IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE	)	
	)	ID# 9504004126
v.	)	
	)	
DARYL ANDRUS,	)	
	)	
Defendant.	)	
	)	

Submitted: May 24, 2010
Decided: July 22, 2010

Upon Defendant's Motion for Postconviction Relief.
DENIED.

MEMORANDUM OPINION

John Williams, Esquire, Deputy Attorney General, Department of Justice, Dover, Delaware, Attorney for the State

Michael W. Modica, Esquire, Michael W. Modica, Attorney at Law, Wilmington, Delaware, Attorney for Defendant

COOCH, J.

I. INTRODUCTION

Defendant's motion for postconviction relief stems from a 1996 trial where Defendant and a codefendant, Jeffrey Fogg, were found guilty of non-capital Murder First Degree in connection with the beating death of James Dilley. As a

result of his conviction, Defendant was sentenced to life in prison without the possibility of probation or parole.

At trial, among other evidence, the State introduced the testimony of Robert Richmond ("Richmond"). Richmond testified that he had met Defendant while in prison and that Defendant had divulged specific details about the murder to him.[1] Specifically, Richmond stated that Defendant initiated a fight with Dilley and that Defendant and Fogg beat Dilley to death.[2] Richmond further testified that Defendant was concerned that his ring, which was confiscated by police, would match the numerous cuts on Dilley's face.[3] Richmond stated that Defendant told him that Fogg had become "carried away with the beating and went too far."[4] Richmond also testified that Defendant and Fogg "cleaned up" the murder scene by dragging Dilley's corpse to the bathtub and filling the tub with water.[5] Richmond stated that he had no agreement or understanding with the State in return for testifying.[6]

After Defendant was convicted and his conviction was affirmed by the Delaware Supreme Court,[7] Defendant filed a motion for postconviction relief alleging, in part, that the State failed to turn over potential impeachment evidence

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[1] Op. Br. At 2.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Andrus v. State*, 1998 WL 736338 (Del. Supr.).

about Richmond in violation of *Brady v. Maryland*.[8] Because Richmond was incarcerated in Georgia at the time, this Court deferred judgment on any *Brady* claims until Richmond was available to testify.[9]

In 2009, Delaware obtained custody of Richmond and a hearing was held to take Richmond's testimony in connection with Defendant's alleged *Brady* claims. In addition to Richmond's testimony, the Court heard testimony from Peter N. Letang, Colleen K. Norris, and Joseph A. Gabay. Mr. Letang and Ms. Norris represented the State at Defendant's trial, and Mr. Gabay had represented Mr. Richmond. All three attorneys testified that no agreement was ever made between the State and Richmond in return for Richmond's testimony.

The issues before the Court are: (1) whether the State failed to disclose the existence of an agreement or an implicit agreement between Richmond and the State in exchange for Richmond's testimony; and (2) assuming there was such an undisclosed agreement, whether the failure to disclose the agreement materially affected the results of Defendant's trial.

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[8] 373 U.S. 83 (1963) (holding that the State must disclose evidence favorable to the accused upon request when such evidence is material to guilt or punishment).

[9] The Court summarily dismissed Defendant's other contentions alleging that (1) the Court erred in granting a motion to suppress before trial; (2) the State's medical examiner "misled the jury regarding the strength of her qualifications"; (3) the Court erred in admitting evidence about a prior beating of the victim by Defendant two weeks prior to the murder; (4) the prosecutor improperly commented on Defendant's lack of remorse in closing argument; (5) defense counsel failed to hire an independent pathologist; (6) defense counsel failed to hire an independent crime scene expert; and (7) defense counsel was ineffective in failing to raise certain objections and other meritorious issues. *See State v. Andrus*, 2003 WL 1387115 (Del. Super.).

After reviewing the testimony presented at the evidentiary hearing held in connection with this motion for postconviction relief, this Court holds that there was no undisclosed agreement or implicit agreement between the State and Richmond. Thus, there was no *Brady* violation constituting prosecutorial misconduct.

Alternatively, this Court holds that even if there was a *Brady* violation from the State's failure to disclose an agreement or implicit agreement between the State and Richmond, the failure to disclose that evidence was not material in that it did not affect Defendant's rights at trial. Accordingly, Defendant's motion for postconviction relief is **DENIED**.[10]

II. FACTS

A. Defendant's Murder Trial

The following facts related to Defendant's murder trial are recited verbatim from the Delaware Supreme Court's 1998 opinion:

> On April 4, 1995, there was a party at 407 7th Street, Holloway Terrace, the residence of Daryl "Babe" Andrus. John "Dwayne" Cathell brought over a case of beer around noon and sat on the porch drinking with Andrus and two other men. Fogg arrived around 2:30 p.m. with a 12-pack of beer and Cheryl Adams. James "JD" Dilley was there also. Dilley and Andrus had been friends for years, although two weeks earlier Andrus had severely beaten Dilley on the face. Dilley was a small man, weighing about 150 pounds and five feet three inches tall. He had a clawed right hand.

[10] Codefendant Jeffrey Fogg also filed a motion for postconviction relief in connection with this case. Defendant Fogg's motion was denied in *State v. Fogg*, I.D. No. 9504002666R, July 22, 2010.

The party migrated from the front porch to the back where Fogg provoked Cathell into fighting by kicking Cathell's leg and knocking his hat off. Subsequently, the party moved down to the basement where Cathell and Fogg fought again. Dilley got between the two men, but Andrus hit Dilley out of the way and broke up the fight.

