

IN THE
SUPREME COURT OF THE
STATE OF LOUISIANA

HERMAN WALLACE

Petitioner,

v.

BURL CAIN, WARDEN

Respondent.

*On Application for Supervisory and Remedial Writs to Review the
Ruling of the District Court Denying Post Conviction Relief, In Case No. 10-73-6820*

**BRIEF OF THE INNOCENCE NETWORK AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

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I. PRELIMINARY STATEMENT

Empirical studies have clearly established false snitch testimony as the leading cause of wrongful convictions in capital cases in the United States. In light of the obvious credibility issues associated with snitch testimony and the overwhelming empirical evidence noted above, any conviction obtained in a case where the State failed to disclose to the Defense any promise, inducement or offer made to the snitch in connection with his or her testimony is inherently suspect. That is the issue presented by this case: Does a *Brady* Claim exist when jailhouse snitch testimony is central to a conviction and the Government did not disclose that the Warden had promised the jailhouse snitch that he would advocate a pardon on his behalf? The risk of wrongful convictions will be greatly increased if Louisiana does not reverse Wallace's conviction.

II. INTEREST OF AMICUS CURIAE

The Innocence Network (the Network) is an association of organizations dedicated to providing *pro bono* legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The forty-nine current members of the Network represent hundreds of prisoners with innocence claims in all fifty states and the District of Columbia, as well as Australia, Canada, the United Kingdom, and New Zealand.¹ The Network's member organizations pioneered the post-conviction DNA model that

¹ The member organizations include Alaska Innocence Project, Arizona Justice Project, Association in the Defense of the Wrongly Convicted (Canada), California & Hawaii Innocence Project, Center on Wrongful Convictions, Connecticut Innocence Project, Cooley Innocence Project (Michigan), Delaware Office of the Public Defender, Downstate Illinois Innocence Project, Georgia Innocence Project, Idaho Innocence Project (Idaho, Montana, Eastern Washington), Indiana University School of Law Wrongful Convictions Component, Innocence Network UK, The Innocence Project, Innocence Project Arkansas, Innocence Project New Orleans (Louisiana and Mississippi), Innocence Project New Zealand, Innocence Project Northwest Clinic (Washington), Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Kentucky Innocence Project, Maryland Office of the Public Defender, Medill Innocence Project (all states), Michigan Innocence Clinic, Mid-Atlantic Innocence Project (Washington D.C., Maryland, Virginia),

has to date exonerated over 200 innocent persons, and has served as counsel in the majority of these cases. As perhaps the nation's leading authority on wrongful convictions, the Network and members Barry Scheck and Peter Neufeld (both of whom founded the Innocence Project and are members of New York State's Commission on Forensic Science, charged with regulating state and local crime laboratories) are regularly consulted by officials at the state, local, and federal levels. The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system, in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented.

In this case, the Innocence Network seeks to set forth the dangers associated with the use of jailhouse snitch testimony in the hope that the risk of future wrongful convictions will be minimized. The experience of the Innocence Network has demonstrated the unfortunate but substantial role that lying informants play in wrongful convictions. For example, Dennis Fritz and Ron Williamson served eleven years in prison for murder due to the testimony of such informants: one snitch came forward the day before prosecutors would have had to drop charges

Midwestern Innocence Project (Missouri, Kansas, Iowa), Mississippi Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence Project (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont), North Carolina Center on Actual Innocence, Northern Arizona Justice Project, Northern California Innocence Project, Office of the Public Defender, State of Delaware, Ohio Innocence Project, Pace Post Conviction Project (New York), Rocky Mountain Innocence Project, Schuster Institute for Investigative Journalism at Brandeis University Justice Brandeis Innocence Project (Massachusetts), Texas Center for Actual Innocence, Texas Innocence Network, The Reinvestigation Project of the New York Office of the Appellate Defender, University of British Columbia Law Innocence Project (Canada), University of Leeds Innocence Project (Great Britain), and the Wisconsin Innocence Project.

against Fritz with the claim that Fritz had confessed to him while they shared a jail cell,² and another claimed that she had heard Williamson allude to his role in the crime.³ Only after DNA testing exonerated Fritz and Williamson (and incriminated another government witness as the true perpetrator) were both men released. Such cases highlight the degree to which snitch testimony can corrupt our system of justice, and the concomitant necessity of conditioning the admission of snitch testimony on appropriate safeguards.

