SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA,	:	
	:	
	:	
v.	:	**Criminal No. F 5751-04**
	:	
	:	**Closed Case**
DWIGHT GRANDSON,	:	**Judge Rhonda Reid Winston**
	:	
Defendant.	:	

ORDER

This matter is before the Court on Defendant's Motion to Vacate Convictions ("Motion") for first degree premeditated murder, possession of a firearm during a crime of violence, carrying a pistol without a license, and obstruction of justice in connection with the shooting death of Derrick Hinson on September 7, 2006. Defendant's motion is based on the government's failure to disclose exculpatory information as is required by *Brady v. Maryland*, 373 U.S. 83 (1964). The Court finds that the defendant has met his burden of proving that, but, for the nondisclosure and tardy disclosure of exculpatory evidence by the government in this case, there is a reasonable probability the outcome of the trial would have been different. Therefore, for the reasons set forth both below, the Court grants the defendant's Motion to Vacate Convictions.

I. INTRODUCTION

Procedural History

On September 11, 2004, the defendant was arrested and held in connection with the murder of Derrick Hinson on September 7, 2004. On June 8, 2005 he was charged in an indictment with first-degree premeditated murder while armed, possession of a firearm during a crime of violence, carrying a pistol without a license (felony), and obstructing justice.[1] In a superseding indictment on June 8, 2005, Jerome Holliway and Danielle Adams were charged as co-defendants with Defendant. Each was charged with obstruction of justice, accessory after the fact to murder, threats, (felony), and assault with a dangerous weapon. On May 17, 2006, the defendant's case was certified by Judge Gardner to this Court for trial.

This case was tried before a jury from May 18, 2006 through May 30, 2006, and the Defendant was convicted of the aforementioned offenses. On September 8, 2006, he was sentenced to an aggregate term of 34 years imprisonment.[2] On December 11, 2006, Defendant filed a Motion to Vacate Sentence pursuant to SCR-Criminal Rule 33, based on newly discovered evidence – specifically, that the government had failed to disclose that a government witness, Miracle Cowser, had been promised a reward of $25,000.00 for her assistance and testimony in this case. [3] In its response to that Motion, filed

[1]After the superseding indictment, all hearings in the matters were held together until Judge Gardner certified Mr. Grandson's case to this Court for trial on May 17, 2006.

[2] The defendant was sentenced to concurrent terms of thirty (30) years in prison for first degree premeditated murder, five (5) years for possession of a firearm during a crime of violence, and eight (8) months for carrying a pistol without a license. These terms were to be followed by terms of supervised release of five (5) years for murder and three (3) years for each of the other counts. The Court also sentenced Grandson to consecutive terms of forty eight (48) months in prison and five (5) years of supervised release for obstruction of justice.

[3] The defense learned of this evidence when a news story aired on WJLA-TV in which Cowser claimed that she had been promised a reward of $25,000.00 upon conviction of Defendant, in exchange for her assistance and testimony in the case, but that she had not received her money.

January 24, 2007, the Government responded that "the United States is not aware of any promises of reward money to Cowser".[4] (Govt.'s Resp. 7). This Court denied the Motion without a hearing.

Subsequently, on June 12, 2009, while his case was on appeal, Defendant filed the instant motion, alleging that the government had violated *Brady* when it failed to disclose "exculpatory information bearing on his guilt or innocence and on the credibility of its witnesses Miracle and Myra Cowser and [that] the prosecutor's suppression of that evidence was highly prejudicial." (Motion at 1). Specifically, the defendant contends that the government failed to disclose "[Miracle] Cowser's expectation of a substantial reward and belief that she was entitled to it". (Motion at 31-34). In its response, the Government conceded that, although Miracle Cowser had not been *promised* a reward before trial, she nevertheless had the expectation of a reward. It further conceded that "the United States no longer has sufficient confidence in the guilty verdict against the defendant for the obstruction of justice [count] and therefore does not oppose the Court's vacating the defendant's conviction and sentence on the obstruction count." (Govt.'s Resp. at 3).

While acknowledging that the Government was required to disclose Miracle's expectation of a reward before trial, the Government argues that the Defendant's convictions on the other counts should not be vacated because, even had disclosure been made, there is no reasonable probability that the outcome of the trial would have been different.

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[4] Reward money was paid to Miracle Cowser, Myra Cowser, and Tecoiya Wood in December, 2006.

In addition to considering the evidence at the hearing, on this Motion, see § III, *infra*, the Court has reviewed the transcripts of the jury trial and the relevant pre-trial proceedings, and the transcript of the after-sentence hearing before the Hon. Wendell Gardner in the related cases, *United States v. Adams*, 2004 FEL 5752, and *United States v. Holliway*, 2004 ADM 5753, which involved allegations that the Government had withheld evidence that Miracle Cowser had an expectation of a reward for her testimony in their cases.

II. TRIAL

The Government's evidence at trial showed that Derrick Hinson was shot and killed in an alley on the 2300 block of Ainger Place, S.E. at approximately 9:25 pm on September 7, 2004. On September 11, 2004, Miracle Cowser reported to police that early that morning , the defendant, Jerome Holliway, (the defendant's cousin), and Danielle Adams (defendant's girlfriend) threatened to kill her if she provided information to the police implicating the defendant in the Hinson murder. In response to Cowser's report, the police arrested the defendant, Holliway, and Adams later that day. That night, Myra Cowser, Miracle Cowser's 12 year old daughter, identified the defendant, Dwight Grandson, who was known by the nickname "Bin Laden", as the man she saw shoot and kill Hinson, and the defendant was held.

The following evidence was a major part of the Plaintiff's case at the defendant's trial before this Court from May 18, 2006 through May 30, 2006.

A. The Government's Evidence

1. Miracle Cowser

At trial, Miracle Cowser ("Miracle") testified that in September, 2004, she lived on Ainger Place S.E. with her daughter Myra (5-22-06 at 136-37). She had a sisterly relationship with Danielle Adams ("Danielle") and knew the defendant because he was Danielle's boyfriend. (*Id.* at 139-45). Miracle was also a friend of the decedent, Hinson. (*Id.* at 139-45).

On the night of September 7, 2004, Miracle was in bed when she heard gunshots outside. (*Id.* at 148). She jumped out of bed and ran to the door where she encountered her daughter, Myra Cowser, ("Myra") coming in the house. (*Id.).* Myra was crying and Miracle *believed* that Myra said "Oh, my God, Bin Laden was shot!" (*Id.* at 149). Miracle also heard other people yelling outside "I can't believe Bin laden shot that boy". (*Id.).* She then ran to check on Adams and her children because Myra told her that Adams's house had been "shot up". (*Id.* at 150). Next, she saw the decedent lying on the ground "in a puddle of blood". (*Id.).* The police were already on the scene at that point, (5-23-06 at 241), but Miracle did not talk to them that night because she "didn't want to be involved in nothing". (5-22-06 at 158). When Miracle returned home that night, Myra told her "Bin Laden shot that boy." (5-23-06 at 283).

In the days following the killing, Detective Brett Smith called Miracle several times, apparently having gotten her telephone number from Danielle Adams. (*Id.* at 162). When she complained to Danielle about having given the police her number, the defendant was present and told her "bitch don't say my name." (*Id.* at 162).

A couple of nights later, in the early morning hours of September 11, 2004, Miracle drove into her parking lot and encountered Danielle, the defendant, and a man whom she did not know (later identified as Jerome Holliway). (*Id.* at 164). Danielle invited Miracle into her apartment. (*Id.* at 164-65). When she entered Danielle's home, Miracle testified the defendant asked her "bitch why you here?" (*Id.* at 165), and then told her "you better not say nothing." (*Id.* at 167). Holliway then joined in saying "this bitch know too much information. We should do her right now . . . I'll chop your head off bitch and walk it to the dumpster around the corner." (*Id.* at 178). Miracle testified that the defendant first said "yeah" to Holliway's threats, but then told Miracle, "don't take it, he's drunk." (*Id.* at 179).[5] At that point, Miracle claimed, she heard the following exchange between the defendant and Holliway:

> **Holliway:** Shut the fuck up. I'm here because you killed somebody. I'm taking up for you.
> **Defendant:** Shut the fuck up. That's not for everybody to know.

(*Id.* at 179).[6]

Cowser testified that, after the "threats", she remained at Danielle's home drinking and smoking marijuana with the people who had threatened her because she did not want them to think she was "snitching." (*Id.* at 179, 190). When she did go home later, she immediately called the police to report the threats. (*Id.* at 180-81). Later that day, Detective Brett Smith arrived, and Miracle and Myra went with him to the homicide office, where they gave taped video statements to the police. (*Id.* at 187- 88).

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[5] Cowser was impeached with her grand jury testimony that she had been threatened by Holliway and Adams but not by the defendant. (5-23-06 at 284).

[6] These statements were admitted over the defense objection to show consciousness of guilt on the part of the defendant.

2. Myra Cowser

Myra Cowser was 12 years old at the time of the shooting and 13 years old at the time of the trial. (5-18-06 at 72). By September 2004, Myra and her mother had been living on Ainger place, S.E. (the "Woodlands" area) for four years. (*Id.* at 73-74). Myra knew Danielle Adams because her mother and Danielle were friends, and Danielle's two daughters were her playmates. She knew the defendant because he "used to go with Danielle", (*Id.* at 77-78), and she knew the decedent, Hinson, because he was her mother's friend.