Around 8:00 p.m., Andrus, Fogg and Adams went to a tavern. They stayed there for about an hour and a half. According to Adams, Fogg and Andrus were rowdy and excited from the drinking and earlier fighting.

On their way back to Andrus's residence, they stopped at a liquor store. They arrived at Holloway Terrace at approximately 10:00 or 10:30 p.m. Dilley was there. When Adams left approximately 20 minutes later, only three people remained in the dwelling: Dilley, who was in the living room trying to get a fire started in a wood stove, and Andrus and Fogg, who were in the kitchen pouring glasses of black sambucca.

The next morning at approximately 7:30 a.m., an ambulance from the local fire company responded to 407 7th Street. When they arrived on the scene, Fogg directed them inside where they found a body wearing boxer shorts and socks. There was blood all over the walls and carpets of the house. Fogg started mouth-to-mouth resuscitation while the emergency medical technicians began CPR compressions. Fogg told them, “I don't understand what happened, we were talking to him this morning.”

A short time later, paramedics arrived. Andrus directed them to the victim. Examining Dilley, the paramedics found signs of rigor mortis in the jaw and finger and no pulse. CPR was discontinued and Dilley was pronounced dead at 7:42 a.m.

When Officer Romi Allen of the New Castle County Police Department arrived, the paramedics informed Allen that this was a crime scene. The victim's face was a bloody pulp. As described by the medical examiner at trial, Dilley had suffered multiple severe injuries caused by “kicking, punching, stomping and striking or being struck with blunt objects as well as hands and shod feet,” to the extent that some of these actions left imprints on his body. The injuries to his face were so severe that his nose was torn away from his cheek and his ears were torn away from the back of his head. A false plate inside his mouth was broken into multiple pieces because he had been kicked. The hyoid bone underneath his chin was fractured. According to the medical examiner, Dilley died as a result of extreme blood loss complicated by the inhalation of blood and vomit into his airway.

* * *

[At trial,] Robert Richmond, an inmate at the Delaware Correctional Center, was called as a witness by the State. Richmond testified that he had met Andrus

> at Gander Hill. Andrus had told Richmond about his crime, stating that the victim, who lived with Andrus, had slapped Andrus in the face and that Andrus had started fighting. The victim fell to the floor, and Andrus and the co-defendant, who was staying there at the time, kicked and stomped the victim. Andrus said that he had hit the man in the face and apparently was concerned that his ring, which was taken from him by the police, would match 17 cuts to the man's face. According to Richmond, Andrus had claimed that his co-defendant, whose name Richmond did not remember, had gotten carried away with the beating and went too far. The incident took place in the living room and afterward, they dragged the victim to the bathroom to clean him up. Their main concern was to clean up the house. They had plans of getting rid of the body, but too many people knew that Dilley had been there and that they had been fighting. Andrus told Richmond that he went to bed and, the next morning after sobering up, he called 911.[11]

When asked at trial about any favorable treatment Richmond had received in return for his trial testimony, Richmond testified:

> [Mr. Letang]: Could you tell us whether or not any promises had been made to you or any threats had been made to you to get you to talk to the police?
>
> A: No, no promises or threats.
>
> Q: Was there some litigation or something that you had filed or [your attorney] had filed that was in the works during the period of time, some kind of motion?
>
> A: Yes, it was. It was a Rule 61 motion I had originally filed. I had messed it up in some areas. And a judge granted me – Joseph Gabay to come in and help me get it going again. And, yes, that was pending at the time I had contact.
>
> Q: If I can ask you, did that have to do with the recalculation of a sentence you were serving?
>
> A: Yes.
>
> Q: You were initially given an eight year sentence. Am I correct in stating that?
>
> A: Yes.
>
> * * *
>
> Q: Since the time that the statement was given, has there been any conversation between you and any police officer or prosecutor dealing with the status of that motion – the motion – the Rule 61 recalculation of time motion? Has that come up in conversations dealing with your testimony here in this proceeding?
>
> A: No. There has been absolutely no promises made on it whatsoever, no.[12]

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[11] *Andrus v. State*, 1998 WL 736338, at * 2-4 (Del. Supr.).

[12] Trans. of April 29, 1996 trial at 132-33.

On cross examination at trial Richmond testified:

> [Mr. Foley]: Now, when Mr. Gabay got in the case, was there any – was there ever any discussion between you and him as to the possibility of you getting information that would be helpful to your situation?
>
> A: I was hoping that it would, but he said that there was no way that the State could make any promises on that, which they haven't and couldn't.
>
> Q: But prior to you going to Gander Hill, prior to you meeting with Mr. Andrus, you and your attorney had talked about the possibility of you possibly getting information from an inmate that would be helpful to your predicament?
>
> A: Oh, no, absolutely not.
>
> Q: I thought you just said there was discussions?
>
> A: You mean before like – like he told me to go find an inmate and see if I can get information and bring you something? I don't understand what you're saying.
>
> Q: Did you ever say, hey, Mr. Gabay, if I merely get information, will that help out? Did you ever raise that question to him?
>
> A: Oh, yeah, yeah, I did bring that up.
>
> Q: At what point did you bring that up to him?
>
> A: In the original letter I wrote to him, and I said, I got some information on – on a murder case, and will it be any help to my Rule 61 whatsoever? That's how I set everything up.
>
> Q: I didn't mean to cut you off.
>
> Prior to writing Mr. Gabay the letter, had you and he ever raised the possibility of providing assistance to the authorities.
>
> A: No.
>
> Q: Never talked about it?
>
> A: No.[13]

Based in part on the testimony of Richmond, Defendant and his codefendant Jeffrey Fogg were convicted of Murder First Degree and sentenced to life in prison without the possibility of probation or parole.