III. FACTUAL BACKGROUND

At between 7:45 and 7:49 am on April 17, 1972, Brent Miller, a prison guard at the Louisiana State Penitentiary at Angola, was stabbed at least twelve times. Trial transcript at 201-202. Physical evidence, including a bloody fingerprint lifted from the crime scene, did not link Petitioner Herman Wallace or any of his three alleged accomplices to the murder. CR at 4.⁴ In addition, four witnesses who had no motivation to lie testified at trial that Mr. Wallace was not at the murder scene when the murder occurred. Trial transcript at 297, 300, 306, 326-30, 340-45, and 351-353.

Despite the fact that the physical evidence did not support a conviction and that there were several alibi witnesses, Petitioner Wallace was convicted. The conviction was based almost entirely on the testimony of two fellow Angola inmates, Hezekiah Brown and Chester Jackson. CR at 4.

² Innocence Project, Profile of Dennis Fritz, <http://www.innocenceproject.org/Content/152.php> (last visited Sept. 8, 2008).

³ Innocence Project, Profile of Ron Williamson, <http://www.innocenceproject.org/Content/295.php> (last visited Sept. 8, 2008).

⁴ Citations in this brief to “CR” are citations to the November 7, 2006 “Commissioner’s Report On Brady Claim Following Remand,” in case number 10-73-6820 Section: III (*Herman Joshua Wallace v. State of Louisiana*), 19th Judicial District Court, Parish of East Baton Rouge.

As to Wallace's alleged accomplices, co-Defendant Chester Jackson was allowed to plea to manslaughter, despite confessing to premeditated and cold-blooded murder. CR at 24. Co-Defendant Gilbert Montegut was tried with Petitioner Wallace, but was acquitted. CR at 1. Co-Defendant Albert Woodfox was tried separately and convicted, but his conviction was later overturned. *Id.* Woodfox was retried and convicted in 1998. *Id.* In June, 2008, however, a federal magistrate recommended that his conviction be reversed, and the district court for the Middle District of Louisiana agreed. Woodfox's case is now pending before the United States Court of Appeals for the Fifth Circuit.

A. Hezekiah Brown's testimony

Hezekiah Brown was a former death row inmate and serial rapist, who at the time of Wallace's trial, was serving a natural life sentence in maximum-security at Angola, and was old, sick, and partially crippled. CR at 4-5, 17 and 18.

On the day of the murder, Brown was interrogated, but denied any knowledge of the stabbing. CR at 5. Several days later, Brown recanted his earlier statements, and told authorities that Jackson, Woodfox, Wallace, and Montegut had committed the murder "in bandanas" and "without a word." CR at 4 and 5.

It is now beyond dispute that before Petitioner Wallace's trial, Angola's Warden, Murray Henderson, promised to (and later successfully did) help Brown obtain a pardon in exchange for his testimony against Wallace. *See generally* CR. And after his testimony, but before his pardon, Brown was afforded numerous other significant privileges at Angola as rewards for his testimony, including a secured living area outside of the general prison population with its own television set. CR at 11-13. Brown was also given additional security protection during work details, an unlimited supply of cigarettes, birthday cakes, and was paid incentive wages even when he did not work. *Id.* These facts were never disclosed to Petitioner Wallace or his counsel until many years later. CR at 6.

B. Chester Jackson's testimony

At the time of the murder, Chester Jackson was a violent criminal serving time in maximum-security at Angola for armed robbery. CR at 4. He confessed to the murder at a midnight interrogation session between two and four nights after the stabbing occurred. CR at 5.

