SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION — FELONY BRANCH

DWIGHT GRANDSON, vs. **UNITED STATES.**	No. F-5751-04 Hon. Rhonda R. Winston (Closed Case)

MOTION PURSUANT TO D.C. CODE § 23-110 TO VACATE CONVICTION AND SENTENCE AND FOR A NEW TRIAL

Defendant Dwight Grandson, through undersigned counsel, respectfully requests, pursuant to D.C. Code § 23-110, that the Court vacate his conviction and sentence in the above-captioned case and order a new trial. As the basis for this motion Mr. Grandson asserts that the government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1964), to disclose exculpatory information bearing on his guilt or innocence and on the credibility of its witnesses Miracle and Myra Cowser, and the prosecutor's suppression of that evidence was highly prejudicial.

STATEMENT OF THE CASE

Police arrested Mr. Grandson September 11, 2004 on a charge of second-degree murder. Two codefendants, his girlfriend Danielle Adams and his cousin Jerome Holliway, were arrested at the same time on charges of obstructing justice by threatening a potential witness in the homicide case. The government initially obtained an indictment against Adams and Holliway, and their cases proceeded toward trial. But Judge Eric Christian dismissed that case May 5, 2005 without prejudice

The government filed an indictment June 8, 2005 charging Mr. Grandson with first-degree premeditated murder while armed, possession of a firearm during a crime of violence, carrying a pistol without a license (felony), and obstruction of justice. The indictment charged Adams and Holliway with obstruction of justice, being accessories after the fact of murder, threatening to injure Miracle Cowser, and assault on her with a dangerous weapon (knife). It

charged Holliway with threatening Tecoya Wood, another government witness.

In late October 2005, relying on *Brady, supra,* Mr. Grandson filed a motion to compel the government to provide medical records documenting Miracle Cowser's prior psychiatric treatment.[1] The government filed its opposition to the motion November 1, and Judge John Bayly Jr. ordered the government to provide the records by November 22, 2005 for *in camera* review.

This case was assigned to Judge Wendell P. Gardner in early 2006, and in a hearing February 27, 2006 attended by Mr. Grandson, but in the absence of codefendants and their counsel, the Judge denied Defendant access to the medical records. But the Judge reversed his ruling after a lengthy discussion with all counsel the day after the trial was supposed to begin. Tr. 3/29/06, 118. The Judge again ordered the prosecutor to turn over the medical records in a hearing April 25. Tr. 4/25/06, 20 – 23.

The government filed motions *in limine* to preclude Mr. Grandson from putting on a third-party culpability defense, for admission of a recording of a telephone call made by the decedent moments before he was shot, to admit statements Mr. Grandson purportedly made to the decedent before his death, and to preclude the defense from introducing evidence from the autopsy report that the decedent tested positive for narcotics.

Judge Gardner carried the case for trial for several days, but on April 4, when he tried to reschedule the trial, it became apparent that Adams's lawyer would be unavailable. Because Mr. Grandson was detained and the government did not object, the Judge severed his case and set the trial May 17. Judge Gardner certified Mr. Grandson's case to this Court and jury selection began that day. The jury returned a verdict of guilty on all counts May 30, 2006.

[1] At a hearing in January 2005, on the eve of trial in the case against Holliway and Adams, Judge Christian ordered the government to permit defense counsel to review all of its files except its work product. The order was a sanction for failure to disclose *Brady* material. As a result of that order Holliway and Adams obtained the medical records. See Tr. 4/25/06, 12 – 13. The Judge imposed a protective order, which prevented codefendants' counsel from providing copies of the records to Mr. Grandson's lawyer. Tr. 3/29/06, 114.

The trial of Holliway and Adams before Judge Gardner ran from August 1 – 11, 2006. The jury found Adams guilty of obstructing justice, accessory after the fact of murder and threatening Cowser, but acquitted her of assault with a dangerous weapon. Tr. 8/11/06, 622. It convicted Holliway of obstructing justice, being an accessory after the fact of murder and threatening Cowser. It convicted him of simple assault as a lesser-included offense of assault with a dangerous weapon, and acquitted him of obstructing justice by threatening Tecoya Wood. *Id.* at 623 – 4.

The Court sentenced Mr. Grandson September 7, 2006 to concurrent terms of 30 years in prison for first-degree premeditated murder, five years for possession of a firearm during a violent crime and eight months for carrying a pistol without a license. Tr. 9/7/06, 24 – 5. These sentences are followed by terms of supervised release of five years for murder and three years for each of the other counts. It sentenced Defendant to a consecutive term of 48 months in prison and five years of supervised release for obstructing justice. *Id.* at 25. The Court also ordered Mr. Grandson to pay a total of $700 to the Victim Compensation Fund. *Id.* at 25 – 6.

Mr. Grandson filed a motion for a new trial pursuant to D.C. Crim. R. 33 December 11, 2006 citing newly-discovered evidence concerning Miracle Cowser's bias against him, asserting that the government's failure to disclose that Miracle Cowser had been promised a reward violated *Brady, supra*. The evidence was a news story aired on WJLA-TV in which Cowser claimed that she had been promised a reward upon conviction of Defendant, Adams and Holliway, but that she had not received her money. The government responded that there was no evidence that it had offered her a reward or that she had an expectation of receiving one before or during either trial. This Court denied the motion without a hearing.

Subsequently, Holliway filed a motion raising the same issues and Adams joined the motion July 29, 2008. Judge Gardner held an evidentiary hearing over several days from January to March 2009 in which Myra and Miracle Cowser, detectives Brett Smith and Michael Fulton, Assistant U.S. Attorney Steven Snyder, and Yvonne Bryant, a victim/witness specialist in the U.S. Attorney's office, testified. At the conclusion of the hearing March 12, 2009 the

government requested a continuance to try to negotiate dispositions short of a ruling on the new trial motions with counsel for Adams and Holliway. Judge Gardner resentenced Adams to time served and Holliway to a reduced term of imprisonment.

RELEVANT PROCEDURAL HISTORY

THE TRIAL PROSECUTOR'S LENGTHY PATTERN OF WITHHOLDING EXCULPATORY EVIDENCE THROUGH MR. GRANDSON'S TRIAL

Although Mr. Grandson and his codefendants were arrested at the same time, the government initially obtained only indictments charging Adams and Holliway with obstructing justice by threatening Miracle Cowser. The Hon. Eric Christian presided over their case, and scheduled trial in early January 2005.

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 crime. Tr. 1/5/05, 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 personnel 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 became an adult. *Id.* at 3 – 4.

Among material turned over to defense counsel at the trial call January 5, 2005, purportedly as Jencks material, was a grand jury transcript in which Jamilia Washington testified that Cowser said she was schizophrenic, that she took medication and "smoked water (PCP)." *Id.* at 6. Judge Christian found that the prosecutor had violated its obligations under *Brady*, and as a sanction ordered the government to "turn over all of it[s] files to the defense at this time…. All the grand jury material.… And I don't want any further delays. So, Mr. Snyder, turn over your entire file to Mr. Lasley and Mr. Riley." *Id.* at 16.

