STATE OF LOUISIANA	**20TH JUDICIAL DISTRICT COURT**
v.	**PARISH OF WEST FELICIANA**
ALBERT WOODFOX	**CASE NO. 15-WFLN-088, DIV. B**

MOTION TO QUASH THE INDICTMENT

COMES NOW the Defendant, Albert Woodfox, who respectfully moves this Court pursuant to Louisiana Constitution Article I, Section 2, 16, 22, and 24, Louisiana Code of Criminal Procedure Articles 531 et seq., and the Sixth and Fourteenth Amendments to the United States Constitution to quash the indictment against him.

Introduction

Albert Woodfox has spent over four decades in prison, most of it in extended lockdown, serving a life sentence for a conviction that was obtained pursuant to an unconstitutional indictment, later vacated, then reimposed after a second conviction was obtained pursuant to another unconstitutional indictment, and then vacated again. His conditions of confinement have been exceedingly harsh. In the civil case challenging those conditions, the U.S. Court of Appeals for the Fifth Circuit spoke of "Woodfox's decades long, effectively indefinite solitary confinement," and quoted with approval the federal district court's statement that "Plaintiffs' approximately forty-year length of incarceration in extended lockdown is so atypical that the Court is unable to find another instance of an inmate spending even close to that much time in isolation." *Wilkerson v. Stadler*, 773 F.3d 845, 856 (5th Cir. 2014).

Now the State has indicted Albert Woodfox again and seeks to try him a third time for the 1972 murder of an Angola prison guard. In the intervening 43 years, however, the State's key witnesses have died, including everyone who claimed to see Mr. Woodfox at the scene of the crime. Mr. Woodfox never had an opportunity to cross-examine them adequately, and cannot do so now that they are deceased. As indicated by the case law, including the groundbreaking opinion eleven years ago in *Crawford v. Washington*, 541 U.S. 36 (2004), the use of their prior statements against him at a new trial would violate the Confrontation Clauses of the Sixth Amendment of the United States Constitution and Section 16 of Article I of the Louisiana Constitutiion Moreover, the key witnesses for the defense also have died, meaning the jury cannot make the credibility determinations between defense and prosecution witnesses that are necessary to Mr. Woodfox's defense. The leaders of the investigation have died, meaning they cannot be questioned about various matters, including a bloody tennis shoe that apparently was

found near the scene but never tested.[1] Because of the prejudice to Mr. Woodfox stemming from the particulars of this case, he cannot be tried a third time, 43 years after the fact, without violating the Due Process Clauses of the Fourteenth Amendment and Section 2 of Article I of the Louisiana Constitution.

The State's reliance on deceased witnesses is particularly problematic given the crime scene. The victim was stabbed 32 times, the scene was covered in blood, a bloody fingerprint was found on the wall, other fingerprints were lifted nearby, and a knife dripping in blood was found under the building. Yet none of this physical evidence links Albert Woodfox to the crime. Mr. Woodfox has always maintained his innocence, and has done so in every statement he has ever given. Although jailhouse informants are often a hallmark of cases like this, no one has ever come forward to testify that Mr. Woodfox admitted culpability during some conversation on the prison tiers where he has been confined these many decades. Thus, there is no physical evidence and no admission to corroborate the testimony of the State's three deceased witnesses who said they saw Woodfox at the scene of the crime.

The most important of these is Hezekiah Brown. The State has admitted that "the testimony of Hezekiah Brown is the key item of evidence against Woodfox" and "is so critical to the case that without it there would probably be no case." (*Woodfox v. Cain*, No. 68933 (21st JDC), State's Response to Application for Post-Conviction Relief (Sept. 30, 2004). pp. 9-10). Ex. 1. Brown testified at the first trial in 1973, but has died since. If there is a new trial, his testimony, like that of all of the key witnesses, will have to be read into the record if deemed admissible. But Woodfox's counsel never had the opportunity to confront Brown on cross-examination with crucial impeachment evidence because the evidence was not disclosed until well after the 1973 trial, and there will be no opportunity for a new jury to see or hear Brown's responses after being confronted with this impeachment information.

This motion will first discuss in more detail Hezekiah Brown and the other two deceased witnesses who purportedly corroborate him. Next it will discuss the three most important defense witnesses, all of whom are now deceased, and the conflicts between the prosecution and defense witnesses that cannot be resolved given that all are deceased. Finally, the motion will discuss the relevant precedents, including the Supreme Court's 2004 decision in *Crawford v. Washington*, which was handed down since the 1998 trial in this case and which changes the landscape regarding the Confrontation Clause.

[1] Some of the witnesses discussed in this motion died prior to the 1998 trial and their testimony was read into the record in 1998. Others have died since then as confirmed by the affidavit that is Exhibit 37 to this motion.

The State's Alleged Eyewitnesses

Hezekiah Brown

The State has admitted that "the testimony of Hezekiah Brown is the key item of evidence against Woodfox" and "is so critical to the case that without it there would probably be no case." (Woodfox v. Cain, No. 68933 (21st JDC), State's Response to Application for Post-Conviction Relief (Sept. 30, 2004). pp. 9-10). Ex. 1. He testified in 1973, and because he died in the interim, his 1973 testimony was read into the record at the 1998 trial. In his testimony, Brown claimed that he saw Wallace, Woodfox, Jackson, and a man named Gilbert Montegut, kill Brent Miller, after which they all ran out of Pine 1 dorm and Brown followed behind. Brown also claimed under oath that he never received any promises for his testimony, except that he would be moved to a different place in the prison, away from Woodfox. Tr. 1188, 1195. Ex.2.[2] Since his 1973 testimony, significant evidence has come to light showing that he lied when he made that claim, and that in fact he received a number of benefits and promises for his testimony. This includes the following:

* C. Murray Henderson, who was Warden from 1965 to 1975, testified at the 1998 trial that prior to Brown's 1973 testimony, Henderson promised Brown he would support his request for a pardon. Unfortunately, Brown died in the meantime and could not be confronted with this fact. Henderson explained the promise in the 1998 trial:

> A: . . . [N]othing was promised to him to begin with, but we told him, you know, we would protect him and try to help him any way we could after he, you know, cracked the case for us.
>
> Q And that *if he testified, you promised him that you would do whatever you could to support his pardon?*
>
> A *Right.*
>
> Q Did you not?
>
> A Absolutely.
>
> *Q And those promises were — were made to him by you.*
>
> *A Yeah.*
>
> *Q Before he testified.*
>
> *A. That's right.*

Tr. 1363 (emphasis added), Ex. 3.[3]

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[2] "Tr." refers to the 1998 trial transcript.

