents and transcript of the testimony are in the consideration and adjudication on the merits of the Defendant's claim for reversal of his conviction and sentence.

FACTS OF THE CRIMINAL CASE

Once again, because this case involves a 30-year old murder, a chronological recap of the case is offered for clarity. The facts originate in the transcripts of the trial of Wallace and the admitted transcript of the 1998 Woodfox retrial, and from other exhibits in evidence. In 1972, at the time of the murder of the young corrections officer, Brent Miller, LSP was a racially segregated and volatile prison, with no black correctional officers employed there.¹⁰ Living quarters for inmates were also separated by race.¹¹ Racial hostilities of some of the inmates ran high at that time, as testified to by Chester Jackson, one of the murderers. Mr. Jackson testified that before the morning of the murder—approximately a week earlier—Albert Woodfox and others, including him, had decided to "kill a free man"—"throw away a pig."¹² A diversionary disturbance was set up

⁹ The Court sustained the State's objection to the testimony of Wilbert Rideau who the Defendant wanted to qualify as an "expert in prison life" at Angola in the 1970's. The Court sustained the State's objection and ruled that even assuming Mr. Rideau could be "qualified" his testimony would be irrelevant and unnecessary to the issue of *Brady* violation.

¹⁰ See Exh. 11, testimony of Murray Henderson at 1998 Woodfox retrial 1311 & 1315.

¹¹ *Id.* at p. 1311.

¹² R. 375, testimony of Chester Jackson.

in the dining hall on the morning of April 17, 1972, in order to cause most of the guards to be otherwise engaged. Thereafter, while most of the prison was at breakfast, Officer Miller entered a prison dormitory (Pine 1) to have coffee with an elderly black inmate, Hezekiah Brown.¹³ According to the evidence, Miller was stabbed dozens of times by four inmates--alleged by Brown to include Albert Woodfox, Herman Wallace, Gilbert Montegut, and record for the Court's review. This report is issued on the record for the Court's de novo Chester Jackson.¹⁴ As noted in a prior report, no motive was actually proven other than apparent racial hatred and hostility toward the administration. There had been rumors that a "free" white man was to be killed.¹⁵ Exactly what happened on April 17, 1974 and thereafter may never be entirely known, for many reasons, not the least of which is that both of the State's star witnesses, Hezekiah Brown and Chester Jackson, are deceased, along with then Warden Murray Henderson. (Warden Henderson is the person allegedly responsible for acts and promises to Brown now relied upon as the basis for reversal of Mr. Wallace's conviction).

At the scene, a bloody fingerprint and a homemade knife were found, but neither was ever connected to the Defendants in this case. The State's primary evidence was produced through the testimony of Hezekiah Brown and Chester Jackson--both inmates serving considerable time for violent crimes already. Brown was serving life for aggravated rape and Jackson was serving an armed robbery sentence.

At the trial of this matter, Hezekiah Brown, an elderly inmate, testified that on the morning of the killing, most of the other inmates of Pine 1 Dormitory were at breakfast call approximately a mile away, while Brown was making coffee and talking to Miller in the dorm.¹⁶ He testified that the Defendant, (Wallace), Woodfox, Jackson and Montegut entered the dorm in bandanas, seized Miller, and without a word violently stabbed him numerous times.¹⁷ Although the assailants saw Brown, they did not harm him, and all quickly left the dorm.¹⁸ (Jackson testified that the original plan was to kill Brown also, but for reasons unknown, they did not.) Brown also left quickly and went to

¹³ See testimony of Hezekiah Brown at Wallace trial, R. pp. 288-289.

¹⁴ Id. at R. pp. 295-296 (Wallace trial).

¹⁵ See testimony of Chester Jackson at Wallace trial, Tr. pp. 373-375, 424-425, 430-432. The day before Miller was killed; there was a botched attempt on the life of another white corrections officer when an incendiary object was thrown into a small office. The officer escaped with burns. This information is simply for the Court's edification and understanding of the volatile atmosphere surrounding the killing of Brent Miller.

¹⁶ See testimony of Brown at Wallace trial, R. pp. 288-289.

¹⁷ Id. at R. pp. 294-297, 305-306, testimony of Hezekiah Brown.

¹⁸ Id. at R. p. 297.

the infirmary to give himself an alibi for that time.¹⁹ Jackson testified that he and Wallace went to another dorm and changed clothes, then separated.

A review of Jackson's testimony shown later herein clearly shows that he was evasive, uncomfortable, and vague in almost all of his answers under cross-examination. He never actually accused Montegut, but was equivocal in his answers to all questions regarding Montegut's involvement, and also in many of his answers regarding whether he would be allowed to plead to a lesser charge by the DA. This aspect of the trial will be discussed hereinafter below under the Brady analysis.

As for the aftermath of the murder, the facts are not entirely clear from that time of the murder as to who went where before the alarm went out that an officer was down. Authorities interviewed many inmates in the days immediately following the murder in an attempt to identify the killers. For obvious reasons, it was imperative to identify and arrest the murderers as quickly as possible—particularly in the case of a murdered guard, because of the unique and volatile dynamics between dangerous criminals in a maximum-security facility and their custodians.

Hezekiah Brown was questioned on the day of the murder, but initially denied any knowledge of the killing, claiming an alibi. Many inmates were transferred into a lockdown facility while the investigation ensued, and it appears that the Defendant, Woodfox, and Jackson were among those being held, and possibly Montegut, but the record is not clear.

Following the taking of many statements, prison officials focused on Hezekiah Brown, as a witness, and Chester Jackson, as a perpetrator. It appears from the record that an inmate, Leonard Turner, referred to as "Specs," said that Brown had been in a position to see the perpetrators. Some 2-4 nights after the murder, Mr. Brown and Mr. Jackson were once again questioned about the incident. At that time, Brown stated that he told authorities he had seen Woodfox, Wallace, Jackson and Montegut commit the crime.²⁰ Mr. Jackson also allegedly gave an incriminating statement naming Woodfox, Wallace, and himself as the perpetrators.²¹ At some point prior to Brown's trial testimony, the timing of which is not precisely stated in the record, Warden Murray

¹⁹ Id. at R. pp. 297-298 (Wallace trial).

²⁰ See testimony of Brown at Wallace trial, Tr. pp. 303-305. See also testimony of Brown offered at 1998 Woodfox retrial, Tr. pp. 109-110. See also testimony of Murray Henderson at Woodfox retrial, Tr. pp. 1964, 1972-1973.