> [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.

> I want you, number two, to 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.

Id. at 17. The order encompassed grand jury transcripts of all witnesses, "[w]hether you are going to use the witnesses or not…. [W]e 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.

In a discovery letter dated June 12, 2005 Mr. Grandson's lawyer requested "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 hearing July 12, 2005 Mr. Grandson's new lawyer noted that the government had at least one eyewitness and one "ear witness" who exonerated Defendant. Tr. 7/12/05, 3 – 4. She followed up with a discovery letter dated July 19 renewing the request and stating, "I do not believe that your *Brady* obligations are satisfied by the disclosure made to date." Letter dated July 19, 2005, 3.

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

Tr. 8/9/05, 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 prejdudicing 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. Tr. 8/22/05, 6, 14.

In a hearing November 18, 2005 trial 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. Tr. 11/18/05, 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.

Trial Counsel again demanded access to Cowser's medical records in a hearing December 15, 2005. Tr. 12/15/05, 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 Mr. Grandson 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."[2] *Id.* at 43.

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.*

In the next hearing, over which Judge Gardner presided, defense counsel again asked for copies of Cowser's medical records and the following colloquy occurred.

[2] In a discovery letter dated March 17, 2006, about 10 days before trial was to begin, the prosecutor identified Ronald Lee as the witness who said Corbin confessed to shooting the decedent. By then Lee was incarcerated at U.S.P. Big Sandy in Inez, Kentucky. He did not identify the eye-witness 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 March 29.

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 en 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 whole 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 the others?

MR. SNYDER: I would like the records to be returned. Judge Christian did it when — finally he issued a protective order on disclosure of those records. There was never any ruling even by Judge Christian that the 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 en camera so the Court can make a determination. I mean, I am not trying to keep anything relevant from the defense.

Tr. 2/27/06, 5 – 6, 10.

Finally, in a Status Hearing April 25, 2006, defense counsel produced a transcript of the January 5, 2005 trial call in which Judge Christian ordered the prosecutor to open his files, including the medical records, to codefendants' counsel. Tr. 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 what I'm telling you to do …, you give him everything you gave them…. And don't tell me anything 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 began. Tr. 5/22/06, 9.

The day trial was supposed to begin the prosecutor provided defense counsel 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. Tr. 3/28/06, 9 – 10. But he 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.

Immediately before trial the government disclosed that a witness identified as Witness A would testify that she saw Mr. Grandson shoot the decedent. But 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.[3] Tr. 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:

> [PROSECUTOR] … [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 the 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.[4] 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

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

[4] The prosecutor 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.

> witness, that the defendant was shot, not that he was the 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 actual 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, if that person is called —
>
> THE COURT: So you told them that person's name, the one who thought they heard that this man got shot? They thought they heard that 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 of 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.[5] *Id.* at 42 – 4.

The previous day the prosecutor informed defense counsel for the first time about two eyewitnesses, André Hammond and a person for whom he did not provide a name or contact information. *Id.* at 37, 50. He said Hammond told investigators Mr. Grandson was the shooter, but also said another person with a gun was 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

[5] When he made this statement Mr. Grandson's case was still joined with his codefendants' cases and the government almost certainly would have to call Cowser to testify about the alleged obstruction of justice and related counts.

"thicker" than Mr. Grandson. *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 witnesses to defense counsel in time for them to challenge his insistence on controlling defense access to potentially exculpatory evidence. *Id.* at 53.

In March 2006, about a week before trial was to begin, the prosecutor turned over the recording of the decedent's telephone call at the time of the shooting, which defense counsel requested three months earlier. *Id.* at 53. When counsel informed the Judge that the tape confirmed his belief that voices of witnesses had been recorded, as well as the decedents "moans and groans," and that investigators played the tape for at least one witness, the prosecutor denied that he had previously told Judge Bayly the tape contained only the decedents moaning.[6] 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. Tr. 3/29/06, 60, 63. *See above at 6*.

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 information if he can't do anything with it? What's the [point] of having information for information sake if you really can't effectively utilize the information?

Id. at 61. He agreed with defense counsel that late disclosure of the tape "puts me in [an] untenable position where I'm forced to ask for a continuance to do further investigation…." *Id.* at 65.

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

[6] Among the voices on the tape was that of McBride, who testified at trial as a defense witness that someone other than Mr. Grandson shot the decedent. When defense counsel first requested the tape December 15, 2005 the prosecutor had not identified McBride as a potential *Brady* witness.

health issues. Tr. 4/4/06, 3 – 4.

On the last day of trial, near the end of the government's cross-examination of McBride, defense counsel learned that the witness told the grand jury Mr. Grandson often carried a .25 caliber handgun. Tr. 5/26/06, 44. That piece of information was critical, as this Court recognized, because the ballistics evidence showed that the bullets used in the homicide were .45 caliber. *Id.* at 43 – 4. "[I]t should have been provided, if not a year ago, certainly after *Sykes*,"[7] the Court said. *Id.* at 42.

In its case-in-chief the government called Diane Scott, who lived with Mr. Grandson's family, to testify that a few days before the homicide she saw Defendant with an object that appeared to be a black handgun tucked into his waistband. Before he disclosed McBride's grand jury transcript the prosecutor sought to cross-examine McBride about whether he had seen Mr. Grandson in possession of a gun and initially the Court refused to permit that line of questioning because the government had not given prior notice of it.

Defense counsel argued that he would have made different tactical decisions regarding cross-examination of Scott, and asked for time to review McBride's grand jury testimony and to talk to the witness before deciding whether the Court should change its ruling and permit the government to elicit testimony that Mr. Grandson carried a gun. *Id.* at 44 – 5.

> I think the entire grand jury should have been turned over as *Brady* information because he says definitively that the shooter was not Mr. Grandson, so I don't know why it wasn't. But the information concerning the 25-caliber gun should have been turned over at the very least.
>
> … [I]t should have been turned over as reverse Jencks. Once he took the stand, the government had a prior statement. I don't know why I wasn't given it then.

Id. at 47.

The Court refused to permit the prosecutor on cross-examination to bring out that Mr. Grandson carried a gun, but said it would permit further cross-examination if defense counsel

[7] *Sykes v. United States*, 897 A.2d 769 (D.C. 2006), was decided in early March 2006.

brought it out on redirect. *Id.* at 49.

The trial of Adams and Holliway began August 1, 2006 and the jury found them guilty August 9.

During its 5 p.m. newscast December 1, 2006, WJLA-TV aired a story prepared by Reporter Sam Ford. Anchor Maureen Bunyan introduced it saying,

> She risked her life to testify in a murder case in D.C., and now a woman is wondering where is her reward?
>
> The witness was promised $25,000 from Crimesolvers after she provided information that led to a conviction. So far, she hasn't seen a dime.