[3] Henderson also testified that he followed through on his promise to help Brown secure a pardon, that he sent a letter to the trial judge to ask the trial judge to recommend Brown for a pardon (which the Judge did), that he prepared a letter for Mr. Brown to send to the Pardon Board, that he offered to appear before

* Further, Henderson in 1998 testified to another important fact that Brown could not be confronted with. Brown testified in 1973 that one of the people joining with Woodfox in the killing was another prisoner named Gilbert Montegut. Tr. 1182, Ex. 4. However, Henderson, who talked with Brown on multiple occasions, testified in 1998 that "in my presence, he [Brown] never, ever named Gilbert Montegut." Tr. 1363, Ex. 3. The fact that Brown apparently fabricated his testimony regarding Gilbert Montegut shows he could have done so regarding Woodfox, yet Woodfox could not confront Brown with this additional discrepancy.

* In addition, Henderson testified that immediately after Hezekiah Brown "told us his story" and named Woodfox as one of the killers, Brown was transferred to the "dog pen." Tr. 1372, Ex. 7. This allegedly was for reasons of protection. Tr. 1374, Ex.8. Henderson testified that he carried a carton of cigarettes to Brown at the dog pen every week (although that clearly was not necessary for Brown's "protection"). Tr. 1376, Ex. 9.

* Bobby Oliveaux, who was a security officer at Angola in 1972, testified at a 2006 state court post-conviction hearing for Herman Wallace (who also was convicted in the Brent Miller murder). Ex. 10. Specifically, Oliveaux testified: (1) within a few months after Brown's transfer to the dog pen, Oliveaux assumed the duty of signing out for a carton of cigarettes and taking it to Hezekiah Brown every week, *id.* at 35; (2) if Brown ran out of these state-issued cigarettes, Oliveaux would purchase more for Brown out of Oliveaux's pocket, *id.* at 44; (3) Oliveaux was ordered by his superiors to deliver the weekly cartons to Brown, *id.* at 37; (4) Oliveaux was told that the Warden promised Brown that when Brown agreed to help in the investigation, prison personnel would deliver him a weekly carton of cigarettes, *id.* at 47; (5) cigarettes were a form of contraband currency among inmates and they could be used for, among other things, gambling and the purchase of alcohol, drugs, and sex, *id.* at 40-43; (6) Oliveaux gave Brown birthday cakes as well, *id.* at 40; (7) at first, Brown lived in a four-bedroom house, with a kitchen and dining hall, along with 10-12 other prisoners at the dog pen, *id.* at 37-38; (8) Brown was later moved to a separate outbuilding where he lived by himself, *id.* at 38-39; and (9) Brown had a television in his room. *Id.* at 43.[4]

* In 1974, a year after his 1973 trial testimony against Woodfox, Hezekiah Brown

the Pardon Board on behalf of Mr. Brown, and that he instructed prison officials to pay for Mr. Brown's clemency advertisement with prison funds. Tr. 1349-1356, Ex. 5. Mr. Brown was later granted clemency and his sentence was commuted to time served. Tr. 1360-1361, Ex. 6. Although Henderson took these actions after Brown testified in 1973, the actions corroborate Henderson's testimony that he promised Brown that if Brown testified against Woodfox, Henderson would do whatever he could to secure a pardon for Brown.

[4] Pp. 31-32 and 48-49 of this transcript are missing from the copy that the undersigned counsel have. As of the present time, the undersigned have been unable to find those pages.

testified in a separate trial against Herman Wallace and Gilbert Montegut. There, it was disclosed for the first time that when Brown was pulled in for the interrogation that led to his identification of Woodfox and the other three, prison officials had already laid out for Brown a group of files on selected prisoners, including the four that Brown ultimately named. According to Brown: "I picked the boys out. They had all the jackets out there, and I picked them out from amongst the rest of them, and I told them exactly what happened." Transcript of State v. Montegut & Wallace, p. 35 (Ex. 11). Brown also testified at the Wallace trial about the consequences if he failed to give prison authorities some names. "I knowed if I said no, I didn't know nothing about it, then it was going to be something --- I'm going to get punished behind it, I'm going to get throwed in one of them cells, and I done stayed too long in one of them cells on death row, and I'm going to get misused, treated in a cool way, you know --- I know that --- but I couldn't stand that no more, so I set there a long time before I answered them people's questions, when they was asking me about who they was." *Id.* p. 34 (Ex. 11).

Because none of this was disclosed to defense counsel prior to the 1973 trial, Brown could not be confronted about any of this information, including the promises and favors he received as a result of his cooperation, how they were not necessary for his "protection," and how those might have influenced his testimony. And because he has died in the meantime, he cannot be confronted with it now.

Paul Fobb

In the 1973 trial, Paul Fobb testified that he was by the side of Pine 1 dorm on April 17, 1972 when he saw Albert Woodfox enter the dorm alone, that Fobb stood there for 5 or 10 minutes, and that Woodfox then exited by himself and threw a rag inside Pine 4 dorm. Tr. 1011-1012, Ex. 12. Fobb conceded that he had no sight in his right eye in 1972, having lost it during his first year in prison, but claimed that he could see Woodfox out of his left eye. Tr. 1005-1006, Ex. 13.

