IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALBERT LEE THOMAS, JR. — APPELLANT

V. — NO. 2007-KA-1197-COA

STATE OF MISSISSIPPI — APPELLEE

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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V.	**NO. 2007-KA-1197-COA**
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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Albert Lee Thomas, Jr., Appellant
3. Honorable Robert Schuler Smith, District Attorney
4. Honorable Tomie T. Green, Circuit Court Judge

This the 10th day of June, 2008.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: Brenda Jackson Patterson

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STATEMENT OF THE CASE

During the January 2003 Term of the Hinds County Grand Jury, Albert Lee Thomas, Jr., was indicted for wilfully, unlawfully and feloniously, without authority of law, killing and murdering Johnny E. Hampton, in violation of Section 97-3-19(1), Mississippi Code of 1972 as amended. On December 1, 2004, after a trial by jury, Mr. Thomas was convicted and sentenced to a term of Life in the Mississippi Department of Corrections. Feeling aggrieved, he files this appeal.

STATEMENT OF THE FACTS

On August 24, 2002, Albert Lee Thomas, Jr., Mary Henderson and Tony Taylor Jr., were out riding around when Johnny Earl Hampton flagged them down on the corner of Prentiss and Capitol Streets and got into the car. Once in the car, Mr. Hampton told Mr. Thomas he wanted to go hit a lick. Hit a lick meant he would drop him at locations like Vern Addition over by Wood Street and pick him up thirty minutes later. When Mr. Thomas would return to pick up Mr. Hampton, Mr. Hampton would have a pillow case with things in it. For dropping him off, Mr. Hampton would pay him in money and drugs. **T. 338 and 360.**

According to Ms. Henderson and Mr. Thomas, at least two months prior to the above date, Mr. Thomas had suspected Mr. Hampton of stealing cocaine out of his apartment. **T. 305 and 336.** However, Mr. Thomas testified that prior to the day Mr. Hampton flagged him down, he had seen Mr. Hampton five or six times after he believed he had taken his drugs **T. 336.**

Once Mr. Hampton got in the car, they went to the Maple Street Apartment where they all lived. Mr. Thomas went up to his apartment and got some marijuana, Mr. Hampton got out of the car and went near the office of the complex and smoked crack cocaine. **T. 319.** Once Mr. Thomas came down from his apartment, he picked Mr. Hampton up and asked him if he was ready and he

told him yes, he was ready. They left and Mr. Thomas stopped and got gas and a cigar. Mr. Thomas says he asked Mr. Hampton at some point doing the drive did he take his drugs two months earlier. During the argument about the drugs he stopped the car and Mr. Hampton got out of the car and went to the back of the car and Mr. Thomas got out and went to the back with him. During the argument, Mr. Thomas testified that Mr. Hampton pulled out a screwdriver and came at him with the screwdriver and he pulled out his gun and shot him in his left thigh. **T. 341.** (Charles Taylor, crime scene investigator, testified that a screwdriver and a piece of antenna were found inside Mr. Hampton's pocket **T. 191**) Afterwards, they got in the car and Ms. Henderson said Central Mississippi Medical Center was the closet hospital, so he headed to the hospital the route he knew to take. While in route, the car, which had already been making knocking sounds stopped, it would not crank. **T. 342.** Ms. Henderson got in the driver's seat and Tony Taylor pushed the car down the hill. Mr. Thomas testified that Mr. Hampton was limping and he got on his left side, which was the side he had been shot on, and tried to support him as they walked. While Mr. Thomas was assisting Mr. Hampton, Mr. Hampton grabbed his gun and they began tussling for the gun. Two shots fired, one striking Mr. Hampton in the left back of the head. **T. 343-344.** Mr. Thomas further testified that had he had the gun in his hand, he was so close that he would not have missed shooting Mr. Hampton twice. He said Mr. Hampton grabbed the gun and he was trying to keep him from shooting him and the gun fired twice striking Mr. Hampton in the head. He realized that Mr. Hampton was dead, and he panicked and pulled him off the road into a wooded area. **T. 345.**