²¹ See statement offered by the DA at the Wallace trial in rebuttal to cross examination of Jackson regarding his having apparently told his lawyer he was beaten for the confession.

Henderson promised to help Brown obtain a pardon.²² This information was not made known to the Defense in this case until years after the trial.²³

EVOLUTION OF BRADY RULE

The suppression of evidence favorable to an accused by the State violates due process when the evidence is material either to guilt or punishment, or provides impeaching evidence, irrespective of the good faith or bad faith or the prosecution.²⁴ The key issue is materiality—a term of art for which a concise definition does not exist in the jurisprudence. During my research, I found it not infrequent that trial courts, and even appellate courts, were reversed because of that Court's inability to apply the "correct analysis" in determining what is material. The case law has apparently evolved in the Supreme Court since Brady was originally penned. It is not all exculpatory or impeaching evidence that qualifies as Brady evidence sufficient to require reversal.

"The Brady rule is based on the requirement of due process. It requires disclosure of evidence that is both favorable to the accused and material either to guilt or to punishment. Impeachment evidence, because it is evidence favorable to the accused, falls within the Brady rule. If disclosed and used effectively, impeachment evidence may make the difference between conviction and acquittal. As the Supreme Court noted in *Bagley*: The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."²⁵ (Emphasis mine).

Sufficiency of the evidence is not the test and nor is the outcome of the trial in light of the other evidence presented.²⁶ In other words, even if the Court could find that other evidence (excluding the withheld information) could have supported a conviction, a Defendant may still maintain a valid Brady claim based on the suppressed evidence if "confidence in" the verdict is undermined by the omission.²⁷ The Brady rule is based on due process, and its purpose is to help to ensure that injustice does not occur.

²² See testimony of Henderson, *supra* at Tr. p. 1949.

²³ (It is alleged to have come to the Defendant's attention sometime in the 1990's at which time he attempted unsuccessfully to add this *Brady* claim to his prior pending PCR application filed in 1993. Thus is the reason for the delay in presenting this claim that favors and promises to Brown, which were not disclosed to the Defendant, so prejudiced the trial proceedings that the confidence in the verdict is undermined.)

²⁴ See *Brady v. Maryland*, 83 S.Ct. 1194, 1196-97 (1963); *State v. Smith*, 681 So.2d 991 (La. App. 1 Cir. 1996); see also *Kyles v. Whitley*, 115 S.Ct. 1555, 1565 (1995).

²⁵ *State v. Lindsay*, 621 So.2d 618, 626 (La. 1995).

²⁶ See *State v. Knapper*, *supra* at 959; see also *Kyles v. Whitley*, *supra*.

²⁷ *Kyles v. Whitley*, *supra* at 434; *Bagley v. U.S.*, 473 U.S. at 678, 105 S.Ct. at 3381; *Strickland*, 683 So.2d at 234; *State v. Marshall*, 94-0461, p. 14 (La.9/5/95), 660 So.2d 819, 825.

The obligation to divulge such evidence applies to more than just the prosecuting attorney, and includes other government actors, including investigators—or in this case, the Warden investigating the murder at his prison. It is the duty of the assistant district attorney prosecuting the case to learn of any evidence favorable to the defense which is known to others acting on the government's behalf.²⁸ I point this out because there is no evidence in the record, and the Defendant does not allege, that the prosecutor in this case was aware of the favors and/or promise allegedly given and made to its star witness, Hezekiah Brown. Thus, the jurisprudence is clear that even if he is not informed by the authorities, he is still held to be responsible for the omission.²⁹

In the final analysis of this case, assuming arguendo that the Court finds that a promise of reward and favors existed, the ultimate issue is whether the failure to disclose such a promise could reasonably put the case in such a different light as to undermine one's confidence in the verdict.³⁰ In other words, "if there is a reasonable probability that, had the suppressed evidence been disclosed to the defense, the result of the proceeding would have been different," reversal is required.³¹ This case hinges on whether the Court determines such a reasonable probability exists in this case.

To aid the Court in performing a proper evaluation in this case, the four criteria for determining materiality are restated verbatim from our Supreme Court in the 1995 case of *State v. Marshall*:

"*Kyles v. Whitley* emphasizes four aspects of materiality under *Bagley*. First, 'a showing of materiality does not require demonstration by preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal (whether based on the presence of reasonable doubt or acceptance of an explanation for the crime that does not inculcate the defendant).' [citing *Kyles*]. *Kyles* explained that the meaning of 'reasonable probability' of a different result '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.' *Id.* A 'reasonable probability' of a different result is shown when the state's suppression of evidence 'undermines confidence in the outcome of the trial.' *Id.*

²⁸ *Strickler v. Greene*, 119 S.Ct. 1936 (1999).

²⁹ *Strickler v. Greene*, 119 S.Ct. 1936 (1999).

³⁰ See *Brady v. Maryland*, supra; see also *Kyles v. Whitley*, supra at 1565.

³¹ *Bell v. Bell*, supra at 750, quoting *U.S. v. Bagley*, 105 S.Ct. 3375 (1985).

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all, a *Brady* violation is shown, not by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that 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.*

Third, 'once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. ... *Id.* (citations omitted).

Finally, materiality must be considered 'in terms of suppressed evidence considered collectively, not item-by-item.' *Id.* at 1567. It is not enough for reviewing courts to consider the impact of each item of exculpatory evidence standing alone; *the cumulative effect of the suppressed evidence must be considered.*"³²

In yet a later case, the Supreme Court stated the standard again in *Strickler v. Greene*³³, saying it requires the Movant to prove three elements: (1) favorable (impeaching or exculpatory) evidence (2) that must have been withheld and (3) prejudice must have been caused thereby. The issue in this case is "was there prejudice?"

APPLICATION OF STANDARD TO THE FACTS SHOWN IN THIS CASE

As to the facts in this case, there were several of witnesses to various events of that day around the time of the killing. However Brown and Jackson were the only two, besides the other perpetrators, who were supposedly present and in a position to see what happened to Miller at the time of the killing. Since Jackson's surprise testimony for the State came only after the trial began, it is apparent that the State's case initially rested heavily on the testimony of Hezekiah Brown, and that his credibility was a significant factor in the trial and presumably even more important in obtaining the indictment, since Jackson apparently did not testify there. Therefore, it would have been critical to the Defense to know if Brown [or Jackson] had a reason or advantage, other than conscience, to testify against Mr. Wallace.

³² *St. v. Marshall*, 660 So2d @826 (quoting *Kyles v. Whitley*, 115 S.Ct. @1569.