Miracle Cowser, who was not identified, said police told her "Don't worry about anything, because you'll get everything back, $25,000, as soon as he gets sentenced. He was sentenced six months ago. Where's my money?" According to Ford, "[s]he said detectives of violent crimes told her she would get the reward money when Dwight Branson was convicted. She also helped convict two other people at Woodland for trying to intimidate her, but she says police are not keeping their part of the deal."

THE POST-CONVICTION HEARING IN THE CODEFENDANTS' CASE

MIRACLE COWSER

When she testified January 29, 2009 Miracle Cowser said detectives Brett Smith and Michael Fulton helped move her into a hotel September 11, 2004. She learned from police later that someone had ransacked her apartment, and she asked the detectives whether she could get reimbursement for her damaged property. She also discussed reimbursement with witness protection personnel in the U.S. Attorney's office. But she insisted that she did not ask and police never told her she would get a reward for being a witness in this case.

Miracle Cowser testified that she did not learn about the Metropolitan Police Department's reward program until after the second trial and all three defendants had been sentenced. She said she learned about it from her daughter Myra. But she later said she learned about the reward from Myra after Mr. Grandson's conviction but before the Adams-Holliway

trial.

When she learned about the reward program, Miracle Cowser testified, she did not believe she would get money because she did not witness the homicide. When she testified in the second trial she did not expect a reward, she added.

According to Miracle Cowser, Myra was the first to ask for a reward and then she approached the prosecutor, asking whether she would get a reward as well. But, she said, the prosecutor did not know about the reward, so she asked Smith, who advised that the process takes a long time and Myra should not expect her reward quickly. Miracle said she also discussed the reward with Bryant, the victim-witness specialist.

Cowser testified that she made the inquires for Myra and did not expect that she would receive a reward. But she said the story that aired on WJLA was accurate.

MYRA COWSER

In testimony March 5, 2009, Myra Cowser said about a year after Mr. Grandson's trial Smith came to her school with a check, which he gave to her grandmother. Until then she was unaware that there was a reward program and both she and her grandmother were surprised when she received the check. Myra said she does not know how much money she received and did not wonder why Smith gave it to her. Myra believes the money is in a bank account.

Before that she never discussed a reward with her mother or police, Myra said. In fact, for some time she had been living with her grandmother, and learned from Miracle that she, too, received a check. Myra said Miracle told her after the broadcast she had been on television, but not the reason for her appearance.

She denied telling Miracle about the reward program and said they never discussed a reward before she received the check.

DET. BRETT SMITH

Smith testified March 5 that his first contact with Miracle Cowser was a telephone conversation September 8, 2004. Their first face-to-face meeting occurred September 11 when

he went to Ainger Place, S.E. to arrest Mr. Grandson and his codefendants. 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.

After the videotaped interviews Smith took them to a hotel, where they stayed September 11 and 12. He then took them to the victim/witness office in the U.S. Attorney's office to arrange more permanent housing. During that time, Smith said, he provided a small amount of money so they could buy food and other essential items.

Smith testified that he learned a few days later that Miracle's apartment had been burglarized and that items had been taken or damaged. A few days later Miracle Cowser expressed concern about getting compensation for the stolen and damaged property, he said. Smith said he inquired about getting reimbursement from the Superior Court victims' fund and the U.S. Attorney's victims' fund, but they do not cover property losses. But as time passed Miracle learned about the police department's reward program. He said, "she morphed one thing to the other, and it was all about getting something for her trouble. When she realized the only thing available was reward money that's what she focused on."

Miracle initiated conversations about the reward program, according to Smith. He said he never promise her a reward, told her the MPD program provided rewards to witnesses who come forward and provide information leading to the arrest and conviction of defendants, and that they would discuss the matter "down the line." As time passed Miracle's approach changed, he said, and by the time of Mr. Grandson's trial her mindset was that she would get the reward, regardless of the outcome.

Miracle's financial situation and "stability at home" were difficult and she often brought the subject up when they spoke about the case. According to the detective they talked several times a week about her problems, and she often threw in her belief that she should get a reward. The reward was an "important issue" for Miracle before Mr. Grandson's trial and she often "bugged" him about it. He made it clear that the MPD, not the U.S. Attorney's office, distributed the money. Smith told her nothing could be done about a reward until after trial.

According to Smith, Miracle Cowser has "phenomenal phone skills" and she "turned up the heat" after the homicide trial. He said she became much more demanding about getting the reward, "sicced the Mayor's office" on him, and called senior officers in the MPD. Smith had four or five conversations with an assistant to the Mayor about Miracle's demands. Calls to the Mayor's office continued until he delivered the checks early in 2007, Smith added.

Smith did not recall when he first discussed Miracle's expectation with Snyder, saying it may have come up before the homicide trial, but he was "more certain" that they spoke before Adams's and Holliway's trial. He advised Snyder to tell Miracle the U.S. Attorney's office had nothing to do with the reward program.

Near the end of 2006 Smith recommended payments to Myra and Miracle Cowser and Tecoya Wood. He advised that Myra and Tecoya should get larger rewards because there had been a greater negative impact on them and they would benefit more than Miracle. When he delivered the check to Myra and her grandmother they appeared surprised, like they were unaware of the reward.

DET. MICHAEL FULTON

On March 5 Fulton recalled that Miracle was upset about the break-in at her apartment on Ainger Place. When it became clear that the victims' fund would not reimburses her for the loss the subject of the reward program came up. He did not believe Smith was present during his first conversation with Miracle about the reward. Fulton said he explained that the MPD could pay up to $25,000 for information leading to arrest and conviction. He told her that if the defendants were convicted she would be eligible for a reward, and that Smith would have to process the request because he was the lead detective.

Fulton said he made no promises to Miracle about a reward and no other MPD officer, in his presence, made such a promise.

Fulton testified that in conversations with Smith he learned that Miracle had brought up the reward before Mr. Grandson's trial and Smith "put her off." But from Smith's comments

before the homicide trial it was clear that Miracle expected a reward if the defendants were convicted.

YVONNE BRYANT

Bryant, a victim-witness specialist in the U.S. Attorney's office, accompanied Miracle Cowser to court during both trials. But she had no specific recollection of discussing a reward with Miracle before October 26, 2006, when she made a note in her file that Miracle asked why she had not yet received her reward.

Bryant said it is possible that Miracle raised the issue earlier, but she did not make any notes about that. Usually when she accompanies witnesses to court they have general conversations unrelated to the trial, Bryant added. She did recall discussing Miracle's expectation of a reward with Smith and Snyder, but could not recall when or how many times that occurred. She was certain that on at least one occasion Miracle asked about a reward in a telephone conversation and Bryant "probably would have" notified Snyder.

The witness testified that if Miracle could not reach Snyder by telephone she often called Bryant. The reward may have come up in some telephone conversations they had between the two trials.

