IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT LEE THOMAS, JR. — APPELLANT

VS. — NO. 2007-KA-1197

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LBERT LEE THOMAS, A/K/A BOO, A/K/A AL THOMAS,
A/K/A ALBERT BROWN THOMAS, A/K/A ALBERT LEE — APPELLANT

VERSUS — NO. 2007-KA-1197

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

This appeal is taken from the Circuit Court of the First Judicial District of Hinds County, wherein Albert Lee Thomas was convicted of murder and sentenced to a term of life in the custody of the Mississippi Department of Corrections. (C.P.91) Aggrieved by the judgment rendered against him, Thomas has perfected an appeal to this Court.

Statement of Substantive Facts

Catherine Nell Wilson testified that she was the mother of Johnny Earl Hampton, who had died at the age of 33. Although Mr. Hampton had a learning disability, he "[s]ometimes ... did janitor work ... [a]t the Holiday Inn." When he "wasn't with his girlfriend," he lived with Ms. Wilson. (T.155-56) The morning of Saturday, August, 24, 2002, Ms. Wilson saw her son for the last time. He "had on some short khaki pants and a T-shirt, but he didn't have the T-shirt on. He had it hanging on his shoulder." The following day, she suspected that "something was wrong" when

she ascertained that Mr. Hampton had not made coffee, as was his daily custom. That Sunday and on the day afterward, she asked her neighbors whether they had seen him; they all said that they had not. On Tuesday, August 27, she filed a missing person's report with the police. (T.156-58)

Officer Robert Williams of the Jackson Police Department testified that on August 27, 2002, he responded to Ms. Wilson's report that her son Johnny Hampton [hereinafter "Johnny"] was missing. During his subsequent investigation, he "learned several names of individuals supposedly involved in this." Those suspects were Tyson Dixon, Albert Thomas, and Thomas's girlfriend Mary Henderson. Acting on information provided by Ms. Wilson's relative Maurice Wilson [hereinafter "Maurice"], Officer Williams went to the city impound lot to look for a vehicle which he believed was involved in the suspected crime. He did not find the vehicle there. Officer Williams then went to the residence of Mary Henderson's mother, a woman known to him as "Janice." In Officer Williams' words, Janice "gave me that name of Boo which was the only thing I had at the time. She gave me his full name, which was Albert Thomas." She also advised him that Thomas lived with his mother at 854 Carver Street. Officer Williams went to this location but "found nothing." Nor did he find Tyson Dixon. (T.160-64)

Detective Charles Taylor testified that a screwdriver was found on the victim's body, completely inside his pants pocket. (T.192)

Maurice Wilson, Mr. Hampton's nephew, testified that he was quite familiar with the Maple Street Apartments and knew "[a] lot of people" who lived there, including the defendant, another man called "Tank" and a woman named "Mary."[1] At about midnight on a Saturday night/Sunday

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[1]Maurice did not know Mary's last name. (T.205)

morning in August 2002, Mr. Wilson, Tyson Dixon and "a boy named Corey" were "sitting out there at the Maple Street Apartments" when they saw Johnny, Mary, Tank and the defendant in a car which "[p]ulled up in the cut." While Tank "stayed in the car, ... Boo [the defendant] and Mary got out the car and went upstairs. They stayed up there about five or ten minutes. They came back out." Mr. Hampton "went around the corner .. around there by the office." After "Boo and Mary came back downstairs and got in the car," Mr. Hampton joined them. (T.202-07)

When the prosecutor asked, "When was the next time that you saw any of these four people again?" Maurice testified as follows:

> That Sunday morning about 2 or 3:00 that morning.
>
> * * * * *
>
> [W]hen they come in the Maple Street Apartments, they got out of a car in the middle of Fortification, and they come back. And Tank went in the house. He came with one shoe off, you know what I'm saying. And then Boo and Mary came back, and then he gave the due who car they had, he gave him the keys back and told him his car was over there off of McDowell.
>
> (T.210)

Tank then went to his mother's apartment, and the defendant and Mary went "[t]o their apartment." (T.211)