On September 7, 2004, Myra was playing at Danielle's house after school. (*Id.* at 82-83). The defendant and the decedent, whom she knew as "D", were also present. (*Id.*). As Danielle and the decedent were leaving to go to McDonalds and the liquor store, Myra heard the defendant tell Danielle in a voice that sounded "like he was mad" that he was going to "get" the decedent when they returned. (*Id.* at 83, 86-87).

When the decedent returned, Myra heard the defendant accuse Danielle of wanting the decedent "for his money", and then a fight broke out between Danielle and the defendant. (*Id.* at 88). When the fight escalated, Myra went outside of Danielle's house and told the decedent. (*Id.* at 88-89). The decedent entered Danielle's house and broke up the fight and then dragged the defendant out of the house. (*Id.*). A few moments later, Myra went outside where she observed the defendant and the decedent fighting. (*Id.* at 90). Myra claimed that the defendant was "on the ground with a black eye", (*Id.* at 94, 173-74), vowing to "get" the decedent when he returned, and left the area. (*Id.*). Myra proceeded to play jump rope with Danielle's daughters. (*Id.* at 94-97.)

She saw her friend Tecoiya Wood sitting on her porch. (*Id.* at 131-33.) While jumping rope, Myra saw the defendant return to the area. (*Id.* at 96). Although it was dark by that point and the defendant had "a little shining mask thing" over the lower part of his face, Myra claimed, she was able to recognize the defendant, and could see the tattoo of a teardrop near his eye. (*Id.* at 99-100, 145, 175).

Myra testified that the defendant held a black gun in his hand, stood just ten feet from her and her playmates, and told them to "watch out". (*Id.* at 101, 146-47). At that time, the decedent was standing in the middle of the street, making a phone call with a cell phone. (*Id.* at 101). The defendant called out the decedent's name, (*Id.* at 103), and then Myra saw the defendant shoot "about six shots" into the decedent's stomach and chest. (*Id.* at 103-07).

Myra testified that after witnessing the shooting, she ran to the closest building, and (*Id.* at 106-07, 183), then, a few moments later, she ran home and awakened her mother, who was sleeping. (*Id.* at 109, 167).[7] Myra also testified that she saw the defendant a few days later when his cousin, Jerome Holliway, was banging on the front door of her apartment. (*Id.* at 109). Myra did *not* report what she had seen to the police immediately because she was "not no snitch", but only did so "after they threatened [her] mother." (*Id.* at 115).

[7] Myra was impeached with her September 11, 2004 videotaped statement to the M.P.D. Detective Smith of September 11, 2004 in which she said .that she had observed the shooting when she went outside to take out the trash, and that she had first reported to her mother that it was the defendant who had been shot. (5-18-06 at 168-69). On redirect, Myra testified that other people were saying that the defendant had been shot and killed, but that she knew that the defendant had committed the shooting. (*Id.* at 177, 181-82).

3. Tecoiya Woods

Tecoiya Woods was 12 years old at the time of the shooting and 14 years old at the time she testified at the defendant's trial. (5-18-06 at 188-89). At the time of the shooting, she lived with her mother and siblings on Ainger Place, S.E. (*Id.* at 190).

On September 7, 2004, Tecoiya was playing outside with other children, (*Id.* at 200-01), and the defendant was sitting on Danielle's porch, dressed in all black. (*Id.* at 199-204). The decedent approached the defendant, said "something about a robbery," and then punched the defendant in the face two times, knocking him to the ground. (*Id.* at 202-03; 5-19-06 at 255, 273). When the defendant got back to his feet, he told the decedent, "watch" and quickly left the area. (5-19-06 at 204). Tecoiya then went inside. (*Id.*).[8]

When Tecoiya came back outside it was dark, and the streetlights were on. (*Id.* at 204-05, 210). She saw the defendant come back to the area. (*Id.* at 205). Although the defendant was wearing a mask up to his eye, Tecoiya testified, she could see his entire body and recognized him because of his all black clothing and because of his "tall and slinky" body. (*Id.* at 207; 5-19-06 at 233, 275, 279). Tecoiya then witnessed the defendant walk toward the decedent and fire about five shots at the decedent. (5-18-06 at 207; 5-19-06 at 269). Tecoiya testified that she did not see Myra Cowser outside while this was going on. After witnessing the shooting, Tecoiya did not see where the defendant

[8] Tecoyia testified at the trial that she did not see the decedent drag the defendant out of Ms. Adams' house, did not see the defendant hit the decedent at all, and that she did not see Myra outside when the decedent punched the defendant or at any other time that night. (5-19-06 at 256-66).

went. She ran into the house and told her mother that "Bin Laden had shot that boy". (*Id.* at 209; 5-19-06 at 273-76).

4. Margo Frye

Frye testified at the defendant's murder trial that she was walking back to her neighborhood with her children when she heard 4 or 5 shots ring out. (5-19-06. at 291-92). She and her children immediately dove to the ground, she saw the decedent also lying on the ground. She also observed people running past her, including the defendant. She testified that the defendant looked behind him with a look on his face "like something had happened". (*Id.* at 295-96). She did not observe a gun in the defendant's hand, nor did she see a mask on his face. She did observe a black scarf on the defendant's head with blood on it. (*Id.* at 315-16, 325-26).

5. Jamise Liberty

Jamise Liberty was the girlfriend of the defendant's brother. (5-19-06 at 348-50). She testified that at approximately 9:00 pm one night in September, 2004, the defendant came to his mother's home, where she was living at the time. (*Id.* at 360-61). She heard the defendant talking to his mother from her bedroom. (*Id.).* The tone of the defendant's voice indicated to her that something was wrong, so she put him on the phone with his brother with whom she was talking. (*Id.).* As he talked to his brother, the defendant seemed upset and pressed a t-shirt against some "blood spots" on his face. (*Id.* at 362-63). She did not see the defendant carrying a gun or wearing a mask. (*Id.* at 375). After the phone call, the defendant asked Liberty to take him to his father's home in Landover, Maryland and she agreed. (*Id.* at 364). While en route, the defendant changed his mind and asked her to drive to another brother's house in Forestville, Maryland, which was

closer than his father's house. (*Id.* at 365-66, 376). Liberty dropped the defendant off in Forestville and returned to Southeast, D.C. (*Id.* at 366).

6. Dianna Scott

Dianna Scott was very close to the defendant and his family and considered him "like a nephew" since he was a little boy. (5-25-06 at 492). She had lived with the defendant's family intermittently from the time the defendant was two years old. (*Id.*). She was living at the defendant's mother's home in September, 2004. She testified at trial that the day before the shooting, the defendant showed her a "black and flat" object that was "straight".[9] (5-25-2006 at 498, 500, 509-10).

A few nights later, the defendant knocked on the door, and when she answered it, the defendant appeared to be "very upset" and looked like he had just been in a fight. He had a scar across his eye and specks of blood on his t-shirt. (*Id.* at 496). Ten or fifteen minutes later, Jamise and the defendant left. (*Id.* at 497). As he left, the defendant told Ms. Scott that he had been fighting. (*Id.* at 520-521).

7. Additional Testimony of Government Witnesses

The government also presented testimony from Police Officer Kemper Agee, who was the lead mobile crime officer with the responsibility of processing the shooting scene. (5-19-06 at 378-85). He testified that the police recovered a number of .45 caliber cartridge casings, spent bullets, and bullet fragments from the scene. (5-19-06 at 385-90). The police never recovered a mask or gun. (Id. at 129-133). M.P. D. Firearm examiner, Jonathan Pope, testified that the eight cartridge cases recovered had all been

[9] Ms. Scott was impeached with her grand jury testimony in which she indicated that the defendant had shown her a "pistol" tucked into his waistband. (5-26-06 at 502).

fired from the same .45 caliber handgun. (5-25-06 at 448-72). The two spent .45 caliber bullets he examined had also been fired from the same firearm. (Id. at 472-78). The evidence showed that the decedent had been shot with a .45 caliber gun.

D.C. Deputy Medical Examiner, Lois Goslinoski, testified that she observed from the autopsy of the decedent that he had received four gunshot wounds and one graze wound. (5-22-06 at 26-47). The decedent also had facial abrasions and scrapes on his face and both upper and lower lips, and cuts on the knuckles and fingers of his right hand, all of which were consistent with the decedent having been in a "physical altercation." (5-22-06 at 68-78).

B. The Defense Evidence

1. Thomas McBride

Thomas "Tommy" McBride testified as a defense witness, having been given a grant of immunity pursuant to *Carter v. United States,* 684 A.2d 331 (D.C. 1996) (en banc) (requiring prosecution to choose between immunizing critical defense witnesses or to face dismissal of the indictment in case where court finds prosecutorial distortion of fact-finding process). He and the decedent, for whom he sold drugs at the time of the shooting, had been friends for 15 years. (5-25-06 at 547). McBride had known the defendant for only 7 or 8 months and considered him an "associate". (*Id.* at 539).