At some point Miracle told Bryant she had called the Mayor's office, and from comments she heard in her office, "everyone knew she had called the Mayor" and other people in the U.S. Attorney's office.

ASST. U.S. ATTORNEY STEVEN SNYDER

Snyder testified March 12, 2009 that he met Miracle and Myra Cowser shortly after police put them in temporary housing, but he did not discuss a reward with Miracle then. He was aware that the U.S. Attorney's office provided assistance through the victim-witness office, and that MPD provided assistance to them. He recalled that Miracle complained early on about loss of her property

There were no discussions with the witnesses about a reward before Mr. Grandson's trial,

he said. But he recalled speaking with investigators about the fact that Miracle Cowser was a difficult witness and that any reward should go to Myra because she witnessed the homicide. He characterized that as an "offhanded conversation" about which Miracle and Myra Cowser were not aware.

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

In about June 2006, between the two trials, Miracle called and offered information about an unrelated homicide near where she was living, the prosecutor testified. She believed she could identify the shooter and asked if there was a reward in that case, Snyder added. It appeared to him that Miracle knew before she called about the reward program and that it applied in homicide cases. He found out which detective was investigating that homicide and put Miracle in contact with him, noting that some information she provided about that shooting was accurate.

Between Mr. Grandson's trial and the Adams-Holliway trial the issue of a reward in this case never came up in conversations with Miracle or Myra Cowser, according to Snyder. After the homicide trial Miracle's calls came in streaks with breaks between them, he said. She complained about the fact that she was living in a very bad neighborhood and about the loss of her property.

Snyder did not remember having any discussions with the detectives between the trials or after the second trial about Miracle's expectation that she would receive a reward. Initially the prosecutor said he became aware that Miracle expected a reward after the WJLA-TV story aired because Holliway filed a motion requesting a new trial. After learning about the interview, Snyder stated, he understood that she had an expectation, or at least a hope, of receiving a reward, and he recalled asking Smith at that point whether any promises had been made to her.

But he 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. The first email detailed a conference call he, Austin and Cowser had, which included no reference to a reward. In the second Snyder detailed a subsequent discussion with Austin, and said that during the conference call Cowser "devoted much time to discussing reward money."[8] At the hearing 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.

ARGUMENT

There is no question that the prosecutor committed multiple *Brady* violations in the case against Mr. Grandson and his codefendants. Judge Christian sanctioned Snyder in January 2005 for failing to disclose exculpatory evidence until the trial date by ordering him to open his case files to counsel representing Holliway and Adams. Then the prosecutor went from Judge Christian to Judge Bayly to Judge Gardner, attempting to relitigate the issue of whether he had to provide Mr. Grandson's lawyer access to the same information he had been ordered unequivocally to disclose to the codefendants. Defense counsel finally received Miracle Cowser's psychiatric records May 17, 2006, the day the homicide trial began, too late to use them effectively to challenge Cowser's competency to testify.[9]

Although the prosecutor informed defense counsel that two eyewitnesses gave descriptions of the shooter that did not match Mr. Grandson, he repeatedly refused to identify

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

[9] The medical records indicated that Cowser received treatment for schizophrenia before she became an adult. Defense counsel had located a witness who, about the time of the homicide, heard Cowser state that she was schizophrenic and that she self-medicated with narcotics and alcohol. Defense counsel should have been allowed to have a medical expert evaluate the treatment records to determine whether there was a basis to challenge Cowser's competency. *See, e.g., Vereen v. United States*, 587 A.2d 456, 457 – 8 (D.C. 1991); *Hunter v. United States*, 548 A.2d 806, 811 (D.C. 1988); *United States v. Crosby*, 462 F.2d 1201, 1202 – 3 (D.C. Cir. 1972).

those witnesses. He claimed that they were represented by counsel and alternatively said he contacted the witnesses' lawyers and that he gave Mr. Grandson's lawyer the names of the counsel for the eyewitnesses.

In March 2006 Judge Gardner delayed the trial for two months, in part because the day trial was to begin the prosecutor turned over a tape-recorded voice mail message the defense requested months earlier. *See above at 10 – 11.* In addition to the decedent's last phone call, the tape included comments of eyewitnesses to the shooting, defense witness McBride among them. It is obvious Snyder considered the tape important, because it was the first thing he talked about in his opening statement.[10] The tape clearly was exculpatory in that it placed McBride at the scene when the shots were fired, lending credibility to his account of the crime.

McBride was one of the eyewitnesses Snyder refused to identify by name, and he never revealed that the man appeared before the grand jury, gave a description of the crime significantly different than accounts of Myra Cowser and Tecoya Wood, said Mr. Grandson was not the shooter, and provided a description of the shooter that did not match Defendant. Although McBride's grand jury transcript contained clearly exculpatory evidence the prosecutor did not give it to defense counsel until the Court ordered him to do so on the last day of trial.

During trial the prosecutor called Diane Scott to testify about seeing Mr. Grandson with a black handgun several days before the homicide.[11] He then sought permission to ask McBride if

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[10] But for the Judge's decision to postpone the trial, giving defense counsel time to investigate, the disclosure would have been yet another *Brady* violation.

[11] Snyder knew Scott could not give a detailed description of the gun and that McBride told the grand jury Mr. Grandson carried a .25 caliber pistol, not a .45 like the murder weapon. Nonetheless, he sought admission under *Johnson v. United States*, 683 A.2d 1087, 1096 – 7 (D.C. 1996), which held that possession of a gun like the murder weapon several weeks before a homicide is direct evidence of the charged crime, not other-crimes evidence. Tr. 5/17/06AM, 5 – 6. He said, "[o]ne of the eyewitnesses described the gun as basically looking like a police gun, which was a semiautomatic weapon. And there were shell casings recovered from the scene, so that's consistent with the description." *Id.* at 8. Defense counsel objected because Scott's description was insufficient to say that the gun matched the murder weapon. *Id.* at 11 – 12. The distinction is very important because *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), places the burden on the government to demonstrate that unrelated other-crimes evidence falls within

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he had ever seen Defendant with a gun, hoping jurors would infer that Mr. Grandson regularly carried a gun that he used to shoot the decedent. Neither the Court nor defense counsel knew that McBride told the grand jury Mr. Grandson carried a .25 caliber pistol. On the last day of trial, near the end of cross-examination, the secret came out. This Court again chastised Snyder for withholding evidence he was required to disclose pretrial under *Brady*.

After sentencing, defense counsel learned that Miracle Cowser expected to receive a reward of up to $25,000 for testimony against Mr. Grandson. That expectation, even if government agents made no promises to her, would have formed the basis for extremely damaging bias cross-examination of Cowser. Because the issue was witness bias, if Cowser denied knowledge that she might receive a reward or claimed that the possibility had not colored her testimony, defense counsel would have been able to introduce extrinsic evidence to contradict her.[12] He could have recalled Smith and Fulton to show that she knew about the reward program, that they had told her that to be eligible for a reward a witness had to provide information leading to arrest and conviction, and that she had repeatedly expressed the belief that she was entitled to be rewarded for her trouble, as Smith characterized it.