[13] *Id.* at 138-39.

B. Richmond Asserts That the State Made an Agreement in Exchange for his Testimony

Shortly after the conclusion of the trial, and despite Richmond's trial testimony denying any agreement, Richmond sent a series of letters requesting that the State honor its alleged agreement made in exchange for his testimony.[14] Richmond wrote to Mr. Letang that "you aggreed [sic] in return for my testamony [sic] that for reasons of my safty [sic] I would be transferred from DCC to MCI until [sic] my sentence reduction redused [sic] my sentence down to 5 years making me elageble [sic] for release about now."[15] He further stated that "I was doing real well till [sic] I accepted the State's agreement."[16]

Richmond also sent letters to another judge of this Court asserting that "the State, Peter Letang [sic] Koleen [sic] Norris along with my atorny [sic] Joe Gabay had a verble [sic] agreement Friday April 26, 1996 that if I would testify in the above trial that I would be released from prison after serving five years which is just about up." [17] In another letter to a judge in Superior Court, Richmond stated that "I helped and it was my help that put two murderers in prison for the rest of

[14] Appx. at 62, 63. Defendant submitted the appendix in connection with this issue. The State did not submit a separate appendix and has relied on Defendant's appendix.
[15] *Id.* at 62.
[16] *Id.* at 63.
[17] *Id.* at 66.

their lives. It was made clear that I would be okay . . . well not supposed to be here still taking this abuse. It was a deal." [18]

C. Richmond is Granted a Reduction of his Sentence

On August 15, 1996, about three months after conclusion of the trial, Richmond filed a motion for sentence reduction requesting that his sentence be suspended for time served.[19] Mr. Letang signed the motion consenting to its form and content.[20] The motion sought a reduction of Richmond's sentences on the sole basis that Richmond had testified as a State's witness in Defendant's murder trial.

A hearing was held before another Superior Court judge on Richmond's motion for sentence modification. At the hearing, Richmond withdrew a pending Rule 61 motion. Mr. Letang explained the State's position in consenting to Richmond's motion for reduction of sentence at the hearing on that motion:

> "[T]he State's position is basically couched on a security problem within the institution, and I think that there is some viable concerns the State has as far as Mr. Richmond's status in the institution . . . those defendants in the murder case were convicted. They have long separate criminal histories. And a lot of people that are in the institution are aware of Mr. Richmond's status.
>
> Number two, he did testify effectively in the murder trial. By acquiescing to this request, we do not in any way diminish the serious nature of Mr. Richmond's record, because he is no choir boy. We are aware of that. On the other hand, given the fact that he participated when he did not have to participate in the murder trial, we think that the position the State is taking is appropriate."[21]

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[18] *Id.* at 71-72.
[19] *Id.* at 79-82.
[20] *Id.* at 82.
[21] *Id.* at 94-95.

The Court granted Richmond's motion for sentence modification noting that the motion was "agreed to by the State." [22]

D. Defendant Files a Motion for Postconviction Relief

In 2001, Defendant, represented by new counsel, filed a motion for postconviction relief pursuant to Superior Court Rule of Criminal Procedure 61 alleging, among other claims, that the State violated his constitutional rights by failing to disclose an agreement the State had made with Richmond in exchange for his testimony.

This Court denied Defendant's motion for postconviction relief in part, but reserved decision on Defendant's potential *Brady* claim until Richmond was available to testify in Delaware.[23]

In 2009, Richmond was detained in Delaware for a violation of probation charge. A hearing on Defendant's motion for postconviction relief was scheduled, and Richmond was called to testify about any potential deal he had made with the State in exchange for the favorable testimony he had given at Defendant's murder trial. The Court also heard testimony from Peter N. Letang, Colleen K. Norris, and

[22] *Id.* at 88, 95.

[23] *State v. Andrus*, 2003 WL 1387115 (Del. Super.), *aff'd Andrus v. State*, 2004 WL 691922 (Del. Supr.). The Court reserved decision on Defendant's potential *Brady* claim because Richmond was incarcerated in Georgia when the motion was filed and for various reasons was not at that time able to be brought back to Delaware for testimony on Defendant's motion.

Joseph A. Gabay, all of whom were involved in obtaining Richmond's proffered testimony.

The testimony elicited at the hearing established that prior to Defendant's trial, Richmond was serving five years at Level V in connection with a conviction of Unlawful Sexual Intercourse Third Degree and three years at Level V in connection with a Burglary Second Degree conviction.[24] Richmond had filed a motion on August 29, 1994 seeking a reduction of his aggregate eight years at Level V to five years at Level V.[25] Another judge in Superior Court denied Richmond's motion in part and granted in part to allow further exploration of the issues.[26]

Joseph Gabay was appointed by another Superior Court judge to represent Richmond and sought to expand and amend Richmond's previous motion.[27] While Richmond's expanded motion was pending before another judge of this Court, Richmond met with prosecutors and advised them of statements allegedly made by Defendant concerning the death of James Dilley.[28] In 1996, Mr. Gabay sent a letter to the Superior Court judge presiding over Richmond's postconviction claims advising that:

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[24] Op. Br. At 2.
[25] *Id.* at 2-3.
[26] *Id.* at 3.
[27] *Id.*
[28] *Id.*

> Mr. Richmond has provided key information to the State in connection with one of its homicide prosecutions. My conversations with the assigned deputy indicate that the matter will be tried in mid-March. Following his testimony it is expected that this matter will be ripe for resolution. Therefore, I would suggest we revisit this matter in mid-April to see what transpired.[29]

Richmond's pending motion was deferred until after his testimony in Defendant's murder trial.