On September 7, 2004, McBride, who is paralyzed from the waist down and wheel-chair bound, went to the area around Ainger Place at approximately lunchtime to sell drugs.[10] (*Id.* at 546). He remained in the area all day selling drugs and saw the decedent periodically to exchange money and drugs. During an encounter that evening,

[10] McBride was impeached with convictions for larceny ('96), aggravated assault (95), assault with a dangerous weapon ('87), and possession of cocaine ('87). (5-25-06 at 586).

two men approached McBride and the decedent. (*Id.* at 558-59). McBride recognized the men from the neighborhood, but only knew the name of one of them – "Moe" or "Blacky". (*Id.* at 559-62). McBride described "Blacky" as being about 5'6" tall with a medium build, and described the second man as being of similar height and build and dressed in all black. (*Id.* at 565). The second man pulled out a gun, (*Id.*at 562), and robbed the decedent of his cash and drugs and the keys to his truck. (*Id.* at 563-66, 565). Both men then walked the decedent to his car and Blacky started rummaging through the decedent's trunk. (*Id.* at 567-68). At that point McBride rolled up to them in his wheelchair and told the two robbers to "leave it alone" and the two men ran off. (*Id.* at 569-70).

The decedent chased the two robbers briefly, but then returned, approached the defendant who was sitting on a chair on Danielle Adams' patio, and punched the defendant several times. According to McBride, the decedent thought that the defendant had set him up. The defendant got up and immediately ran into a clothes line pole making him appear "discombobulated", "punch-drunk", and "knocked out on his feet". (*Id.* at 572). Eventually, the defendant ran away from the area. (*Id.* at 573).

As McBride started to roll off, he saw someone run past him displaying a gun. (*Id.* at 567). McBride watched the person fire the gun approximately 8 times into the decedent. (*Id.* at 579). The shooter was 5'6 or 5'7 of medium build and dressed in all black. He had something covering his face so that McBride never saw his face, but, McBride testified, he was "100% confident" that the shooter was shorter and stockier than the defendant, According to body structure; the shooter could not have been the defendant. (*Id.* at 577-81; 5-26-06 at 31-32). McBride also discounted the defendant as a

possible shooter because the shooting happened just three or four minutes after he had seen the defendant in his "discombobulated" state and he didn't believe that the defendant would have had time to recover so quickly. (5-26-06 at 33). Near the end of McBride's testimony, this Court discovered, and informed defense counsel, that McBride testified in the grand jury that the defendant carried a .25 caliber pistol. (5-26-06 at 69, 74). That evidence was never provided to defense counsel by the government.

The Court took a brief recess to allow defense counsel to review the grand jury transcript and prepare to use it in his re-direct of McBride. Defense counsel did elicit testimony from McBride on re-direct that he had seen the defendant with a gun previously, but that the gun the defendant carried was different in appearance from the murder weapon.

2. Juan Newby

Mr. Newby was familiar with the Woodlands area because his aunt lived there. (5-26-06 at 76-79). Newby's son was a friend of the defendant, and he had known the defendant since he was young. (*Id.* at 77). Newby knew Tommy McBride well, and was familiar with the decedent, but did not know him well. (*Id.* at 77-81).

On September 7, 2004, Newby was in the neighborhood when he became aware of a "commotion already in progress" across the street. (*Id.* at 80). Newby heard the decedent tell the defendant, "you let them bitch ass niggers rob me," and then he saw the decedent punch the defendant several times. (*Id.* at 81-82). The defendant was knocked down, but then got up, ran into a pole (hitting his face), and eventually fled the area. (*Id.* at 82).

About two or three minutes later, Newby saw "a little short dude" arrive carrying a gun. (*Id.* at 82-84). The "short dude" was dressed in all black, and was 5'4 or 5'5, and thus, shorter than the defendant, whom Newby estimated to be 6'2 or 6'3. (*Id.* at 84-87). Upon seeing the gunman, Newby immediately began to run away from the area and heard gunshots as he ran. (*Id.* at 83). Newby testified that he did not see any young girls in the area that night, but that it was possible that they were out there. (*Id.* at 91-92, 95-96).

Newby was impeached with prior convictions for attempted possession of PCP ('87, '89), carrying a dangerous weapon (gun) ('93), possession of unregistered firearm ('95), possession of marijuana ('95), attempted possession with intent to distribute cocaine ('99), (5-26-06 at 77, 93-94).

3. Curtis Noland

Mr. Noland, age 22, had been the defendant's friend since their school days. (5-30-06 at 11-12, 22). On the night of September 7, 2004, Noland was in the area when he saw the defendant running toward him with his face "kind of messed up" with bleeding cuts and bruises. (*Id.*). The defendant, out of breath and panicking like he was scared, asked Noland for help. (*Id.* at 16-17).

About five or ten minutes later, while Noland was still standing with the defendant, he testified, they heard gunshots coming from Ainger Place. (*Id.* at 14). The two ducked into a nearby building for safety. (*Id.* at 14, 18). After another five to ten minutes, Noland testified that he walked the defendant halfway to his mother's house, where he left him. (*Id.*).

On May 30, 2006, the jury returned a guilty verdict against the defendant on all charges. On September 8, 2006 the Court sentenced the defendant to an aggregate term of forty three (43) years of imprisonment.

III. POST-TRIAL

In their separate co-defendant trial before the Honorable Wendell P. Gardner, Jr., Jerome Holliway and Danielle Adams were convicted of accessory after the fact to the first degree murder of Derrick Hinson, obstruction of justice, and felony threats. Holliway was also convicted of simple assault. In that trial, Miracle Cowser gave the same testimony that she gave in the defendant's murder trial.

A. Co-Defendants' Post-Trial Motion

On June 8, 2007, Jerome Holliway filed a Motion for New Trial pursuant to Rule 33 and D.C. Code § 23-110, citing the same grounds as the defendant's December 11, 2006 Motion.[11] Danielle Adams later joined in that Motion. On January 29, 2009, March 3, 2009, and March 12, 2009, Judge Gardner held a post-trial hearing on the Holliway-Adams Motion. At that hearing, Judge Gardner heard testimony from Miracle Cowser, Myra Cowser, Detectives Michael Fulton and Brett Smith, a victim-witness specialist in the U.S. Attorney's office, Yvonne Bryant, and Assistant United States Attorney Steven Snyder. The relevant portions of their testimonies are as follows:

1. Miracle Cowser

When she testified on January 29, 2009, Miracle Cowser said Detectives Brett Smith and Michael Fulton helped move her into a hotel on September 11, 2004. (1-29-09 at 36).

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[11] Holliway's Motion stated that the government violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to disclose a pre-trial promise by a law enforcement official to pay the principal witness, Miracle Cowser, $25,000 for her assistance and testimony in connection with his case and that he was "constitutionally prejudiced" by the non-disclosure of this impeachment information. (Holliway, Motion at 1-9).

She learned later that someone had ransacked her apartment, and she asked the detectives whether she could be reimbursed for her damaged property. (1-29-09 at 39). She also discussed reimbursement with witness protection personnel in the U.S. Attorney's office. (1-29-09 at 40). Cowser insisted that she did not ask and police ever told her she would get a reward for being a witness in this case. (1-29-09 at 40).

Miracle Cowser testified that she learned about the reward from her daughter Myra. (1-29-09 at 33). Cowser first said that she did not learn about the Metropolitan Police Department's reward program until after Holliway, Adams, and the defendant had been sentenced. (1-29-09 at 29-30). However, she later said she learned about the reward after the defendant's conviction but before the co-defendant's trial. (1-29-09 at 42).

Cowser testified that initially, she did not believe that she was eligible for reward money because she did not witness the homicide, and when she testified in the second trial she did not expect to receive a reward. (1-29-09 at 57-59). According to Cowser, Myra was the first to ask for a reward. When she did, Smith advised her that the process takes a long time and she should not expect her reward quickly. (1-29-09 at 62-63). Cowser said she also discussed the reward with Yvonne Bryant, the victim-witness specialist in the office of the United States Attorney's Office. (1-29-09 at 57-63).

Cowser testified that she made the inquiries for Myra and did not expect that she would receive a reward, but she said that the story that aired on WJLA was accurate. (1-29-09 at 72).

2. *Myra Cowser*

In testimony March 3, 2009, Myra Cowser said about a year after the defendant's trial, Smith came to her school with a check, which he gave to her grandmother. (3-3-09 at

11). Until then, she was unaware that there was a reward program, and both she and her grandmother were surprised when she received the check. (3-3-09 at 10). Myra said she does not know how much money she received and was not even curious why she received money. (3-3-09 at 20-21). Myra testified that she believed that the money was in a bank account. (3-3-09 at 21).

Before receiving the money, she testified, she never discussed a reward with her mother or police. (3-3-09 at 24). Myra said that she had been living with her grandmother for some time when learned from Miracle that she, too, received a check. (*Id.*). Myra said that Miracle told her after the broadcast that she had been on television, but did not tell her the reason for the appearance. (*Id.*).

Myra denied telling Miracle about the reward program and said they never discussed a reward before she received her check. (*Id.*).

3. *Detective Brett Smith*

Smith testified on March 5, 2009. According to Smith, his first contact with Miracle Cowser was a telephone conversation September 8, 2004. (03-05-2009 at 63). Their first face-to-face meeting occurred September 11, when he went to Ainger Place to arrest Mr. Grandson and his codefendants. (03-05-2009 at 63). He had decided to relocate Miracle and Myra Cowser for their safety, and after making the arrests he took them to the Homicide Branch to be interviewed. (03-05-2009 at 68-69).