Maurice went on to testify that Tyson Dixon had been "living with Boo and Mary." After the defendant and Mary returned to their apartment early that Sunday morning, Dixon "went upstairs and came back down, and he stayed there ... for a minute." At about dawn, Dixon gave Maurice some information which caused him to become concerned for his uncle's safety. Maurice "went home" and told his uncle Harold Hampton [hereinafter "Harold"] and his grandmother, Johnny's mother, what he had heard. (T.211-15)

Harold, Johnny's half brother, testified that after Maurice first gave him this information, he did not take it seriously. The next day, however, when Johnny did not return home, Harold became "concerned enough to make inquiries of Tank and other neighbors. Tank was dismissive of Harold's concerns. Subsequently, Harold called on the defendant and asked him whether he had "done something to Johnny." The defendant said, "No." (T.220-26) Thereafter, Harold questioned his longtime friend Robert Henderson [hereinafter "Robert"], Tank's uncle. Robert agreed to speak with his nephew about these circumstances. Approximately an hour later, Robert telephoned Harold and asked him to meet him at a location on Capitol Street. When Harold arrived there, Robert told him "[t]hat Boo had shot Johnny and left him in some woods over on Shaw Road." Harold informed his mother and the police. Afterward, Harold, his brother Walter, and Robert met police officers at the location on Shaw Road. Acting on information provided by his nephew Tank, Robert led them to Johnny's body. (T.233-35)

Robert testified that his nephew Tank had told him that "he knew somebody who had killed somebody." At Robert's request, Tank took him "over to the scene," but it was too dark for them to "really see anything." The next morning, however, Robert returned to the site and found a "decomposed" body. He then "contacted the family" and "told them" that he "did know where the body was." (T.263-64)

Detective Keith Venson of the Jackson Police Department testified that he had been involved in several stages of this case, from taking statements and recovering evidence to preparing the case for presentation to the grand jury. At some point during the week before trial, Detective Venson met United States Attorney Lampton and Tony Taylor, a/k/a/ Tank, at the jail in Raymond. Based on an ensuing conversation, Detective Venson recovered from Taylor's cell a note written on yellow ruled legal paper. Detective Vinson requested "that latent prints be recovered from the letter," but none

matched those of the defendant. Nor did handwriting exemplars from the defendant match the handwriting on the letter. Detective Venson was unable to obtain an exemplar from Taylor because he (Taylor) could not write. (T.267-72)

Jeffrey Johnson, an inmate of the county jail in Raymond, testified that the defendant had handed him a note written on yellow paper of the same kind as the exhibit introduced during Detective Venson's testimony. The defendant asked Johnson "to give it to Red, James Underwood." As Johnson was "walking off," the defendant told him, essentially, to tell Tank that "the boy had a knife on him" and he (Thomas) had killed him for that reason. Johnson complied with the defendant's requests: he gave the note and the message to "Red." (T.278-81)

James Underwood, a/k/a Red, testified that while he was incarcerated in the jail in Raymond, a man known as Jeff asked him to deliver a note to Tank. This message was written on yellow paper. Jeff told him that it had come from Thomas. Underwood handed the letter to Tank, who responded, "here, Boo sent this." (T.286-88)

Charles McGowan testified that Tank had been his cell mate in the jail in Raymond. Because Tank was illiterate, McGowan frequently read "family letters ... and minor stuff" to him. At one point, Tank showed him a note which referred to someone's having been killed. McGowan identified this letter as the one which had been admitted during Detective Venson's testimony. After McGowan read the note to him, Tank "just said it was a lie." (T.291-93)

Mary Henderson testified that in August 2002, she was involved in a romantic relationship with Thomas. While they were living together, they habitually used marijuana and cocaine. They spent a great deal of time with Tank, a neighbor. Ms. Henderson was also acquainted with Johnny Hampton. Although she could not remember the date, Ms. Henderson recalled that the last time she saw Mr. Hampton alive was on a Thursday. A month or two before this time, Thomas told her that

someone had stolen his supply of crack cocaine and that he suspected Mr. Hampton of having committed the theft. Thomas was not happy about these circumstances.[2] (T.300-05)

