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CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	NO: MO:05-CR-00134(1)-RAJ
	§	
(1) YOLANDA JEAN MADDEN	§	

ORDER GRANTING MOVANT'S MOTION UNDER 28 U.S.C. §2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

Before the Court are Movant's Motion under 28 U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§2255"), the Government's Response and Movant's Reply to the Government's Response, as well as numerous other pleadings filed by both sides. After due consideration, this Court finds that Movant is not entitled to relief on a majority of her claims; however, this Court grants her §2255 solely on her *Brady* claim.

I. Background

Movant was indicted on June 22, 2005, for one count of possession with intent to distribute methamphetamine within one thousand feet of a university, a junior high school, and a playground, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) & 860. On July 5, 2005, Movant was arraigned and entered a plea of not guilty. On September 13, 2005, counsel for Movant filed a motion to suppress. Movant waived her right to a jury trial, and on October 11, 2005, this Court held a combined suppression hearing and bench trial, denied the Movant's Motion to Suppress, and found her guilty. On March 23, 2006, Movant was sentenced to 78 months of imprisonment in the Bureau of Prisons, followed by six years supervised release and a $100 special assessment.

Movant filed a direct appeal with the Fifth Circuit Court of Appeals, which was denied on

February 28, 2007. She then filed for a writ of certiorari with the United States Supreme Court, which was denied on October 29, 2007. Finally, on August 12, 2008, Movant filed the Motion to Vacate currently before this Court.

Movant timely filed this §2255, in which she claims the following:

1. Her attorney had a conflict of interest that adversely affected his duty to represent her;

2. Her attorney failed to present exculpatory evidence to this Court;

3. Her attorney failed to object to the "lies" told by the government witnesses;

4. Her attorney failed to advise her that she had a right to testify; and

5. Her attorney failed to file pretrial motions that would have resulted in a dismissal of the case against her.

In her supplement to her § 2255, she added one claim:

6. *Brady* claim - the Government failed to turn over exculpatory and/or impeachment evidence in its possession.

II. Applicable Law

Title 28 U.S.C. § 2255 provides relief for a federal prisoner who can establish that either: (1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack. *United States v. Placente*, 81 F.3d 555, 558 (5th Cir. 1996); *United States v. Seyfert*, 67 F.3d 544, 546 (5th Cir. 1995); and Title 28 U.S.C. § 2255.

In other words, § 2255 relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal. *United States v. Payne*, 99 F.3d 1273, 1281

(5th Cir. 1996) and *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996). The Fifth Circuit has repeatedly held that a convicted criminal defendant may not raise an issue, regardless of whether constitutional or jurisdictional in nature, for the first time in a § 2255 motion without showing either (1) "cause" and "actual prejudice" resulting from the error, or (2) that a complete miscarriage of justice will result if the issues are left unaddressed. *Gaudet*, 81 F.3d at 589 and *United States v. Acklen*, 47 F.3d 739, 741-42 (5th Cir. 1995).

III. Discussion

A. Ineffective Assistance of Counsel Standard

One claim the Fifth Circuit recognizes as satisfying the "cause" and "actual prejudice" standard is actual ineffective assistance by Movant's trial or appellate counsel. *Gaudet*, 81 F.3d at 589; *Acklen*, 47 F.3d at 742. The constitutional standard for determining whether a criminal defendant has been denied effective assistance of counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court held that "[t]he bench mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686; *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985). To facilitate the inquiry, the Supreme Court established a two-prong test:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Strickland, 466 U.S. at 687.

In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Id.* at 687-88. In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. *Id* at 689. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993); *Strickland*, 466 U.S. at 689; *Green v. Johnson*, 116 F.3d 1115, 1122 (5th Cir. 1997). "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692. It is strongly presumed that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690.

To establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. In addition, analysis of the second, or prejudice, prong of the *Strickland* test must include an examination of whether counsel's deficient performance caused the outcome to be unreliable or the proceeding to be fundamentally unfair. *Lockhart*, 506 U.S. at 368-73. "Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." *Id.* at 372.

Because a convicted defendant must satisfy both prongs of the *Strickland* test, a failure to establish either deficient performance or prejudice under the test makes it unnecessary to examine

the other prong. *Strickland*, 466 U.S. at 700; *Seyfert*, 67 F.3d at 547. Therefore, a failure to establish that counsel's performance fell below an objective standard of reasonableness avoids the need to consider the issue of prejudice. *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990). It is also unnecessary to consider whether counsel's performance was deficient where there is an insufficient showing of prejudice. *Black v. Collins*, 962 F.2d 394, 401 (5th Cir. 1992). Further, mere conclusory allegations in support of claims of ineffective assistance of counsel are insufficient, as a matter of law, to raise a constitutional issue. *Kinnamon v. Scott*, 40 F.3d 731, 735 (5th Cir. 1994).