Jackson was initially on trial with Petitioner Wallace and Gilbert Montegut. CR at 1. On the second day of trial, however, Jackson, without in any way warning his attorney, who was also Wallace and Montegut's attorney, announced that he wanted to testify for the State. *Id.* His trial was then reassigned to a later date. *Id.* Jackson soon thereafter was allowed to plea to manslaughter. *Id.*

The Commissioner⁵ found that Jackson's testimony at Petitioner Wallace's trial "was so full of obfuscation that it is impossible to discern what, if anything, he was trying to convey." CR at 20-21. For example, Jackson's testimony as to whether he was offered a deal with the District Attorney in exchange for his testimony against Wallace is almost impossible to decipher. CR at 10. He even contradicted his own mother's sworn testimony that he was offered such a deal. *Id.* Moreover, Jackson's testimony contradicted Brown's testimony in several critical respects, including whether Gilbert Montegut was involved in the murder. CR at 9, 10, and 12.

C. Fingerprint Evidence

During the investigation following the murder, the State Bureau of Identification found five fingerprints—one of which was a bloody print—near the victim's body. Trial transcript at 245-53. None of these prints matched Wallace or his three alleged accomplices. *Id.* Moreover,

⁵ The "Commissioner" is a judicial officer of the 19th Judicial District Court, Parish of East Baton Rouge. The Commissioner's findings in connection with Petitioner Wallace's *Brady* claim are contained in a 27-page report entitled "Commissioner's Report on Brady Claim Following Remand." As the title of the Report indicates, the Commissioner made his fact findings pursuant to an order from the First Circuit intermediate appellate court that remanded in part Petitioner Wallace's sixth application for post conviction relief for further fact finding.

prison officials never tested the five fingerprints against the fingerprint cards that were available for every inmate in the prison at that time. *Id.*

D. Alibi Evidence

Four witnesses who had no motivation to lie testified at trial that Mr. Wallace was not at the murder scene when the murder occurred. Abraham Thomas testified that he ate breakfast with Petitioner Wallace in the dining hall on the morning of the murder, and that Wallace had some books with him. Trial transcript at 328 and 330. Thomas further testified that after finishing breakfast, he and Wallace left together and went directly to the license tag plant where they worked. *Id.* at 329-30. Before they were allowed to work, they had to check in with a guard and provide their names and inmate numbers so they could be recorded on a roster. *Id.* at 326-27.

Clarence Jones testified that on the morning of the murder, he also ate breakfast with Petitioner Wallace in the dining hall, along with Abraham Thomas, and Irving Braud. *Id.* at 341-42. During their breakfast, a person nicknamed “Slick” who worked in the kitchen gave Wallace three or four books. *Id.* at 345. Jones further testified that after breakfast, Jones, Wallace, and Thomas left for the license tag plant at about 7:50 am. *Id.* at 343-44.

Gerald Bryant testified that his nickname was “Slick,” and that he was working in the kitchen on the morning of the murder. *Id.* at 351-52. He further testified that he served Wallace and Thomas breakfast at 7:30 or 7:45 am, and that he brought Wallace some books to the table where Wallace was eating. *Id.* at 352-53.

Finally, Henry Cage testified that on the morning of the murder, he saw Wallace and Gilbert Montegut in the dining hall at 7:30 am. *Id.* at 297. After breakfast, Cage left for the license tag plant, arriving there between 7:55 and 8:00 am. *Id.* at 300. When he arrived, he saw Petitioner Wallace already working. *Id.* At trial, Cage identified the tag plant roster that

contained the names, dates, and hours of the tag plant workers. *Id.* at 306. The roster showed that Wallace had worked a full day on the day of the murder. *Id.* at 340.

IV. ARGUMENT

A. Snitch Testimony Raises Serious Credibility Issues Because Snitches Have an Obvious Self-Interest to be Untruthful

The Supreme Court has expressed grave concerns and doubts about the reliability of snitch testimony. *Banks v. Dretke*, 540 U.S. 668, 701-02 (2004) (“This Court has long recognized the ‘serious questions of credibility’ informers pose.”). “The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious questions of credibility.” *On Lee v. United States*, 343 U.S. 747, 757 (1952).