Richmond also met with Peter N. Letang, one of two Deputy Attorneys General assigned to Defendant's murder trial (along with Ms. Norris), to discuss his trial testimony.[30] Mr. Letang later testified at Defendant's Rule 61 hearing that he did not enter an agreement with Richmond in exchange for Richmond's testimony. However, Mr. Letang did indicate that Richmond expressed concerns related to (1) his pending motion for sentence reduction in an unrelated case and (2) his safety at the prison if he testified.[31] Although Mr. Letang denied that an express agreement was made with Richmond, Mr. Letang testified that he assumed that Richmond was motivated to assist the State "because he thought it would benefit him in some way[.]" [32] Mr. Letang stated the only "agreement" made in exchange for Richmond's testimony was to move Richmond to isolation to protect him from possible retribution as a result of him testifying for the State.[33]

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[29] Appx. at 78.
[30] *Id.* at 244.
[31] *Id.* at 254.
[32] *Id.* at 259.
[33] *Id.* at 273-74.

Ms. Norris further corroborated Mr. Letang's testimony about the nonexistence of an agreement. Ms. Norris testified that the only thing the State offered Richmond in exchange for his testimony was to move him to a separate location in the prison away from Defendant.[34]

Mr. Gabay, Richmond's attorney at the time of Defendant's trial, also testified that to his knowledge no agreement had ever been made with Richmond in exchange for his testimony. [35] Mr. Gabay testified that Richmond had information and wanted to "do something with it."[36] Mr. Gabay stated that "I think it's fair to say we – I would expect that he might get some points for this, but there is [sic] no formal deal."[37] Mr. Gabay explained that he thought Richmond's testimony "should be considered" when this Court addressed Richmond's pending Rule 61.[38]

Richmond also testified and stated that he had an expectation that if he testified in favor of the State, he would receive a benefit. Richmond testified "that was the deal, I mean, absolutely, I would have never ever done it without it. The deal was that I would be immediately released from prison." [39] Richmond stated

[34] *Id.* at 374.
[35] *Id.* at 198.
[36] *Id.* at 196-97.
[37] *Id.* at 198.
[38] *Id.* at 210.
[39] *Id.* at 218.

that he sent the post-trial letters to Mr. Letang "because he is the one that made all of these deals with me and reneged on every one of them."[40]

According to Richmond, "everything was set up by the State. They told [him] what to say and how to be more convincing."[41] Richmond asserted that Mr. Letang coached him to change his testimony to make Fogg seem more involved and encouraged him to say more about Defendant's ring.[42] Richmond testified that he had an agreement that he would be immediately released from prison in exchange for his testimony, and that the State failed to honor its promise.

III. PARTIES' CONTENTIONS

Defendant argues that his rights were violated because the State had made an agreement with Richmond in exchange for his favorable testimony that was never disclosed to Defendant. In support of this argument, Defendant argues that "[e]vidence of any understanding or agreement is relevant to such witnesses credibility and a jury is entitled to consider it."[43] Defendant asserts that "[t]he lack of a formal agreement does not excuse a prosecutor from this disclosure requirement."[44]

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[40] *Id.* at 219.
[41] *Id.* at 216-17.
[42] *Id.* 217.
[43] Op. Br. at 14 (citing *Brown v. Wainwright*, 785 F.2d 1457, 1465 (11th Cir. 1986)).
[44] *Id.*

Defendant argues that the evidence adduced at his Rule 61 hearing limited to the "Richmond issues" "demonstrates the existence of a tacit understanding or an implicit agreement that Richmond would receive benefits in exchange for his testimony against [Defendant]."[45] Defendant also contends that "[e]ven if there was no deal, the State had a duty to disclose Richmond's expressed desire for a deal or benefit, as that is evidence which could be used to impeach his credibility because it would expose his motivation for testifying."[46]

Finally, Defendant argues that his *Brady* claim is not procedurally barred by Superior Court Rule of Criminal Procedure 61 because Defendant can establish both cause for procedural default and actual prejudice.

First, Defendant argues that there is cause for the procedural default because Defendant did not know and could not reasonably have known of the agreement the State made with Richmond because the State actively concealed this information.[47] Defendant argues that Richmond testified falsely at trial, and it was impossible for Defendant to have discovered this until Richmond's testimony at the Rule 61 hearing. [48]

[45] *Id.* at 15.
[46] *Id.* at 12 (citing *People v. Ford*, 339 N.Y.S.2d 620 (N.Y. App. Div. 1973)).
[47] *Id.* at 10.
[48] *Id.*

Second, Defendant argues that there is actual prejudice because "prosecutorial misconduct" unfairly bolstered Richmond's credibility.[49] Defendant argues that if the State had provided information about Richmond's deal or expectation of a deal, then Richmond could have been impeached by that information and the jury would have been less inclined to believe Richmond's testimony.[50] Thus, Defendant argues that the result at trial would have been different if the State had not unfairly bolstered Richmond's credibility by concealing an agreement.[51]

In response, the State argues that there was no *Brady* violation. The State asserts that any constitutional claim Defendant may have raised is barred because Defendant did not properly raise such a claim and only stated conclusory assertions in support of such a claim.[52] The State also contends that Defendant's allegation of a *Brady* violation is procedurally defaulted pursuant to Rule 61(i)(3).[53]

The State argues that "[Defendant's] argument depends upon the believability of Richmond's March 6, 2009 Rule 61 hearing testimony."[54] The State argues that "Richmond is not a credible witness[,]" and his testimony at the

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[49] *Id.* at 11.
[50] *Id.*
[51] *Id.*
[52] Ans. Br. at 9-10.
[53] *Id.* at 10.
[54] *Id.* at 12.