THE PROSECUTOR DELIBERATELY SUPPRESSED EXCULPATORY EVIDENCE THAT WAS MATERIAL

The Supreme Court's directive in *Brady* is clear and simple:

> the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
> …
> A prosecution that withholds evidence on demand of an accused which, if made avail-

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one of the exceptions to the general prohibition against admission of propensity evidence. *Johnson, supra*, at 1101. When evidence of uncharged criminal conduct is direct evidence of the charged crime, the defendant has the burden of demonstrating that admission would be more prejudicial than probative. *Id.* Had the prosecutor disclosed McBride's grand jury testimony it is far less likely that the Court would have agreed with the prosecutor that Scott's testimony was admissible under *Johnson* or *Drew*. Tr. 5/17/06AM, 12 – 13.

[12] *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

> able, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice….

373 U.S. at 87 – 88. "When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 – 70, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959)). "[T]he duty encompasses impeachment evidence as well as exculpatory evidence." *United States. v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

In *United States v. Agurs*, 427 U.S. 97, 106, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the Supreme Court stated:

> Although there is … no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

The Supreme Court has repeatedly stated "the three … essential elements of a *Brady* prosecutorial misconduct claim: 'That the evidence … must be favorable to the accused …; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.' " *Banks v Dretke*, 540 U.S. 668, 691, 124 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004)(quoting *Strickler v. Greene*, 527 U.S. 263, 281 – 2, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

The D.C. Court of Appeals recently reaffirmed that

> we cannot emphasize too strongly that, unlike the obligation under the *Jencks* 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, … the due process obligation under *Brady* to disclose exculpatory information is for the purpose of allowing defense counsel an opportunity to investigate the facts of the case and, with the help of the defendant, craft an appropriate defense…. This necessarily implies timely, pretrial disclosure….

Perez v. United States, 968 A.2d 39, 43 (D.C. 2009)(citations omitted). As this Court pointed out

when it chastised the prosecutor on the last day of trial for failing to disclose McBride's grand jury testimony, the Court of Appeals made a very similar statement in *Sykes, supra*, about two months before Mr. Grandson's trial. *See above at 11*.

Bagley, supra, requires the government to disclose information tending to show that a witness is biased against the defendant. *See, also, Johnson v. United States*, 537 A.2^{d} 555, 559 (D.C. 1988). "[B]ias cross examination directed to a key witness may be extremely important to the jury's determination of guilt or innocence." *Sherer v. United States*, 470 A.2^{d} 732, 736 (D.C. 1983)(quoting *Springer v. United States*, 388 A.2^{d} 846, 855 (D.C. 1978)).

It does not matter that investigators and the prosecutor made no promise to Cowser that she would receive a reward if the jury convicted Mr. Grandson. *Brady* and its progeny require disclosure of evidence of the kind provided by Smith and Fulton in the hearing on Holliway's and Adams's § 23-110 motions, that Cowser believed she was entitled to a reward upon conviction for testifying against Defendant. As the Fifth Circuit explained, " 'what 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.3^{d} 886 891 (5th Cir. 2000)(quoting *United States v. Hall*, 653 F.2^{d} 1002, 1008 (5th Cir. 1981)).

The Sixth Circuit 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.
>
> The threat of incorrect jury verdicts is further increased by tacit agreements because, when testifying, a witness whose agreement is tacit, rather than explicit, can state that he has not received any promises or benefits in exchange for his testimony. By definition, tacit agreements are not concrete or explicit…. And given the absence of any formal arrangements, a witness's statement that he has no expectation of favorable treatment concerns only his subjective understanding, and cannot typically be demonstrably falsified. Likewise, the prosecutor can argue to the jury that the witness is

> testifying disinterestedly, which artificially increases the witness's credibility — artificially, that is, because the premise of the argument is false…. If the tacit agreement is not disclosed, the defendant is left with only argument, not evidence, to attempt to counter the credibility that improperly accrues to the witness on account of his supposedly pure motive.

Bell v. Bell, 512 F.3d 223, 244 – 6 (6th Cir. 2008)(*en banc*).

Miracle Cowser's sense of entitlement to a reward, evidenced by Smith's and Fulton's testimony at the post-trial hearing, is no less invidious than a tacit agreement. If anything it is more of a problem because, based on the detectives statements to her that the MPD paid rewards to people who helped the government get convictions, Cowser would have believed her testimony would have to be sufficient to produce a conviction..

COWSER'S TRIAL TESTIMONY DEMONSTRATES HER INTENT TO EARN A REWARD

This Court need not speculate about whether Cowser altered her account of events in September 2004 to earn her payoff.

When Smith and Fulton interviewed Miracle September 11 she said Holliway and Adams threatened her earlier that morning, not Mr. Grandson. While Holliway was threatening to kill her, "Bin Laden[13] was like man (Holliway), shut up, man. Stop being hot. He was saying that shit all loud, I killed nigger. You don't need to say that in front of her," and Holliway "started yelling at Bin Laden to shut the fuck up, but he was playing with him." *Id.* at 15. After Holliway threatened her with a knife, Cowser said, "I thought he was serious. And Bin Laden kept saying that's just the liquor talking, Miracle. Don't be scared. He ain't going to do shit." *Id.* at 16. "Bin Laden didn't say nothing, he was laughing and he was like don't take that shit serious." *Id.* at 19. She said nothing about Mr. Grandson threatening her. [14]

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[13] People in the neighborhood referred to Mr. Grandson as Bin Laden.

[14] According to Cowser, when she arrived at Adams's residence

> Bin Laden said what you doing in here, fat girl? And I was like nothing, I just came to see what my sister was doing. He was like yeah, he was like keep my name out your mouth because you don't need to be running your mouth about nothing. You don't know nothing. That's what you better say. And I was like Bin Laden, I was like come on, now. I was like much as you know me, I stay in the house. I said even though I know you don't fuck with me because we was about to fight the other day, and you tried to get your sisters to jump me. I

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Cowser told the grand jury Mr. Grandson's cousin and friends threatened her.[15] GJ 10/1/04, 5. Mr. Grandson had been present September 8 when Cowser and Adams argued over the fact that Adams had given investigators Cowser's telephone number after the shooting. *Id.* at 19. Because he heard the argument Mr. Grandson believed she had told police he shot the decedent, Cowser explained. *Id.* at 19 – 20. Then a juror asked, "was Bin Laden threatening you," and Cowser replied,

> A. No. He didn't threaten me. He just like telling his cousin to shut the fuck up. Then they was about to get into it. But he was playing. Well, Bin Laden told him to shut the fuck up. His cousin like got a little mad and like, what the hell you talking about shut up for? He was like, nigger you just killed somebody. I'm over here to help you. I'm over here to protect you. You know what I'm saying? You ain't doing your job right.
> …
>
> He was like, nigger, shut the fuck up. Jumped up out the chair, shut the fuck up. Don't be telling everybody I killed that nigger. Don't be saying all that in front of everybody. That ain't for everybody to know. Shut up.