³³ 119 S.Ct. 1936 (1999).

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"When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within the Brady rule."³⁴

In this case, the Defendant asserts that Brown received special treatment by prison authorities, together with a promise that the Warden would work for a pardon for him, and that if this information had been known to the Defense at trial, it could have seriously affected the jury's determination of Brown's credibility. Since there were only two witnesses that allegedly saw the murder and murderers, it may help the Court to consider the strength of some of the testimony given by Chester Jackson, the co-defendant of Wallace, whose own trial for murder was put off until after his testimony. Although he admitted involvement in the killing, ("I was gave a knife" ... "got the knife from [Woodfox] and hit the man with it."³⁵), and inculpated Wallace and Woodfox, it was apparent that he was intentionally and inexplicably obfuscating and parsing words throughout cross examination on the issue of Montegut's involvement—which Brown had testified to—and also on the issue of any possible deal with the District Attorney for a reduced charge:

Mr. Garretson: Throughout your testimony, I have noticed that there has been no mention of Gilbert Montegut. Did Gilbert Montegut have anything to do with this?

Mr. Jackson: *He could have been in the dormitory and I didn't see him probably. ... Or he could have came in...when the struggle was going on...*³⁶

Mr. Garretson: Will you answer, was Montegut with you, yes or no? Just answer that...

Mr. Jackson: *He could have been with us.*

Mr. Garretson: If he was walking along with you, would you know it?

Mr. Jackson: *He could have went down the walk.*

Mr. Garretson: All I'm asking you is if he was with you and Woodfox. Was he with you, was Montegut with you?

Mr. Jackson: Not in the yard with us, no. ³⁷

³⁴ *Bell v. Bell*, 460 F.3d 739, 749 (6th Cir. 2006), quoting *Giglio v. U.S.*, 92 S.Ct. 763 (1972).

³⁵ R. 401-402.

³⁶ R. 420.

³⁷ See R. p426-427.

Mr. Garretson: Did you see Montegut come in there after you and Woodfox went in the dormitory?

Mr. Jackson: *I can't recall...He could have.*

Mr. Garretson: And am I correct in the information that I received from your mother that the DA has offered to reduce your charges to manslaughter for your testimony here today?

Mr. Jackson: No.

Mr. Garretson: Your mother is incorrect, is that right?

Mr. Jackson: No, sir

Mr. Garretson: Is she correct or incorrect?

Mr. Jackson: Incorrect.

Mr. Garretson: She is incorrect? The DA has not offered to reduce your charges....?

Mr. Jackson: No sir.³⁸

Mr. Garretson: Mr. Jackson, *is it your impression in your mind right now that when you leave here today, or tomorrow or whenever you leave here, that you will be tried for the murder in this case?*

Mr. Jackson: *I do not recall. I might. I supposed to be tried".³⁹*

On the other hand, Mr. Jackson did testify without apparent equivocation that Woodfox, Wallace, and he (because someone gave him a knife) perpetrated the murder. His testimony did not follow Brown's precisely, but the discrepancies, with the major exception of Montegut's involvement—of which Brown seemed quite certain—might have been attributable to the chaos and trauma caused by the violence of the event and the need to hurry to get away. But the answers regarding Montegut's involvement and his own discussions with the DA put his credibility on shaky ground in my opinion. One can only speculate as to what or who the jury believed, but it is unlikely they could have believed both, Jackson and Brown, both on exactly who was involved. The credibility of both was an issue for the jury.

THE PROMISE TO HELP OBTAIN A PARDON AND OTHER FAVORS TO BROWN – ALLEGEDLY GIVEN BY LSP WARDEN MURRAY HENDERSON

³⁸ R. p. 454

³⁹ R. 455.

The Defendant alleges that Hezekiah Brown received important favors and a promise of a pardon before he testified and that these facts were not known before trial and could have been used to impeach Mr. Brown's credibility. The favors included moving him to a secure location out of the general population into a private room and providing him with cigarettes on a regular and continuing basis for years. The record supports this conclusion.⁴⁰ Mr. Bobby Oliveaux, retired DOC employee, testified at the PCR hearing in 2006 that he was working at Angola in 1972 in security at the "dog pen", and was familiar with the "commotion" that went on in the dining hall the morning of the murder.⁴¹ He testified that after the murder, Hezekiah Brown was given protection from other inmates by his transfer him to the "dog pen"⁴², which was where Brown and a couple of other prisoners who needed protection for unstated reasons were housed. ⁴³ According to Mr. Oliveaux, if an outside inmate was called to do work at the dog pen during that time, he would be accompanied by security, and additional security would be with Mr. Brown.⁴⁴ Mr. Oliveaux also stated that the only income for Mr. Brown would have been incentive pay, which at that time would have been between two and ten cents/hour.⁴⁵ Oliveaux further testified that Mr. Brown had no visitors or family that would correspond with him, and no other known source of income than the incentive wages he garnered. (The Defense insinuates that Brown may have been paid ostensibly for his cooperation since Wallace claims that Brown could not have otherwise accumulated \$900 from incentive wages alone by 1986. There is no evidence to support this claim. Brown was in prison for several years before 1972 and until 1986, and even at the rate of \$.05/hour, he would have made well over \$1,000 in that time, assuming he was not required to pay for other things in prison after 1972).

Finally, Mr. Oliveaux testified that shortly after Brown had been at the dog pen, Oliveaux was told by prison authorities above him to make sure that Mr. Brown did not run out of cigarettes while he was in his custody.⁴⁶

Mr. Trenticosta: What would happen if he told you he ran out of cigarettes?

Mr. Oliveaux: I would get his cigarettes.

⁴⁰ See Testimony of Henderson given at the Woodfox retrial, as well as the testimony of

⁴¹ PCR 2006 hearing tr. P. 30.

⁴² Id. p 32.

⁴³ Id. p. 33.

⁴⁴ Id. 34.

⁴⁵ Id.

⁴⁶ Id. p. 35 & 36 & 37.

Mr. Trenticosta: Before the week was out?

Mr. Oliveaux: Right. **Mr. Garretson:** Okay, but you didn't see Montegut stab him, did you?

Mr. Jackson: *Not right off hand.*⁴⁷

Mr. Garretson: you didn't see him in Pine 3 when you went to dump your clothes or change clothes?

Mr. Jackson: I ran in and ran out.

Mr. Garretson: Okay, but you didn't see him in there?