Neither Ms. Henderson nor Mr. Taylor witnessed the shooting when Mr. Hampton was killed. However, the State called Mr. Taylor as a rebuttal witness to Mr. Thomas' testimony that the first time that he shot Mr. Hampton, which was in the left thigh, was when Mr. Hampton came at him with a screwdriver. Mr. Taylor, who was seated in the rear seat of the automobile at the time

of the shooting, testified, "I ain't see no screwdriver." Also, the State attempted to get the contents of a letter into evidence that Mr. Taylor said Mr. Thomas wrote. The letter was not in Mr. Thomas' handwriting and could not be authenticated. **T. 387.**

In its case in chief, the State called Mr. Taylor's mother, Xavier McDonald who testified that Albert Thomas acted very upset and out of control about his drugs being taken the day Mr. Hampton was killed . She also testified that Mr. Taylor had emotional problems since he was six. His uncle, Robert Henderson, testified that Mr. Taylor was an habitual liar and you couldn't believe a lot that he says. **T. 240 and 266.**

After trial, it was discovered that the prosecutor failed to reveal promises it had made to Ms. McDonald and Mr. Taylor in exchange for their testimony. Mr. Thomas filed his motion for a new trial alleging among other things a due process violation because the prosecution failed to reveal deals made to the above two witnesses. The trial court denied the motion failing to find a due process violation.

STATEMENT OF THE ISSUES

I. WHETHER THE STATE VIOLATED MR. THOMAS' DUE PROCESS RIGHT.

II. WHETHER MR. THOMAS WAS DENIED DUE PROCESS OF LAW BY WITNESS' FALSE TESTIMONY?

SUMMARY OF THE ARGUMENT

I. WHETHER THE PROSECUTOR'S FAILURE TO DISCLOSE PROMISES MADE TO TWO OF ITS WITNESSES VIOLATED MR. THOMAS' DUE PROCESS REQUIRING A NEW TRIAL.

Mr. Thomas contends that his due process rights were violated by the state's failure to reveal several deals made with Tony Taylor and promises to his mother, Xavier McDonald. The state offered to release Mr. Taylor from jail, to give him suspended sentences in two causes and remand the other two causes in exchange for his testimony. The state promised Ms. McDonald, that in exchange for her testimony her son would be given the above deals.

The failure of the state to disclose plea-bargaining agreements or negotiations with key witnesses deprives a defendant of constitutional due process. *Giglio v. United States, 405 U.S. 150 (1972).* [setting aside a conviction where the government failed to disclose its promise to a testifying witness who was an accomplice that he would not be prosecuted in return for his cooperation.] In *Giglio*, the Court held that:

> "When the reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the general rule of Brady][1] ... Here the Government's

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[1] In *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963), the Supreme Court held that suppression by the prosecution of information materially favorable to an accused violates due process regardless of the good or bad faith of the prosecution. Impeachment material is clearly exculpatory and qualifies as Brady material. *United States v. Bagley*, 473 U.S. 667 (1984). The same is true of evidence which provides an additional, though not exclusive, basis of impeachment. *Monroe v. Blackburn*, 607 F.2d 148, 152 (5th Cir. 1979).

> case depended almost entirely on [one witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [His] credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it."

Id., 405 U.S. at 154-155.

Whether the witness or the prosecution intentionally concealed the real deal is not the issue. The "witness" good faith does not render the Brady violation any less material. *United States v. Smith, 77 F.3d 511, 516 (D.C. Cir 1996).*

There is not any difference between exculpatory and impeachment evidence for Brady purposes, favorable evidence is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Kyles v. Whitley, 514 U.S. 419, 431-434(1995)* citing *United States v. Bagley, 473 U.S. at 682.*

In *Kyles*, the Court discussed the meaning of materiality under Bagley emphasizing that a reviewing court must focus on the fairness of the trial the defendant received rather than on whether a different result would have occurred had the undisclosed evidence been revealed.