Courts disfavor snitch testimony because there is a substantial risk that snitches have incentive to testify untruthfully in exchange for leniency or payment. Jailhouse snitches may use “false information as barter or currency to obtain leniency in her own case, a process which, given the nature of criminal informants, suggests a motive to manufacture evidence.” *Plascencia v. Alameida*, 467 F.3d 1190, 1199 (9th Cir. 2006). Payment to jailhouse snitches can “provide an incentive to [such] witnesses to come forward and lie simply for the purpose of receiving the payment. . . . [B]ecause of the vulnerability of such contingent-payment arrangements to corruption, they may be approved only rarely and under the highest scrutiny.” *United States v. Levenite*, 277 F.3d 454, 462 (4th Cir. 2002). The danger of perjury by jailhouse snitches “generated by dangling such a plump carrot before a critical witness is why [the Fifth Circuit] requires rigorous safeguards to protect the integrity and accuracy of the jury’s fact-finding.” *United States v. Villafranca*, 260 F.3d 374, 380 (5th Cir. 2001).

A former prosecutor himself, Judge Trott of the Ninth Circuit, has summed up the perils of snitch testimony as follows:

Because of the perverse and mercurial nature of the devils with whom the criminal justice system has chosen to deal, each contract for testimony is fraught with the real peril that the proffered testimony will not be truthful, but simply factually contrived to “get” a target of sufficient interest to induce concessions from the government. Defendants or suspects with nothing to sell sometimes embark on a methodical journey to manufacture evidence and to create something of value, setting up and betraying friends, relatives, and cellmates alike. Frequently, and because they are aware of the low value of their credibility, criminals will even go so far as to create corroboration for their lies by recruiting others into the plot.

N. Mariana Islands v. Bowie, 243 F.3d 1109, 1124 (9th Cir. 2001).

The case of Dennis Fritz and Ron Williamson is illustrative of the injustice that can result from the snitch testimony. In 1982 Debra Sue Carter, a waitress, was found raped and murdered in her apartment. The police investigation recovered latent fingerprints, hair, bodily fluids and a bloody fingerprint at the crime scene. *Williamson v. Ward*, 110 F.3d 1508, 1510-11 (10th Cir. 1997). In 1987, Fritz and Williamson were charged with rape and murder. Despite the fact that none of the fingerprints matched the defendants, at the trial the prosecution bolstered its inconclusive physical evidence with the testimony of a jailhouse snitch who claimed that Fritz has confessed to the murder and with another informant who testified that he had seen Williamson at the victim’s workplace before the crime occurred. *Id.* Both men were convicted. Fritz received a life sentence and Williamson was sentenced to death. Only after both men had served twelve years in prison, and Williamson came within five days of execution, was it discovered, through DNA testing, that the crime had actually been committed by Glenn Gore, one of the prosecution’s own witnesses. *Post-Conviction DNA Testing: When is Justice Served: Hearings Before the Senate Comm. on the Judiciary*, 106th Cong. 115-117 (2000) (statement of Dennis Fritz). Despite the fact the Gore was the last person to see the victim alive, and having an obvious motive to see someone else convicted of the crime, the prosecution did not question the veracity of Gore’s testimony. Moreover, Gore, who was facing kidnapping and assault charges at the time, received a plea bargain in return for his testimony—a fact that was not

disclosed to the jury. *Williamson v. Reynolds*, 904 F. Supp. 1529, 1549 (D. Okla. 1995). In reversing the convictions, Judge Seay wrote “God help us, if ever in this great country we turn our heads while people who have not had a fair trial are executed. That almost happened in this case.” *Id.* at 1577.

B. Empirical Data Demonstrates that Snitch Testimony is the Greatest Single Source of Wrongful Convictions

Numerous studies have demonstrated the unreliability of snitch testimony such as that relied on to convict Herman Wallace.¹⁰ A recent Northwestern University Law School study concluded that snitches are the leading cause of wrongful conviction in capital cases in the United States accounting for more erroneous convictions than incorrect eyewitness identification, false confessions or misleading scientific evidence. Center on Wrongful Convictions, *The Snitch System – How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row* (Northwestern University School of Law, 2004).¹¹ The Northwestern study examined the 111 death row exonerations that occurred between 1973 and 2004 and found that fifty of those cases involved snitch testimony that was later found to be false. *Id.* at 3. Overall, false or misleading snitch testimony was found to be a factor in 45.9% of all the wrongful capital convictions examined—nearly twice the second leading cause of wrongful conviction, erroneous eyewitness identification testimony. *Id.*

Other studies have found snitch testimony to be equally unreliable. In 2000, Barry

¹⁰ The term “snitch” as used herein is defined as an informant who provides information regarding another person’s criminal conduct in exchange for some government-conferred benefit, usually lenience for his own crimes, a fee, or preferential treatment. A. Natapoff, *Comment: The Faces of Wrongful Conviction symposium: Beyond Unreliable: How Snitches Contribute To Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107 at n.1 (2006).