In summary, then, in order to prevail on a claim of ineffective assistance of counsel, a convicted defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

B. Claims

Ineffective Assistance of Counsel

1. Counsel had a conflict of interest that adversely affected his duty to represent her.

"Under the Sixth Amendment, if a defendant has a constitutional right to counsel, he also has a corresponding right to representation that is free from any conflict of interest." *United States v. Vaquero*, 997 F.2d 78, 89 (5th Cir.1993) (*citing Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

To prevail on an ineffective-assistance-of-counsel claim, Movant must show that trial counsel was acting under the influence of an actual conflict of interest that adversely affected counsel's performance at trial. See *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *see also Strickland v. Washington*, 466 U.S. 668 (1984); *Perillo v. Johnson*, 205 F.3d 775, 781 (5th Cir. 2000). Movant need not show prejudice in the sense that the outcome of the proceeding would have been different if it were not

for his attorney's conflict of interest. *Perillo*, 205 F.3d at 781-82 ("Assuming the defendant establishes an actual conflict that adversely affected counsel's performance, prejudice is presumed without any further inquiry into the effect of the actual conflict on the outcome of the defendant's trial.").

Here, the *Cuyler* standard would apply because Movant's claim involved trial counsel's conflict of interest stemming from multiple representation, rather than a conflict of interest springing "from a conflict between the attorney's personal interest and that of his client." *United States v. Newell*, 315 F.3d 510, 516 (5th Cir. 2002) (*quoting Beets v. Scott*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc)).

Therefore, the applicable standard depends on the type of conflict of interest alleged. From the pleadings it is impossible to determine what type of conflict of interest is being put forth.

"[A] district court does not commit error when it disposes of a habeas petitioner's claims without holding a full-fledged evidentiary hearing when those claims are unmeritorious, conclusory, and wholly unsupported by the record." *Pierre v. United States*, 525 F.2d 933 (5th Cir. 1976); *see also United States v. Jones*, 614 F.2d 80, 82 (5th Cir. 1980) (holding that a district court did not err in failing to hold an evidentiary hearing on a § 2255 motion, where petitioner's claims were conclusory in nature and unsupported by the record), *cert. denied*, 446 U.S. 945 (1980).

Movant's allegations of ineffective assistance of counsel due to a conflict of interest are wholly conclusory. Her Motion to Vacate is silent as to what constituted counsel's conflict of interest. While the Court must construe a pro se § 2255 motion liberally, conclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir. 1983)); *United*

States v. Jones, 614 F.2d 80, 81 (5th Cir. 1980) (conclusory statements regarding government conspiracy were insufficient to state a constitutional claim in a § 2255 proceeding); *United States v. Daniels*, 12 F.Supp.2d 568, 575 (N.D. Tex. 1998) (conclusory allegations cannot serve as the basis for a claim of ineffective assistance of counsel in a § 2255 proceeding).

Movant has failed to show that her attorney's representation fell below an objective standard of reasonableness or that the result at trial would have been different absent this alleged conflict of interest. Movant has wholly failed to demonstrate that there even was a conflict of interest in this case, let alone which type of conflict of interest. This claim is utterly conclusory.

In its response, the Government accused Movant of having a conclusory claim concerning counsel's conflict of interest. In reply to the Government's response, Movant simply states the following: "Ms. Madden's counsel labored under an actual conflict of interest which adversely affected their performance during the pretrial, trial, sentencing and direct appeal process in this case. This duty was in conflict with the duty owed to Ms. Madden. Counsel chose between the duties. This choice adversely affected the performance of counsel during the pretrial, trial, sentencing and direct appeal process due to the multiplicity of errors by counsel as set forth herein." Reply at ¶ 47. Nowhere else in the 27 page Reply or 3 page Memorandum in Support does Movant address the factual underpinnings of this alleged conflict of interest.