After the videotaped interviews, Smith took them to a hotel where they stayed September 11 and 12. (03-05-2009 at 68). He then took them to the victim-witness office in the U.S. attorney's office to arrange for more permanent housing. (03-05-2009 at 68).

During that time, Smith said, he provided a small amount of money so they could buy food and other essential items. (03-05-2009 at 70).

Smith testified that he learned a few days later that Miracle's apartment had been burglarized and that items had been taken or damaged. (03-05-2009 at 69). Thereafter, Miracle expressed concern about getting compensation for the stolen and damaged property. (03-05-2009 at 90). Smith said he inquired about getting compensation from the Superior Court Crime Victims' Compensation Fund and the U.S. Attorney's Victims' fund, but learned that they do not cover property losses. (03-05-2009 at 91). Then Miracle learned about the police department's reward program from a third party, not Smith. (03-05-2009 at 92). "When she realized that the only thing available was reward money, that's what she focused on." (03-05-2009 at 92). Smith said that "she morphed one thing to the other (victim compensation and reward money), and it became all about getting something for her trouble. (03-05-2009 at 92).

Miracle initiated conversations about the reward program, according to Smith. (03-05-2009 at 71). He said he never promised her a reward, but he told her the MPD program provided rewards to witnesses who came forward and provided information leading to the arrest and conviction of defendants, and that they would discuss the matter "down the line". (03-05-2009 at 72). Miracle had previous independent knowledge of rewards, and knew that rewards had been given in other murder cases. (03-05-2009 at 93). As time passed, Miracle's approached changed, he said, and by the time of Mr. Grandson's trial her mindset was that she would get a reward, regardless of the outcome. (03-05-2009 at 72).

Smith testified that he did not recall when he first discussed Miracle's expectation with Mr. Snyder. It may have come up before the homicide trial, but he was "more certain"

that they spoke before Adams' and Holliway's trial. (03-05-2009 at 100). When they spoke, Smith advised Snyder to tell Miracle that the U.S. Attorney's office had nothing to do with the reward program. (03-05-2009 at 81).

4. *Detective Michael Fulton*

Detective Fulton, who assisted Detective Smith in this case, testified on March 5, at the codefendants' § 23-110 hearing. (03-05-2009 at 39). He testified that Miracle was upset about the break-in at her apartment on Ainger Place. (03-05-2009 at 41). When it became clear that the Crime Victims' Compensation Fund would not replace her items, the subject of the reward program came up. (03-05-2009 at 41). He did not recall Smith being present during his first conversation with Miracle about the reward. (03-05-2009 at 59). Fulton said he explained that the MPD could pay up $25,000 for information that leads to the arrest and conviction of a person for a crime". (03-05-2009 at 42). "[They] talked about the reward money and if there was a conviction in this case that she would be eligible and that's something [] that she would need to go through detective Smith for because he was the lead detective and the lead detective usually handles that." (03-05-2009 at 44).

5. *Assistant United States Attorney Steven Snyder*

Assistant United State's Attorney Snyder testified March 12, 2009 that he met Miracle and Myra Cowser shortly after the police put them in temporary housing, but he did not discuss reward money with the Cowsers. (3-12-09 at 35). He was aware that they had obtained assistance from the victim-witness section of the U.S. Attorney's Offices and the MPD provided assistance to them. (3-12-09 at 35). He recalled that Miracle complained early on about the loss of her property. (3-12-09 at 52).

He testified that there were no discussions with Miracle about a reward before Grandson's trial. (3-12-09 at 46). He did recall speaking with investigators about the fact that Miracle was a difficult witness and that any reward should go to Myra, because she witnessed the homicide. (3-12-09 at 36). He characterized that as an "off-hand conversation" about which Miracle and Myra were not aware. (3-12-09 at 36-37).

According to Snyder, neither Miracle nor Myra gave any indication that they expected a reward. (3-12-09 at 37). He said that all of the witnesses in this case were "incredibly needy," and he spoke with Miracle almost daily before Grandson's trial. (3-12-09 at 40). She talked about all kinds of issues in her life – problems in her relationship with Myra from whom she had become estranged, housing issues and, threats she had received. (3-12-09 at 41). Snyder claimed they never discussed money issues. "That never came up." (3-12-09 at 41). He added that Myra never asked for anything. (3-12-09 at 42).

Snyder testified that, on or about June, 2006, between the two trials, Miracle called and offered information about an unrelated homicide near where she was living. (3-12-09 at 59). She believed that she could identify the shooter and asked if there was a reward in that case. (3-12-09 at 38). It appeared to him that Miracle knew before she called him about the reward program and that it applied in homicide cases. (3-12-09 at 61). He found out which detective was investigating that homicide and put Miracle in contact with him, noting that some of the information she provided about that shooting was accurate. (3-12-09 at 39).

Snyder testified that, between Mr. Grandson's trial and the co-defendants' trial, the issue of reward money in this case never came up in conversations with Miracle or Myra. (3-12-09 at 41). He said that after the homicide trial, Miracle's calls came in streaks with

breaks between them. (3-12-09 at 56). She complained about the fact that she was living in a bad neighborhood and about the loss of her property. (3-12-09 at 58).

Contrary to Detective Smith's testimony, Snyder claimed not to recall having any discussions with the detectives between the trials or after the second trial about Miracle's expectation of a reward. (3-12-09 at 66). Initially, Snyder claimed that he became aware that Miracle expected a reward after the WJLA-TV story aired because Holliway filed a motion requesting a new trial. (3-12-09 at 68). After learning about the interview, Snyder stated that only then did he understand that she had an expectation, or at least a hope of receiving a reward. (3-12-09 at 68). He recalled asking Smith at that point whether any promises had been made to her. (3-12-09 at 65).

However, Snyder acknowledged sending emails October 19, and 23, 2006, six weeks before the broadcast, about Cowser's complaints to Ron Austin, an aide to then City Councilman Adrian Fenty, with whom he had several conversations. (3-12-09 at 43). The first email detailed the conference call between him, Austin, and Cowser, which included no reference to a reward. In the second email, Snyder detailed a subsequent discussion with Austin, but also said that during the conference call Cowser "devoted much time to discussing reward money".[12] (3-12-09 at 47). At the post-trial hearing before Judge Gardner on March 12, 2009, he could not recall what Cowser said about the reward, but said if she had demanded payment he would have put that in the email. (3-12-09 at 47).

On April 2, 2009, Judge Gardner accepted the parties' proposed disposition in the Holliway-Adams cases wherein Holliway's sentence was reduced from 17 to 7 years and Adams's 10 year sentence reduced to time served.

[12] The emails became Gov't Exh.7 at the hearing on Holliway's new trial Motion.

B. Defendant's Second Post-Trial Motion

On June 12, 2009, the defendant filed the instant motion – his second post-trial Motion seeking to vacate his sentence and for a new trial, pursuant to D.C. Code § 23-110. For the first time, the government acknowledged that Snyder knew before he filed his response to Defendant's first post-trial Motion that Miracle Cowser had an expectation of a reward before the defendant's trial. At the hearing on this Motion, Miracle Cowser, Myra Cowser, and Detective Brett Smith testified.

Miracle testified that she had no expectation of a reward before the trial and had no knowledge of the possibility of a reward until "after everybody was sentenced". Myra testified that she never discussed reward money or the possibility of receiving a reward in connection with the defendant's case with her mother. Nor did she recall ever overhearing her mother discuss a reward. Myra testified that, despite having lived with her mother for almost a year after the shooting occurred, and being escorted by the police to and from police stations, and court with her mother, she had not talked with her mother at all about the case since the first few days after the shooting.

Detective Smith testified at the post-trial hearing before this Court on March 2, 2010. He testified that he had no information – nor did he believe – that Myra had any expectation of reward money before the trial. Miracle, however, learned about the possibility of a reward prior to the trial, as soon as she realized that the Crime Victims' Compensation Fund was not going to reimburse her for the property that she lost when her apartment was burglarized. He testified that Miracle had an "expectation" that she would get paid at the end of the case regardless of the outcome, but that she "absolutely"

understood that receiving a reward was contingent upon someone being convicted of the murder.

Finally, Tecoiya Woods testified at the post-trial hearing before this Court on March 10, 2010. At that hearing, Tecoiya testified that she did not know who the shooter was. Tecoiya acknowledged that she had testified as a government witness in the defendant's trial as an eyewitness to the murder, and that she had identified the defendant as the person she saw shoot the decedent; however, she testified that before the trial she had not been promised, nor did she expect any reward in connection with her testimony.

On cross-examination Tecoiya was asked whether she had spoken with Assistant United State's Attorney Michael Sweeney, who represented the government at the hearing.[13] She testified that told Mr. Sweeney that she had seen "somebody" come from behind the recreation center and shoot the decedent. At the post-trial hearing before this Court, she testified that she did not see the shooter's face and that she only testified that the defendant was the shooter at his murder trial because she *thought* it was him "[b]ecause [the defendant and the decedent] got into it and I just thought it was him (the defendant). [The defendant] had on black earlier that day and the [shooter] had on all black, too, the same height as [the defendant]." (3-3-10).

