

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

VIRTY LEE THAMES

APPELLANT

VS.

CAUSE NO. 2007-KA-01573-COA

STATE OF MISSISSIPPI

APPELLEE

Appeal from the Circuit Court of  
Newton County, Mississippi  
Criminal Action No. 07-CR-018-NW-G

**REBUTTAL BRIEF OF APPELLANT**

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### **STATEMENT REGARDING ORAL ARGUMENT**

The State's Brief, though technically well prepared, is largely a justification of the performance of Virty Lee Thames' trial counsel's performance in his defense of Thames. An objective reading of the issues raised as to conflict of interest and ineffective assistance of counsel at sentencing will show the State ignored the substantive questions raised by Thames in his direct brief. This is an area in the judicial system of our State that requires enhanced examination at this time, and, in Thames' case would require oral argument to receive a full examination by this Court.

For this reason, Virty Lee Thames respectfully requests oral argument in his case as permitted under **Miss.R.App.P., Rule 34(b)**.

## **SUMMARY OF THE REPLY ARGUMENT**

There is something very wrong in the case of Virty Lee Thames. In his first collision with the criminal justice system in Mississippi, Thames was absolutely hammered for a brief possession of cocaine, while doing nothing more than running an errand for his then employer, Otha Wheaton. Thames' employment with Wheaton was as a mechanic, not a drug runner.

Thames' counsel had, at best, dual loyalties. Apparently trial counsel had been counsel for Otha Wheaton for a number of years. When Wheaton arranged to have his said counsel also represent Thames, an inescapable conflict arose. The total record of the case demonstrates a shielding of Wheaton from examination in Thames' defense. At sentencing, it was particularly apparent that Thames was not allowed to use all his weapons for mitigation in his defense. This is ineffective assistance.

The Jury Verdict was equally flawed in Thames' case, especially as to the level of guilt. Though presented with an option as to a lesser offense, the Jury just ignored same. This could have been corrected by the trial judge at sentencing, but the trial judge was not given the full story.

Virty Lee Thames has changed his employment and associations, including Otha Wheaton. To warehouse him into the M.D.O.C. for fifteen years would be a travesty of both justice and decency. Thames requests this Court's reversal of this travesty.

## **REPLY ARGUMENT AND CITATION OF AUTHORITIES**

### **1. The actual conflict of interest of trial counsel was prejudicial to Thames' defense.**

It is instructive that as to both the "conflict of interest" issue and the "ineffective assistance of counsel at sentencing" issue raised by Thames, the State did not respond in a substantive manner, rather only sought to justify Thames' trial counsel's performance. To simplify the discussion on these issues, the performance of trial counsel was not adequate under Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984), especially considering the breakdowns which occurred during the sentencing phase.

What is further instructive on these issues is the fact that although both Thames and Otha Wheaton were a part of the single investigation, (RE-54-56), only Thames has to date been tried, and Wheaton has not even been indicted as of June 27, 2008, as revealed from the records of Newton County. But, it was *Wheaton* who Donna Keel called for delivery of the cocaine. (T-56) And, it was *Wheaton's* man who threatened Ms. Keel and her family. (T-65) This indicates something is seriously wrong in the prosecution of Thames as a "drug dealer". (State's Brief at Page 3).

As the record is incomplete as to the prosecution of Wheaton in this specific case, we must assume the dual representation continues, contrary to the pronouncements of Jones v. State, 883 So.2d 578 (Miss. App. 2003). As such, and as argued by Thames, it is for this Court to determine whether **Rule 1.7, Rules of Professional Conduct** was violated in his case. Thames continues to contend he was materially limited in the presentation of his case.

The ineffective assistance of counsel at sentencing phase is even more acute. Incorporating the authorities cited in his initial Brief, Thames asserts these distinguish Caldwell v. State, 953 So.2d 266 (Miss.App. 2007), and that his said cited authorities refute the State's argument that failing to

present witnesses at sentencing hearing is not ineffective assistance. To be sure, trial counsel did make a plea for mercy. However, the fact that Thames was prepared to present four non-related, impartial witnesses, (RE-50), at sentencing for mitigation purposes, and this request was ignored by trial counsel, raises a very real question as to effective assistance of counsel in failing to present this evidence at sentencing. Spicer v. State, 973 So.2d 184 (Miss. 2008).

Finally, as this, and other issues affecting both the Bar and the Judiciary has recently been discussed in **The Mississippi Lawyer**, January-February, 2008, Page 10, et seq. An increased scrutiny is being placed upon the entire judicial system. In Thames' case this Court is presented with a factually undisputed situation that requires a thorough examination of these delicate and important matters. Thames requests this examination.

## **2. The Jury Verdict in this case was incorrect as to the "sale" of cocaine.**

Admittedly, this is a high hill for Thames to climb, as discussed in his direct Brief. There is the video tape, there is the testimony of Ms Keel, and of the various agents involved in this case. But was it a "sale" by Thames or merely a *possession*? This was raised at trial, but apparently ignored by the fact finder.

Thames contends his was mere *possession*, pursuant to Berry v. State, 652 So.2d 745 (Miss. 1995), wherein it was announced that any possession, however fleeting, is sufficient for conviction. Yet even Berry makes the distinctions between ownership, payment and control. Delivery, standing alone, does not constitute a sale. Sumrall v. State, 257 So.2d 853, appeal after remand. 272 So.2d 917 Miss. 1972). An examination of the testimony and evidence in this case, even in the light most favorable to the State, would demonstrate the cocaine belonged to Otha Wheaton and was delivered

to Donna Keel solely in response to her request voiced solely to Thames employer, Wheaton. The prejudicial effect to Thames of the lapses in his Counsel's handling of the case was not only substantial, **Brown v. State**, 969 So.2d 891 (Miss.App. 2007), They were fatal to Thames in his defense. This requires an examination by this Court. It cannot be justified.

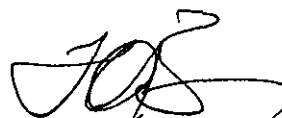
### CONCLUSION

Virty Lee Thames was a man with problems, and these problems finally caught up with him. The outcome at trial was grossly disproportionate to his culpability, and was controlled by another—Otha Wheaton-- who had much more to lose. Thames now has his life back on track but faces the only punishment meted out in this case, though he was only a delivery man . This requires review by this Court.

Thames respectfully submits that a review of the entire record in his case will demonstrate that the facts as here asserted are precisely what occurred. He further submits that he has presented abundant facts, reasons and authorities for reversal of his conviction. Virty Lee Thames respectfully requests that this Court reverse and render the Conviction and Sentence of the Circuit Court of Newton County, Mississippi, or alternatively that this Honorable Court remand this cause to said Newton County Circuit Court for trial on the crime of possession of a controlled substance, or for re-sentencing.

VIRTY LEE THAMES, Appellant

By: \_\_\_\_\_



THOMAS Q. BRAME, JR.,  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, Thomas Q. Brame, Jr., attorney fo record for the Appellant, Virty Lee Thames, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing Rebuttal Brief, by United States Mail, postage prepaid, to the following listed persons:

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CERTIFIED this, the 21<sup>st</sup> day of July, 2008.



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