Approximately two months later, Ms. Henderson, Thomas and Tank were "riding around" together in Thomas's car. Thomas was driving. When they saw Mr. Hampton standing "on the corner of Capitol and Prentiss," Thomas and Tank were "saying something about a lick; they had a lick." Thomas stopped the car, and Mr. Hampton got in. They went back to the Maple Street Apartments. Ms. Henderson remained in the car while Thomas went into their apartment. When he returned about five minutes later, he "asked where Johnny had went to," and Ms. Henderson told him that he had walked "up there by the office." Thomas then "pulled up on the side of the office, and Mr. Hampton got back into the car. Tank and Thomas continued to talk about "a lick." (T.305-09)

Thomas then drove down Capitol Street, "down there by the baseball field." Thomas stopped the car, and he and Mr. Hampton got out. Thomas asked Mr. Hampton why he had stolen his "dope"; Mr. Hampton denied having done so; an argument ensued; and a shot was fired. Thereafter, Ms. Henderson observed that Mr. Hampton had been shot in the leg. He asked to be taken to the hospital. Thomas and Mr. Hampton got back into the car. As Thomas ostensibly drove toward the hospital, he asked Mr. Hampton, "man you not gone tell on me, is you?"
Mr. Hampton answered, "Just take me to the hospital."[3] Thomas then drove down some "back

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[2]Ms. Henderson testified that Thomas usually carried a gun. (T.306)

road." At some location off Maddox Road, "the car cut off." Tank pushed the automobile while Ms. Henderson guided it. Ultimately, the car "coasted on down the hill to the stop sign." Thomas and Mr. Hampton were left behind. As Tank and Ms. Henderson "got out to walk back up the street," they "heard some more shots" and took cover behind some trailers. Approximately five minutes later, Thomas "came down the street." He advised Ms. Henderson and Tank not to tell anyone what had happened. (T.309-15)

Without objection by the defense, the court accepted Dr. Steven Timothy Hayne as an expert in the field of forensic pathology. Dr. Hayne testified that he had performed the autopsy on the body of Mr. Hampton, which by that time was in a state of advanced decomposition. "The external examination revealed the presence of a gunshot wound to the left thigh." This wound, a non-lethal one, had been caused by a bullet which had "entered at a point 42 inches below hte top of the head, exited at a point approximately 44 inches below the top of the head on the back of the thigh." A second gunshot bullet had "struck the decent on the left back of the head a a point approximately four inches below the top of the head, approximately three inches to the left from the mid back of the head." The projectile had caused massive brain injury, and its track was "noted ... downward, ... consistent with the decedent's head turned to the left." The wound to the head was lethal. (T.167-72)

After the state rested, the defendant took the stand and testified that he had not been angry with Mr. Hampton and that he was shot him in the leg because he was running toward him with a screwdriver. Later, as Thomas was attempting to give him aid, Mr. Hampton he pulled a gun out of Thomas's pocket. After some "tussling," the gun fired twice, and Mr. Hampton appeared to have

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[3]While Thomas and Mr. Hampton continued to have a "conversation" about "drugs," the latter did not make any threats against the former. (T.311)

been killed instantly. (T.339-45)

In rebuttal, Tony Taylor, a/k/a Tank, testified that he currently was an inmate of the jail in Raymond. The night of the shooting, he was in the car with Thomas, Ms. Henderson and the victim. He did not see Mr. Hampton with a screwdriver. He remembered receiving the letter purporting to have been written by Thomas. While he (Taylor) was still in jail, Thomas asked him why he hard turned the letter over to the authorities and why he was "snitching" on him. (T.386-89)

SUMMARY OF THE ARGUMENT

The trial court did not err in overruling the motion for new trial. The defendant failed to establish a violation of *Brady*, infra, or *Giglio*, infra.