Mr. Jackson: *Very few people I see in there.*

Mr. Garretson: Right, but one of the *few* you didn't see was Montegut, is that right?

Mr. Jackson: *It's a possibility.*

Mr. Garretson: But did you see him...?

Mr. Jackson: *I didn't know them people like I know them now. I just start knowing Gilbert since this incident happened since we been indicted, that's when I start knowing him...face to face.*⁴⁸

He stubbornly refused to clearly answer any question about Montegut's involvement for reasons never shown. Further, his testimony was almost as obtuse regarding whether he would get a lesser charge on his murder charge for testifying:

Mr. Trenticosta: You paid for them by yourself?

Mr. Oliveaux: I got the cigarettes for him.

Mr. Trenticosta: Did you pay for them every week?

Mr. Oliveaux: I don't remember. I didn't pay for them. The State paid for them evidently.⁴⁹

Mr. Trenticosta: Giving of the cigarettes to Mr. Brown was approved by higher up than you were, wasn't it?

Mr. Oliveaux: yes, sir.⁵⁰

⁴⁷ R. 427.

⁴⁸ 428

⁴⁹ Id. p. 35-36.

⁵⁰ Id. p. 36.

Mr. Trenticosta: Did you consider yourself to be like family, like his family?

Mr. Oliveaux: I was in charge of 12 or 13 inmates and I considered them all like children. You had to take care of them.⁵¹...I reckon he was like family...Yes, you consider that as a family. You're taking care of somebody 24 hours a day.⁵²

Warden Henderson likewise testified in a previous hearing that he was aware of, if not responsible for, the giving of cigarettes to Brown. However, the Defendant intimates without any actual proof that the cigarettes were used as currency by Brown for any or all manner of illegal or unauthorized activities at the prison. Mr. Oliveaux testified that he was "sure" that cigarettes could be used as currency within the prison system⁵³, but neither he nor anyone else offered any evidence in the record to support a finding that Mr. Brown used the cigarettes for any purpose other than for smoking them.⁵⁴

Mr. Trenticosta: Do you know if Hezekiah traded in any vices?

Mr. Oliveaux; No, I don't.⁵⁵

Though the prison Warden⁵⁶ or someone with administrative authority obviously authorized the State to pay for Mr. Brown's cigarettes for many years, ostensibly until his release in 1986 when he was pardoned, there is no actual evidence that this was a promised obligation for his testimony.⁵⁷ There were apparently other gratuities given to Mr. Brown after he divulged the names of the alleged killers. Aside from cigarettes, Mr. Oliveaux testified he also gave Brown (and occasionally other inmates) birthday cakes.⁵⁸ After Brown was moved to the dog pen, because he continued to fear for his life, the prison administration also moved him into an "out building" with a TV by himself.⁵⁹ In addition, his job as an orderly for Mr. Oliveaux earned him incentive wages even when he did not perform any work.⁶⁰ Mr. Oliveaux acknowledged that no other inmates among those assigned to his custody had a private room with TV; nor did they receive free cigarettes. Even though there is no evidence in the record to actually show that the

⁵¹ Id. p. 43.

⁵² Id. p. 44.

⁵³ Id. p. 40-41.

⁵⁴ See PCR hearing testimony of Bobby Oliveaux dated Sept. 19, 2006 p. 41-42.

⁵⁵ Id. p. 43.

⁵⁶ See Id, Oliveaux testimony, p. 47.

⁵⁷ Id. p. 39-40, p. 46-47.

⁵⁸ Id. p. 40.

⁵⁹ Id. pp. 38-39.

⁶⁰ Id. p. 40.

cigarettes and other gratuities were part of any pre-trial agreement or promise by the Warden for the witness's cooperation or testimony, it is completely plausible, and more than likely, that all of the largesse would have ceased had Mr. Brown refused to testify for the State. Nonetheless, this stipend of cigarettes, the private room and birthday cakes, even if not disclosed to the Defense before trial, could not alone be considered sufficient to undermine confidence in the verdict.

However, the Court is required to consider all of the omitted evidence cumulatively with other evidence of favors or promises.⁶¹ Therefore, in addition to the cigarettes, cakes, TV, etc, the most significant omitted information alleged was the Warden's promise to personally help Brown obtain a pardon for "cracking the case" for the authorities.⁶²

The State is correct in its argument that there is no specific admission by Henderson that the promise to help with a pardon or the favors given were actually made "in exchange for his testimony." However, the fact is, the promise to help with a pardon was clearly made to the witness before he testified, according to Henderson's sworn testimony at Woodfox's retrial.⁶³ This Writer considers the promise to be quite significant under those circumstances, considering applicable jurisprudence.

The Warden acknowledged that he had sent numerous letters to various officials after the trial, including the trial judge and pardon board members, attempting to obtain a favorable recommendation for Mr. Brown's pardon request.⁶⁴

"Dear Judge Shea;
... [Brown] was resentenced in your court from Death to a Life sentence. On April 17, 1972 a white officer was killed by three black militants from the New Orleans area. Brown testified for the State and on the basis of his testimony these three individuals received a life sentence each.⁶⁵...I would appreciate any consideration you would give him."⁶⁶

"Dear Mrs. Hunt:
It is my understanding that [Brown's] case was considered by the Pardon Board...and recommendation from you. You will recall that Mr. Brown was a key witness in the apprehension and conviction of the three inmates who

⁶¹ See *State v. Marshall* 660 So.2d 819, (La.9/5/95).

⁶² See 2006 PCR Exh. 11, p. 1363 of Henderson's trial testimony.

⁶³ Id.

⁶⁴ See Exh. 11, pp. 1348-56 and Exhs. 1-4.

⁶⁵ Actually, Jackson pled to a lesser charge and received 21 years, and Montegut was acquitted.

⁶⁶ Exh. 1, letter dated February 15, 1974 from Henderson to Brown's trial judge.

killed Brent Miller.... I would personally appreciate any consideration you give him."⁶⁷

"Dear Judge Shea:

As a result of [Brown's] willingness to come forward, other witnesses were found and convictions of three inmates were obtained. ...It is my personal opinion that the State has an obligation to try to help this individual in some way."⁶⁸

The letters and Henderson's post-Wallace-trial testimony admitted in the current PCR hearing, clearly show Warden Henderson's and others' efforts to obtain a commutation for Brown, as was promised to Brown by Henderson before the Wallace trial.⁶⁹

Q: Didn't you also tell him that if he gave you the information and proceed to testify for the State, that you would also promise to support a pardon application for him?

Henderson: Yeah,...