Q. But you could see all right in April of last year.

A. Yes, sir.

Id. at 1006. Fobb died prior to the 1998 trial and his testimony was read into the record. Like Hezekiah Brown, Fobb was never confronted with significant impeachment evidence that has come to light since he testified. This includes the following:

* At no point prior to either trial were the prison records regarding Fobb's vision disclosed to the defense or obtained by the defense, and they were not used by the defense in

either trial. Instead, they were uncovered by post-conviction counsel after the 1998 trial. They show that Fobb was admitted to Charity Hospital for his eye condition five times between 1968 and April 17, 1972 for a total of 115 days. He was also treated at the Angola hospital 20 times between 1967 and April 17, 1972, but the records do not indicate how many of those were for an eye condition. Declaration of Dr. Daniel Pope, pp. 2-3, attached here as Ex. 14. On June 21, 1968, Fobb was discharged from a 25 day stay at Charity Hospital with a final diagnosis of open angle juvenile glaucoma in both eyes. Dr. Leslie Handmacher, an Optometrist who has reviewed Fobb's medical records, has explained that (1) "Fobb's right eye was effectively blind by 1968," (2) "beginning in 1968, Fobb's left eye already exhibited signs of serious degeneration," (3) "[b]etween December 1968 and April 1970, Fobb underwent three bilateral sclerectomies," which is "a quite unusual level of surgical intervention" which "were 'last resort' treatment options . . . to . . . save what was left of his vision," (4) "[b]ased on subsequent tests, these efforts failed," and (5) it is his opinion based on Fobb's medical records — from both before and after April 17, 1972 — that his vision in both eyes was so bad that it "would have been impossible" for Fobb to "have visually identified a person from a distance of 30 to 40 feet on April 17, 1972." Declaration of Dr. Leslie Handmacher, pp. 6-17, attached here as Ex. 15.

* Prior to the 1973 trial, the State never disclosed that Associate Warden Hayden Dees had transferred Fobb and another inmate, Joseph Richey, off the grounds of Angola to the more desirable State Police Barracks prior to their testimony in 1973. Dees did so without permission from Warden Henderson. This came to light in the 1998 trial when Henderson confirmed it and said it "was outside the scope of a legitimate investigation." Tr. 1364, Ex. 16.

* Fobb was released on a medical furlough in 1974, not long after testifying in the 1973 trial, notwithstanding that this sort of furlough was typically available only to prisoners with less than six months to live. Tr. 1497-1504, Ex. 17.

* The State failed to turn over the notes of Sheriff Bill Daniel, who interviewed prisoners on the day of the killing about their whereabouts. These included notes about his conversation with Paul Fobb, whose last name was misspelled as “Fabre” but whose LDOC number and dorm assignment confirm that it was him. The notes read as follows: “Paul Fabre – 65899 – H-1 [Hickory 1]. Off – no breakfast – never left dorm. Dorm man can verify w.abouts.” Ex. 18. This directly rebuts Fobb’s testimony that he left his dorm and saw Woodfox exit Pine-1. Had these notes been disclosed, counsel at the 1973 trial could have confronted Fobb about this. Had Fobb confirmed the statement, this would have affected the

credibility of his later claim that he saw Woodfox outside the crime scene. Had he denied it, Sheriff Daniels could have been called to impeach him (perhaps after reviewing his notes to refresh his recollection). Either way, Fobb's credibility would have been impeached.

* The metamorphosis in Fobb's account is further confirmed from certain records of the West Feliciana Parish Sheriff's Office, obtained after the 1998 trial through a Public Records Act request, which include a page with descriptions of information provided by people who later became witnesses at trial. Although the page contains no date, it apparently was written at least a few weeks after the Miller killing. Included is a note regarding what Fobb had apparently disclosed at some point after his original interview by Sheriff Daniel. It said: "Paul Fobb. LSP # 65899. Heard Woodfox making plans for killing." Ex. 19. However, there is no mention of Fobb alleging that he saw Woodfox leave the Pine 1 dorm. Had this been disclosed to defense counsel prior to the 1973 trial, Fobb could have been further confronted about the change in his story from the day of the event, when he simply said he was in his dorm, to this later interview, when he said he heard Woodfox but never mentioned seeing him, to his trial testimony, where he claimed he saw Woodfox leaving the Pine 1 dorm. Being confronted with this fact, Fobb might have admitted that he kept changing his statement to enhance the value of his testimony in order to obtain favorable treatment, but that it all was untrue. Or perhaps he would have contended that he told authorities everything to which he later testified, but they must not have written it down. At that point, defense counsel could have called as a witness the people who interviewed Fobb to confirm what is in the notes. Whatever Fobb's answer, his credibility would have been impeached.

Because these matters were unavailable to defense counsel at the 1973 trial, Fobb could not be confronted about his extensive hospitalizations and surgeries on both eyes. Also, he could not be questioned about his move to the desirable quarters at the State Police Barracks. And although he could not have testified in 1973 about the 1974 furlough, he likely would have been promised prior to his 1973 testimony that efforts would be made to obtain his release (just as Brown was promised efforts would be made to obtain a pardon). He could not be questioned about such a promise. And he could not be questioned about his failures to mention in his statement that he had seen Woodfox outside Pine 1 dorm even though that was the centerpiece of his trial testimony.

Joseph Richey

Joseph Richey testified both in 1973 and in 1998. There were differences in the two

versions, but in both trials, he claimed that around the time of the murder, he saw inmate Leonard “Specs” Turner come out of Pine 1 dorm at a fast pace, followed by Woodfox, and then by Montegut, Jackson, Wallace, and Brown. He said that Woodfox bumped into a trash cart being pushed by inmate Herbert "Fess" Williams. Tr. 831-841, Ex. 20. Richey then went into Pine 1 where he claims he saw Miller’s dead body on the floor. Richey also testified in 1998 that he and Woodfox previously had a confrontation when Woodfox — who was involved in a campaign to protect weaker inmates — approached a group that included Richey and warned them not to engage in the prevalent practice of molesting those inmates. Tr. 816-817, 871-876, Ex. 21. In addition, Richey testified that he was moved from Angola to the State Police Barracks, but that it was after he testified in the 1973 trial. Tr. 904, Ex. 22.