PROPOSITION:

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

Immediately prior to calling Tony Taylor in rebuttal, the U.S. Attorney made this statement to the court, outside the presence of the jury:

> And I want you to know that I have told Tony Taylor if he testifies, he's told me he's scared; that I'm going to try to see if I can get him out on bond. I'm concerned about his safety in jail. He knows that. I talked with Rebecca Taylor. And if he testifies in the murder case, then I'm going to try and see if I can get him where he doesn't have to spend, you know, anymore time in jail until after that comes up.
>
> (T.385)

During cross-examination of Taylor, the defense asked, "You've been promised to get out of jail for coming in today, haven't you?" Taylor maintained that he had not been promised, but that the U.S. Attorney had told him that he would "try" to get him released. (T.390-91)

In his motion for j.n.o.v./new trial, Thomas alleged that his due process rights had been

violated by the prosecution's failure to disclose promises it had made to Taylor and by its failure to correct false testimony by Taylor at trial. (C.P.98-104) In response to that motion, the Assistant U.S. Attorney filed a cogent memorandum of law which the state hereby adopts by reference. (See Exhibit "A" appended to the Brief for Appellee.)

To summarize the position taken in the trial court and maintained on appeal, the state submits that in order to establish a *Brady*[1] violation, the defendant must prove

> a. that the State possessed evidence favorable to the defendant (including impeachment evidence);
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> b. that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> c. that the prosecution suppressed the favorable evidence; and
>
> d. that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.
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> *Carr v. State*, 873 So.2d 991, 1000 (Miss.2004).

Accord, *Montgomery v. State*, 891 So.2d 179, 183 (Miss.2004).; *King v. State*, 656 So.2d 1168, 1174 (Miss.1995).

To prove a due process violation on the ground the state failed to correct false testimony, a defendant must show that a) the witness testified falsely, b) the prosecution knew the testimony was false, and c) the testimony was material. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972).

As pointed out in the attached memorandum, the defendant in this case failed to establish at least three of the essential *Brady* elements, specifically, b., c. and d. outlined above. As for the

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[1]*Brady v. Maryland*, 373 U.S. 83, 87 (1963).

alleged failure to correct false testimony, the defendant cannot satisfy the three part test outlined in *Giglio*.

First, all of the material evidence was disclosed by the state prior to Taylor's testimony and there was no false testimony. The U.S. Attorney stated in open court that he had told Taylor that he was going to try to see if he could get Taylor released on bond. He did *not* say that he had "promised" him anything. (T.385) Taylor testified to the same fact: that there was no promise, but that the U.S. Attorney "say he gone try." [sic] (T.390)

Under these circumstances, there is no showing that material evidence was withheld or that false testimony was given.[2]

In this case, the record establishes that the prosecution disclosed that it had offered to try to get Taylor released on bond and that Taylor testified to this fact. The only remaining question is whether the prosecution made additional promises to Taylor, i.e., that he would be given suspended sentences upon conviction on charges facing him, and whether, had those alleged additional promises been disclosed, there is a reasonable probability the outcome would have been different. The state submits the record does not support the allegation that the prosecution made other promises to Taylor.[3] We maintain the position that the defendant cannot show any alleged additional

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[2]Again, the Appellee adopts by reference the more extensive analysis which appears under Sections II. and III. of memorandum filed by the Assistant U.S. Attorney.

[3]The affidavit of Michael Knapp, attached as an exhibit to the motion for new trial, does not support the allegation that the prosecution made additional promises to Taylor. (C.P.108) As for the subsequent imposition of suspended sentences upon Taylor's convictions of other offenses, this

promises would have had a material impact on the jury's assessment of Taylor's credibility, much a reasonable probability that a different result would have been reached. The jury heard that the U.S. Attorney had told Taylor that he would try to get him released on bond; thus, it had a basis for questioning Taylor's credibility. Telling the jury that the prosecution would get him suspended sentences on his pending charges would not have given the jurors a set of facts materially different from the ones they had already heard.

In conclusion, the state adopts by reference its Statement of Substantive Facts in submitting that the evidence against Thomas was overwhelming. Therefore, Thomas cannot show that the evidence alleged to have been withheld or the false statements alleged not to have been corrected were material.