Q: And did you do that?

Henderson: I wrote letters for him.⁷⁰

The record is replete with Henderson's (and his successors') efforts on behalf of Brown after the original trial, although there is no mention of them by witnesses at the Defendant's trial. Brown's life sentence was commuted to time served in 1986, when he was eighty. At the time he was released, his inmate account showed a balance of approximately \$900. Contrary to the Defendant's insinuation otherwise, there is no evidence in the record that shows that the money was given for his testimony or that it was ill gotten in any manner.

So, recapping the evidence in the record that was apparently omitted from disclosure before Wallace's trial, the following is relevant to the jury's determination of Mr. Browns' true reason for testifying, and thus, his credibility:

- 1: favorable treatment while under protection following his "cracking the case";
2. Apparent largesse by the administration following Brown's statement, including several hundred *cartons of cigarettes* doled out weekly or more often, a clemency *advertisement*, a *separate housing facility with TV*⁷¹; and most significantly,

⁶⁷ Exh. 2, letter dated April 1974 from Henderson to the Secretary of the Department of Corrections.

⁶⁸ Exh. 3, letter to Judge Shea from Henderson dated September 18, 1975.

⁶⁹ See Exhibits 1-8 offered at PCR hearing of 2006.

⁷⁰ Henderson's testimony at trial, p. 1348.

⁷¹ Id, p. 38-40.

3. A promise by the LSP Warden to help Brown obtain a commutation of his life sentence, which help began within 30 days of the Wallace trial and ultimately resulted in a pardon some 14 years after trial.

WHETHER THE PROMISES/FAVORS WERE MATERIAL

First, the State argues that no promises were made "in exchange for testimony."⁷² However, Mr. Lee conceded that the evidence did show favors to Brown⁷³, but concluded that this sort of treatment was not uncommon in cases of prison witnesses and would have been known to defense counsel. Further, the State argued that it was only Henderson that favored Brown, without actually promising him anything of significance. The State concluded that just because "... the one warden ...worked for [Brown] for several years and kept trying to get him a pardon doesn't necessarily mean that he [Brown] had been promised that."⁷⁴

"I didn't see anybody else writing letters on his behalf...They've looked everywhere...and there are no other letters that said, yeah, we've got to honor this agreement that we made; we've got to honor this promise that we made to Brown. Its just Warden Henderson, who ironically enough ended up in jail himself."⁷⁵

"What we have seen is that Brown was perhaps getting favors, but we don't know why."⁷⁶

On the contrary, I believe the evidence shows a promise was made and that the favors were given because of his cooperation and willingness to testify for the State. It goes without saying that if he had refused to testify, those favors would have ceased. Further, the State argues that since the Warden couldn't grant a pardon, Brown, (who would have known that), would not have endangered his life by testifying based only on the "hope of a pardon."⁷⁷ The State, thus, asserts this "promise" could not have influenced Brown's decision to testify or the altered the truth of his testimony because it was not worth the risk he would face.⁷⁸ With all due respect for the District Attorney's conclusion, I disagree. I think it is fair to say that an old, crippled inmate serving life in a maximum security prison would jump at the chance to be free. I think this Court is well

⁷² 2006 PCR tr. P. 72.

⁷³ Id. p. 78.

⁷⁴ Id.

⁷⁵ id. p. 77.

⁷⁶ Id. p. 80.

⁷⁷ Id. p. 81.

⁷⁸ Id. p. 81.

aware of what an inmate might decide to testify to or not to testify to when given the "hope" of the ultimate reward—freedom from natural life and certain death in prison.

I am not suggesting, however, that Brown lied in his testimony. However, I do not think it is necessary to believe that he did in order to find the promises made to him were material. I think that just the "hope" of freedom—reasonably based on the promise of the Warden's help to get a pardon—could certainly have influenced Brown's decision to help the State at trial. Such a promise, it is fair to say, could have even influenced him to lie if he was so inclined. We should not overlook the fact that Mr. Brown was not just any bystander, but had served and was serving time for attempted aggravated rape and aggravated rape, respectively. He was not a newcomer to the prison system or a young naïve man. Warden Henderson's promise was made to him before he testified at trial.⁷⁹ He had to know the State relied heavily upon his statements, especially when the Warden offered help in obtaining a pardon for him soon after his statement.

Q: Didn't you also tell him that if he gave you the information and proceeded to testify for the State, that you would also promise to support a pardon application for him?

Henderson: Yeah, I told him that later, I've forgotten when. And shortly after that, or sometime after that, I was – I went to Tennessee as Commissioner of Corrections, and I went up to the dog pen and told him that because I was leaving didn't mean that I wouldn't continue to try to do something for him.⁸⁰

Q: [Brown] also indicated in his testimony [in Woodfox's trial] that nothing was promised him. Absolutely nothing was promised him to secure his testimony. That statement ...is not true, is it?

Henderson: Well, nothing was promised to him to begin with, but we told him, you know, we would protect him and try to help him any way we could after he, you know, cracked the case for us.⁸¹

Q: That if he testified, you promised him that you would do whatever you could to support his pardon?

Henderson: Right.

Q: And those promises were – were made to him by you?

Henderson: Yeah.

⁷⁹ See Exh. 11, p. 1362-63, testimony of Murray Henderson at 1998 Woodfox retrial.

⁸⁰ Henderson allegedly went to Tennessee in 1975.

⁸¹ The Defendant suggests that this statement meant that the "favor or help" was predicated on his "cracking the case" as opposed to an equally likely interpretation that the "favor" was a result of his "cracking the case." Nevertheless, this Court cannot certainly determine the meaning of this statement without further information.

Q: Before he testified?

Henderson: That's right.⁸² (Emphasis mine).

Clearly, there were commitments made to the witness before his testimony—call them promises, agreements, favors—they were offers of help forthcoming for his “cracking the case.”

Our Supreme Court has held that the mere “possibility of reward” can be deemed material so that a fair trial demands the jury be given the opportunity to hear of it gauging the affected witness’s credibility.⁸³ In this case, the Defendant was denied the opportunity to present that evidence.