¹¹ Available at <http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf> (last visited Sept. 8, 2008).

Scheck and the Innocence Project published that 21% of wrongful capital convictions were due to, or involved, false snitch testimony. J. Dwyer, P. Neufeld & B. Scheck, *Actual Innocence*, 246 (Doubleday 2000). In California it is estimated that 20% of all wrongful convictions, capital and otherwise, are the result of false snitch testimony. N. Martin, *Innocence Lost*, San Francisco Magazine, 87-88 (Nov. 2004). A study conducted by Professor Samuel Gross estimated that 50% of wrongful murder convictions nationwide between 1989 and 2003 involved perjury by a jailhouse snitch or other witness who stood to gain from giving false testimony. S.R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 543-44 (2005). Finally, the landmark study conducted by Bedau and Radelet examined records of 350 wrongful capital convictions between 1900 and 1987 and concluded that perjury by prosecution witnesses was the cause of 117 of the 350 wrongful convictions identified. H.A. Bedau & M.L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 60-62 (1987).

C. **Courts and Legislative Bodies Have Recognized the Unreliability of Snitch Testimony and Taken Measures to Restrict the Use of Snitch Testimony**

In recognition of the fact that snitch testimony poses serious credibility questions, the Supreme Court has held that “a defendant is entitled to broad latitude to probe credibility [of a jailhouse informant] by cross-examination and to have the issues submitted to the jury with careful instructions.” *On Lee*, 343 U.S. at 757. Federal and state courts “have therefore allowed defendants ‘broad latitude to probe [informants’] credibility by cross-examination’ and have counseled submission of the credibility issue to the jury “with careful instructions.” *Banks*, 540 U.S. at 702; see Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 Hastings L.J. 1381, 1385 (1996) (“Jurors suspect [informants’] motives from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly

untrustworthy and unreliable openly expressing disgust with the prosecution for making deals with such scum.”).

Because of its inherent unreliability, several state courts and legislative bodies have, since the time that Wallace was convicted, established preconditions before snitch testimony may be admitted. For example, snitch testimony may not be admitted in a capital case in Illinois unless the judge conducts a preliminary hearing and determines that the testimony is reliable. *See* 725 ILCS 5/115-21(d) (2008) (“The court shall conduct a hearing to determine whether the testimony of the informant is reliable, unless the defendant waives such a hearing. If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial. At this hearing, the court shall consider the factors enumerated in subsection (c) as well as any other factors relating to reliability.”).

Noting that “[c]ourts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of benefit for his or her testimony,” the Oklahoma Court of Criminal Appeals has adopted strict disclosure guidelines that require the prosecution to provide complete information regarding any deal, promise, inducement or benefit that the prosecution has made or may make in the future to the informant. *Dodd v. State*, 993 P.2d 778, 783 (Okla. Crim. App. 2000). The required disclosures include (i) a list of all other cases in which the informant has testified or offered testimony (even if not called) and whether the informant received any deal, promise or benefit for said testimony, (ii) whether the witness has at any time recanted any testimony or statement, and (iii) any other information relevant to the informant’s credibility. *Id.* at 784.

Ruling that “a legally unsophisticated jury has little knowledge as to the types of pressures and inducements that jail inmates are under to ‘cooperate’ with the state and to say anything that is ‘helpful’ to the state’s case,” the Nevada Supreme Court requires trial courts to

conduct preliminary hearings to assess the reliability of jailhouse informant testimony. *D'Agostino v. State*, 823 P.2d 283, 284-85 (Nev. 1991).