The Court discussed four aspects of materiality under Bagley. The Court provided that although the constitutional duty is triggered by the potential impact of favorable but undisclosed evidence, Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines

confidence in the outcome of the trial." Id. at 434 citing *Bagley, 473 U.S. at 682.*

The second aspect of Bagley materiality is that it is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. A Brady violation is not shown by demonstrating that some of the inculpatory evidence should have been excluded. It is shown by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. *Kyles v. Whitley, 514 U.S. at 434. FN8.*

Third, once a reviewing court applying Bagley has found constitutional error there is no need for harmless-error review. Because once there has been Bagley error it cannot be found harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at FN9.

The fourth aspect of *Bagley* materiality is its definition in terms of suppressed evidence considered collectively, not item by item. Id. at FN10. The Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. The prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. The prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. Id. at 437-438.

In the present case, even after the defense filed a motion for discovery requesting the state to disclose grants of promises of immunity or other inducements to any person or witnesses for the

state, the state failed to disclose promises and deals made to Tony Taylor and Xavier McDonald.[2] **(See Motion For Discovery R.E. 6-7).** This information could have been used to impeach these witnesses. Therefore, the only remaining issue is whether the impeachment information was sufficiently "material" to establish a Brady violation.

The state called fourteen witnesses. Of those fourteen witnesses the state could not have gotten a conviction for murder without Xavier McDonald and Tony Taylor. Therefore, their credibility as witnesses was an important issue in the case and all evidence of agreements and promises made were relevant to their credibility and the jury was entitled to know of it. Disclosure of the promises made to these two witnesses would have resulted in a different result reasonably probable.

Ms. McDonald's testimony was critical for the state. This witness was the only witness who testified that the day Mr. Thomas' drugs came up missing was the same day he killed Mr. Hampton. Inconsistent with Ms. McDonald's testimony was the testimony of Ms. Henderson and Mr. Thomas who testified that it was as long as two months after Mr. Thomas' drugs came up missing that he killed Mr. Hampton. **T. 305 and 336.**

Ms. McDonald portrayed Mr. Thomas as violent and out of control about his drugs. Her testimony was determinative of his guilt. The following testimony given by Ms. McDonald is offered to support this position:

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Attorney Frank L. McWillams signed an affidavit swearing that his client, Tony Taylor informed him that the U.S. Attorney had promised to release him from incarceration and give him suspended sentences on his pending charges if he would testify against Albert Thomas. The day of his testimony Mr. Taylor was released from jail without bail and promised suspended sentences and remand of two auto burglary cases pending against him. He also swore that Mr. Taylor had informed him that the U.S. Attorney had visited his mother's house and used her telephone to call several people. He said the U.S. Attorney had promised his mother that in exchange for her testimony against Albert Thomas he would release her son from jail and remand some of his cases. **R.E. 57.**

T. 246.

Q. That he was spending time with the defendant and with Mary. Let me direct your attention to Albert Lee Thomas, the defendant, and ask if there was a time - - a period close in time to when John Earl Hampton disappeared that you personally heard Albert Lee Thomas talking about drugs being missing?

A. Albert Lee Thomas came to my house looking for my son Tony, Jr. He asked me where my son was, and I asked him what was wrong. He had been hollering. And as he was approaching my building saying all kinds of things about his drugs had been taken. So when he got to my house, I pretended like I didn't know what he had been saying as he was coming toward my building.

I asked him what was wrong. He said that, "somebody done took my drugs. Where is Tom, Jr. at". I called my other child, and my child told Tom, Jr. to come outside. He came on the steps, and he and Albert Lee started talking. A couple seconds later my son and Albert Lee started to walk off.