Richey died on December 24, 2013. At neither of the two trials was he confronted with some key impeachment information that has come to light. This includes the following:

* Like Paul Fobb, Richey was transferred to a state police barracks by Associate Warden Hayden Dees. Warden Henderson testified in 1998 that the transfer "was outside the scope of a legitimate investigation." Tr. 1364, Ex. 15. Eventually, the transfer was formalized. As the Louisiana Supreme Court later noted in an opinion regarding some bank robberies Richey committed while living at the barracks, Richey's cooperation in the Woodfox investigation led to the formal transfer where he was allowed to participate in a work release program. *State v. Richey*, 364 So. 2d 566, 567 (La. 1978). Indeed, Richey also worked in the Governor's Mansion while living at the barracks. Tr. 868, Ex. 23. Richey's bank robberies occurred in 1975 and 1976. His delusional explanation, as later described by the Louisiana Supreme Court, was that (in the Supreme Court's words) Richey was "instructed [by authorities] to commit a series of robberies for which he would be captured" as part of an effort to discredit and force the resignation of the Commander of the state police. *Id*. at 570.

However, because it was never disclosed, Richey was not confronted at the 1998 trial about his move to the desirable quarters at the State Police Barracks. Had Woodfox’s 1998 counsel bothered to investigate, and to read the 1978 opinion affirming Richey’s bank robbery convictions, the lawyer could have confronted Richey about what promises were made to him prior to the 1973 trial about transfer to the Police Barracks. But inexplicably, the lawyer failed to do that.

* The State failed to disclose prior to the 1973 or 1998 trials the notes of Sheriff Daniel when he interviewed Richey on the day of the murder. They state: “Joseph Richey, p-4 72037.

went to chow then went to Hic-4 and gave crutches some cigs and went back to dorm." Ex. 24. At the 1998 trial, however, Richey testified to something very different on cross-examination:

> Q. . . . you didn't tell Sheriff Daniel that you had witnessed the whole thing, did you?
>
> A. That I had witnessed?
>
> Q. Yeah, that you had witnessed anything happened in there, specifically, like what happened? You didn't — you didn't tell him that, did you? Sheriff Daniel?
>
> A. No, I told him exactly what I stated today. I've always stated that.
>
> Q. You — you told Sheriff Daniel that you had seen Mr. ---
>
> A. *Those people leave the dorm.*

Tr. 877, Ex. 25 (emphasis added).

Had Sheriff Daniel's notes been turned over, defense counsel could have followed up by asking Mr. Richey if, in fact, he simply told Sheriff Daniel that he had gone to chow, then went to Hickory 4 dorm to give an inmate called "Crutches" some cigarettes and then returned to his own dorm, Pine 4, and never told Sheriff Daniel that he witnessed Woodfox and the others leave the Pine 1 dorm. Being confronted with those specifics, Richey either would have corrected himself and confessed the truth about what he did and did not tell Sheriff Daniel, or would have continued to lie and claim he told Daniel that he saw "[t]hose people leave the dorm." If he had done the latter, the defense could then have called Sheriff Daniel, refreshed his recollection with the notes, and had him testify that Richey told him what was in the notes but that Richey never said that he saw Woodfox and others leave the dorm where Miller's body was found soon thereafter. This would have been significant impeachment that damaged Richey's credibility.

However, now that Richey is deceased, he cannot be asked that specific question, and the jury at a new trial will not be able to see or hear him answer the question, and either recant or continue to lie. Moreover, Sheriff Daniel also is deceased, dying in 2013, and he cannot be called to testify about the interview of Richey as reflected in his notes.

This is particularly important evidence because it demonstrates that Richey did not claim in the beginning that he saw Woodfox, but instead did so only after he spent a month on lockdown in the cellblocks. Tr. 850-851, Ex. 26. Once he made the statement implicating Woodfox, he was transferred out of the cellblocks. Tr. 853-854, Ex. 27.

This problem was caused by the State, which failed to turn over Daniel's notes during the 1998 trial even though they clearly were favorable to the Defense and even though the trial judge warned them that they had the responsibility to disclose exculpatory evidence. Sheriff Daniel had

turned over all of his interview notes to the prosecutor. Rather than disclosing them all to the defense, the prosecutor insisted on turning them over to the Judge for in camera inspection. In fact, a number of documents were turned over for in camera inspection, including the Sheriff's investigative file, which contained his interview notes. Tr. 649, Ex. 28. With respect to those and other documents, the Judge agreed to "give it a shot," but issued a warning: "I'm not sure that I would recognize what you perceive to be exculpatory information . . . and I hate to be placed in the position of being the — gatekeeper of exculpatory information. . . . It's a very uncomfortable position to be placed in." Tr. 655, Ex. 29. The Judge then admonished the State: "I also remind the State that, although we do not have full and complete discovery, if I miss something that is exculpatory, *then you all are going to have to live with that.*" Tr. 656, Ex. 29 (emphasis added).

* After the 1998 trial, post-conviction counsel obtained some typewritten notes of trial prosecutor Julie Cullen regarding Joseph Richey, including her summary of her interview with Richey. In the summary, she referred to Richey as "JB" since he also was known as Joseph Bowden. In one entry, she summarized something Richey said to her: "When CJ [Chester Jackson] getting ready to testify and JB heard CJ's family talking was first time really realized that AW was involved in the murder — JB testified at Wallace trial." Ex. 30. This indicates that Richey actually never saw Woodfox leave the scene of the murder but instead "really realized" that only when "CJ's family" said something about it. However, because this was never revealed to the defense, Richey could never be cross-examined about it.