SUMMARY

It is clear from the above testimony that Murray Henderson did tell Brown that he would assist him in obtaining a pardon--after Brown gave his statement implicating Wallace, but before he testified for the State at the Wallace trial. Regardless of how the offer is characterized— a promise, an agreement, a favor – it was clearly an offer of something of considerable import because it gave Brown hope that he did not otherwise have – hope that he would some day be released from prison. This was an old, sick and partially crippled man – by his own and Henderson’s description – who was serving a life sentence without any family, supporters or prospect of release, virtually certain to die alone in prison. In addition, he had witnessed a murder and had been questioned more than once by the administration. He had given them incriminating information would have soon become known to the perpetrators and which did, quite expectedly, place his life in immediate and continuing danger from one or more of the perpetrators or others connected to them. In all likelihood, that danger would continue for a long time, if not his life. As a result, the administration moved him into a much more secure area, where, even so, he continued to fear for his life and have nightmares. ⁸⁴ Against those circumstances, the Warden’s promise of help to get a pardon would certainly have been a significant prize to dangle in front of Brown, and would quite naturally have increased his desire to help the State at trial.

⁸² Exh. 11, 1998 Woodfox retrial, Tr. pp. 1362-63

⁸³ See *State v. Lindsay* 621 So.2d 618 (La. 1995).

⁸⁴ See PCR hearing of Sept. 20, 2006, testimony of Bobby Oliveaux, Tr. pp. 38-39.

Unlike Defense Counsel, I do not find Mr. Brown's testimony incredible — quite the contrary. He was seen by others in a position to have witnessed the murder at close hand.⁸⁵ He knew very well three of the four perpetrators that he named, having lived with or around them for years.⁸⁶ He testified he was an old, sick man and his body could not take any more abuse — the source of which, he does not identify — so when he was questioned the second time, he decided to “tell the truth.”⁸⁷ In addition, he stated he did not want to be implicated in the murder himself, which he assumed likely because of the proximity of the victim's body to his bunk.⁸⁸

Also, unlike the Defense, I do not interpret Henderson's phrase “after he cracked the case for us” to mean that Brown was told before he implicated anyone that only if he cracked the case, he would get the promised help. On the contrary, in the context of the sentence and considering Henderson's other statements on the subject, it seems clear that what Henderson said was that Brown gave them the names of the perpetrators first and only then did Henderson offer a “reward” for his coming forth with the “truth.” In other words, the inculcation came first, and then the offer of possible reward.

DOES THE POSSIBILITY OF REWARD UNDERMINE CONFIDENCE IN THE OUTCOME?

All that having been said, is the offer of the possibility of an substantial reward in this case, information that, if made known to trial defense counsel at the Wallace trial, could have impeached Brown's credibility? In other words, is it so important that its omission now undermines confidence in the process that led to the verdict? While I think it does, “Undermining confidence” is assuredly an elusive, abstract intangible that does not easily lend itself to subjective analysis. However, its roots are in the due process clause, a concept more universally understood by the Courts, and the violation of which is more easily recognized even if it is not always susceptible to concise articulation. In this case, as in most, whether the offer of reward meets the “materiality” standard required for reversal is clearly a judgment call — a judicial conclusion based on the law, experience and understanding of the criminal/legal process after full consideration of the facts and circumstances of this particular case.

The State argues that it is not material, in part because that information was made known to the jury in Woodfox, and it still resulted in his conviction. However, as

⁸⁵ See testimony of Henderson at 1998 Woodfox retrial, Tr. pp. 1346-47.

⁸⁶ See testimony of Hezekiah Brown at Wallace trial, Tr. pp. 277-281.

⁸⁷ Id. at p. 302. See also testimony of Brown offered at 1998 Woodfox retrial, Tr. p. 110.

⁸⁸ Id. at p. 298 (Wallace trial).

pointed out by Counsel for Mr. Wallace, the measuring stick is not what one jury actually did with the information, but what is the probability that the suppressed information likely prejudiced the Defense in the Wallace trial in 1974. I suggest that the promise is material under the constitutional standard of Brady and its progeny. However, I note that the jurisprudence appears to be less than clear in analyzing similar claims, and thus, I cannot say that reasonable minds would all reach the same conclusion. Hereafter, I set forth some of the contradiction in jurisprudence.

In other jurisdictions, even when information was withheld that would have given a witness motivation to fabricate testimony; some courts have determined that no Brady violation occurred. Courts have denied similar Brady claims for reasons including that there was other strong corroboration of the witness's testimony, or because it was "self validating" or because the Court found that the promise of reward was not given "in exchange" for testimony (as the State now argues).⁸⁹ In another case, a federal district court in Wisconsin found no Brady violation when the prosecutor failed to disclose a promise made to a witness before trial because the witness's testimony never varied throughout the proceedings before and after the promise, (as appears to be the case here).⁹⁰ In the Wisconsin case, the Court found the witness merely reiterated his same testimony given at a preliminary hearing. The Court reasoned that "there were no substantial inconsistencies between [the witness's] preliminary hearing testimony and his testimony at trial," and thus, the information was not "material." (The same could be said of Brown's initial statement to authorities and his trial testimony.) However, the only "promise" given in the Wisconsin case involved a recommendation that the witness not get jail time on pending charges in another district.

Considering the case in light of those opinions, there is no doubt that Brown's testimony, in this case, was consistent and was corroborated in part by Chester Jackson, i.e. as to involvement by Jackson, Wallace and Woodfox. However, Jackson did not corroborate Brown's clear statement that there were four masked men who came in together and killed Miller and that Montegut was the fourth person with the other three when Miller was killed. This contradiction could not be easily reconciled unless the jury disbelieved one of the witnesses—Brown or Jackson. (It appears they disbelieved Brown.) In fact, Jackson's testimony in that regard was so full of obfuscation that it is

⁸⁹ See *Mataya v. Kingston*, 371 F.3d 353 (7th Cir. 2004); *State v. DuBray*, 77 P.3d 247 (MT 2003).

⁹⁰ See *Ruiz v. Cady*, 710 F.2d 1214 (1983).

impossible to discern what, if anything, he was trying to convey about Montegut's whereabouts and participation in the murder. The only thing clear about his testimony was that there were three of them that entered together and killed Miller—Woodfox, Wallace and Jackson—not Montegut. Ever the equivocator, he did not rule out Montegut's coming in later and stabbing the victim— but only after he said left the dorm.⁹¹ In fact, if he was right that before they did, it would have been impossible for Brown to have seen Montegut come in later and stab the victim.

One can only speculate as to the jury's reason for acquitting Montegut, but could logically conclude that the jury discounted Brown's credibility—at least as to Montegut's involvement, since they did acquit him. Thus, under those circumstances, the omitted evidence (of a promise showing that Brown stood a chance to gain full release if he testified for the State against the accused), would have taken on added significance for the Defense —particularly since Brown stated that he was telling the truth solely based on his conscience and his fear of reprisals.