I asked my son where was he going. He said, "I'll be back in a few minutes. I've got to straighten out some stuff". Albert Lee said, "come to me. Come show me". Whatever he was going to show him I don't know, but that's what he said to my son as they were walking off away from my building.

Q. Later that day, did you see Albert Lee Thomas, Johnny Earl Hampton, your son and Mary, the woman that lived with the defendant, together in a car?

A. Yes, I did.

Q. And if you would, just tell the ladies and gentlemen of the jury about when that was and what occurred.

A. Late that afternoon my son and Albert Lee got in the car with Mary and left the projects. About 5:30, 6:00 they came back. They went to Mary's house. They didn't stay no longer than maybe 10 or 15 minutes. They got back in the raggedy car that they was in and drove out of the projects. As they were driving out of the projects, my house is sitting on a hump in the front of my building. You have to slow down at that hump to get out of the apartment complex. I was standing there in front of my building, and I started fussing at my son for being in the car with them and leaving out of the projects. Mary turned to me and said, "he'll be all right, mama" over her shoulder, and they left. I didn't see my son again until 2:45 that morning.

Q. What was his condition when you saw him?

A. His clothing was torn on his - - his shirt was torn on his right - - on his left shoulder. He had blood on his pants. One of his shoes was missing. His eyes were blood shot red.

From **T. 248** last paragraph and fourth sentence through **T. 251** Ms. McDonald talks about the condition her son was in when he came back from being with Mr. Thomas, Ms. Henderson and Mr. Hampton. She said her son was hoarse as if he had been hollering and he informed her that if anybody came looking for him to tell them "I ain't here and I ain't been here". She also said he didn't want to talk about what was wrong. Was acting paranoid and thought someone was coming up the stairs. He was grabbing his head and rubbing it and couldn't be still. He was jittery. Finally, he went in her bedroom and jumped out the window and she did not see him for two or three days.

T. 249.

Q. Did you see Albert Lee Thomas any?

A. Yes, I did.

Q. And when did you see him in relationship to when your son came home?

A. He came to my house and asked me where my son was, and he sent two previous guys to my house.

Q. Did you tell him where your son was?

A. I didn't know where my son was.

Q. Did he tell you why he wanted to see your son?

A. No.

Her son came back two or three days later dirty and nasty hadn't had a bath. And at that point in time everybody started coming to my house because they knew her son was home.

Q. You've mentioned Tyson Dixon, the defendant Albert Lee Thomas. Did they come to your house?

A. Yes, they did.

Q. And Johnny Earl Hampton had some relatives and brothers. Did they come to your house?

A. Yes, they did.

Q. If you would, describe for the jury and the Court what happened at your house while Tyson Dixon is there and the defendant is there, what is said?

A. When they came to my house, it was like a mob. They were looking for my son. They all wanted to talk to my son and the defendant and Tyson together because Tyson had been saying around the project complex to me - -

MS. JACKSON: Objection, Your Honor.

THE COURT: Objection sustained.

Q. Did Tyson Dixon and the defendant confront each other there at your house?

A. Yes, they did.

Q. Did they exchange words?

A. Yes, they did.

Q. And what did Tyson Dixon say to the defendant?

MS. JACKSON: Objection, Your Honor.

THE COURT: Objection sustained.

Q. What did the defendant say? What did Albert Lee Thomas say after he had been confronted by Tyson Dixon?

A. "Tony, Jr., what did you tell them. They said you said I killed their brother, their cousin, their uncle. What did you say. What did you tell them". "I ain't did nothing, man". Tom, Jr. Said, "I ain't told nobody nothing. I ain't heard nothing, and I ain't seen nothing". They were all beginning to argue about Tyson confronting the defendant for the things Tyson was saying that he had told him.