The Court questioned Ms. Wood closely, inquiring about whether anyone had exerted any pressure on her to say that she merely *assumed* that the defendant was the shooter. She responded in the negative.

[13] The Assistant United States Attorney at the hearing, Michael Sweeney was not the prosecutor at trial. The prosecutor at trial in this case was Assistant United States Attorney Steven Snyder.

C. LEGAL STANDARD

To succeed on a Motion for a new trial based on a *Brady* violation, a defendant must prove that there was in fact a *Brady* violation and that "in light of all the evidence, including that untainted by the Brady violation, it is reasonably probable that a jury would have entertained a reasonable doubt regarding petitioner's guilt." *Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (citations omitted).

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Id. at 87. In addition, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985). "[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more." *Kyles v. Whitley*, 514 U.S. 419, 437 (1976). Rather, the government's constitutional obligation to disclose such evidence matures only when the *Brady* materiality standard is met. *United States v. Agurs*, 427 U.S. 97, 108 (1976).

"[T]here are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the state, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "[T]here

is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. *Id.* at 281.

The first component – evidence favorable to the accused, includes evidence relating to the reliability of a witness, impeachment evidence, and exculpatory evidence. See *United States v. Bagley,* 473 U.S. 667, 676-77 (1985).

In considering the second component – suppressions – whether such suppression was inadvertent or whether the prosecutor was even aware of the evidence is inapposite. " . . . [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1976). Prosecutors are required to disclose any agreements reached with witnesses in exchange for their testimony. See *Hawthorne v. United States*, 504 A.2d 580 (D.C. 1986) (discussing the government's duty to fully disclose the terms of a plea agreement to the jury so that the jury may consider it in evaluating the witness' credibility). Similarly, if a prosecution witness falsely denies such an agreement exists, the prosecution has an affirmative duty to step forward and correct that testimony. See *United States v. Sanflippio*, 564 F.2d 176, 178 (5th Cir. 1977) (noting that the duty to correct false testimony of a government witness is the prosecutor's and it arises when the false evidence appears).

Regardless of whether the failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87, " . . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Kyles v. Whitley*, 514 U.S. 419, 438 (1976). Unlike the obligation under the *Jenks* Act, 18 U.S.C. § 3500 (2000), to turn over to the defense prior statements of a government witness before that witness

testifies on direct examination, under *Brady,* the prosecutor's obligation is to disclose exculpatory information in sufficient time for the defendant to use it at trial, allowing defense counsel an opportunity to investigate the facts of the case and with the help of the defendant, craft an appropriate defense. *Perez v. United States,* 968 A.2d 39, 43 (D.C. 2009). "This necessarily implies timely, pretrial disclosure." See *Curry v. United States*, 658 A.2d 193, 197 (D.C. 1995) (holding that "a prosecutor's timely disclosure obligation with respect to *Brady* material cannot be over-emphasized.").

Showing that the prosecution *suppressed* evidence *favorable to the accused* does necessarily satisfy the third component of prejudice. To determine whether evidence is truly *Brady*, the Court considers each piece of evidence individually; however, to determine the existence of prejudice sufficient to grant a new trial, the Court must consider the cumulative effect of the suppressed evidence on the entire record. *Kyles v. Whitley*, 514 U.S. 419, 420 (1976). The defense must show that the net effect of the unlawful suppression resulted in the existence of a "reasonable probability" that the result of the trial would have been different, absent the *Brady* violation. *Kyles v. Whitley*, 514 U.S. 419, 434 (1976).

V. DISCUSSION

A. Part I – Snyder's History of Brady Violations

Although this Motion turns on materiality, it is imperative that this Court begin with the history of repeated, blatant *Brady* violations and misrepresentations by the prosecutor in this case. They began well before the defendant's trial while the defendant's case was still joined with the cases of Danielle Adams and Jerome Holliway.

1. Medical Records

Prior to trial, Adams's lawyer filed a pretrial motion seeking medical records regarding Cowser's treatment for schizophrenia, arguing that her mental health might have affected her ability to perceive, recall, and recount the alleged events about which she testified. (5-5-05 at 4). He asked for copies of radio run recordings from 2003 and 2004 for incidents in which relatives, fearing that Cowser would commit suicide, summoned emergency medical personal to her residence. (*Id.* at 5, 9). The prosecutor asserted that Cowser had been treated for schizophrenia several years earlier, when she was a juvenile, but not since 1997 when she reached adulthood. (*Id.* at 3-4). The prosecutor did not produce any documents responsive to counsel's request prior to trial.

Not until the actual trial call on January 5, 2005, did the prosecutor turn over to counsel, purportedly as *Jencks* material, a grand jury transcript in which a witness, Jamilia Washington, had testified that Cowser said she was schizophrenic, that she took medication, and "smoked water (PCP)" (*Id.* at 6).[14] When Judge Christian found that the prosecutor had violated its obligations under *Brady*, as a sanction, he ordered the government to

> "Turn over all of [its] files to the defense at this time. [Y]our entire file, all grand jury material, all grand jury testimony, all statements made, running resumes from officers or detectives, witness statements from witnesses, your entire file, turn it over to Mr. Riley and Mr. Lasley (counsel for Adams and Holliway).
>
> I want you to, number two, seek further from your complaining witness this 911 – these 911 calls that Mr. Lasley referred to and any other medical records that may be in existence.

[14] The clear inference from the defense is that Jamilia Washington's grand jury testimony was of statements made by Cowser after she reached adulthood.

(5-5-05 *at* 17). The order covered grand jury transcripts of all witnesses, "[w]hether you are going to use the witnesses or not ... we are not splitting hairs, Mr. Snyder. I don't want you to come in and say 'the PD 668 or 47 isn't part of what I was talking about'." (*Id.* at 20-21). The Judge excluded the government's "internal notes" and "trial strategy," and with regard to Cowser's medical records he directed the prosecutor to "[a]scertain what is out there for my inspection, but that includes follow up." (*Id.* at 18, 20).

After he reviewed Cowser's medical records, Judge Christian turned them over to counsel for Adams and Holliway and issued a protective order limiting their use of the documents.

2. <u>Witness Identification</u>

In a discovery letter dated June 12, 2005, Mr. Grandson's lawyer requested from the government "all statements and identifying information with regard to . . . the witness who claims that [Maurice "Black Moe"] Corbin confessed to the shooting and the eye-witness who does not believe Mr. Grandson is the shooter and who gives identifying information with regard to the murderers[]."

In a July 12, 2005 hearing before Judge Bayly, the defendant's new lawyer noted that the government had at least one eye-witness and one "ear witness" who exonerated Defendant. (7-12-05 at 34). She followed up with a second discovery letter dated July 19 renewing the request, stating, "I do not believe that your *Brady* obligations are satisfied by the disclosure made to date." (*Letter* dated 7-19-05 at 3).

Although defense counsel did not know the witnesses' names, she cited those statements in a bond review motion and the government filed its opposition, which stated that

> A witness has informed authorities that Morris Corbin [] also known as Black Moe [] confessed to the witness that he, not your client shot and killed Derek Hinson [].
>
> A different witness stated that he had witnessed the shooting and does not believe that your client was the shooter. The witness described the shooter as between 5 feet and 9inches and 5 feet and 11 inches in height, and wearing all black.

(8-9-05 at 10-11). The prosecutor still had not disclosed the identities of these witnesses by August 9, 2005, the date of the bond review hearing. (*Id.* at 8-9, 12-13).

Counsel argued that the prosecutor's refusal to identify the witnesses was prejudicing Mr. Grandson by hampering her investigation. (*Id.* at 15). When counsel asked that the government be compelled to disclose the names before the next hearing Judge Bayly responded, "I am inclined to grant your motion, but we'll take it up again on the 22nd." (*Id.* at 16). At the next hearing two weeks later the prosecutor gave defense counsel the name of the lawyer representing only one of the witnesses. (8-22-05 at 6, 14).

In a hearing on November 18, 2005 defense counsel again asked the Court to order the government to provide all of the discovery covered by Judge Christian's January 5, 2005 order, including Cowser's psychiatric records. (11-18-05 at 4, 13). The prosecutor conceded that Judge Christian had reviewed the medical records and provided unredacted copies to counsel for Adams and Holliway, but he continued to resist disclosure to Mr. Grandson. (*Id.* at 13-14).

3. Medical Records

Defense counsel again demanded access to Cowser's medical records in a hearing December 15, 2005. (12-15-05 at 20). He told Judge Bayly he still had not received the identities of the witness to whom Maurice Corbin confessed or the eye-witness who said he believed someone other than the defendant shot the decedent. (*Id.* at 42-3). The prosecutor responded that both witnesses were represented by counsel and "I will contact Counsel and ask them how they want to proceed."[15] (*Id.* at 43).

On February 27, 2006, in a hearing before Judge Gardner, defense counsel asked for copies of Cowser's medical records and the following colloquy occurred.