The jurisprudence is not entirely clear as to whether the "materiality" standard actually requires proof of the likelihood that the witness lied (ostensibly to obtain the promised reward) or whether it only requires that there be proof that the promise would have provided significant incentive for the witness to lie, had he been so inclined. Considering the issue in light of fairness in the proceedings, it would seem that the standard is only that the offer of reward be significant enough to induce one, in the witness's situation, to fabricate testimony if he was so inclined and there is not then overwhelming evidence of guilt.

After careful analysis of the case law, particularly the Louisiana Supreme Court's holding in *State v. Lindsay*, it suggests that the possibility of reward — not authority to grant — is sufficient to rise to the level of material information if it is withheld and involves the testimony of a substantial eye witness, as Mr. Brown most assuredly was. In so finding, I considered additional jurisprudence on similar claims of offers of reward given before a witness testified. In *Bell v. Bell*,⁹² a Tennessee case involving a letter from the DA seeking a parole for a witness, a federal court (6th Circuit) reversed the conviction on a Brady claim. The Court found that a letter written by the prosecutor to the parole

⁹¹ See testimony of Chester Jackson at Wallace trial, Tr. pp. 384, 400-402, 427. Note, however, that Jackson vaguely implicated Montegut in the planning of the murder although his testimony as to Montegut's involvement is otherwise useless and evasive.
⁹² 460 F3rd 739 (6th Cir. Tenn. 2006)

board for a key witness shortly after the trial, was material, impeaching information that should have been disclosed to the Defense. I note, however, the witness in this case offered the only evidence of premeditation required for a first-degree murder conviction. In reversing the conviction, the Court noted that the question had not previously been answered by the U.S. Supreme Court as to whether a tacit agreement, rather than an express agreement, is sufficient to be material. In answering that question affirmatively, the Court held that any favorable agreement, express or tacit, is to be considered "favorable" evidence under Brady. It cited the Seventh, Eighth and Ninth Circuits, all of whom agreed with the Court's analysis. It is clear that facts that imply an agreement would also bear on the witness' credibility and would have to be disclosed.⁹³

Another case cited in Bell — *Reutter v. Solem*⁹⁴, *infra* — also resulted in reversal of a conviction under a similar Brady claim. In that case, the 8th Court found that the DA had failed to disclose that its star witness had a commutation hearing set to be heard after trial of the Defendant. The Court stated, "Our conclusion does not depend on a finding of either an express or implied agreement...regarding the prosecution's favorable recommendation to the parole board.... We hold that, ...the fact of the witness' impending commutation hearing was material...and that petitioner is therefore entitled to relief."⁹⁵

Even in a case where reversal was not ordered when evidence of favorable treatment for witness was suppressed, a federal Court (2nd Cir.), in affirming the conviction stated that while the Government was free to reward witnesses for cooperation with favorable treatment without disclosure, they may do so only if "it does not promise anything to the witnesses prior to their testimony".⁹⁶

The Court's reasoning in the Bell case is highly relevant and fairly articulates the practicalities of negotiations between the government and incarcerated individuals when their testimony is involved.

"Moreover, a tacit agreement in this context is based on the transparent incentives for both the witness and the prosecution. The fact is that a jailhouse informant is one of the least likely candidates for altruistic behavior; his offer to testify is usually coupled with an expectation of some benefit in return. The prosecution is not naive as to

⁹³ *Bell v. Bell*, *supra* at 751, citing *U.S. v. Shaffer*, 789 F.2d 682 (9th Cir. 1986).

⁹⁴ 888 F.3d 578 (8th Circuit 1989).

⁹⁵ See *Reutter v. Solem*, 888 F.2d 578, 581 (8th Cir. 1989).

⁹⁶ See *Shabazz v. Artuz*, 336 F.3d 154, 157 (2nd Cir. 2003) (Emphasis mine).

this expectation, and the prosecution also knows that when the value of the informant's testimony reaches a sufficient level, it is in the prosecution's interest to fulfill this expectation. At the most fundamental level, the arrangement is a quid pro quo; the informant knows he is giving something of value and expects something in return; the prosecution knows it is receiving something of value and gives something in return."⁹⁷

In *U.S. v. Giglio*⁹⁸, the Supreme Court reversed a conviction based on nondisclosure of a prosecutor's tacit agreement — if not a promise — not to prosecute a witness on other charges if he would testify before the grand jury consistent with a statement he had given FBI investigators. Consistency was not a saving fact. The Court found that the Government's case hinged almost entirely on the witness's testimony against the Defendant.

In the *Lindsay* case, our own Supreme Court also reversed a conviction for failing to disclose the prosecutors' promise to a witness that her testimony would be considered in any future plea bargain agreements with her.⁹⁹ Again, the Court found that the violation warranted a new trial because "the state's case depended almost entirely upon the testimony of [the co-conspirator witness]" in identifying the Defendant Lindsay as the perpetrator.¹⁰⁰ The Trial Court in *Lindsay* had denied relief, finding that since the plea bargain "was not negotiated until after [the witness] testified, and was not consummated until the date after the trial, the state has not violated its duty to ...inform the defendant of the plea bargain".¹⁰¹ On a motion for new trial, the attorney for the witness testified that he had been in negotiations with the State from the onset of the case, but was told that the State would offer no specific agreement before the witness testified. After she testified for the State, it allowed her to plead to accessory after the fact. She, like Brown and Jackson, indicated that she was not promised anything for her testimony. The Supreme Court reversed the Trial Court, holding that the "possibility of reward" gave the witness a "direct, personal stake in" the Defendant's conviction, even though it was not guaranteed through a promise. Ironically, the fact that it was not guaranteed was an element that the Court found "served only to strengthen any incentive to testify falsely in order to secure a conviction."¹⁰² The omission must be evaluated in

⁹⁷ *Bell v. Bell*, supra at 753.

⁹⁸ 92 S.Ct. 763 (1972).

⁹⁹ *State v. Lindsay*, 621 So.2d 618 (La. 1995).

¹⁰⁰ *Id.* at 628.

¹⁰¹ *Id.* at 622.