This Court notes that Movant was represented at trial by three attorneys: Ali Fazel of Houston, Brian Jose Chavez of Odessa, and Robert A. Scardino, Jr. of Houston. Which one of these attorneys labored under a conflict of interest has never been clarified for this Court. Pretrial proceedings, the time when Movant claims counsel was laboring under a conflict of interest, included all three attorneys at different times. Brian Jose Chavez represented Movant from

approximately July 5, 2005 through approximately September 2, 2005, at which time Ali Fazel made an appearance for Movant. Days later, on September 6, 2005, both Ali Fazel and Robert A. Scardino, Jr. appeared *pro hac vice* on Movant's behalf before this Court. At trial, both Mr. Fazel and Mr. Scardino represented Movant. Further, Robert A. Scardino, Jr. appears to be the sole attorney on Movant's direct appeal.

As Movant has chosen not to clarify the factual basis of her claim for this Court, this Court has no recourse but to dismiss this claim as conclusory. While the Court must construe a pro se §2255 motion liberally, conclusory allegations are insufficient to raise cognizable claims of ineffective assistance of counsel. *Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000) (citing *Ross v. Estelle*, 694 F.2d 1008, 1012 (5th Cir.1983)). This claim is without any factual support, affidavits in support, citation to the record, or statements in the Motion to Vacate clarifying this claim, and thereby this claim fails as conclusory.

2. Counsel did not present exculpatory evidence to this Court.

Movant's second claim is that her counsel failed to present exculpatory evidence to this Court. According to Movant, this exculpatory evidence consists of the polygraphs of Movant, her father, and Keith Phillips, that establishes Movant was not aware of any drugs in her vehicle.

While there is no per se rule against admissibility of polygraph evidence, *United States v. Posado*, 57 F.3d 428, 431-36 (5th Cir.1995), the Fifth Circuit Court of Appeals has found that testimony concerning a polygraph examination is admissible where it is not offered to prove the truth of the polygraph result but instead is offered for a limited purpose, such as rebutting a defendant's assertion that his confession was coerced. *United States v. Allard*, 464 F.3d 529, 534 (5th Cir. 2006). Here, Movant wishes to introduce polygraph evidence to prove the truth of her statements concerning

knowledge of drugs in her vehicle. This particular use of polygraph evidence is specifically not allowed in this Circuit. Therefore, Movant's claim that counsel was ineffective for failing to introduce this evidence at trial is without merit.

3. Counsel did not object to the "lies" told by the government witnesses.

Under *Strickland*'s first prong, there is a strong presumption that the performance of counsel "falls within the wide range of reasonable professional assistance." *United States v. Samuel*, 59 F.3d 526, 528 (5thCir. 1995). Thus, Movant must overcome the presumption that under the circumstances, "the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689.

According to Movant, all of the witnesses who testified for the Government were lying as to her involvement in this case, and her counsel failed to object to these "lies." However, during Detective Travland's testimony, for instance, counsel objected six times, and counsel's cross examination of him lasted over three times as long as the Government's direct examination. This Court is at a loss for what more counsel could have done to attack the credibility of the lead officer in the case. Counsel's attack was textbook as to how to cross-examine a key witness. The problem with Counsel's result was that it appeared to this Court that the officer was testifying truthfully. But that wasn't for lack of trying on Counsel's part to discredit the detective.

Movant is very vague as to what "lies" counsel was unable to ferret out during his rigorous cross examination. Movant, therefore, fails to overcome the presumption that the performance of counsel fell within the range of reasonable professional assistance. Because *Strickland's* two prong test is conjunctive, failure to meet the "reasonableness" prong pretermits an inquiry into the "prejudice" prong. *See Carter v. Johnson*, 110 F.3d 1098, 1110 (5th Cir. 1997). Notwithstanding,

Movant does not show that counsel's failure to make a specific objection deprived her of a fundamentally fair trial. This claim is also denied.

4. Counsel failed to advise her that she had a right to testify.

Movant alleges that counsel failed to advise her that she had a right to testify on her own behalf at trial. A criminal defendant has a constitutional right to testify on his own behalf, and this right is granted to the defendant personally, not to his counsel. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). When a Movant argues that his counsel interfered with his right to testify, "[t]he appropriate vehicle for such claims is a claim of ineffective assistance of counsel" under *Strickland*. *Sayre v. Anderson*, 238 F.3d 631, 634 & n. 2 (5th Cir.2001) (quoting *United States v. Brown*, 217 F.3d 247, 258-59 (5th Cir.2000)).

"A defendant may of course waive his right to testify, and frequently does so on the advice of counsel. We would find no violation of the right to testify if [the defendant] acquiesced during trial to his attorney's recommendation that he not testify and later decided that he should have testified. Instead, a violation of this right only occurred if the "final decision that [defendant] would not testify was made against his will. In other words, we must determine whether [defendant] made a knowing, voluntary and intelligent waiver of his right to testify." *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994) (*citing United States v. Teague*, 908 F.2d 752, 759 (11th Cir.1990), *rehearing granted*, 953 F.2d 1525 (11th Cir.), cert. denied, 506 U.S. 842 (1992)).