Ms. McDonald was one of the two most important witnesses for the state. Her presentation of Mr. Thomas was that he was very upset and angry concerning his drugs in as little as an hour or two before Mr. Hampton was killed. She states the same set of facts as Ms. Henderson does as to the four individuals being together and leaving and coming back to the apartment and leaving again. However, her testimony is crucial aid for the state when she states Mr. Thomas was angry over his

drugs and also places the day that Mr. Thomas was angry over his drugs as the day Mr. Hampton was killed. If the jury had known of the promises made to help her son, they would have found a motive for her to lie and a reason to believe her not to be a credible witness. The record is silent as to her tone of voice, however, her tone testifying during trial was excited, angry and hysterical. She made Mr. Thomas appear to be an awful person. Disclosure of the promises would have raised an opportunity to attack her good faith in testifying.

Also, during cross-examination, Ms. McDonald came to court with a statement to substantiate her testimony, however, that statement was not a part of discovery. She stated that she had her statement in her pocket. The defense never received a copy of the statement she brought to court with her prior to her testifying. The statement provided in discovery appeared to be the entire statement of Ms. McDonald. **T. 254-255.** However, because the defense was not made aware of the promises made to Ms. McDonald, the defense was unable to attack her credibility. Had the defense been able to attack her credibility, the defense would have placed both statements into evidence and attacked her credibility as having fabricated her new statement. It would have been helpful to the jury to know of the promises made to Ms. McDonald and they would have known that the statement that she came to court with was fabricated to substantiate her testimony. They would have had a reason to believe that some of her testimony was exaggerated and fabricated to help her son get out of jail and get some of his charges remanded. There is a reasonable probability that the jury would have reached a different verdict because her testimony help substantiate the charge of intent to kill murder. The verdict reached by the jury was not a verdict worthy of confidence.

Ms. Henderson's testimony not only contradicted Ms. McDonald's testimony as to the time of two months in between the time Mr. Thomas' drugs came up missing and the day Mr. Hampton was killed, but, she also testified that Mr. Thomas was not angry with Mr. Hampton, nor was he

looking for him the day he killed Mr. Hampton. She said that they were riding around and Mr. Hampton flagged them down and asked Mr. Thomas to take him to hit a lick. **T. 318-319.** Ms. Henderson's testimony substantiated the testimony of Mr. Thomas who said that he was not looking for Mr. Hampton and Mr. Hampton stopped him and asked him to take him to hit a lick. **T. 336-337.** Here, the jury reasonably believed both Ms. Henderson had a motive to lie because she dated Mr. Thomas and Mr. Thomas had a motive to lie because he was on trial for his life. However, because they were not presented with the promises made to Ms. McDonald, they did not have any reason not to believe her. Disclosure of the promises would have afforded the defense the opportunity to attack her credibility and her motive to exaggerate and fabricate her testimony. Mr. Thomas testified to the following in reference to Ms. McDonald's testimony that he came to her house hollering and angry about his drugs.

T. 354.

Q. Did you go and talk to Xaviar McDonald about your cocaine being missing:

A. No, sir.

Q. When she says that, that never happened?

A. I swear to God it ain't happen.

Q. Pardon?

A. I swear to God - - I mean I swear to God it ain't never happen. I ain't come to her about no - - never said nothing about no drugs.

Because the deals were not revealed to the jury it would only be reasonable for them to believe Ms. McDonald over Mr. Thomas.

Tony Taylor was the only witness who was in a position to see the initial gunshot received by Mr. Hampton. Mr. Taylor was on the back seat of the vehicle when Mr. Thomas shot Mr.