Id. 38 – 9.

But at trial the prosecutor asked Cowser about her argument with Adams September 8 and the Court permitted him to elicit Mr. Grandson's hearsay statements as evidence of consciousness of guilt. Tr. 5/22/06, 159. Although she told the grand jury Mr. Grandson

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> was like (indiscernible) I don't get in nobody's business and everybody know me that I stay to myself around here. So he was like yeah, I feel you on that. And I explained to him, I was like no, my whole thing about it was I was mad because Danielle gave the detectives my number and they've been calling me and people talking about I been snitching.

Miracle Cowser Interview, 9/11/04, 10.

[15] She testified that early September 11 at Adams's apartment

> I was talking to Doody for a slight moment in the kitchen. And while I was talking to her, Bin Laden yelled out his mouth, what the fuck you doing over here, bitch? And I looked and I'm like, where is he at? I'm looking around the door and I'm like, what you just say to me? He was like, I said, what the fuck you doing over here. I said, no, I don't need you to come at me like that. And I was like, I'm over here talking to my sister. Why? Is it a problem? I call Danyelle Adams my sister because we were so close in a long period of time. And I'm like, is that a problem? And he was like, yeah. He was like, well, as you can see, you don't know nothing and you better not say nothing and keep my name out your mouth.

Id. at 17.

overheard the argument and drew a conclusion from it, she testified that

> He said, "Bitch, don't say my name." And I said, "Why?"
> …
> … I tried to explain to him why I was mad, and he kept cussing me out and kept saying, "Bitch, didn't I fucking say you don't say my fucking name? Don't say my name no more." And I was, like, "Whatever, Bin Ladin." He was like, "Bitch." And then he got in my face and he was, like, "Didn't I say don't fucking say my name?" And I was, like, "Whatever. Don't put me in no shit." Then that's when Danyelle pulled me away.

Id. at 162. At trial, in her account of the incident early September 11, Cowser claimed Mr. Grandson said

> "Bitch, what you doing walking up in here? Why the fuck you in here?"
> …
>
> I said, "What the fuck you talking about? That's my mother-fuckin' sister house. I can come in here if I want to."
> …
>
> "You fat ass, you better not — you don't know nothing." Something came about. It was I can't believe — because it was a lot of cussing and back and forth a little bit. Then he was, like, "Bitch, you don't know nothing, you ain't seen nothing, and you better not say nothing."

Id. at 166.

On cross-examination she attempted to deny that what she told the grand jury.[16] *Id.* at 275 – 8, 284 – 5. Then, the prosecutor gave her another opportunity to claim that Mr. Grandson threatened her. *Id.* at 295 – 7.

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[16] The following exchange occurred

> Q. Okay. The boy that was threatening you is not this man that's sitting right there with the blue shirt, you're talking about a different boy; correct?
> A. He did threaten, too, also.
> …
> Q. The cousin is not that person sitting at that table there; correct?
> A. Correct.
> …
> Q. … That person, the cousin, was saying things to you in a threatening manner; correct?
> A. Correct.
> Q. … And after he was saying those things to you, Dwight Grandson was telling you to not pay those things any attention; correct?

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THE PROSECUTOR HAD A DUTY TO DISCLOSE WHAT DETECTIVES KNEW

The Court does not need to speculate about what the prosecutor knew and when he learned about Cowser's expectation of a substantial reward and belief that she was entitled to it. Smith and Fulton testified very straightforwardly that they were aware before Mr. Grandson's trial about it. Although Smith was uncertain when he discussed the issue with Snyder, the prosecutor had a duty to learn what his investigators knew and to disclose that information to

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A. No, that's not what he said.
Q. Well, he said words to the effect that they are drunk, don't pay them any mind; correct?
A. No, that's not what he said.
Q. He never said that?
A. He said that at the time but not right then and there. That wasn't for that incident what he said.
Q. Well, what incident — well, he did tell you not to pay them any attention because they were drunk; correct?
A. No. He didn't say that. He said don't pay him no mind.
Q. Right, meaning the cousin?
A. The cousin, but not at the time being.
Q. Well, what do you mean "not at the time being"?
A. You are making a trick question. Okay? Because the cousin threatened me, and after the cousin threatened me, Bin Ladin threatened me too, okay, the same threat.
Q. Let me ask you this. When did Mr. Dwight Grandson tell you not to pay them any attention?
A. That was after the fact, when he was talking about chopping my head off, taking it to the dumpster, when he pulled the butcher knife out by the microwave.
…
A. And then that's when I was getting in my finish and in gear. I guess he know I'm good at calling the police. So when he got offensive, he stood up for his cousin and said, "Don't pay him no mind. He's drunk."
…
Q. Okay. When he was standing up for his cousin, he told you to not pay him any mind; correct?
No. He stood up for his cousin by "Don't pay him no mind. He drunk."
Q. Let me ask you.
A. Because he knew I was going to call the police. That's why he said that.
Q. Okay. I'm sorry. What did you say?
A. Because he knew I was going call the police. That's why he said that.
Q. Okay. That's why he said it?
A. Yeah. Basically, yeah.

Id. at 275 – 8.

defense counsel.

The Supreme Court stated very clearly that "the 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, 115 S. Ct. 1555, 131 L. Ed. 2^{d} 490 (1995). *See, e.g. Guest v. United States*, 867 A. 2^{d} 208, 212 n. 8 (D.C. 2005).

Even if the Court credits the prosecutor's assertions that he knew nothing about Cowser's demands until fall 2006, his failure to disclose information known to Smith and Fulton violated Mr. Grandson's right to due process.

THE* BRADY *VIOLATIONS WERE HIGHLY PREJUDICIAL

The government may argue that a defendant is entitled to a new trial only if he can demonstrate that, had the prosecutor disclosed the information to a reasonably competent defense lawyer, the outcome of the trial would have been different. It will say, even if Miracle Cowser's testimony affected his conviction for obstructing justice, because she did not witness the homicide it could not have seriously affected his first-degree murder conviction. Therefore, as to the murder conviction, the prosecutor's suppression of evidence was not "material" or prejudicial under *Brady*.