Additionally, between 1997 and 2003, many courts added special provisions to their pattern jury instructions to address the inherent unreliability of snitch testimony. For example, jury instructions in the First, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits were amended to add an instruction explicitly requiring district court judges to issue special cautionary instructions for evaluating snitch testimony. K. O'Malley, J. Grenig, & W. Lee, *Federal Jury Practice and Instructions, Criminal* § 15.02 (6th ed. 2008); see *Hoffa v. United States*, 385 U.S. 293, 312 (1966) (approving cautionary “interested witness” jury instruction). As the Fifth Circuit has recognized, because the admission of the testimony of a paid informant raises serious concerns about the fairness of a trial, the trial court is required to “give a careful instruction to the jury pointing out the compensated witness’ suspect credibility.” *United States v. Narviz-Guerra*, 148 F.3d 530, 538 (5th Cir. 1998). For example, in *United States v. Ramirez*, 810 F.2d 1338 (5th Cir. 1987), the trial court instructed the jury as follows:

[A] paid informant or a witness who has been promised that he or she will not be charged or prosecuted or witnesses [sic] that hope to gain more favorable treatment in his or her own case, may have a reason to make a false statement because he wants to strike a good bargain with the government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of the other witnesses.

Id. at 1344. Similarly, the Pattern Criminal Federal Jury Instructions for the Seventh Circuit provides:

3.13 WITNESSES REQUIRING SPECIAL CAUTION

You have heard testimony from _____ who:

(a) received immunity: that is, a promise from the government that any testimony or other information he/she provided would not be used against him/her in a criminal case.

(b) received benefits from the government in connection with this case, namely _____.

(c) has admitted [been convicted of] lying under oath.

(d) stated that he/she was involved in the commission of the offense as charged against the defendant.

(e) has pleaded guilty to an offense arising out of the same occurrence for which the defendant is now on trial. His/ her guilty plea is not to be considered as evidence against the defendant.

You may give his/her testimony such weight as you feel it deserves, keeping in mind that it must be considered with caution and great care.

Instruction No. 3.13 (1999), available at <http://www.ca7.uscourts.gov/pjury.pdf>; *see also* Sixth Circuit Criminal Pattern Jury Instructions, § 7.06A(2) (1991) (“The use of paid informants is common and permissible. But you should consider _____’s testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government gave him.”); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), Special Instruction No. 1.1 (2003) (“The testimony of some witnesses must be considered with more caution than the testimony of other witnesses. For example, a paid informer, or a witness who has been promised that he or she will not be charged or prosecuted, or a witness who hopes to gain more favorable treatment in his or her own case, may have a reason to make a false statement because the witness wants to strike a good bargain with the Government. So, while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses.”).

Of particular relevance here, the Louisiana Appeals Court has expressly recognized that snitch testimony should be viewed with suspicion and distrust. *State v. Divers*, 889 So.2d 335,

352 (La.App. 2d Cir. 2004). Specifically, in *Divers*, the Louisiana Appeals Court held that an informant's testimony that has not been corroborated requires a jury instruction to proceed with "great caution" when considering informant testimony.

D. Snitch Testimony is Particularly Unreliable When the Government Has Not Disclosed Any Promises, Deals or Inducements

Snitch testimony is particularly unreliable when the Government has not disclosed any promises, inducements or deals incenting the snitch to testify. When no disclosure is made, the jury cannot weigh the inherent credibility issues widely acknowledged to exist with snitch testimony and the defense is deprived of its right to cross-examine and further focus the jury on the suspect credibility of the witness in a manner that may not otherwise be apparent to the jury absent cross-examination.

The importance of full disclosure and the ability to conduct vigorous cross examination following full disclosure cannot be understated. The Supreme Court has held that the "established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa v. United States*, 385 U.S. 293, 311 (1966); see *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) ("[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."). The opportunity to cross-examine is particularly important where, as here, "a prosecution witness has had prior dealings with the prosecution or with other law enforcement officials, so that the possibility exists that his testimony was motivated by a desire to please the prosecution in exchange for the prosecutor's actions." *United States v. Mayer*, 556 F.2d 245, 248-49 (5th Cir. 1977).¹² Not only is it essential that the jury be alerted to a snitch's dealings with the prosecutor

¹² In *Mayer*, the Fifth Circuit held that it was reversible error to preclude cross-examination as to a witness's incentives to testify. 556 F.2d at 251-53.

to properly weigh and assess the credibility of the witness, but the failure to disclose a prosecutor's dealings with a jailhouse snitch sends a message to the jury that the motivation of the testifying witness is to ensure that justice is being done, possibly at the risk of endangering himself or herself.