CONCLUSION

For the reasons set out above, the state submits the trial court properly denied the motion for new trial. The judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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documentation does not appear in the record and thus cannot be considered by this Court. *Givens v. State*, 967 So.2d 1 (Miss.2007) (an appellate court may act only on the basis of the official record). While the appellant filed a motion to supplement the record to include these documents, that motion was denied by this Court on July 30, 2008.

CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Tomie T. Green
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IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VS. CRIMINAL ACTION NO. 03-29CRG

ALBERT LEE THOMAS, JR. DEFENDANT

OPPOSITION TO DEFENDANT'S MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

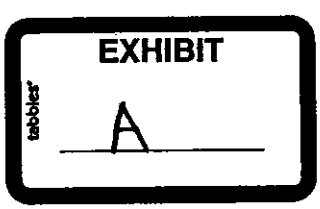
COMES NOW, the State of Mississippi, and files this Opposition to Defendant's Memorandum in Support of Motion for New Trial, and would say the following.

I. **Introduction.**

The Defendant alleges that his constitutional due process rights have been violated because the Prosecution failed to disclose promises it had made to Tony Taylor and because the Prosecution failed to correct false testimony by Mr. Taylor at trial.

To establish a Brady violation for failure to disclose evidence, "a defendant must prove the following: (1) that the government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." King v. State, 656 So.2d 1168, 1174 (1995).

To establish a due process violation for failure to correct false testimony, a defendant must establish that (1) the witness testified falsely; (2) the government knew the testimony was false; and (3) the testimony was material. Giglio v. United States, 405 U.S. 150, 153- 54 (1972); Knox v. Johnson, 224 F.3d 470, 477 (5th Cir. 2000).



In this case, the Defendant can not establish at least three essential elements of a Brady violation: (1) that the Prosecution suppressed any evidence, (2) that the Defendant did not possess the evidence or could not have obtained it with reasonable diligence, or (3) that had the evidence been disclosed, a reasonable probability exists that the outcome would have been different. Likewise, the Defendant cannot prove that (1) there was any false testimony at trial which the Prosecution had a duty to correct, (2) that the Prosecution knew that the testimony given at trial was false, or (3) that the allegedly false testimony was material.

II. The Prosecution told the Court and the Defendant what it had told Tony Taylor prior to Taylor's testimony and Mr. Taylor accurately testified to what he had been told by the Prosecution.

In order for there to be a Brady violation for alleged nondisclosure of information, the Defendant must prove that material evidence was withheld by the State. King, 656 So.2d at 1174; Giglio, 405 U.S. at 150. Further, for there to be a due process violation for failure to correct false testimony, the Defendant must prove that false testimony was given at trial and that the Prosecution knew that the testimony was false. Giglio, 405 U.S. at 153-54.

In this case, all of the material evidence was disclosed by the State prior to Tony Taylor's testimony and there was no false testimony. Mr. Lampton revealed in Open Court that he had told Tony Taylor that he would do what he could to get Mr. Taylor out on bond. This was the only promise made by Mr. Lampton to Mr. Taylor, and both Mr. Lampton and Mr. Taylor testified accurately to this promise.

Prior to calling Mr. Taylor as a witness, Mr. Lampton told the Court that:

> And I want you to know that I have told Tony Taylor if he testifies, he's told me he's scared. **That I'm going to try to see if I can get him out on bond.** I'm concerned about his safety in jail. He knows that. I've talked to Rebecca Taylor.

> And if he testifies in the murder case, **then I'm going to try see if I can get him where he doesn't have to spend, you know, anymore time in jail** until after that comes up.

(Transcript of State v. Albert Lee Thomas, Jr. at page 7) (emphasis added).[1]

Mr. Taylor's testimony mirrored that of Mr. Lampton. Mr. Taylor specifically denied that Mr. Lampton had promised him without qualification that he would get out of jail. (Transcript of State v. Albert Lee Thomas, Jr. at page 13). Instead, Mr. Taylor testified that Mr. Lampton promised that he would try to get him out on bond:

Q. (By Ms. Jackson) Mr. Thomas, for coming in and testifying here today, you have been promised by the U.S. Attorney that he's going to get you bond to get out?
A. No. **He say he gone try.**
Q. **He gone try?**
A. **Yes.**

(Transcript of State v. Albert Lee Thomas, Jr. at page 14) (emphasis added).