The most significant error in that argument is that the prosecutor obtained permission, over defense objection, to elicit Miracle's testimony about hearsay admissions Mr. Grandson allegedly made early September 11. He argued, and the Court agreed, that the testimony was admissible to show consciousness of guilt. Then, In his rebuttal argument the prosecutor told jurors,

> What Miracle Cowser told you supported by Detective Smith was not that the defendant said, hey, what are you talking about? I had nothing whatsoever to do with this. He was saying keep my name out of it. And he also say when the cousin — after the cousin had threatened to cut off Miracle's — Ms. Cowser's head and the defendant said, yeah, we ought to do that and Ms. Cowser got upset. The defendant said, well, don't worry they are all drunk. And then the cousin turned on the defendant and said basically you killed this person. I'm trying to protect you. What are you doing here? And the defendant said, hey, that's not for everyone to know. That's not just saying keep my name out of this or anything like that, it's not.

Tr. 5/30/06, 79 – 80. He cast the hearsay statement as an adoptive, if not explicit, admission to committing murder.

Miracle Cowser's testimony and the prosecutor's argument were particularly damaging because the government's evidence in support of the murder charge was otherwise weak. Relying on Smith's testimony in the post-trial hearing, the government may argue that Myra Cowser did not know she would receive a reward until she received a check early in 2007. Therefore, unlike her mother, she had no motive to fabricate.

But there is considerable evidence that Myra Cowser's testimony was based on information gleaned from others, rather than first-hand knowledge, and that she fabricated what she claimed to have seen. Myra Cowser claimed that she was playing double-dutch with two other children when she witnessed the shooting, but no other witness for the prosecution or defense saw her in the area before or after it, or anyone playing double-dutch. Tr. 5/26/06, 63 – 4 (Thomas McBride); GJ 5/2/05, 13 – 14, Tr. 5/19/06, 41 – 2 (Tecoya Wood). In addition, she gave inconsistent versions of events.

Miracle Cowser told police and later testified that she was asleep until Myra ran into the apartment saying that Mr. Grandson had been shot. "The words that came out her mouth was — she was not really shedding tears, but she was whining, like, 'Can you go check on Aunt Damio (ph)? They just shot Aunt Damio house up and Bin Laden dead.' She thought it was Bin Laden laying down there." Miracle Cowser Interview, 3. In the grand jury Miracle was "confident" that Myra initially said Mr. Grandson had been killed. GJ 10/1/04, 9 – 10. At trial she said Myra "was crying and in shock.… In my words, I believe I could have sworn she said, 'Oh, my God, Bin Ladin was shot.' That's what I heard." Tr. 5/22/06, 149 – 50.

Myra Cowser told Smith she heard shots and "I ran in the house and I told my mother go see was Danielle all right because Bin Laden had just shot well, at first, we thought it was Bin Laden dead. Then we went over there, it was D. That's when my mother went to go see was Danielle [okay]." Myra Cowser Interview, 6. Myra told the grand jury she was certain she told her mother Mr. Grandson shot the decedent and that her mother was mistaken. GJ 9/15/04, 25. At trial Myra testified

that she told her mother Mr. Grandson shot the decedent. Tr. 5/18/06, 109. She denied telling Smith "we thought it was Bin Laden dead." *Id.* at 130.

Beginning soon after the homicide Myra repeatedly and consistently recounted a series of events after she got home from school September 7, 2004, in which Mr. Grandson expressed jealousy about Adams's relationship with the decedent, that Defendant had beaten up Adams, and then the decedent had dragged Defendant from Adams's apartment and beaten him up. Tr. 5/18/06, 87 – 88, 90 – 95. According to her version of events, this fight was several hours before the homicide and Mr. Grandson fought back. This testimony was totally uncorroborated.

In fact, Miracle Cowser contradicted her daughter, testifying that when she went to Adams's apartment after the homicide she saw no signs that Adams had been injured. Tr. 5/22/06, 249 – 51. According to Miracle, Adams was high, she was crying, she was talking on the telephone, and her clothes were neat, not disheveled.

Other witnesses, including Tecoya Wood, said shortly before the shooting Mr. Grandson was sitting in a chair outside the back door of Adams's residence when the decedent walked over and beat him so badly that he fell to the ground and appeared disoriented. All agreed the attack was unprovoked and Mr. Grandson did not fight back. Tr. 5/18/06, 202 – 4 (Tecoya Wood); 5/25/06, 571 – 2 (Thomas McBride); Tr. 5/30/06, 12 – 14 (Curtis Noland).

The medical examiner testified that the decedent had lacerations and abrasions on his head and body that were made "several minutes, not hours" before he died. Tr. 5/22/06, 70 – 71. Her testimony corroborated McBride's testimony that two men robbed and assaulted the decedent at gunpoint a short time before the shooting.

Although Tecoya Wood identified Mr. Grandson as the shooter other aspects of her testimony corroborated McBride's and Noland's testimony about events before and after the homicide. The medical examiner could not identify the shooter, but her findings negated Myra Cowser's claim that the decedent and Mr. Grandson fought several hours earlier.

Throughout the trial the prosecutor sought to cast the government's civilian witnesses, including Miracle and Myra Cowser, as individuals who did not want to come to testify but were

courageously doing their civic duty, even though they did not want to snitch. He characterized defense witnesses as friends of Mr. Grandson's who believed being a "snitch" was a heinous act.

> [W]hen you evaluate whether or not to credit someone in our lives, stepping outside the courtroom in our lives, one of the most important things that people take into account is you look at somebody and you look at how they're saying it. You look at how they are carrying themselves. And as they're saying it you look and you say why are they coming forward? Why are they saying what they are saying? What's their bias? And look at the government witnesses other than the police officers, Myra Cowser: She didn't want to come forward. She didn't want to be a snitch. Her term. Tecoyia Wood: Looks at her on the stand. She was terrified. You could see it. Margo Frye: She had to be arrested twice. She didn't want to be here. Denise Liberty: She said she didn't want to be here. The defendant's brother's girlfriend. Ms. Scott: The defendant's aunt, she had to practically be arrested. The police had to go out and chase her down. She told you she didn't want to be here.
>
> The reason none of these people wanted to be here is because they didn't want to have to sit up in court and do a very difficult thing. Admittedly it's a very difficult thing. They didn't want to have to do it, but they had the courage to come forward and tell you what they saw or heard or experienced. And let me tell you something, you look at them and you think about that. The strength that it took to do that and ask yourself — I mean they're not getting anything for it. There's no evidence that they're — I mean they're not getting anything for it, except for particularly Myra and Tecoyia, they're still children. They get the pleasure of a very adult cross-examination.… And essentially point the finger to do what the defense witnesses tell you you do not do on the street. And even Myra told you that you don't tell on people. You don't do it. The pressure not to do it is tremendous, but they did it because it was right and that's why they did it.

Tr. 5/30/06. 45 – 6. Later he said of the defense witnesses,

> they don't tell you who did it…. That's the heavy lifting and that's what the government's witnesses had to do. That's the heavy lifting here, ladies and gentlemen. And I mean on the street it's a snitch. Here in the courtroom it's coming forward and talking about what has happened, telling the truth for justice. And that's your decision, justice.… But as we're going through all this, remember, ladies and gentlemen, who is more credible? Who do you believe, the family of the defendant, the friends of the defendant, the people who knew him, the people who are coming forward and doing what the defense witnesses say you do not do on the street and pointing the finger? Or do you believe the criminals and childhood friend of the defendant who say, don't know, but not him. Beyond a reasonable, ladies and gentlemen, he did it.