> **THE COURT:** I thought the last time we were here I said for you to get the information.
> **MR. MOSLEY:** I still don't have the information, Your Honor.
> **THE COURT:** Didn't I tell him to give you the information?
> **MR. MOSLEY:** Yes, your honor.
> **MR. SNYDER**: That wasn't my understanding, Your Honor. These records – the reason they are submitted to the Court for in camera review is that these records go back to when the witness was six years old, nearly 20 years. And they deal with just a host of issues that were generated when the witness was in the foster care system of this court. And none of these records pertain to the witness as an adult. And I am not aware of any records of psychiatric treatment of this witness as an adult. And that's why we resisted this. I mean it is a significant invasion of the witness' privacy.
> ...
> **THE COURT**: So what is it that you are protecting if it has already been disclosed to others?
> **MR. SNYDER**: I would like the records to be returned. Judge Christian did it when – he finally issued a protective order on disclosure of those records. There was never any ruling even by Judge Christian that the

[15] In a discovery letter dated March 17, 2006, 10 days before trial was set to begin, the prosecutor identified Ronald Lee as the witness who said Corbin confessed to shooting the decedent. By then Lee was incarcerated at the United States Prison, Big Sandy in Inez, Ky. The prosecutor did not identify the eyewitness to the shooting, Thomas McBride. By the time counsel learned Lee's identity it would have been too late to bring him back to Washington to testify if the trial had started as scheduled on March 29, 2006.

> records could be used at trial or anything of the sort. It was a discovery issue.
>
> And again, that's why we presented these records to the Court in camera so the Court can make a determination. I mean, I am not trying to keep anything relevant from the defense

(2-27-06 at 6, 10).

4. Tape Recording

Defense counsel added that, through investigation, he learned that the decedent made a telephone call shortly before he was shot and that a recording of the call might contain *Brady* information. (*Id.*). The prosecutor said "[t]here is no *Brady* on that tape that I am aware of." (*Id.*). This was a blatant misrepresentation. On the audio tape, in addition to the decedent's moans and the screams of others, a male voice can clearly be heard comforting and encouraging the dying Hinson. This corroborates Tommy McBride's testimony that he was at the scene and urged the decedent to fight for his life.

In March, 2006, approximately a week before trial was to begin, the prosecutor turned over the recording of the audio tape of the telephone call, which defense counsel had requested three months previously. (*Id.* at 53). When counsel informed the Judge that the tape confirmed his believe that voices of witnesses had been recorded as well as the decedent's "moans and groans" and that investigators played the tape for at least one witness, the prosecutor denied that he had previously told Judge Bayly that the tape contained only the decedents moaning.[16] He insisted that it contained no *Brady* material and he turned it over under Rule 16 because the government intended to introduce it at trial. (3-29-06 at 60, 63).

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[16] When defense counsel first requested the tape on December 15, 2005, the prosecutor had not identified McBride as a potential *Brady* witness.

As Judge Gardner correctly recognized,

> How do you know, for example, that if somebody hears the tape accurately or inaccurately they say oh, that's Sammy in the background yelling? And then he goes to Sammy well, were you there? You didn't say anything to the police about being there.
>
> I think his whole point is this. What good does it do him to receive favorable information if he can't do anything with it? What is the [point] of having information for information's sake if you really can't effectively utilize the information?

(*Id.* at 61). Judge Gardner rescheduled the trial for May 17, 2006, to give defense counsel more time to investigate the new information and to obtain records concerning Cowser's recent mental health issues. (4-4-06, 3-4).

Finally, in a status hearing April 25, 2006, defense counsel produced a transcript of the January 5, 2006 trial call in which Judge Christian ordered the prosecutor to open his files, including the medical records, to codefendants' counsel. (4-5-06, 12-13). When the prosecutor again attempted to argue that Judge Christian made the order in a different case and that the government had not provided the medical records to the codefendants, the judge said, "Now I am telling you to do ..., you give him everything you gave them ... and don't tell me anything else about somebody else copying it for you giving it to them. I'm telling you what I want done." (*Id.* at 21). Defense counsel did not receive the medical records until May 17, 2006, the day trial in this case began. (5-22-06, 9).

5. <u>Description of the shooter</u>

On March 28, 2006, the day trial was supposed to begin, the prosecutor provided defense counsel with a radio run recording in which a police officer indicated that a witness had given him a description of the shooter that did not match Mr. Grandson. (3-28-06, 9-10). The prosecutor did not identify the officer or the witness who provided the

description. (*Id.* at 11). Although the recording had been in the government's possession for 18 months, the prosecutor said he did not know the identity of the officer or the witness.

6. Witness Identification Miracle and Myra

In addition, immediately before trial, the government disclosed that a witness identified as "Witness A" would testify that she saw Mr. Grandson shoot the decedent, but that immediately after the shooting Witness A told another person, identified as Witness B, that Mr. Grandson had been shot. The government did not identify either witness.[17] (3-29-06, 15-17). In response to defense counsel's argument that *Brady* required disclosure of the identities of the two witnesses, the following occurred:

> **MR. SNYDER ...** [T]he United States, and actually defense, does everything we can to avoid disclosing witness identities because of the well-established issues involving witnesses in the District
> **THE COURT:** Okay. Since you are trying to put this safety issue on me. When am I supposed to investigate it, in the middle of the trial or something? Isn't this supposed to be brought to my attention?
> You're just going to withhold the name and then the name is going to come out in the middle of trial and what, you want me to do is stop the trial so then they can run out and investigate it or something?
> **MR. SNYDER:** Both of these witnesses will be available for testimony, Your Honor.
> **THE COURT:** Yes, they'll be made available for testimony, but investigation and testimony is two different things. If I'm trying to investigate something, when am I going to investigate it if I'm here from 9:00 to 5:00 trying the case?
> **MR SNYDER**: Your Honor, this is not exculpatory *Brady*,[18] This is not where a witness came in and originally said that somebody else shot the victim.
> This is where a witness told another witness that the — according to this other witness, that the defendant was shot, not that he was the

[17] It later became clear that Myra Cowser was Witness A and Miracle Cowser was Witness B.

[18] Snyder attempted to draw a distinction between what he termed "little *Brady*," impeachment evidence, and "big *Brady*," evidence that the defendant did *not* commit the crime. The case law makes no such distinction, and the prosecutor cited no authority for the proposition that he was required to disclose only "big *Brady*" evidence before trial.

shooter, but that he was shot. The witness who was the actual eyewitness maintains that all along and it had said that the defendant was the shooter.

...

THE COURT: If somebody is saying that he was shot, I mean, are they saying he was shot instead of somebody else? He was shot in addition to somebody else?

In other words, what he's saying is ambiguous because if you say well, he was shot; I thought the case was about somebody else getting shot.

MR. SNYDER: What the witness heard or believed it heard initially was that the defendant had been shot, not that the defendant was the shooter. That's what the witness believed it had heard.

...

But the witness said — the person who was the actually eyewitness then told the — repeatedly told the witness that the defendant was the shooter.

So, what we have on — I mean, I've disclosed it to the Defense. If the witness is called to testify, the person who was doing the listening of that person is called —

THE COURT: So you told them that person's name? The one who thought that they heard this man got shot?

MR. SNYDER: I have not disclosed that person's name yet. I mean, they haven't asked me to disclose the person's name.

...

I mean, I just disclosed this a couple days ago, so.

...

THE COURT: For the life of me I couldn't see why you wouldn't give them her name unless you're afraid she's going to give up somebody else because why is she unsafe because she thought she heard that he got shot?

(*Id.* at 17-19). The prosecutor later said he was not certain he would call Miracle Cowser as a government witness.[19] (*Id.* at 42-4).

7. Witness Identification Hammond

On March 28, the previous day, the prosecutor had informed defense counsel for the first time about two eyewitnesses, Andre Hammond, and a person for whom he did not provide a name or contact information. (*Id.* at 37, 50). He said Hammond told

[19] When the prosecutor made this statement, the defendant's case was still joined with his codefendants' cases and the government would have *had* to call Cowser to testify about the alleged obstruction of justice and related counts.

investigators Mr. Grandson was the shooter, but also said there was another person with a gun on the scene, and he was unsure whether that person fired his weapon. (*Id.* at 37). The unidentified witness described the shooter as shorter and "thicker" than the defendant. (*Id.* at 50-52).

The prosecutor refused to identify the second witness, claiming he had been threatened, but offered to arrange a meeting among defense counsel and the witness. (*Id.* at 52). The Court admonished the prosecutor that he should have provided information about the witness to defense counsel in time for them to challenge his insistence on controlling defense access to potentially exculpatory evidence. (*Id.* at 53).

8. McBride's Grand Jury Transcript

On the day before the last witnesses at trial testified, near the end of the government's cross-examination of defense witness, Tommy McBride, the Court was required to review McBride's grand jury testimony. During its review, the Court observed that McBride had testified before the grand jury that the defendant carried a .25 caliber gun. In light of the ballistics evidence that the decedent was shot with a .45 caliber gun, the Court recognized that evidence that the defendant carried a .25 caliber gun was *Brady* evidence. The Court can say with almost absolute certainty that the government would have never divulged it to the defense. The Court admonished the prosecutor that he should have turned it over "if not a year ago, certainly after *Sykes,*"[20]

That is the back-drop of this Court's Analysis.

B. Discussion Part II - *Brady*

[20] *Sykes v. United States,* 897 A.2d 769 (D.C. 2006), was decided in early March 2006 held that "the government must disclose both exculpatory information and "evidence ... that affects the credibility of a government witness where material to guilt or punishment."