Of course, the danger a wrongful conviction posed by admitting snitch testimony when the Government has not disclosed any deals, inducements or promises offered to the snitch is magnified if the snitch testimony is central to the Government's case. Indeed, courts have reversed convictions in such circumstances, particularly when other evidence tends to prove innocence. For example, in *Banks*, the Supreme Court reversed the defendant's state death sentence on *Brady* grounds because the jury never learned that the witness Farr, whose "testimony was the centerpiece of Banks's prosecution's penalty-phase case," had been a paid informer for the police who specifically had been paid for playing an "instigating role" in the events that allowed the state to argue Banks's continued dangerousness unless he was executed. 540 U.S. at 701. The jury also did not learn that Farr's involvement with drugs gave him a "continuing interest in obtaining [the investigating police officer's] favor." *Id.* at 673. The Supreme Court reasoned that "Farr's testimony about Banks's propensity to commit violent acts," was "crucial to the prosecution," even while the jury was kept "ignorant of Farr's true role in the investigation and trial of the case," as well as of his informer status. *Id.* at 672, 702-03.

In *Horton v. Mayle*, 408 F.3d 570 (9th Cir. 2005), the Ninth Circuit vacated the district court's denial of the defendant's *Brady* claim because the state failed to disclose that one of its star witnesses was an informant who had received immunity in exchange for its testimony and his testimony was "the glue that held the prosecution's case together." *Id.* at 578-79. The Ninth Circuit concluded that the state's failure to disclose the immunity deal undermined confidence in the outcome of the trial because the informant's testimony "was central to the prosecution's

case” and “provided the only ‘direct’ evidence that connected [the defendant] to the crime.” *Id.* The Court explained, “without [the informant’s] testimony, the prosecution’s case was entirely circumstantial. No fingerprints, DNA evidence, or eyewitness testimony placed [the defendant] at the scene.” *Id.* at 579. The Court further held that “where a witness is central to the prosecution’s case, the defendant’s conviction demonstrates that the impeachment evidence presented at trial likely did not suffice to convince the jury that the witness lacked credibility. In such cases, we noted, the suppressed impeachment evidence ‘takes on an even greater importance.’” *Id.* at 581 (quoting *Benn v. Lambert*, 283 F.3d 1040, 1054 (9th Cir. 2002)).

V. **WALLACE’S WRIT SHOULD BE ALLOWED**

Under the *Brady* doctrine, it is a violation of due process if the State withholds evidence favorable to the accused, and that “evidence is material to either guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The United States Supreme Court has clearly established that evidence that may be used to impeach the testimony of a witness falls within the *Brady* rule. *Giglio v. United States*, 405 U.S. 150 (1972) (reversing conviction and granting motion for a new trial when the Government failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the government).

Louisiana Appellate Courts, in interpreting the United States Supreme Court’s decisions in *Brady* and *Giglio*, have recognized that a valid *Brady* claim may rest on even non-explicit promises to a snitch in exchange for testimony:

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

State v. Lindsey, 621 So.2d 618, 625 (La.App. 2d Cir. 1993).

In practice, Louisiana Appellate Courts and the Fifth Circuit have allowed *Brady* claims when a central witness had an undisclosed deal with the State. *See, e.g., Tassin v. Cain*, 517 F.3d

770, 780-81 (5th Cir. 2008) (reversing conviction and granting new trial when State failed to disclose agreement with witness for preferential treatment when disclosure would have put case in a different light so as to undermine confidence of the jury); *State v. Bailey*, 367 So.2d 368, 371 (La. 1979) (reversing conviction and granting new trial when State failed to disclose promise to consider leniency for witness whose testimony may have been determinative of guilt); *State v. Lindsey*, 621 So.2d 618, 628 (La.App. 2d Cir. 1993) (reversing conviction and granting new trial when State failed to disclose promise to consider leniency for witness whose testimony may have been determinative of guilt). The failure to disclose a deal with a government witness is particularly material when the government witness's testimony was different before the deal was offered. *Bailey*, 367 So.2d at 371.