Rule 61 hearing is directly contradicted by his trial testimony.[55] The State argues that "contrary testimony of all the other Rule 61 witnesses is more compelling and believable."[56] The State asserts that "[b]ased upon this conflicting record, [Defendant] cannot establish cause sufficient to excuse his procedural default of the Richmond *Brady* violation." [57] Additionally, the State contends that "[l]ikewise, [Defendant] cannot establish prejudice to excuse the procedural default . . . [because] [i]f there was no consideration granted to Richmond . . . there was nothing further to impact the jury's consideration of Richmond's credibility . . . ."[58] Accordingly, the State urges this Court to deny Defendant's motion.

IV. DISCUSSION

A. Introduction

The issues before the Court are: (1) whether the State failed to disclose the existence of an agreement or an implicit agreement between Richmond and the State in exchange for Richmond's testimony; and (2) assuming there was such an undisclosed agreement, whether the failure to disclose the agreement materially affected the results of Defendant's trial.[59]

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[55] *Id.*
[56] *Id.* at 18.
[57] *Id.* at 25.
[58] *Id.* at 26.
[59] To the extent Defendant argues any claims of error based on the Delaware Constitution, this Court holds that those claims have not been properly presented before this Court. In *Ortiz v. State*, the Delaware Supreme Court made clear that a conclusory allegation of a state

Pursuant to *Brady*, the State has a duty to disclose favorable information to a defendant when such information in material to guilt or punishment.[60] The State's obligation to disclose such favorable evidence covers both exculpatory information as well as all evidence that could be used for impeachment.[61] An agreement made with a witness in exchange for that witness's testimony constitutes *Brady* material and must be disclosed.[62] Any agreement between the State and a witness need not be formal.[63] The State should disclose any evidence of an implicit promise of leniency in exchange for favorable testimony. [64]

If the State fails to disclose evidence of an agreement with a witness, a new trial is not "automatically" required.[65] This Court must also make a finding that the undisclosed *Brady* information materially affected Defendant's right to a fair trial.[66] "A new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . .'"[67]

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constitutional violation is insufficient and, without more, is waived. 869 A.2d 285, n. 4 (Del. 2005). Defendant offers no distinct argument apart from his *Brady* claims that his constitutional rights were violated.

[60] 373 U.S. 83 (1963).

[61] *Giglio v. United States*, 405 U.S. 150, 154 (1972).

[62] *Id*. at 154-55.

[63] *See Jackson v. State*, 770 A.2d 506 (Del. 2001) (holding that the State should disclose even an "implicit" promise of leniency).

[64] *Id.*; *see also Campbell v. Reed*, 594 F.2d 4, 7-8 (4th Cir. 1979) ("a tentative promise of leniency might be interpreted by a witness as contingent upon the nature of his testimony. Thus, there would be a greater incentive for the witness to try to make his testimony pleasing to the prosecutor.").

[65] *Giglio*, 405 U.S. at 154.

[66] *Id.*

[67] *Id.* (citing *Napue v. People of State of Illinois*, 360 U.S. 264, 271 (1959)).

B. The Record Does Not Establish the Existence of An Undisclosed Agreement or Even an Implicit Agreement Between Richmond and the State and, Therefore, Defendant Cannot Establish Cause for Procedural Default

After reviewing the testimony at trial and the testimony adduced at the Rule 61 hearing, this Court concludes that Defendant has not shown that there was any "agreement" between the State and Richmond necessary to invoke disclosure under *Brady*. Accordingly, there was no *Brady* violation, and Defendant has failed to establish cause for procedural default.

In this postconviction proceeding, the trial judge sits as the trier of fact and must assess the credibility of all witnesses in an attempt to resolve conflicts in testimony.[68] Here, all the witnesses except Richmond testified that there was no agreement between Richmond and the State in exchange for Richmond's favorable testimony. This Court finds that Richmond is not a credible witness insofar as he sought to recant his trial testimony and his testimony is directly contradicted by his own trial testimony as well as the testimony of other witnesses at the Rule 61 hearing.

During Defendant's murder trial, Richmond was serving five years at Level V in connection with a conviction of Unlawful Sexual Intercourse Third Degree and three years at Level V in connection with a Burglary Second Degree

[68] *See generally*, *Ashley v. State*, 988 A.2d 420, 422 (Del. 2010); *Morgan v. State*, 922 A.2d 395, 400 (Del. 2007).

conviction.[69] After his release, Richmond served twenty-six months in a Georgia prison.[70]

At the time of the 2009 hearing, Richmond was incarcerated in Delaware for violating probation.[71] Following his release from custody, Richmond was to return to Georgia to serve a fifteen year probation sentence.[72] Richmond has six Delaware felony convictions and has previously been declared a habitual offender.[73]

Richmond testified in connection with Defendant's Rule 61 hearing that his trial testimony was accurate except in two instances.[74] First, Richmond claimed that he was given additional information by the State to further implicate Defendant.[75] Second, Richmond stated that his trial testimony about Defendant and Fogg being in "cahoots" with the Pagan Motorcycle Club "was a lie."[76] Otherwise, Richmond testified that his trial testimony was accurate even though "[he didn't] remember too much about it."[77]

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[69] Op. Br. At 2.
[70] Appx. at 216.
[71] *Id.* at 213.
[72] *Id.* at 227. This probation sentence was to be transferred to Tennessee, where Richmond apparently said that he intended to reside.
[73] *Id.* at 109, 148, 255, 346-47.
[74] *Id.* at 217, 225.
[75] *Id.* at 217.
[76] *Id.* at 225.
[77] *Id.* at 217.