On September 17, 2009, this Court held an evidentiary hearing solely on the issue of whether counsel advised Movant that she could take the stand on her own behalf. At this hearing, neither counsel Scardino nor Movant Madden elected to testify as to their respective recollection of events. Absent any evidence marshaled by Movant on her own behalf, this Court dismisses this claim as

conclusory.

5. Counsel failed to file pretrial motions that would have resulted in a dismissal of the case against her.

Movant avers that defense counsel failed to file pretrial motions that would have resulted in a dismissal of the charges against her. Under the two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), Movant must show that counsel's assistance was deficient and that the deficiency prejudiced her defense. The second prong requires showing that the error deprived Movant of a fair trial. *Id.*; *see Lockhart v. Fretwell*, 506 U.S. 364 (1993).

"To satisfy the first *Strickland* prong, a defendant must demonstrate attorney performance outside the wide range of reasonable professional assistance, and must overcome a presumption of adequacy." *Carson v. Collins*, 993 F.2d 461, 465 (5th Cir. 1993) (footnote omitted), *cert. denied*, 114 S.Ct. 265 (1993). Movant's contentions concerning counsel's performance in handling pretrial matters ignores the record, which indicates that trial counsel filed a Motion to Suppress in this case and participated in a lengthy hearing covering this motion. In light of this record, Movant has failed to establish that her counsel's performance fell below an objective standard of reasonableness. As this Court has found there was no ineffective assistance of counsel in this case, the Court will not find Movant was prejudiced through the actions of counsel. This claim is also denied.

6. *Brady* claim - the Government failed to turn over exculpatory and/or impeachment evidence in its possession.

The Supreme Court has held that suppression of evidence that is material to either guilt or punishment violates due process whether or not the state acted in good faith. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To prevail on a *Brady* claim, a defendant must "demonstrate that: (1) the

prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was 'material either to guilt or punishment.' " *Id.*; *Vega v. Johnson*, 149 F.3d 354, 363 (5th Cir.1998), *cert. denied.*, 525 U.S. 1119 (1999). Evidence withheld in violation of a prosecutor's obligation under *Brady* is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

The Supreme Court has since "held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence." *Strickler v. Greene*, 527 U.S. 263, 280 (1999) (citations omitted). The *Brady* disclosure rule encompasses evidence "known only to police investigators and not to the prosecutor" and imposes on individual prosecutors "a duty to learn of any favorable evidence known to the others acting on the government's behalf ... including the police." *Id.* at 280-81 (citations omitted). Thus, the prosecution has a duty to learn of any exculpatory evidence known to police officers and others working on the government's behalf and to disclose such evidence to the defendant. *See id.*

Evidence is material only if there is a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed. *Bagley*, 473 U.S. at 682. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* The items of suppressed evidence should be viewed collectively, not item by item. *Kyles v. Whitley*, 514 U.S. 419, 436 (1995).

The Supreme Court has made clear that "materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the

defendant's acquittal." *Kyles*, 514 U.S. at 434. Materiality is established "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263 (citations omitted). There is a "reasonable probability" of a different result when "the government's evidentiary suppression undermines confidence in the outcome of the trial." *Kyles*, 514 U.S. at 434.

In this case, Movant Madden claims that the Government presented false evidence against her in the form of the testimony of Detective Greg Travland of the Odessa Police Department. Detective Travland, according to Movant, was not at her confession - as he and other officers testified - but instead was across town booking informant Keith Phillips into the Ector County Jail. Movant Madden asserts this is factually supported by the whited-out login sheet at the Ector County Jail as well as the computer print out stating who delivered Keith Phillips to the jail on the day in question.

This Court held an evidentiary hearing on this issue on November 25, 2009. Two documents were produced that were not made available to the defense at trial, including the whited-out login sheet at the jail (Def. Ex. 3 [copy] & 6 [original]) as well as the Ector County jail printout of who delivered informant Keith Phillips to the jail (Def. Ex. 4).