The two pieces of evidence at the heart of the instant Motion in this case are 1) Miracle Cowser's expectation prior to trial that she would receive a reward if the defendant was convicted, which was withheld completely, and discovered only after Miracle Cowser said during an interview with a local news program that she had been promised a reward but had not received it and 2) the testimony of Thomas McBride that the gun that the defendant was known to carry was a .25 caliber – which the prosecutor never disclosed, but which was discovered inadvertently by the Court during its review of Tommy McBride's grand jury testimony near the end of trial.

1. *Miracle Cowser's Expectation of a reward*

It is undisputed that the prosecutor had a duty to disclose Miracle Cowser's expectation of reward money to the defense before trial, as it provided a motive for Miracle Cowser to testify as she did at trial and thus, it was favorable to the accused. [21] The government's *Brady* obligation requires that it discover *Brady* information, and, given the testimony of Detective Fulton and Smith, there is no doubt that the prosecutor in this case – assuming that he did not know about the evidence – could easily have discovered

[21] As the Fifth Circuit explained, " '[w]hat tells . . . is not the actual existence of a deal but the witness' belief or disbelief that a deal exists.' Further, the imperative of protecting a defendant's right to effective cross-examination is even more critical where, as here, the witness is crucial to the prosecution's case." *Wilkerson v. Cain,* 233 F.3d 886, 891 (5th Cir. 2000) (quoting *United States v. Hall,* 653 F.2d 1002, 1008 (5th Cir. 1981)).

The Sixth Circuit in *Bell v. Bell,* 512 F.3d 223 (Tenn. 2008), recognized that a tacit agreement is more likely to skew a witness's testimony than an explicit promise of a benefit in return for favorable testimony. "In the case of an explicit agreement, the testifying witness will know what he can expect to receive in exchange for his testimony, and will know the conditions he must fulfill. When a witness is instead led to believe that favorable testimony will be rewarded in some unspecified way, the witness may justifiably expect that the more valuable his testimony, the greater the reward." *Id.* at 245.

Miracle Cowser's sense of entitlement to a reward is no less invidious than a tacit agreement. If anything it is more of a problem because, based on the detectives' statements to Miracle – that the MPD paid rewards to people who helped the government get convictions – Miracle was likely to have believed that her testimony would have to be sufficient to produce a conviction.

this evidence. Given the nature of Miracle's inquiries and the frequency with which she communicated those expectations, the government's failure to learn of her expectations "amount [s] to 'failure to turn over an easily turned rock.' See *United States v. Brooks,* 966 F.2d 1500, 1503 (D.C. 1992). Accordingly, assuming that he had no such knowledge, he nevertheless had a duty to disclose it.

Instead of complying with his obligation under *Brady,* the prosecutor continued to withhold the evidence even after it is clear that he had learned of it. This is evidenced by the government's January 29, 2009 Response to the instant Motion, in which it acknowledged "that the government should have made the Court aware of [the fact of the reward money] as it evaluated the defendant's Rule 33 motion which the Court summarily denied in March, 2007". (Govt.'s Resp. at 5, n. 5). [22]

2. *McBride - Grand Jury Testimony*

Defense witness, Thomas McBride, testified in the grand jury that the defendant often carried a .25 caliber handgun. (5-26-06, 44). Evidence that McBride carried a .25 caliber gun was exculpatory in light of the ballistics evidence at trial that the decedent was shot with a .45 caliber semi-automatic weapon. (5-26-06, 43-44).

Unlike the *Brady* information on Miracle Cowser, there is no question that the Prosecutor had direct knowledge of McBride's Grand Jury testimony. He was present in the grand jury; yet, he failed to disclose it to the defense. It was only by happenstance when

[22] Whether the suppression was willful or inadvertent is irrelevant. *Banks v. Dretke,* 540 U.S. 668, 691(2004).

the Court was reviewing the transcript of McBride's grand jury testimony that the Court discovered this additional *Brady* evidence[23] and divulged it to the defense.

C. Discussion Part III - Materiality

The fact that the prosecutor unlawfully withheld *Brady* evidence in this case is clear; however, it does not end the Court's inquiry. The case law requires that there be a reasonable probability that, but for the *Brady* violation, the jury would have reached a different result. To determine whether such a reasonable probability exists, the Court must consider the net effect of the suppressed evidence on the *entire* record. *Kyles v. Whitley*, 514 U.S. 419, 420 (1995).

During the trial, the prosecutor called Dianna Scott, intending to elicit from her that she had seen the defendant with a black handgun several days before the homicide. His purpose was to suggest that the defendant had been carrying the murder weapon around days before Derrick Hinson was killed. Although the prosecutor knew that McBride had told the grand jury that the defendant carried a .25 caliber pistol, he sought to have Scott's testimony admitted pursuant to *Johnson v. United States*, 683 A.2d 1087, 1096-7 (D.C. 1996) (holding that possession of a gun similar to the murder weapon several weeks before a homicide is direct evidence of the charged crime and not other crimes evidence). (5-17-06 at, 5-6). Mr. Snyder said "[o]ne of the eyewitness described the gun as basically looking like a police gun, which was a semi-automatic weapon. (5-17-06 at 5,6). And there were shell casings recovered from the scene, so that is consistent with the description." (*Id.* at 8).[24]

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[23] The defense was made aware of the grand jury testimony by the Court, who reviewed the transcript during a recess that was taken during the trial for the purpose of resolving a different evidentiary question.

[24] Defense counsel argued that the proffer regarding Scott's description of the gun was insufficient and objected to her testimony. *Id.* at 11-12.

Had the prosecutor disclosed McBride's Grand Jury testimony earlier, it is questionable whether the Court would have ruled Scott's testimony admissible under *Johnson.*[25] However, even aside from any ruling the Court might have made about Scott's testimony, the Government's withholding of evidence prejudiced the defense. Defense counsel vigorously objected to any testimony by Scott suggesting that she had seen the defendant with a weapon. Had he been aware of McBride's grand jury testimony that the defendant carried a .25 caliber gun, as he said after the evidence was disclosed at trial, he may well have handled Scott's testimony differently. The bottom line is that defense counsel was deprived of information to which he was entitled and which would have allowed him to make different tactical decisions with regard to Scott.

Although the Court allowed defense counsel the time to review McBride's grand jury testimony, the Court did not address his objections that he had been deprived of the ability to use McBride's *Brady* information when determining how to handle Dianna Scott's testimony. Upon reflection, the Court's failure to do so was harmful to the defendant's case. The defendant suffered as a result of the late disclosure of the Brady information. [26]

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[25] In trying to convince the Court to admit the testimony, the prosecutor told the Court that "one of the eyewitnesses described the gun as basically looking like a police gun, which was a semi-automatic weapon and there were shell casings recovered from the scene, so that's consistent with the description." (5-17-06 at 8).

[26] In closing, the following dialogue occurred:
MR. SNYDER: . . . The defendant's Aunt, Miss DD told you that two days earlier she had seen him with a gun,
MR. MOSLEY: Objection
COURT: Sustained, the jury's recollection will control.
MR. SNYDER: That's right the jury's recollection controls, and she did testify in the Court that she saw a handle, but I also showed her the statement that she signed where she said that it was a pistol.
MR. MOSLEY: Objection.
THE COURT: Sustained, sustained, and that will be stricken because you used it in the wrong way. Go ahead.
MR. SNYDER: In any event, she told you that she saw a black handle, a straight handle;[26] the firearms expert told you that the straight black handle is with a pistol, semi-automatic handguns... and that's what the defendant's aunt told you as well as the defense witness, he also, Mr. McBride told you that he had seen the defendant with a gun.

The Court disagrees with the Government's position that the materiality of Miracle Cowser's testimony was limited to the obstruction of justice conviction. In the view of the Court, Cowser's account of the events in Danielle Adams' apartment in the early morning hours of September 11, several days after the murder, was a key piece of evidence for the Government. Based on that evidence, the jury almost certainly concluded that the defendant had admitted committing the murder. Cowser testified that after Holliway said that he was protecting the Defendant "because [he] killed somebody," the Defendant responded, "Yeah, but everybody don't need to know that." [27]

The importance of the defendant's ability to cross-examine thoroughly the only witness to a confession is critical. The Government's failure to disclose deprived him of that ability. At the time of the trial, counsel's theory of the defense was that Miracle Cowser falsely reported to the police that she had been threatened and that the defendant made incriminating statements. His theory was that she made the untruthful report out of a desire to obtain some form of assistance from the Government. This was based on Cowser's grand jury testimony in which she indicated that she knew, from her daughter's experience in another case, about the availability of "assistance" to Government witnesses.

When defense counsel announced his plan to cross-examine her about "assistance," the prosecutor agreed that such cross-examination was relevant to Cowser's motivation for her initial reports to the police. However, he insisted that, if counsel suggested that

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(5-30-06, closing at 10:44:00).

[27] Miracle Cowser testified that the following discourse ensued:
Holliway: this bitch know too much information we should do her in right now
Defendant: yeah.
Defendant: (to Miracle) Don't worry about him because he is drunk.
Holliway: Shut the fuck up, I'm here because you killed somebody, I'm taking up for you.
Defendant: Shut the fuck up that's not for everybody to know. (5-23-06 at 179).