Therefore, both Mr. Lampton and Mr. Taylor stated that the State had promised to try to get Mr. Taylor out on bond, which is exactly what was promised. The Defendant was provided truthful and complete information about what promises had been made prior to Mr. Taylor testifying.

It is the Defendant's burden to prove that the Prosecution suppressed any evidence and to prove that there was false testimony at trial. He can not do so. Mr. Lampton and Mr. Taylor, one while under an ethical obligation to speak truthfully to the Court and the other while under oath, independently testified that the promise that Mr. Lampton made to Mr. Taylor was that Mr. Lampton would try to get Mr. Taylor out on bond. To rebut the consistent statements of Mr. Lampton and Mr. Taylor, the Defendant offers nothing more than vague, hearsay testimony from

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[1] The State requested a copy of a transcript of the testimony of Tony Taylor and the statements of counsel immediately prior to such testimony. A copy of the transcript is attached hereto as Ex. 1.

Mr. Frank McWilliams about what his client allegedly told him and an affidavit from Mr. Knapp regarding a completely irrelevant conversation between Mr. Lampton and Xavier McDonald that took place ***after*** the trial occurred.[2] Furthermore, the Defendant cross-examined Mr. Taylor about any representations made to him by the State, and therefore there can be no Brady violation for alleged nondisclosure of evidence. United States v. McKinney, 758 F.2d 1036, 1050 (5th Cir.1985) (where the subject matter of withheld information was brought out in cross-examination there is no Brady violation); United States v. Flores, 63 F.3d 1432, 1464 (5th Cir. 1995); United States v. Tham, 884 F.2d 1262, 1266 (9th Cir. 1989) (same).

The Defendant's "evidence" is wholly insufficient to establish that any evidence was withheld, that any false testimony was given, or that the Prosecution knew that false testimony was given. The Defendant's claims that the State has violated the Defendant's due process rights by failing to disclose material information and by failing to correct false testimony are frivolous and wholly without merit.

III. The Public Defender's Office Had Pre-Trial Knowledge of the Promises It Alleges To Have Been Made.

In order for there to be a Brady violation for alleged nondisclosure of evidence, the

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[2] Mr. Knapp says in his affidavit that he overheard Mr. Lampton tell Ms. McDonald that Tony Taylor (her son) was going to get out of jail "***while waiting the Jury's verdict on the trial.***" (Affidavit of Michael L. Knapp) (emphasis added). The conversation between Mr. Lampton and Ms. McDonald occurred at the end of the business day or after normal business hours on December 1, 2004. Tony Taylor was released on December 1, 2004. (State v. Taylor, Order, December 1, 2004). Therefore at the time this conversation took place, the Order had already been entered that Tony Taylor was going to be released. Mr. Lampton was simply relaying to Ms. McDonald what had already taken place. Furthermore, that Tony Taylor got out of jail is entirely consistent with what Mr. Lampton told the Court and the Defendant he intended to attempt to do. (Transcript of State v. Albert Lee Thomas, Jr. at page 7). Moreover, even if Mr. Lampton's conversation with Ms. McDonald indicated new promises were being made to Ms. McDonald (which it does not), whatever Mr. Lampton might promise Ms. McDonald ***after*** the trial was completed can not be the basis of a Brady or due process violation.

Defendant must show that "the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence." King, 656 So.2d at 1174. In spite of the fact that both Tony Taylor and Mr. Lampton, independently, stated that all that was promised was that Mr. Lampton would try to get Tony Taylor out on bond, the Public Defender's office contends that the Prosecution made additional promises to Tony Taylor. The Public Defender's office is wrong. But, even if the Public Defender's office was correct, the Defendant's Motion reveals that the Public Defender's office had knowledge of the additional promises that it alleges were made ***prior*** to Tony Taylor or Xavier McDonald testifying. In his affidavit, Mr. Frank McWilliams stated that Tony Taylor had informed him of these alleged additional promises in ***November 2000.*** (Affidavit of Frank L. McWilliams). The Defendant filed a motion regarding the State's contact with Tony Taylor on ***November 17, 2004***. (Defendant's Motion to Withdraw, or, in the Alternative, to Exclude State Witnesses from Trial.)