Hampton in his left thigh standing at the back of the vehicle. Mr. Thomas testified that Mr. Hampton came at him with a screwdriver and he shot him at that time to keep him from stabbing him. Mr. Taylor testified that he saw what happened and he did not see a screwdriver. **T. 387.** This testimony combined with Xavier McDonald's testimony led the jury to believe that Mr. Thomas was not defending himself but just shot Mr. Hampton over drugs. This testimony reasonably further lead the jury to believe that Mr. Thomas was not truthful when he said the final shot came when while he was bracing Mr. Hampton on the side where he was shot while walking, Mr. Hampton grabbed his gun out of his pocket and they struggled for the gun and Mr. Hampton was killed. **T. 343-344.** Mr. Taylor was the most important witness for the state and his credibility was of vital importance. Any agreements and promises should have been revealed to the jury. As the Court in *Kyles* stated, The prosecution's responsibility for failing to disclose the agreement and promises was inescapable because this evidence rose to a material level of importance. *Kyles v. Whitley, 514 U.S. at 438.*

The testimony of Mr. Hampton's nephew, Maurice Williams, was that his uncle had been convicted of armed robbery and that his uncle had two tear drops under his eye which meant that his uncle had killed someone. **T. 216-219.**

Mr. Harold Hampton, the brother of Johnny Hampton, testified that he did not believe his brother had been killed because his brother could take care of himself. He knew how to fin for himself. He said that Johnny was a better guy than that. He may stray off, but he's coming back. **T. 223.**

Ms. Catherine Nell Wilson, Johnny Hampton's mother, testified that her son was 33 years old. **T. 155.** Mr. Thomas was only 21 years old at the time Mr. Hampton was killed.

Based on the above testimony of Maurice Williams and Harold Hampton, that Mr. Hampton could fin for himself and that he had killed someone, it is reasonably probable that the jury would have believed Mr. Thomas and found self defense or manslaughter had they been made aware of the

agreements and promises made to Xavier McDonald and Tony Taylor. Therefore, the failure to reveal the deal undermines confidence in the outcome of the trial.

Also of importance was Dr. Steven Haynes' testimony that Mr. Hampton received a non-lethal gunshot wound to his left thigh and that he would certainly expect some difficulty walking with that type of trauma to the muscle tissue. He said Mr. Hampton still would have remained capable of weight support since the femur, the lone bone in the thigh, had not been fractured. However, he suspected it would have been very painful to walk. **T. 184.** The testimony of Dr. Haynes made it highly probable that Mr. Thomas was assisting Mr. Hampton walking as Mr. Thomas testified. Combining the testimony of Maurice Williams, Harold Hampton and Mrs. Wilson concerning Mr. Hamptons' age along with Dr. Haynes' testimony, there was a reasonable probability that the jury would have believed that Mr. Thomas was assisting Mr. Hampton walking and while Mr. Hampton was being assisted by Mr. Thomas, Mr. Hampton pulled the gun from Mr. Thomas and they struggled and Mr. Hampton was killed at that time.

Confidence that the verdict would have been unaffected cannot survive when evidence benefitting Mr. Taylor and Ms. McDonald was not presented to the jury. The jury would have had reason to doubt the testimony of Mr. Taylor that he did not see a screwdriver in Mr. Hampton's hand especially with a screwdriver being found in Mr. Hampton's pocket. **T.191.** Had the jury been made aware of the bias testimony of these two witnesses, the state's case would have been made much weaker. Here, there is a reasonable probability of a different verdict shown because the failure to reveal the deal undermines confidence in the outcome of the trial.

On December 1, 2004, the day he testified against Albert Thomas, Tony Taylor was ordered released on his own recognizance from the Hinds County Detention Center on cause numbers 03-0-

847 counts 1and 2 and 03-0-848 counts 1 and 2.[3] Included in that order releasing him on his own recognizance was a **scheduled plead date for those four charges,** set for December 10, 2004. **R.E. 53.** On December 15, 2004 cause number 03-0-848 counts 1 and 2 were ordered remanded to the files as part of the plea agreement in 03-0-847. **R.E. 54.** On March 9, 2005, Tony Taylor was ordered to receive a 3 year suspended sentence in cause 03-0-847 counts 1and 2. These causes were ordered to run concurrent.[4]

Now the State may argue that there is no proof that these deals were in place prior to trial. However, this argument against knowledge is common and the law of circumstantial evidence allows reasonable inferences to be drawn. The fact that Mr. Taylor was released on his own recognizance the day he testified against Mr. Thomas with the date set to resolve the four felony cases he was being held on included in the order releasing him is too obvious that prior knowledge existed. Then on December 15, 2005, two of those cases were remanded referring to the other two causes as part of a plea deal. An even though the suspended sentences were received in March, the two previously mentioned documents had already referenced pleas on these two cases.