Despite Richmond's assertion that he lied at trial, this assertion is contradicted by Richmond's 1995 videotaped statement. In the 1995 statement, taken before Richmond met with Mr. Letang, Richmond essentially recited the same facts he testified about at trial.[78] Additionally, there was never any testimony from Richmond at trial about Defendant's association with the Pagan Motorcycle Club.[79]

Moreover, Defendant's Rule 61 testimony about the existence of an agreement with the State is contradicted by his own trial testimony and all other witnesses at the Rule 61 hearing. At trial, Richmond stated that "[t]here has been absolutely no promises made [] whatsoever, no."[80] Mr. Letang corroborated this assertion at the Rule 61 hearing by testifying that "I made no promises to him about being released." [81] Mr. Letang further testified that "my practice then, and it had been for years, that if there was something that I had promised or something that was mentioned as a catalyst to try to get somebody to testify, I would have memorialized that more than what is written down in this scrawl on this legal pad."[82] Finally, Mr. Letang stated that there was not even any implicit agreement made in exchange for testifying. Mr. Letang testified that "[i]s there any

[78] Ex. G at 3.
[79] Appx. at 148-61.
[80] Trans. of April 29, 1996 trial at 132-33.
[81] Appx. at 312.
[82] *Id.* at 252.

recollection that I have in this case that I winked and nodded at him, the answer to that is absolutely not." [83]

Ms. Norris further corroborated Mr. Letang's testimony about the nonexistence of an agreement. Ms. Norris testified that the only thing the State offered Richmond in exchange for his testimony was to move him to a separate location in the prison away from Defendant and Fogg.[84] Ms. Norris recalled that Richmond had asked for such protection.[85] Ms. Norris further testified that this type of prisoner transfer was "routine" and was not novel or of such magnitude that it had to be communicated to defense counsel. [86]

Mr. Gabay, Richmond's own attorney in 1996, also testified that there was never an agreement made between Richmond and the State. Mr. Gabay testified that "there was never any discussion about what could happen or what would happen."[87]

This Court concludes that there was never any undisclosed agreement made between Richmond and the State, which might suggest *Brady* violation. Richmond was not a credible witness. He has a record as a career criminal and his testimony is filled with numerous contradictions. This Court finds the testimony of Mr. Letang, Ms. Norris, and Mr. Gabay more credible than the testimony of Richmond.

[83] *Id.* at 281.
[84] *Id.* at 374.
[85] *Id.* at 370.
[86] *Id.* at 364
[87] *Id.* at 345.

The burden is on Defendant to establish cause for his procedural default. Because Defendant cannot establish the existence of any undisclosed agreement or even an implicit agreement between Richmond and the State, Defendant has failed to demonstrate cause for procedural default. Even though Richmond may have received a benefit from his testimony in the form of sentence modification after trial, the testimony adduced at the Rule 61 hearing does not show that Richmond was offered anything either explicitly or implicitly in exchange for his testimony prior to trial. The fact that Richmond did receive something after his testimony is not enough to implicate a *Brady* violation or to contradict the testimony of Mr. Letang, Ms. Norris, and Mr. Gabay.[88]

B. Even If There Was an Undisclosed Agreement Between the State and Richmond, Defendant has Failed to Demonstrate a Reasonable Probability That, Had the Evidence Been Disclosed to the Defense, the Result of the Proceeding Would Have Been Different

Additionally, and alternatively, this Court holds that even if there was an undisclosed agreement in violation of *Brady*, Defendant cannot establish that the result of his trial would have been different, and, therefore, cannot establish actual prejudice.

[88] *See Shabazz v. Artuz*, 336 F.3d 154, 165 (2nd Cir. 2003) ("The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony . . . the fact that a prosecutor afforded favorable treatment to a government witness, standing alone, does not establish the existence of an underlying promise of leniency in exchange for testimony.").

Having already found that Richmond is not a credible witnesses, the only evidence that may have been considered an agreement for purposes of *Brady* was the agreement to transfer Richmond to a part of the prison away from Defendant and Fogg. Despite any implication that such a "prisoner transfer" might establish a *Brady* violation, the nondisclosure of this evidence did not materially affect Defendant's trial.

For example, in *United States v. Davis*, the Fifth Circuit Court of Appeals held that agreements for witness protection did not implicate a material violation as required by *Brady*.[89] In *Davis*, the defendant argued that the government withheld material information about a witness in violation of *Brady*.[90] At trial, the witness had testified that he did not have an agreement with the government.[91] The defendant argued that trial testimony from FBI personnel revealed a promise with the witness for protection in exchange for the witness's corporation.[92] Additionally, the defendant argued that the witness had made a favorable plea deal with the government in exchange for testifying.[93]

In holding that there was no *Brady* violation, the Fifth Circuit Court of Appeals stated that "[t]he evidence reflects, however, that [the witness] had *discussed* a plea agreement with the Government, but did not have an actual

[89] *United States v. Davis*, 2010 WL 2388422 (5th Cir. 2010).
[90] *Id.* at * 26.
[91] *Id.*
[92] *Id.*
[93] *Id.*

agreement in place at the time of his 1996 testimony."[94] Additionally, the Fifth Circuit concluded that:

> Even if there was an undisclosed agreement-for example, if the offer of witness protection can be considered an agreement-[the defendant] still cannot show "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The information about the witness protection was not favorable to [the defendant] because the jury may have assumed that [the witness] needed protection from [the defendant], who allegedly had [the victim] killed for filing a complaint against him. Moreover, [the witness's] denial of any promises could not have affected the jury's judgment, or change[d] the outcome of the trial, in light of the overwhelming evidence against [the defendant].[95]

The agreement the State made with Richmond in the present case is similar to the agreement for witness protection in *Davis*. The information about the Richmond "prisoner transfer" was not favorable to Defendant because the jury might have assumed that Defendant was violent and was actually guilty of murder. There is no *Brady* violation stemming from the failure to disclose the Richmond "prisoner transfer."