* Approximately ten years after the second trial, Richey disclosed in a sworn statement, dated August 13, 2008, that he was diagnosed with schizophrenia in the 1960s, that he was prescribed thorazine and received it on a daily basis while at Angola, that he was taking thorazine on the morning of the murder of Brent Miller, that he was taking thorazine and other anti-psychotic medications when he testified at Woodfox's first trial in 1973, that he warned both the detective who contacted him about testifying in the 1998 retrial and 1998 prosecutor Julie Cullen that he was taking anti-psychotic medications, that Cullen told him to bring the medication to the retrial, and that he was taking the medication when he actually testified in 1998. Ex. 31. However, the State failed to disclose Richey's prison medical records or any of this information prior to the 1973 or 1998 trials and Richey could not be confronted with it. Dr. James Marikangas, a Clinical Professor of Psychiatry and Behavioral Neuroscience at George Washington University, has reviewed Mr. Richey's statement and said the following:

“[P]ersons suffering from schizophrenia are unlikely to be reliable witnesses and reporters of events. Medications such as thorazine do not correct the memory deficit which is part of this disease.” Ex. 32.

The Defense Witnesses and Their Conflicts with the State’s Witnesses

Conflict between Brown-Fobb-Richey and Everett Jackson

Everett Jackson testified in 1973 that he was with Albert Woodfox throughout the period of time when the crime happened, and Woodfox had nothing to do with it. They lived in the same dorm — Hickory 4. They walked together with other inmates from the dorm to breakfast, stopped and waited at a gate for about 20 minutes because of problems in the dining hall stemming from a temporary strike by food workers, returned to their dorms and waited another 15 or 20 minutes, and were called back to the dining hall along with other inmates when it reopened, where Jackson ate breakfast with Woodfox and others. After breakfast, Jackson and Woodfox left the dining hall together, and Jackson (an "inmate counsel") retrieved some legal papers for Woodfox and gave them to him. Tr. 1467-1478, Ex.33 As Jackson explained on cross-examination, Woodfox was in his presence for all of the relevant time period, and if it had been Woodfox who killed the officer, "he would've did it in front of approximately three thousand witnesses" who were on their way to and from the dining hall. Tr. 1476, Ex. 33.

Jackson, who did not receive any favors from prison officials for his testimony, directly contradicts the testimony of Brown, Fobb, and Richey, all of whom did receive favors. Jackson died prior to the 1998 trial and his testimony was read into the record.

Conflict between Joseph Richey and Herbert J. "Fess" Williams

In testifying for the State, Richey claimed that he witnessed Woodfox leave Pine 1 dorm and run into a trash cart being pushed by inmate Herbert "Fess" Williams. Tr. 836, Ex. 19. Williams, however, testified in 1973 that he never ran into Woodfox that morning with his trash cart or otherwise. Tr. 1680, Ex. 34. Williams did not receive any favors from prison officials for his testimony. To the contrary, he testified he was put in solitary confinement after being interviewed by officials and explaining that he had not seen Woodfox. Tr. 1686, Ex. 35. He died prior to the 1998 trial and his testimony was read into the record.

Conflict between Brown and former Warden Henderson

Hezekiah Brown testified he never received any promises for his testimony. However, that was contradicted by former Warden Henderson, who testified in 1998 that prior to Brown’s 1973 testimony, Henderson promised Brown that Henderson would do everything he could to

secure a pardon for Brown. Tr. 1363, Ex. 3. Henderson died in 2004.

Warden Henderson, Chief Deputy Daniel, and the Bloody Tennis Shoe

Well after the 1998 trial, post-conviction counsel for Mr. Woodfox obtained an FBI memorandum dated April 19, 1972. The memorandum summarized information provided by Warden Henderson about the Brent Miller killing. It pointed out that a knife had been found under Pine 1 dormitory and "[a]lso a pair of bloody tennis shoes were found in the area of the dormitory." Ex. 36. No mention was ever made during discovery or in the 1973 or 1998 trials about this pair of bloody tennis shoes. They are not listed in the crime lab inventories. But the notes of the Sheriff's office, also not disclosed until after the 1998 trial, indicate that these shoes were treated as an important piece of evidence. These notes show that several prisoners were questioned about the shoes.

William Burtha: "wears shoes 8 ½-9 size"

Wilbert Chaney "wear 8 ½ shoe"

Henry Batiste: "wear 8 1/2 -9 shoe."

"William Burtha has shoe like these tennis shoes."

Ex. 36. Unfortunately, both then-Warden Henderson and then-Chief Deputy Daniel, who led the investigation, are now deceased and unable to answer questions about what happened to the bloody tennis shoe and why it apparently was never tested, or where it might be today. Ex. 37.

Legal Analysis

Because of the passage of time, the failure of the State to disclose impeachment evidence, and the failure of Woodfox's prior counsel to obtain the evidence, the jury at any new trial will be unable to see or hear how Brown, Fobb, and Richey respond when confronted with the wealth of impeachment information which has now been uncovered. Much of the evaluation of a witness's credibility involves a juror's assessment of how the witness reacts when confronted with impeachment evidence. Here, Woodfox will not have the opportunity to challenge their credibility in that manner. Moreover, jurors will be unable to compare the demeanor of the conflicting witnesses for the State and for the Defense and make the credibility judgments that are essential to the Defense challenge to the veracity of Brown, Fobb, and Richey. And it will not be possible to obtain answers about the missing bloody tennis shoes.

As mentioned earlier, no physical evidence connects Woodfox to the bloody crime scene, he has always maintained his innocence, and no one has emerged from the prison tiers to testify that Woodfox made a confession to them. Thus, the State's case hinges on Brown, and to a

lesser extent, Fobb and Richey. Much of Woodfox's defense is based upon a challenge to their credibility. But now that all of the witnesses are deceased, it will be extremely difficult to present that defense.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), the Supreme Court held that prior testimony of an unavailable witness could be introduced at a criminal trial if the cross-examination of the witness at the prior proceeding provided sufficient "indicia of reliability." However, in *Crawford v. Washington*, the Supreme Court held that for "testimonial statements" — such as testimony at a prior proceeding or statements to investigating officers — the *Roberts* focus on "indicia of reliability" was misplaced. Instead, said the Court, "prior trial or preliminary hearing testimony is admissible *only* if the defendant had an *adequate* opportunity to cross-examine." 541 U.S. at 57 (emphasis added).