Id. at 53 – 4.

If the prosecutor had satisfied his obligations under *Brady* he certainly could not have made that argument about Miracle Cowser. In fact, faced with the possibility of devastating

cross-examination, he might not have called her as a witness in Mr. Grandson's trial.

It is less clear that defense counsel, armed with knowledge about Miracle's bias, could have used it to impeach Myra Cowser. But, as noted above, without Miracle's testimony and in light of all of the contradictory evidence, Myra's account of the homicide would have had far less impact on the jury.

Based on the evidence presented at trial, this Court cannot conclude that, even if the prosecutor had disclosed all of the suppressed exculpatory evidence, the outcome of the trial would have been the same. Therefore, it should find that the suppressed evidence was material under *Brady* and Mr. Grandson is entitled to a new trial.

A HEARING IS NECESSARY TO DETERMINE WHETHER MIRACLE COWSER'S CLEAR BIAS INFLUENCED MYRA COWSER'S TRIAL TESTIMONY

There is a strong presumption in favor of holding a hearing when a defendant asserts in a § 23-110 motion that the prosecutor withheld exculpatory information in violation of *Brady*. *Lopez v. United States*, 801 A.2d 39 42 (D.C. 2002). "The trial court must hold a hearing unless the motion and files and records of the case conclusively show that the [defendant] is entitled to no relief." *Reaves v. United States*, 694 A.2d 52, 57-58 (D.C. 1997)(internal quotation marks omitted).

Mr. Grandson's only burden to obtain a hearing "is adequately to allege facts which, if demonstrated, would establish that the prosecutor withheld exculpatory information and that if the jury had received that information there is a reasonable probability that the outcome of the trial would have been different. He does not have to demonstrate that he would have been acquitted. "The statute requires an evidentiary hearing unless the allegations of the motion itself are vague and conclusory, are wholly incredible, or, even if true, would merit no relief." *Gibson v. United States*, 388 A.2d 1214, 1216 (D.C. 1978). Furthermore, "because § 23-110 is a remedy of virtually last resort, any question whether a hearing is appropriate should be resolved in the affirmative." *Id.*

Testimony in the evidentiary hearing in Adams's and Holliway's cases provides ample

support for Mr. Grandson's § 23-110 motion. The Court cannot consider the allegations made above as vague or conclusory.

The government may argue that because Judge Gardner held a hearing in the codefendants' cases there is no need for a hearing in this case. However, despite that hearing, there is evidence outside the record that is relevant to Mr. Grandson's motion.

For example, in September 2004 Myra Cowser lived with her mother, but according to Smith, by fall 2006, when Mr. Grandson and his codefendants were sentenced, they were "estranged" and Myra lived with her grandmother.

At the evidentiary hearing Holliway's lawyer attempted to question Myra about the reasons for their estrangement and discussions they had about the case before the trials. The government objected, and because Myra's testimony about the homicide was not a central factor in the codefendants' convictions, the Judge sustained the objection.

Myra was a key witness against Mr. Grandson. From testimony at the post-trial hearing in Adams's and Holliway's cases it is evident that she did not expect to receive a reward. But that does not mean her testimony was untainted by her mother's expectation of a reward. Myra certainly was aware of her mother's claims that Mr. Grandson and his codefendants threatened her life and that they purportedly had to move as a result of the threats. Miracle Cowser told Smith she had awakened Myra when she returned home from Adams's residence.

> [S]he overheard me talking with my girlfriend, because I was mad. I was tired, I was a little tipsy from the drinks, being we just, got from the cabaret and it took me forever to get in the house because this man kept threatening me and I was scared for my life, so it took me forever to get in my house. And when I got in my house, I was talking to my girlfriend and my daughter woke up and was like what you talking about? And I repeated it to her this morning and I told her she is not allowed to talk to Danielle or her kids anymore

Miracle Cowser Interview, 5.

> Later that day, Myra said, she listened at the apartment door as Holliway made threats.
>
> It was him. He was talking to somebody. And that's when he was like, "Yeah" — he was drunk. He was like, "Yeah, my cousin did do it, but I know he better not get locked up for that murder because if he do," he say, he going to shoot that B house. And we was

> listening to the door and he said, he said, "I should kicked this door down now."… He was like he going to go home and get his Glock or something he said. And that's when he walked off. When he came back, he had on a different shirt. And he — he had on a hat. And he left out the building and he kept walking back and forth by the door and he went to Danielle house.

Myra Cowser Interview, 9.

Myra Cowser testified in the grand jury that several hours after the shooting she saw Mr. Grandson and Adams rifling through the decedent's pickup truck and Defendant took money from it.

> Like, two to three hours later. After the police and the ambulance left, he came back. … It was real late. He went in the truck, and Danyelle went in the truck…. I didn't see what Danyelle got, but Bin Laden had got the money out the glove compartment that he was talking about all day, that they was arguing over, he got that money.

GJ 9/15/04, 24. This appears to have been a blatant fabrication.

At trial, Miracle Cowser testified that she stood near the truck for a couple of minutes before going to Adams's dwelling, but she denied going into it in search of drugs. Tr. 5/23/06, 242 – 3. McBride told jurors the two men who robbed the decedent took him to his truck, and while one was "rambling through his truck," the other guarded the decedent with a gun. Tr. 5/25/06, 568. Smith testified that he examined the truck after the shooting and someone had already rummaged through it. *Id.* at 369 – 70. He said police seized the vehicle so crime scene technicians could examine it and attempt to find fingerprints. *Id.* In short, there is no evidence the truck was still in the parking lot two or three hours after the homicide.

Myra's statements and testimony early in the investigation demonstrate bias, but not the reason for it. It is very likely that during the 20 months that passed from the homicide to Mr. Grandson's trial Myra was influenced by her mother. Myra was only 12 years old in September 2004.

An evidentiary hearing is needed to determine the extent to which Miracle discussed the case with her daughter or discussed it with others in Myra's presence. In addition, the hearing should address whether Miracle stressed the importance of convicting Mr. Grandson and his codefendants as a matter of family safety and well-being.

CONCLUSION

For the reasons stated above and any others that may appear to the Court following an evidentiary hearing, Defendant Dwight Grandson respectfully requests that the Court vacate his conviction and order a new trial because the government violated its *Brady* obligations, and there is a reasonable probability that, but for the prosecutor's suppression of exculpatory evidence, the outcome of his trial would have been different.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S Becker, counsel for Dwight Grandson, certify that on June 11, 2009 I served a true copy of the attached Motion Pursuant to D.C. Code § 23-110 To Vacate Conviction and Sentence and for a New Trial by first-class mail on the person(s) listed below.

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