Cowser's hope for "assistance" was also a motivation for testifying in the manner that she did at trial – i.e. for persisting in her version of events – counsel would "open the door" to his eliciting 1) that, when she had attempted to get assistance in the past, she had been unsuccessful in obtaining assistance and 2) that, in this case, she had received relocation assistance from the police, but was completely dissatisfied with the assistance she received. According to the prosecutor, she was disappointed because the "assistance" consisted of her being moved from one low income housing project to another. Therefore, the prosecutor's argument went, Cowser had no reason to continue help the Government by implicating the defendant , and her account of events must be true. Admonishing defense counsel that he was walking a "thin line," the Court ruled that the government's proposed line of questioning would be appropriate on re-direct if defense counsel "opened the door" in the manner suggested by the prosecutor.

Defense counsel – unwilling to risk "opening the door" – refrained from questioning Miracle Cowser at all about her knowledge of the availability of benefits for Government witnesses. Consequently, the Government was able to argue to the jury that that, far from having anything to gain by testifying in this case, Miracle Cowser had everything to lose by testifying: she risked being labeled a "snitch," He then reminded the jury of the low regard in Cowser's neighborhood for "snitches." He quoted a defense witness who said that snitches were the "lowest of the low." The defense counsel had no way of countering this argument.

Had defense counsel had the wrongfully withheld Brady information, there is every reason to believe that he would have made a different decision with regard to his cross-examination of Miracle Cowser. He would have been able to suggest by his questions that

Cowser went to police in the first place hoping to get some assistance. He would further had been able to suggest that, once she learned of the possibility of a reward of up to $25,000.00, she had every reason to maintain her version throughout trial. Armed with the knowledge about Cowser's expectation of a reward, there is little doubt that defense counsel would have concluded that the benefits of informing the jury of Miracle Cowser's expectation of such a big reward far outweighed any damage from the re-direct examination proposed by the prosecutor.[28] If the jury had heard the detectives' testimony about her expectations, Cowser's credibility as a witness would have been seriously undermined – especially in light of her testimony that, after the threats, she had remained in Adams' apartment – even smoking drugs – for hours.

Miracle Cowser's testimony about the threats to her and the defendant's admissions were the glue that held the Government's case together. With her credibility compromised, the jury would have been left with the testimony of Myra Cowser and Tecoiya Wood, both of whom both identified Defendant as the shooter, Margo Frye and Jamise Liberty.

Myra Cowser was not the strong witness the Government suggests.[29] First, although she claimed to be outside when the shooting occurred, Tecoiya Wood, who knows her, testified that she did not see Myra outside. In addition, Juan Newby, a defense witness, testified that he did not see any girls outside. Also, even according to Miracle, when Myra ran inside, she yelled that Bin Laden had been shot (which Myra testified at trial was what

[28] Cowser testified at both post-trial hearings that she had no expectation of a reward. Indeed she testified that she heard nothing about a reward until after the Holloway-Adams trial that occurred in October, 2006, and that she heard about it from her daughter. In light of the testimony of the Detectives Smith and Fulton, Cowser's testimony is completely incredible.

[29] In its Order denying the defendant's first post-trial motion, the Court cited Myra Cowser's testimony as one of its bases for denial. However, a closer review of Myra's trial testimony conducted in connection with the hearing on this Motion, counsel's arguments, and Myra Cowser's testimony at the post-trial hearings before this Court convinces the Court that it was misguided in placing any reliance on Myra Cowser's trial testimony.

others were saying) and not that he had shot the decedent. Further undermining Myra's credibility was her version of the "fight" that allegedly occurred between Defendant and the decedent before the shooting. According to her, the fight was a continuation of an altercation between the defendant and the decedent that began inside Danielle Adams' apartment after Defendant had fought Adams and Myra sought the decedent's assistance to stop him. This was contradicted not only by defense witness, Tommy McBride, but also by Tecoiya Wood. McBride said that that the defendant was sitting on a chair on Adams porch when the decedent started punching him. Newby gave similar testimony. The Government's witness Tecoiya Wood said the very same thing. Finally, at trial Myra Cowser was impeached with her statement to the police that she had seen the shooting when she went outside to take the trash – not when she was outside jumping rope.

Had the jury heard the withheld evidence, the fact that Tecoiya Wood's identification was based solely on the clothing and physique of the perpetrator would have assumed heightened importance to the jury. Further, considering the problems with Myra's credibility, it is unlikely that the jury would have considered Myra's identification of the defendant as corroborative of that of Woods, whose testimony at trial was elicited almost entirely through leading questions.

The testimony of Frye and Liberty, considered independently of the testimony of Myra and Miracle Cowser and Tecoiya Wood was equally as consistent with the defendant's innocence as it was with his guilt. Frye saw him running after she heard the gunshots, but she testified that everyone was running. Frye testified that she saw blood on him. Liberty also saw blood on him when he came to his mother's house and asked to be driven to Maryland. Given the testimony that the decedent had fought the decedent earlier,

there was an innocent explanation for blood on him – and for his wanting to get out of the neighborhood.

Just as it would have "weakened" the Government's case for the jury, hearing that Miracle expected a reward would likely have caused the jury to give greater credence to the testimony of the three defense witnesses. Although Tommy McBride was impeached with several convictions, the audiotape of the murder – also *Brady* material which the Government delayed in disclosing – indisputably showed that Tommy McBride was on the scene when the shooting occurred and was trying to comfort the decedent as he lay dying, thus corroborating his trial testimony. Also, Tommy McBride was a long time friend of the decedent, and therefore, he had no motivation to help the defendant. Indeed, he would not have testified in the defense case had he not received immunity from the Government. Moreover, the testimony of Tommy McBride and Juan Newby, and the testimony of Tecoiya Wood, that the decedent had punched the defendant repeatedly, thus explaining the presence of blood on him, was corroborated by the testimony of the Deputy Medical Examiner, that the wounds on the decedent's hands were consistent with having been in a fight shortly before he was killed. Newby's testimony provided a reason for the decedent to punch the defendant – he believed that the Defendant had set him up for the earlier robbery about which Tommy McBride testified. [30] Finally Curtis Noland's testimony supported a conclusion that the defendant was running *before*, rather than after, the shots were fired.

The verdicts in this case showed that the jury rejected the testimony of McBride, Newby, who also was impeached with convictions, and Noland. That rejection was perfectly logical if they believed Miracle Cowser. If they believed the defendant had

[30] Detective Smith also testified at the post-trial hearing that there was evidence to suggest that the decedent had been robbed before he was killed.

admitted killing the decedent, reasonable jurors would not have – and should not have – accepted the testimony of the defense witnesses. They likely rejected it out of hand. However, if they had seriously questioned Miracle Cowser's testimony about the admission, in the view of the Court, the testimony of the defense witnesses would have played a more important role in their verdicts.

In sum, for the foregoing reasons, the Court finds that, but for the prosecutor's having violated his obligations under Brady, there is at minimum, a reasonable probability that the outcome of this trial would have been different.

D. Discussion Part IV - Tecoiya Woods Post-Trial Testimony

The defendant did not suggest in either of his post-trial motions that Tecoiya Woods had been promised or had any expectation of a reward; yet, the Government called her as a witness at the hearing on the instant motion. The Court cannot characterize her testimony as a recantation[31] of her trial testimony, but she conveyed to the Court that she was much less certain about her identification of the defendant as Derek Hinson's killer, saying that she had told the Assistant United States Attorney handling this motion that "somebody" had come from behind the recreation center and shoot the decedent, and upon further questioning testified that she merely *assumed* that the defendant was the shooter because 1) he wore all black like the defendant had worn earlier, and 2) because the decedent had earlier fought the defendant.

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[31] When a motion for a new trial is based on the recantation of a witness, the trial court must first determine the credibility of the recantation and only if the Court finds the recantation credible must it proceed to determine the *effect* that the recantation would have had on the jury. *Godfrey v. U.S.*, 454 A.2d 293, 299-300 (D.C. 1982). The Court only discusses the standard for such evidence because the issue was presented at the post-trial hearing and the Court would be remiss in failing to address it.

The standard to be applied to such motions is "whether (1) the recantation would probably produce an acquittal in the event of a retrial, or, less conclusively, (2) without it the jury might have reached a different conclusion". *Perez v. U.S.*, 968 A.2d 39, n. 24 (D.C. 2009) (citations omitted).

In the Court's view, this is especially important when the Court considers the manner in which the testimony was elicited at trial and what it now views as Myra Cowser's lack of credibility.

Although on re-direct by the Government at the hearing, Ms. Woods essentially repeated her trial testimony that she had seen the defendant shot Hinson, the Court was struck by her post-trial testimony that her trial testimony was based on her assumptions. The Court is satisfied after its lengthy colloquy with Tecoiya Wood that this young lady was not "backing away" from her trial testimony because of any threats or pressure from anyone.

At the conclusion of the post-trial hearing, both counsel agreed that the Court must consider Tecoiya Woods post-trial testimony in deciding whether it has confidence in the verdicts in this case. The Court has done so, and, considering her testimony with the aforementioned matters, the Court cannot say that it has confidence in the verdicts in this case.

ACCORDINGLY, for the foregoing reasons, the Court hereby

ORDERS that the Defendant's Motion be and hereby is **GRANTED**; and the Court further

ORDERS that the Defendant's convictions in this case be and hereby are **VACATED** and that he is entitled to a new trial.

SO ORDERED.

5-11-2010
Date

RHONDA REID WINSTON
Associate Judge

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