Following *Crawford*, the Illinois Supreme Court issued a decision in *People v. Torres*, 962 N.E.2d 919 (Ill. 2012) regarding the prerequisites of what *Crawford* called "an adequate opportunity to cross examine" for purposes of the Confrontation Clause. As the Court explained in *Torres*:

> Beyond the freedom to fully question the witness regarding critical areas of observation and recall, to test him for any bias and prejudice, and to otherwise probe for matters affecting his credibility, what counsel *knows* while conducting the cross-examination may, in a given case, impact counsel's ability and opportunity to effectively cross-examine the witness at the prior hearing.

Id. at 932 (emphasis in original). The Court added: "Adequate opportunity to cross-examine means an opportunity to effectively cross-examine, and merely providing an opportunity to cross-examine at the preliminary hearing is not per se adequate opportunity." *Id.* at 932-933, *quoting People v. Horton*, 358 N.E. 2d 1121, 1124 (Ill. 1976). Defense counsel at the prior hearing in the *Torres* case "was not privy to the inconsistent statements [the witness] gave to the police," which "might have been used to confront [the witness] and see if further changes to [his] version of events might be forthcoming." Further, "counsel apparently did not know about [the witness's] status as an alien" in a situation where "the looming threat of deportation might have furnished a formidable incentive for the witness to curry favor with the State." The judge at the prior hearing had rushed the proceedings. "In view of these limitations and the pertinent information of which counsel was not apprised," the Illinois Supreme Court held that the cross-examination at the prior hearing was not adequate, and that the transcript should not have been introduced at the trial. Similarly, the 1973 trial in the present case did not afford what *Crawford* called "an adequate opportunity" to cross-examine Hezekiah Brown. Although

Brown testified that no promises were made to him, he was never confronted about Henderson's promise that if Brown testified, Henderson would do whatever he could to obtain a pardon for Brown. He never was asked about the comfortable living quarters to which he was immediately moved after giving a statement inculpating Woodfox. He was never asked about the valuable weekly delivery of a carton of cigarettes once he had been moved. He was never asked about the extent to which these extraordinary favors influenced his testimony. He was never asked why he perjured himself when he testified that no promises were made. He was never asked if he told Warden Henderson that Gilbert Montegut was involved (something Henderson denied).

Likewise, there was no adequate opportunity to cross-examine Paul Fobb. Although Fobb claimed he could identify Woodfox leaving Pine 1 dorm, he was not confronted with questions about his extensive medical treatment for vision problems in both eyes, the records of which contradict that claim. He was not asked about his move to the desirable quarters at the State Police Barracks prior to his 1973 testimony. He was not asked whether promises were made to him about future release — a release that occurred in 1974 through a medical furlough. He was not asked about the extent to which these favors influenced his testimony. And he was not asked about his earlier statement to investigators when he failed to mention that he saw Woodfox leaving Pine 1 dorm.

There also was no adequate opportunity to cross-examine Joseph Richey. After Richey claimed that he told Sheriff Daniel that he saw Woodfox and others leave the dorm, he was never asked if he actually told Daniel nothing of the sort, but instead simply told Daniel that he had gone to chow, then took cigarettes to an inmate named "Crutches," and then went to his dorm. Richey was never asked if he told prosecutor Julie Cullen that he did not realize Woodfox was "really" involved in the murder until he heard it from "CJ's family." Similarly, he was never questioned about his move to the desirable quarters at the State Police Barracks prior to his 1973 testimony, and the extent to which that favor influenced his testimony. And he was never asked about the effect of his schizophrenia and the anti-psychotic medications, including Thorazine, that he was taking on the morning of Miller's murder and also taking on the occasions he testified against Woodfox.

There was no adequate opportunity to cross-examine then-Chief Deputy Daniel or to ask then-Warden Henderson about the missing bloody tennis shoes.

Thus, this case is not like *Mancusi v. Stubbs*, 408 U.S. 204, 215 (1972), where the Supreme Court rejected a Confrontation Clause challenge because "counsel at the retrial did not

in his proffer show any new and significantly material line of cross-examination that was not at least touched upon in the first trial." Here, these are essential lines of cross-examination that were not touched on in the first trial in 1973 or the second trial in 1998.

Indeed, the Supreme Court has held that precluding a defendant from questioning a witness as to whether he "would be biased as a result of the State's dismissal of his pending public drunkenness charge" — which "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony" — created a situation that "violated [the defendant's] rights secured by the Confrontation Clause." *Delaware v. Van Arsdale,* 475 U.S. 673, 679 (1986). And in *Davis v. Alaska,* 415 U.S. 308 (1974), the defense counsel was not allowed to question a witness about the fact that he on probation for a juvenile offense and therefore subject to police pressure. Reversing the conviction, the Supreme Court said:

> We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' *Douglas v. Alabama,* 380 U.S. [415], at 419 [(1965)]. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer . . . as well as of Green's possible concern that he might be a suspect in the investigation.
>
> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness . . . . On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination . . . .

415 U.S. at 317-318 (citations and footnote omitted).

Taken together, *Van Arsdale* and *Davis* make it clear that a defendant has the right under the Sixth Amendment to confront a prosecution witness about potential favors he has received, and potential pressure to which he is subject, that might provide a motive to favor the prosecution with his testimony, as well as any other facts which could affect the jury's perception of the witness's reliability. Even if defense counsel conducts a cross-examination that includes an inquiry about bias, that cross-examination is not adequate if defense counsel does not have the tools to make a record about potential favors, potential pressures, and other

facts that affect reliability.