As an Ector County jail document, this printout (Def. Ex. 4) would not be *Brady* material because it was not a document created by anyone involved in the prosecution of Movant. *See United States v. Morris*, 80 F.3d 2252, 1179 (7th Cir. 1996) ("Because none of those agencies were part of the team that investigated this case or participated in its prosecution, the district court would not impute their knowledge of potentially exculpatory information to the present prosecutors.") However, as proven in the evidentiary hearing, the whited-out login sheet was an Odessa Police

Department document [or at least one copy of this carbon copied document was a document of the Odessa Police Department]. (Def. Ex. 3 & 6). The Odessa Police Department was the investigating agency in this prosecution. The existence of this document was known to Odessa Police Department Detective Travland, who was part of the prosecution team as well. While this Court finds no purposeful conduct on the part of the Government, the United States Attorney's office, Detective Travland, or any member of the Odessa Police Department in this case, the inadvertent failure to disclose such material does constitute a violation under *Brady*.

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution." 373 U.S. at 87; *see also Kyles v. Whitley*, 115 S.Ct. 1555, 1565; *Giglio v. United States*, 405 U.S. 150 (1972) (holding that *Brady* requires the production of evidence that could be used to impeach a government witness).

This Court finds the failure to disclose the whited-out login sheet to defense counsel to be a violation of *Brady* in that such a document could have been used to impeach witness Detective Travland on the witness stand. Detective Travland could have been impeached concerning his whereabouts during the time in question and whether he was delivering informant Keith Phillips to the jail or witnessing Movant's confession.

This Court makes several important notes. First, there is no evidence that the Assistant U.S. Attorney who prosecuted this case was ever aware of the whited-out login sheet's existence. Second, there is no evidence that Detective Travland or any member of the Odessa Police Department purposefully suppressed the whited-out login sheet. Finally, there is no evidence that Detective Travland or the Odessa Police Department were aware of the significance of the whited-out login

sheet. The significance of the whited-out login sheet did not become apparent until Movant filed her § 2255, as at trial Movant never alleged that Detective Travland was not physically present at her confession. The Court specifically finds there was no evidence of bad faith by the United States Attorney's Office, the Odessa Police Department or Detective Travland.

To establish a *Brady* violation, a Movant must show (1) that the police suppressed evidence; (2) that the evidence was favorable, such as exculpatory or impeachment evidence; and (3) that the evidence was material. *See Mahler v. Kaylo*, 537 F.3d 494, 499-500 (5th Cir. 2008). Where a criminal defendant fails to establish any one element of *Brady*, courts need not inquire into the other components. *See United States v. Runyan*, 290 F.3d 223, 245 (5th Cir. 2002); *United States v. Hughes*, 230 F.3d 815, 819 (5th Cir. 2000).

In assessing materiality, courts must determine "whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004) (*quoting Strickler v. Greene*, 527 U.S. 263, 290 (1999)). The Fifth Circuit has summarized this materiality inquiry as follows:

> [t]he Supreme Court has imposed four criteria for determining whether evidence is material. First, materiality does not require the defendant to demonstrate by a preponderance of the evidence that omitted evidence would have resulted in acquittal. Second, he need not weigh the withheld evidence against the disclosed evidence to show he would have been acquitted by the resulting totality. Third, if evidence is found material, there is no need to conduct a harmless error analysis. Fourth, the withheld evidence should be considered as a whole, not item-by-item.

DiLosa v. Cain, 279 F.3d 259, 263 (5th Cir. 2002) (*citing Kyles v. Whitley*, 514 U.S. 419, 434-37 (1995)).

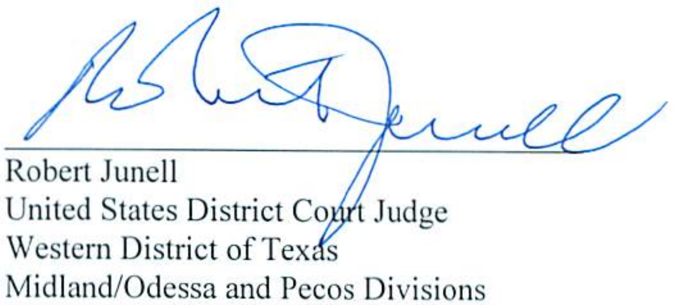
The undisclosed evidence was, to this Court's opinion, favorable to the case because it was impeachment evidence. The evidence was withheld, no matter how inadvertently, by the prosecution

in this case. The evidence in question is undeniably material, as this Court finds "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Strickler v. Greene*, 527 U.S. 263. Given these findings, the Court is compelled to grant Movant's Motion to Vacate.

IV. Conclusion

For the foregoing reasons, this Court now GRANTS Movant's §2255. The Court sets this matter for trial on March 1, 2010.

Signed this 18 day of December, 2009.



Robert Junell
United States District Court Judge
Western District of Texas
Midland/Odessa and Pecos Divisions