Defendant also argues that a formal agreement is not required, and the State must disclose any "expectation" the witness had of receiving a benefit in exchange for testimony. Defendant argues that that failure to disclose any "expectation" of a benefit merits a new trial.

In support of this argument, Defendant relies heavily on *People v. Ford*, a 1973 case from New York holding that a new trial was required when the

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[94] *Id.* at * 28.
[95] *Id.*

prosecution failed to disclose all pretrial conversations with key witnesses because the witness had an expectation of receiving a benefit in exchange for their testimony.[96] In *Ford*, the defendant was convicted of manslaughter in the first degree.[97] The prosecution relied on the testimony of three witnesses and all denied receiving any promises of leniency and denied believing that they would "get a break" in exchange for testifying.[98]

During the cross examinations of the witnesses, the prosecutor did not mention "the possibility that the witnesses might mistakenly have been led to expect leniency or might have received the impression that they would 'get a break' by testifying against defendant."[99] After trial, it was discovered that a possession of heroin charge was pending against one of the witnesses.[100] At the post trial hearing, both witnesses denied receiving any benefit for their testimony, but one witness "admitted that 'in a sense' he had hoped he would receive consideration in exchange for his testimony."[101]

In holding that a new trial was required, the *Ford* Court reasoned that:

> While it is clear that no explicit promises of leniency or consideration were extended to the key prosecution witnesses by members of the District Attorney's staff, it is also clear that during the course of discussions held between the prosecutor's staff and the witnesses before defendant's trial there was a

[96] *People v. Ford*, 339 N.Y.S.2d 620 (N.Y. App. Div. 1973).
[97] *Id.* at 621.
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.* at 621-22.

> substantial possibility that there had arisen in the minds of the witnesses the impression that their testimony incriminating defendant would be rewarded by the prosecutor with at least some 'consideration' in the handling of the charges then pending against the witnesses. The likelihood that a deal was to be consummated must have been enhanced in [the witness's] mind by the fact that he had been released on parole on the pending charges shortly before the beginning of defendant's trial and immediately prior to his conversation with [the prosecutor].[102]

The Court held that "it was incumbent upon the Assistant District Attorney to inform the court and the jury of all the facts and circumstances surrounding the pretrial conversations with the key prosecution witnesses, including, but not limited to, the fact that there was a charge pending against [the witness] at the time he testified at defendant's trial."[103]

In contrast, other cases have held that an "alleged expectation of favorable treatment is also immaterial under *Brady*. Indeed, 'what one party might expect from another does not amount to an agreement between them."'[104] For example, in *Moore-el v. Al Luebbers*, the Eighth Circuit Court of Appeals held that "[a] witness's 'nebulous expectation of help from the state is not *Brady* material,' and absent evidence that the State communicated an agreement that it would consider rewarding [the prosecution witness'] testimony, there was nothing for the government to disclose."[105]

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[102] *Id.* at 622.
[103] *Id.*
[104] *Fleming v. Evans*, 2010 WL 199647, at * 5 (W.D. Okla. 2010) (citing *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir.2002)).
[105] *Moore-el v. Al Luebbers*, 446 F.3d 890, 899 (8th Cir. 2006).

In *Moore-el*, the defendant had been convicted in a Missouri state court of murder in the first degree, attempted robbery in the first degree, and two counts of armed criminal action.[106] The defendant filed a petition for habeas corpus alleging that the State violated his due process rights by failing to disclose *Brady* material, and that the State Court had erred in holding that *Brady* requires only an "express" agreement be disclosed to defense counsel.[107] The Missouri Court of Appeals had previously held that:

> While the prosecutor has an obligation to disclose the state's agreement favorably to dispose of charges pending against a witness in exchange for the witness' testimony, there is no credible evidence of record that there was an agreement between State and [its witness] for the favorable disposition of his pending drug charges in exchange for his testimony in [the defendant's] case. Therefore, State did not engage in prosecutorial misconduct and [the defendant's] trial counsel was not ineffective for failing to ascertain, disclose, and use an agreement for the favorable disposition of [the defendant's] pending charges.[108]

In holding that there was no *Brady* violation, the Eighth Circuit Court of Appeals agreed with the Missouri Court of Appeals and held that there was no need for the State to disclose an "expectation" of benefit.[109] The Eighth Circuit Court of Appeals stated that "[a]n experienced defense attorney may well have hoped and even expected that [the witness's] testimony would result in leniency from the prosecution, but that educated prediction is not the equivalent of an

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[106] *Id.* at 894.
[107] *Id.* at 899.
[108] *Id.*
[109] *Id.* at 900.

affirmative act by the State to hold out a potential reward to the witness if his testimony proves helpful."[110]

Despite Defendant's contention that the State had an obligation to disclose an "expectation" of leniency, this Court chooses not to follow the holding of *People v. Ford*, and, instead, chooses to adopt the holding of *Moore-el* and other cases holding that there is no need to disclose a witness's expectation of future leniency. [111] *Ford* has apparently never been cited by any other case.[112] There is no *Brady* violation from the failure to disclose Richmond's expectation of leniency.