The trial did not start until November 29, 2004. As such, the Public Defender's pleadings admit to knowing of these alleged additional promises prior to the trial. Therefore, even if the additional promises the Public Defender's office alleges to have been made were in fact made (and they were not), there can be no Brady violation for the State's failure to disclose such additional promises because the Public Defender's office had knowledge of these promises prior to either the testimony of Tony Taylor or Xavier McDonald. King, 656 So.2d at 1174; Castillo v. Johnson, 141 F.3d 218, 223 (5th Cir. 1998).

IV. The Defendant Can Not Show That Had the Information Allegedly Withheld Been Disclosed There is a Reasonable Probability That the Outcome of the Trial Would Have Been Different.

In order for there to be a Brady violation for alleged nondisclosure of evidence, the

Defendant must prove "that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." King v. State, 656 So.2d at1174. Likewise, for there to be a due process violation for failure to correct false testimony, the alleged false testimony must be shown to be material. Giglio, 405 U.S. at 153- 54.

The Mississippi Supreme Court has emphasized that "Brady requires a 'reasonable probability' of a different outcome, ***not a mere possibility.***" Todd v. State, 806 So.2d 1086, 1092 (2001) (emphasis added). Further, in order to show a "reasonable probability" a Defendant must prove that "a different result would have been reached had the information been disclosed and presented to the jury." King v. State, 656 So.2d at 1175. In other words, "no Brady violation exists where the evidence in question would not raise a reasonable doubt about guilt under the circumstances." Montgomery v. State, 2004 WL 2609965, *2 (Miss. Sup. Ct. Nov. 18, 2004) (unpublished opinion).

In this case, it is indisputable that the Prosecution disclosed that it had told Mr. Taylor that it would try to get him out on bond and that Mr. Taylor testified to that fact. (Transcript of State v. Albert Lee Thomas, Jr. at 7 and 14). The only matter in dispute is whether the State made additional promises to Mr. Taylor, i.e. that Mr. Taylor would be given a suspended sentence of charges facing him, and whether had those additional promises been disclosed there is a reasonable probability that the outcome would have been different.

The Defendant cannot show that these additional promises would have had a material impact on the Jury's assessment of the credibility of Mr. Taylor, much less that it would have raised a "reasonable doubt about guilt under the circumstances." The Jury was told by Mr. Taylor that Mr. Lampton had promised him that he would try to get him out on bond. Therefore,

the Jury already had a reason to question the credibility of Mr. Taylor. Telling the Jury that Mr. Lampton would get him suspended sentences on charges pending against him and thus get him out of jail would not have provided a set of facts for the jury to assess the credibility of Mr. Taylor materially different from that which the Jury was actually presented with at trial.

The evidence at trial was overwhelming against the Defendant. Telling the Jury that the Prosecution had promised Mr. Taylor that he would get out of jail and get suspended sentences on charges pending against him instead of telling the Jury that the Prosecution had promised Mr. Taylor that the Prosecution would try to get him out of jail would not have raised a "reasonable doubt about guilt [of the Defendant] under the circumstances." Montgomery v. State, 2004 WL 2609965, *2. Therefore, the Defendant cannot show that the evidence alleged to have been withheld or the false statements alleged to not have been corrected were material.

WHEREFORE, PREMISES CONSIDERED, the State of Mississippi prays that the Defendant's Motion be denied.

Respectfully submitted,

DUNN LAMPTON
Special Prosecutor Pro Tempore

BY: 

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CERTIFICATE OF SERVICE

I, H. COLBY LANE, hereby certify that I have faxed and mailed, postage prepaid, a true copy of the foregoing document to:

Brenda Jackson, Esq.
Office of the Hinds County Public Defender
P.O. Box 23029
Jackson, MS 39225

This the 31st day of January 2005.

H. COLBY LANE