¹⁰² *Id.* at 625.

the context of the entire record. If the evidence as a whole is not overwhelming or even strong, but is of a lesser quality, the Lindsay holding suggests that additional evidence of more minor importance might be sufficient to create a reasonable doubt or undermine confidence.¹⁰³

“We note from the outset that the State’s constitutional requirement to disclose material evidence favorable to the defendant is not limited to formal, consummated, binding agreements exacted of the state by the state witness.¹⁰⁴

“Indeed, the [Supreme] Court had suggested as early as its decision in Giglio that something less than an explicit promise to reward a witness in return for testimony might be sufficient to trigger the disclosure requirement of Brady”¹⁰⁵

In this case, considering the specific circumstances as they existed in 1972, some of which are described above, I suggest that the failure to inform Defense Counsel that the Warden made a pre-trial offer to help obtain a pardon for a significant witness for the State — who was serving a natural life sentence — when taken together with the other favors that were granted to Brown, was information that should have been provided to Defense Counsel to show that Brown had a bias and a personal stake in the successful outcome of the State’s case. The Defense should have been allowed to present that information to the jury for their consideration in weighing Brown’s credibility. It is also ironic in retrospect that the record also shows that Jackson, a self-confessed, cold-blooded killer, was allowed just months after his testimony, to plead to the reduced charge of manslaughter, just as his former attorney had suggested during the Wallace trial.

As stated, the case law states that the Court is not to engage in a sufficiency of the evidence analysis, but it also shows that Courts have considered the overall strength of the State’s case to determine whether the information withheld — in this case, reasonable hope of a pardon and various other favors — would have undermined confidence in the verdict. In reviewing this case under that standard, I note that most of the evidence that was accumulated in this case was not necessarily consistent throughout — from witness to witness. Many saw inconsistent and irreconcilable events and people. However, the only actual two witnesses to the murder were Chester Jackson — a

¹⁰³ *Id.* at 628, citing *U.S. v. Agurs*, 96 S.Ct. @ 2402.

¹⁰⁴ *Id.*, citing *Bagley*, *supra*.

¹⁰⁵ *Id.*

participant — and Hezekiah Brown— an eyewitness. All other witnesses that were interviewed and/or called to testify against the Defendant saw events that occurred and people that appeared only after the killing occurred and only outside of the dorm where the murder occurred. No other witness that may have been in the dorm when the murder occurred could identify any participant or describe the events of the stabbing. Therefore, Jackson and Brown were the State's key witnesses. As stated, both of their testimonies were fairly consistent with each other as to the events that occurred at the time of the killing, with the major exception being the number and identity of the murderers. That discrepancy creates a problem when one considers the stakes for Brown and Jackson's vague, evasive testimony apparently exculpating Gilbert Montegut. Considering Jackson's obfuscation during the trial, and the promise to Brown that was not disclosed, I cannot suggest that the evidence of guilt was overwhelming under the circumstances that appear in this record. And in most, if not all, of the jurisprudence where obvious Brady violations did not result in reversal, there was other such clear and convincing evidence of guilt that the Court had no trouble finding that even if the omitted evidence had been timely produced, it would not have likely influenced the result. The "other" evidence in this case is primarily that given by Chester Jackson. From my review of his testimony, it could be best be described as intentionally and narrowly focused and decidedly evasive on important facts he should have been certain of --related to Montegut's participation in the murder and the possibility that Jackson might get or expected to get a deal from the State following his testimony.

Should the Court disagree with my assessment of Jackson's testimony and find that the State's evidence was strong and that Brown's testimony was merely cumulative of Jackson's, jurisprudence would support a conclusion that the State's case would not have been affected by evidence of bias or a personal stake in the outcome by Brown. In that circumstance, the Court should find that the verdict rendered is worthy of confidence and that due process does not require reversal.¹⁰⁶ In other words, if the result is not undermined by non-disclosure of the suppressed evidence, then no new trial is warranted, even though the omitted evidence is obviously exculpatory, as here.¹⁰⁷

As previously stated, under the less than consistent jurisprudence, reasonable minds could differ based on the assessment of the State's case and the importance of

¹⁰⁶ See *State v. Marshall*, 660 So.2d 819, 827 (La. 1995).

¹⁰⁷ *Id.*


Brown's testimony in relation to the verdict. However, after my consideration of all the evidence, I find the quality of Chester Jackson's testimony to be questionable at best and incredible at worst. His testimony was not decisive on issues that he should have been sure of, such as who was involved and whether the State would let him plead to a lesser offense. The fact is that the State did allow him to plead to manslaughter within months of his testimony even though he had confessed in open court to cold-blooded murder, which while certainly not enough by itself to conclude he lied in his testimony, simply confirms the import of Jackson's testimony for the State. Given the circumstances of this case, including the difficulty faced in getting inmate witnesses to testify in the volatile atmosphere surrounding the events of this case, it cannot go unnoticed that the only two witnesses that spoke on the subject of the murder both happened to obtain significant reward following their testimony—at least one of which was promised help in obtaining that reward before he ever testified. At the time it was given, Brown's credibility and testimony was pivotal for the State's case against Montegut—particularly in light of Jackson's evasiveness as to who was involved in the murder. Considering all of the circumstances of this case, and the somewhat poor quality of the evidence on the issue of who was involved, Mr. Brown's testimony on that issue was extremely important to the State—although it did not ultimately win the day. Nevertheless, the fact that he had a very good reason to testify favorably to the State is a fact that could have likely, in the hands of competent counsel, impeached his credibility. I find that the omitted evidence (that Brown had a personal stake in testifying, if not in the outcome as well) was material impeaching information that undermines confidence in the outcome of the trial. If the Court agrees, my formal recommendation follows.

COMMISSIONER'S RECOMMENDATION

While reasonable minds could differ in this case, I have considered all of the evidence submitted in the record and find that Warden Henderson did promise to help Brown with a pardon before Brown testified and that he did authorize other favors within the prison. I further find that such favors, together with the promise to help obtain a pardon, in light of the inconsistencies of Chester Jackson's testimony, should have been disclosed to the Defense before trial, as they weighed on the credibility of Hezekiah Brown. Finally, I further find that after a cumulative evaluation of all of the evidence that was omitted, that failure to inform the Defense of that evidence is sufficient under the facts and circumstances of this case, to undermine confidence in the

proceedings that resulted in a verdict of guilty. Based on that finding, I must recommend reversal of the conviction in this matter.

RESPECTFULLY SUBMITTED this 7th day of November 2006 in Baton Rouge, Louisiana.


RACHEL P. MORGAN
COMMISSIONER, SECTION A
NINETEENTH JUDICIAL DISTRICT COURT

Cc: Herman Wallace, Defendant-Applicant
Nick Trenticosta, Defense Counsel (& Scott Fleming; Susan Herrera)
ADA: Dale Lee