Additionally, other cases have not required a new trial even when the State failed to disclose an "implicit" promise of leniency (rather than an expectation of leniency). In *Jackson v. State*, the Delaware Supreme Court found a *Brady* violation from the State's failure to inform defense counsel of an implicit

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[110] *Id.*

[111] *Fleming v. Evans*, 2010 WL 199647, at * 5 (W.D. Okla. 2010) (citing *Todd v. Schomig*, 283 F.3d 842, 849 (7th Cir.2002)) ("alleged expectation of favorable treatment is also immaterial under *Brady*. Indeed, 'what one party might expect from another does not amount to an agreement between them."'); *Collier v. Davis*, 301 F.3d 843, 849 (7th Cir.2002) (stating that "general and hopeful expectation of leniency is not enough to create an agreement or an understanding" for purposes of a duty of disclosure under *Brady* (citation omitted)); *see also Wisehart v. Davis*, 408 F.3d 321 (7th Cir. 2005) (holding that "expectation" of a benefit is not enough to establish a *Brady* violation); *Goodwin v. Johnson*, 132 F.3d 162, 187 (5th Cir. 1997) ("a nebulous expectation of help from the state . . . is not *Brady* material.").

[112] *Ford* has apparently been cited only by secondary authority. *See Failure of State Prosecutor to Disclose Existence of Plea Bargain or Other Deals with Witness as Violating Due Process*, 12 A.L.R.6th 267 (2006); *Withholding or suppression of evidence by prosecution in criminal case as vitiating conviction*, 34 A.L.R.3d 16 (1970).

agreement with a witness, but held that that violation did not undermine "confidence in the outcome of the trial."[113]

In *Jackson*, the defendant argued that the State had failed to inform him that the State had implicitly promised a witness leniency in exchange for testimony about the defendant's plan to murder another witness.[114] Although the defendant admitted that the witness never had an explicit promise of leniency, the defendant argued that there was a duty to inform defense counsel about an implicit promise of leniency.[115]

The Supreme Court held that there was a duty to inform defense counsel of any implicit promise for leniency.[116] Although the State maintained that the witness was never offered leniency, the Supreme Court stated that "[w]e find clear record support for the proposition that the State did, implicitly, promise [the witness] leniency on the burglary, theft and weapons charges and we conclude that the State should have informed [defense] counsel about that implicit promise." [117] The Supreme Court further reasoned that:

> The jury may well have been troubled, as are we, by an acknowledged and disingenuous prosecutorial practice of implicitly suggesting future possible leniency while maintaining that no actual promise of leniency had been made in order to avoid tainting a witness' credibility because of self-interest. The jury might well expect that, given their own life experiences with human nature, the

[113] *Jackson v. State*, 770 A.2d 506, 517 (Del. 2001).
[114] *Id.* at 514.
[115] *Id.*
[116] *Id.* at 514-15.
[117] *Id.* at 514.

> "implicit" promise might enhance the propensity of a witness, hopeful of leniency if his testimony meets with the prosecutor's approval, to embellish his testimony in order to increase the likelihood of favorable treatment. The insidious nature of the practice would be obvious to all but the most gullible of jurors.[118]

Despite finding a *Brady* violation, the Supreme Court also held that the violation was immaterial and did not "undermine confidence in the verdict[.]"[119] The Supreme Court held that "overwhelming evidence established [the defendant's] guilt[,]" and refused to overturn the verdict.[120]

Here, even if there was an implicit promise of leniency (which this Court does not find), the violation was immaterial and did not "undermine confidence in the verdict."[121] This Court finds no violation because Defendant has failed to establish "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [122] The jury was told about Richmond's criminal history. Even though Richmond testified that he made no agreement with the State in exchange for testifying, the denial of any promise could not have affected the jury's verdict because there was overwhelming evidence of Defendant's guilt.

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[118] *Id.* at 516.
[119] *Id.* at 517.
[120] *Id.*
[121] *Id.*
[122] *United States v. Davis*, 2010 WL 2388422, at *28 (5th Cir. 2010).

At trial, the medical examiner was able to match the victim's injuries to Defendant's ring and cowboy boots. [123] "The cowboy boots, State's Exhibit No. 74, were later identified by a podiatrist as matching casts of [the defendant's] feet."[124] The State also presented bloody fingerprints linking Defendant to the murder scene.[125]

This forensic evidence in addition to the witness testimony demonstrates "overwhelming evidence" of Defendant's guilt.[126] Thus, even if Defendant is correct that the State should have disclosed an "implicit" agreement with Richmond, Defendant has failed to demonstrate that the result of his trial would have been different. Accordingly, Defendant has failed to demonstrate actual prejudice and any potential error does not require granting Defendant a new trial.

V. CONCLUSION

For all the reasons stated above, this Court finds that there was never any agreement between the State and Richmond in exchange for Richmond's favorable testimony. Even if there was an agreement, or an implicit agreement, implicating a potential *Brady* violation, this Court finds that Defendant has failed to demonstrate a reasonable probability that the result of his trial would have been different if the

[123] *Andrus v. State*, 1998 WL 736338, at * 3 (Del. Supr.).
[124] *Id.*
[125] *Id.*
[126] *See Jackson v. State*, 770 A.2d 506, 517 (Del. 2001).

State had disclosed such *Brady* material. Accordingly, Defendant's motion for postconviction relief is **DENIED**.

IT IS SO ORDERED.

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Richard R. Cooch

oc: Prothonotary
cc: Investigative Services