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[3] Mr. Thomas offers the affidavit of Attorney Michael Knapp who was co-counsel at his trial in support of his position that the U.S. Attorney failed to reveal the deal offered to Tony Taylor. The affidavit states that during jury deliberation Mr. Knapp overheard the U.S. Attorney tell Xavier McDonald that Tony would be getting out of jail shortly and not to let him get into any more trouble. R.E. 55

[4] A motion to supplement the record was filed May 8, 2008, which has attached two sentencing orders. In cause 03-0-847 count 1, Mr. Taylor pled guilty to receiving stolen goods and in cause 03-0-847 count 2, he pled guilty to possession of burglary tools. In each cause Mr. Taylor received identical sentences of 3 years suspended and 2 years supervised probation. Both causes were run concurrent to each other.

II. WHETHER MR. THOMAS WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION WHEN WITNESS FALSELY TESTIFIED THAT U.S. ATTORNEY HAD MADE NO PROMISE OF CONSIDERATION, AND U.S. ATTORNEY DID NOTHING TO CORRECT FALSE TESTIMONY OF WITNESS.

During trial, after the defense rested, the U. S. Attorney informed the trial court that he intended to call Tony Taylor in rebuttal and at that time he notified the defense that the state was going to try to get Tony Taylor out of jail.

The U. S. Attorney stated the following:

T. 385

MR. LAMPTON: 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.

THE COURT: It has no importance to me. You have him on cross. Bring the jury in.

T. 390-391.

Q. Okay. You're here today, Mr. Taylor. You've been promised to get out of jail for coming in today, haven't you?

A. No, ma'am.

Q. You've been promised that the U.S. Attorney here, Mr. Lampton, is going to get you out of jail (indicating)?

A. No, ma'am.

Q. No promises have been made to you?

A. Ain't no promise been made.

MS. JACKSON: Court's indulgence. Your Honor, we need to approach the bench.

THE COURT: Yes.
(OFF-THE-RECORD BENCH CONFERENCE)

Q. (By Ms. Jackson) Mr. Thomas , for coming in and testifying here today, you had been promised by the U.S. Attorney that he's going to try to get you bond to get out?

A. No, sir. He say he gone try.

Q. He gone try?

A. Yes, ma'am.

Q. He promised you, didn't he?

A. No, ma'am.

Q. He promised you he was going to try, didn't he?

A. No, ma'am.

Q. And you're in jail for auto theft and receiving stolen goods. That's what you just testified to, right?

A. Yes, ma'am.

The false testimony of a witness for the state that he had received no promise of consideration in return for his testimony, though in fact the state had promised the witness consideration, and the state did nothing to correct testimony was a denial of due process of law in violation of the Fourteenth amendment to the Federal Constitution. *Napue v. State*, 360 U.S. 264 (1959). In *Napue* the alleged false testimony of [the witness] first occurred on his cross-examination:

Q. Did anybody give you a reward or promise you a reward for testifying?

A. There ain't nobody promised me anything.

Q. (By the Assistant State's Attorney) Have I promised you that I would recommend any reduction of sentence to anybody?

A. You did not.

Id. at 267.