Moreover, a *Brady* claim is not premised on a change of outcome. Indeed, even if there is additional evidence supporting conviction, a defendant still has a valid *Brady* claim if the suppressed evidence "undermines confidence in the outcome of the trial." *State v. Bright*, 875 So.2d 37, 42 (La. 2004); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *Bagley v. U.S.*, 473 U.S. 667, 677 (1985); *State v. Marshall*, 660 So.2d 819, 825-26 (La. 1995); *State v. Verret*, 960 So.2d 208, 228 (La.App. 1 Cir. 2007).

When compared to the cases cited above, there is no question that Petitioner Wallace's *Brady* claim should be granted. There is considerable evidence supporting Petitioner Wallace's innocence: physical evidence, including a bloody fingerprint lifted from the crime scene, did not link Petitioner Wallace or any of his three alleged accomplices to the murder (CR at 4); and four separate witnesses who had no motivation to lie testified at trial that Mr. Wallace was not at the murder scene when the murder occurred (Trial transcript at 297, 300, 306, 326-30, 340-45, and 351-353).

In stark contrast to the unassailable evidence tending to support Wallace's innocence, Wallace's conviction rested solely on the testimony of two demonstrably unreliable witnesses.

The Government's central witness, Hezekiah Brown, was a snitch, but the Government never disclosed to the defense the promises made to Brown to incent him to testify. When first questioned, he claimed he knew nothing about the murder. CR at 5. He later changed his testimony. *Id.* Moreover, it is undisputable that before Brown testified at Wallace's trial, Angola's Warden, Murray Henderson, promised to (and later successfully did) help Brown obtain a pardon in exchange for his testimony against Wallace. *See generally* CR. And after his testimony, but before his pardon, Brown was afforded numerous other significant privileges at Angola as rewards for his testimony, including a secured living area outside of the general prison population with its own television set. CR at 11-13. Brown was also given additional security protection during work details, an unlimited supply of cigarettes, birthday cakes, and was paid incentive wages even when he did not work. *Id.* These facts were never disclosed to Petitioner Wallace or his counsel until many years later. CR at 6.

The testimony of the Government's only other witness, fellow inmate Chester Jackson, simply is not credible. Preliminarily, Jackson denied that he had a deal with the District Attorney during his testimony at the Wallace trial, but the facts suggest otherwise. First, Jackson's own mother testified under oath that Jackson did have a deal with the District Attorney in exchange for his testimony against Wallace. CR at 10. Second, Jackson, without warning his attorney or co-defendants, abruptly switched sides during the Wallace trial. CR at 1. Third, despite the fact that Jackson had confessed to cold-blooded premeditated murder, he was allowed to plea to manslaughter shortly after the Wallace trial. CR at 34.

Even if Jackson did not have a deal with the District Attorney, the Commissioner found that Jackson's testimony at Petitioner Wallace's trial "was so full of obfuscation that it is impossible to discern what, if anything, he was trying to convey," and that Jackson's credibility was "on shaky ground." CR at 10, 20-21. Moreover, courts have long been leery of accomplice testimony. *See, e.g., On Lee*, 343 U.S. at 757 ("The use of . . . accomplices . . . may raise

serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility.”); *Crawford v. United States*, 212 U.S. 183, 203-04 (1908).

In sum, Wallace’s conviction was of dubious validity. The physical evidence and the testimony of several alibi witnesses tended to prove Wallace’s innocence. The State’s case was predicated on two demonstrably unreliable witnesses. One of the witnesses was a jailhouse snitch whose testimony was central to the case but the State did not disclose to the Defendant that it had promised to advocate a pardon on behalf of the snitch. In these circumstances, this Court must be especially vigilant about protecting Petitioner Wallace’s Amendment rights, and should reverse his conviction.