It is not enough that Henderson and Oliveaux's testimony about promises and favors, or Fobb's medical records, or notes from the Sheriff's Office and Sheriff Daniel could be presented to the jury at a new trial. As an initial matter, Henderson and Daniel are among the many witnesses who have died in the last 43 years. But even if the transcript of Henderson's testimony were read into the record, *it is important that the witnesses who received the promises and favors be confronted with them and have to respond and explain them, and that the jury be able to see, or at least hear, how they respond.* The same is true with respect to Fobb's blindness, Fobb's lies, and Richey's lies about what he told Sheriff Daniel.

Because these witnesses were never asked about these matters, and because of the passage of 42 years since the first trial, a new jury will never know how these witnesses would have responded to these items. The new jury will never know whether Hezekiah Brown would lie and claim no promises were made, whether he would lie and claim he did not receive the cigarettes, whether he would tell the truth about the promises and favors yet claim they did not influence him, or whether he would admit that he was influenced and in fact did not tell the truth when he testified on direct that Woodfox killed Brent Miller. The new jury will never know whether Paul Fobb would have denied the extensive treatment and the dismal assessments he received from doctors about his deteriorating eyesight in both eyes prior to April of 1972, would have admitted it but claimed he still could identify Woodfox, or would have admitted it and conceded under the glare of cross-examination that he actually could not identify Woodfox. The new jury will never know whether Fobb would have admitted that he did not initially tell authorities that he saw Woodfox leave the dorm, but instead embellished his story even more as time went by. The new jury will never know whether Richey would have denied what Sheriff Daniel's notes reflect — that he never told Daniel that he saw Woodfox and others leave the dorm, but only told Daniel that he went to chow, took cigarettes to another inmate, and returned to his dorm — or would have admitted it when finally confronted and further admitted that he lied when he earlier testified that he did tell Sheriff Daniel about Woodfox. The new jury will never know how Richey would have responded to questions about his statement to prosecutor Cullen that he never "really realized" that Woodfox was involved in the murder until he heard it from "CJ's family," and whether he then would have admitted that he never saw Woodfox leaving the scene of the murder. And the new jury will never know how Fobb and Richey would have answered questions about the favorable treatment they received by being transferred

off the prison grounds prior to their 1973 testimony.

All of these matters are central to a jury's assessment of the credibility of Brown, Fobb, and Richey, and will affect whether any of the jurors have a reasonable doubt as to the credibility of any or all of them. As the Supreme Court explained in *Barber v Page*, 390 U.S. 719, 725 (1968): "The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." The Court also said in *Barber* that the right of confrontation includes "cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Id.* at 722 (citation omitted). *See also State v. Kaufman*, 304 So. 2d 300, 305 (La. 1974) (describing the use of a prior transcript as "testimony by paper instead of in person," and stating that the "[t]he federal and state confrontation clauses impose a heavy burden before such *constitutionally-disfavored evidence* may be used . . . ." (Emphasis added)).

Accordingly, even under the pre-existing "indicia of reliability" standard of *Ohio v. Roberts*, the transcript of Warden Henderson's testimony, the presentation of Oliveaux's testimony, the Fobb medical records, and notes from the Sheriff's Office and Sheriff Daniel, would not be enough for the jury to adequately evaluate the testimony of Brown, Fobb, and rely upon it. As the Pennsylvania Supreme Court explained in *Commonwealth v. Bazemore*, 614 A.2d 684 (Pa. 1992), a pre-*Crawford* decision:

> The mere opportunity to impeach an unavailable witness indirectly is obviously not the same thing as the opportunity to cross-examine (and impeach) the witness directly. Had the defense in this case had the opportunity to confront Hauser directly and to cross-examine him directly with the benefit of the vital withheld information, Hauser may have recanted his prior testimony or he may have made other responsive statements or reactions which would have strengthened appellant's defense by casting doubt upon Hauser's credibility or his prior inconsistent account of the circumstances in question. The introduction of such impeaching information indirectly is clearly an inadequate substitute for a full and fair opportunity to examine the witness himself or herself.

Id. at 687 n. 4.

The decision of the Texas Court of Criminal Appeals (which is the highest court in Texas for criminal cases) in *Cook v. State*, 940 S.W.2d 623 (Tex. Cr. App. 1996) is to the same effect. There, the State had failed to disclose to the defense a prior inconsistent statement of a key prosecution witness who had testified in the first and second trials in that case. Because the prior inconsistent statement had not been known to the defense at the first and second trials, the

death of the witness before the third trial "precluded appellant from investigating the contradictions between his testimony at trial and before the grand jury, and between his trial testimony and his statement to the police." Accordingly, the Texas Court of Criminal Appeals held that the use of his prior testimony at that third trial "cast[] serious doubts as to the fairness of the third trial and the reliability of the proceeding against him," thus violating the Due Process clauses of the federal and state constitutions, and requiring reversal of the conviction. *Id.* at 627.

The Court in *Cook* held that the State could proceed against a defendant in a fourth trial, but there, most of the witnesses were still alive. And the Court said they could not again use the transcript of the deceased witness who had never been properly cross-examined regarding prior inconsistent statements (even though, presumably, the prior inconsistent statements could still be introduced). *Id.* at 627-628.

Here, there is not just one witness who is deceased, *but every key witness in the case*, including the State's essential witness and the two other witnesses who claim they saw Mr. Woodfox near the dorm. The deficiencies in their prior cross-examinations make it clear that Mr. Woodfox cannot receive a fair trial this next time around.

This is even more true now that "indicia of reliability" is no longer the constitutional touchstone for Confrontation Clause claims, and that the focus under *Crawford v. Washington* is solely on an adequate opportunity to cross-examine. Even if the introduction of the impeaching information at a new trial would provide sufficient "indicia of reliability" by allowing the jury to evaluate the testimony of Brown, Fobb, and Richey in light of that information, that is not enough under *Crawford* given that Woodfox never had an opportunity to confront them with this crucial impeachment information.