The Court in Napue provided that a conviction obtained through use of false evidence, known to be such by representatives of the state, must fall under the Fourteenth Amendment. Napue at 269 citing Mooney v. Holohan, 294 U.S. 103 (1935). In *Mooney*, the Court established the rule that the knowing use by a state prosecutor of perjured testimony to obtain a conviction and the deliberate suppression of evidence that would have impeached and refuted the testimony constitutes a denial of due process. The Court reasoned that "a deliberate deception of court and jury by the presentation of testimony known to be perjured" is inconsistent with "the rudimentary demands of justice." *Bagley at 680 citing Mooney at 112.* The Court in *Bagley* went further and cited *Pyle v. Kansas, 317 U.S. 213 (1942)*, where the Court held allegations that the prosecutor had deliberately suppressed evidence favorable to the accused and had knowingly used perjured testimony were sufficient to charge a due process violation. Id. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Napue at 269 citing Alcorta v. State of Texas, 355 U.S. 28 (1957).*

The Court in *Napue* stated that, "the principle that a state may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Id. at 269.

The *Napue* Court went further and provided, "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and

duty to correct what he knows to be false and elicit the truth. * * * That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair." Id. at 269-270 citing *People v. Savvides, 1 N.Y.2d 554 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 8540855.*

In the present case, Mr. Taylor denied that the U.S. Attorney promised to get him out of jail and even denied that he **promised to try** to get him out of jail. The U.S. Attorney never tried to correct Mr. Taylor's testimony. In fact, after cross-examination of Mr. Taylor, the trial court asked if any side had further need of Mr. Taylor and the U.S. Attorney said, "No ma'am." **T. 391.**

While awaiting the Jury's verdict on Mr. Thomas' trial, Attorney Michael Knapp overheard U.S. Attorney Lampton tell Xavier McDonald that Tony would be getting out shortly and instructed her not to let Tony Taylor get into any more trouble.[5] Tony Taylor was the only rebuttal witness called by the state. Jury instructions, closing argument and jury deliberations followed.

Mr. Taylor was released on his own recognizance on December 1, 2004, the day of his testimony. **R.E. 53.** Included in the order releasing him on his own recognizance was a scheduled plea date for all of his pending charges. As previously stated in Argument I, two of those felony cases were remanded to the file and on the other two felony cases he received suspended sentences. **R.E. 54 and see footnote 4.**

Had the jury been apprised of the true facts, they might well have concluded that Mr. Taylor fabricated not having seen Mr. Hampton come at Mr. Thomas with a screwdriver in order to curry the favor of U.S. Attorney Lampton, who provided for his release from incarceration shortly after his testimony.

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[5] See Affidavit of Attorney Michael Knapp R.E. 55.

The state may very well attempt to argue that the U.S. Attorney did not know that Mr. Taylor would be released, however, the implication of knowledge is too strong to overlook. The attorney prosecuting Mr. Taylor would not have had any reason to tell the U.S. Attorney anything other than she would release him because that is what she did. Reasonable inferences may be drawn from the circumstances surrounding the release of Mr. Taylor to conclude that if the U.S. Attorney knew that Mr. Taylor was being released while the jury was deliberating, he knew it when Mr. Taylor was testifying.

The false testimony used by the state in securing the conviction of Mr. Thomas may have had an effect on the outcome of the trial. Therefore, according to the Court in *Napue*, the judgment of the trial court should be reversed.

CONCLUSION

Release of Mr. Taylor on his own recognizance the day of his testimony, remand of two of his felony cases and giving him suspended sentences on the other two of his felony cases was material and, therefore, should have been disclosed to Mr. Thomas under Brady. Failure to disclose this impeachment evidence prevented Mr. Thomas from receiving a fair trial, understood as a trial resulting in a verdict worthy of confidence. Also, the false testimony, of Tony Taylor, used by the state in securing the conviction of Mr. Thomas may have had an effect on the outcome of the trial. Therefore, the judgement of the trial court should be reversed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Brenda Jackson Patterson, Counsel for Albert Lee Thomas, Jr., do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

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This the 10th day of June, 2008.

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