In *Com. v. Bazemore*, quoted earlier, the Pennsylvania Supreme Court held that the Confrontation Clause was violated by the use at trial of a preliminary hearing transcript of an unavailable witness where that witness was not cross-examined about important impeachment information. The Court did so even though there was no specific obligation on the State to disclose that information. The Court looked not to who was at fault, but whether confrontation of the witness with the impeachment information was necessary for an adequate cross-examination:

> The Commonwealth submits that as the prior statement of Hauser was not yet discoverable at the preliminary hearing stage, the Commonwealth had no duty to disclose that statement. We are mindful of the rules of discovery governing criminal prosecutions and by our holding today do not seek to abrogate those rules. Rather, our holding is limited to the facts sub judice and to a determination of what constitutes "full and fair" cross-examination of a now unavailable witness

> where the defense has been denied access to vital impeachment evidence either at or before the time of the prior proceeding at which that witness testified.

614 A.2d at 688.

Accordingly, it does not matter whether anyone was at fault for the inability to confront these witnesses at prior trials with the impeachment information. Even if it did matter, the promises to help these witnesses get out of prison, the favors regarding cigarettes and living conditions, the medical records of Fobb, and the notes of Sheriff Daniel and the Sheriff's Office, are clearly impeachment information that should have been disclosed under *Giglio v. United States,* 405 U.S. 150 (1972) and *Brady v. Maryland,* 373 U.S. 83 (1963). Alternatively, even if the Court concludes that the State was under no obligation to disclose some or all of this information under *Brady* or *Giglio,* it was ineffective for Woodfox's lawyers to fail to obtain this information and fail to use it.

The inability to confront these key prosecution witnesses exemplifies the prejudice to Woodfox of requiring him to defend against accusations that he committed a murder 43 years ago. In *Doggett v. United States,* 505 U.S. 647 (1992), the Supreme Court discussed the difficulty of proving particularized prejudice and instead indicated that in some situations, prejudice must be presumed after a lengthy passage of time:

> *Barker [v. Wingo]* explicitly recognized that impairment of one's defense is the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony "can rarely be shown." 407 U.S. [514], 532 [(1972)] . . . . [W]e generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify.

Doggett, 505 U.S. at 655. *Doggett* involved a Sixth Amendment speedy trial claim where the prosecution's negligence led to an eight year delay between arrest and trial. The Court said that delay was "extraordinary," *id.* at 658, and that dismissal of the charges was required even though the defendant could show no "particularized trial prejudice." *Id.* at 657.

Here, the delay is not eight years, but 43 years. And there is "particularized trial prejudice" as illustrated by the inability of the defense to confront the State's essential witness, Hezekiah Brown, and the two alleged corroborating witnesses, Fobb and Richey, with this important impeachment information, and the inability of the jury to properly weigh the Defense's claim that its witnesses undermine the credibility of Brown, Fobb, and Richey. While this is not a speedy trial claim regarding the passage of time between the most recent indictment and the actual trial, it is a claim about the 43 year delay between the original arrest and the present time, and the State of Louisiana is clearly responsible for it. The State created the unconstitutional

grand jury selection systems under which the prosecutors twice indicted Mr. Woodfox. Once these issues were raised by Mr. Woodfox, the State could have corrected them, put new systems in place, and promptly re-indicted Mr. Woodfox. But instead, the State contested the discrimination claims for many years, such that the second indictment was not issued until 20 years after the arrest and the third indictment was not issued until 43 years after it.

Certainly, the State had the option of contesting these discrimination claims over the 43 years that have ensued since the arrest in this case, but their choice to do so carries significant consequences. Those consequences include the death of key witnesses, particularly the State's essential witnesses who never were adequately cross-examined because of the failure to disclose and utilize important impeachment information. In the 1998 trial, the Judge explained to the prosecutor that if the State failed to disclose evidence favorable to the Defense, "*then you all are going to have to live with that.*" Tr. 656, Ex. 29. (emphasis added). Now that we face the prospect of a third trial where the essential witnesses on both sides are deceased, and where the State's key witnesses were never adequately cross-examined, it is clear that the choices made by the State over the last 43 years have led to a situation where it is impossible to conduct a fair trial. The State is "going to have live with that." If this case is dismissed, it has no one to blame but itself.

Of course, Albert Woodfox has had to "live with" the State's choices as well. For the past 43 years, he has remained in prison on these charges, most of that time spent in what the Fifth Circuit has described as an unprecedented "decades long, effectively indefinite solitary confinement." *Wilkerson v. Stadler*, 773 F.3d at 856. He has yet to have a trial in which the essential witnesses for the State have been adequately cross-examined. Unfortunately, those witnesses are deceased and will never be adequately cross-examined.

Conclusion

Albert Woodfox is 68 years old, less than two years away from turning 70. He has been severely punished for the last 43 years for a crime in which none of the physical evidence implicates him and the State's proof is highly questionable. The circumstances of this case are such that he cannot receive a fair trial 43 years after the fact. The motion to quash should be granted and this case should be dismissed.[5]

[5] In this motion, Mr. Woodfox has "distinctly specified" the grounds for this motion to quash, as required by La. C.Cr.P. art. 536. While these grounds are not specifically enumerated in the La. C.Cr.P. arts. 532-34, the Louisiana Supreme Court has made clear that the grounds articulated therein are merely illustrative and not exclusive. *State v. Reaves*, 376 So. 2d 136, 137 (La. 1979) (referring to the motion to quash as "an all embracive plea"). See also, *State v. Franklin*, 2013-0488 (La. App. 4 Cir. 10/9/13), 126 So. 3d 663, 667 ("While La.C.Cr.P. arts. 532 and 534 provide numerous grounds for motions to quash bills of information, their lists are merely illustrative . . ..")

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served a copy of the foregoing document on the 22nd day of July, 2015, by email (by agreement of all counsel) upon all counsel in this case, including:

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