IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

PAUL MOORE **APPELLANT**

V. **NO. 2009-KA-0063-COA**

STATE OF MISSISSIPPI **APPELLEE**

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. Paul Moore, Appellant
3. Honorable Robert Schuler Smith, District Attorney
4. Honorable W. Swan Yerger, Circuit Court Judge

This the 10 day of November, 2009.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY: _____

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39205
Telephone: 601-576-4200

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STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Hinds County, Mississippi, and a judgment of conviction for the crime of intimidating a witness. Moore was sentenced to five (5) years with

the Mississippi Department of Corrections. Moore is currently in the custody of the Department of Corrections following a jury trial on August 7, 8, 19, 2008, Honorable W. Swan Yerger, presiding.

Following the trial, trial attorney for Moore discovered that an Immunity Agreement was signed on June 24, 2008, by material and complaining witness, Harold Hackett, and the District Attorney, Robert Smith. Moore filed with the trial court, a revised Motion to Permit Out of Time Amendment to Motion for New Trial previously heard and decided. The trial court denied this motion. Moore thereafter filed a writ for extraordinary relief with the Mississippi Court of Appeals. Moore asked the court to reman jurisdiction to Hinds County Circuit Court so the issue could be heard. The Mississippi Court of Appeals granted the Motion. On March 23, 2009, the trial court heard Moore's Amended Motion for a New Trial, which was subsequently denied by the trial court.

FACTS

On February 1, 2008, Sharrod Moore was arrested on the charge of capital murder for allegedly killing Officer R.J. Washington. Tr. 140. Sharrod Moore was indicted and arrested based on the statements made by Harold Hackett[1] (Hackett). Hackett was one of the key witnesses involving the death of Officer R. J. Washington. Tr. 142.

On February 2, 2008, Hackett filed a complaint against Paul Moore (Moore). Tr. 141. According to the testimony of Officer Felix Hodge, Hackett came down to the police station on February 2, 2008, to press charges for Moore pointing a gun at Hackett. Tr. 168. Officer Hodge testified that during his interview with Hackett, Officer Hodge learned that Moore made a threat to Hackett. Tr. 168-69. During this threat Hackett was told that he needed to go down to the police department and tell the police that he did not know anything about the murder of Officer R.J.

[1]Harold Hackett is also known as Howard Hackett.

Washington. Tr. 169. Hackett relayed that message to Officer Hodge that if he did not do as Moore told him then Moore was going to kill him. Tr. 170.

According to the testimony of Tamara Cheatham (Tamara), on February 2, 2008, she was at the Van Winkle Pool Hall with Hackett. Tr. 225, 229. Moore walked in and asked to talk to Hackett. Tr. 230. Hackett and Moore then went outside. *Id.* Tamara claimed that she heard some arguing or talking, but that the conversation did not appear to be friendly. *Id.* Since Moore and Hackett used to be close, Tamara stated that she got in between both of them. *Id.* Tamara continued to testify that she did not know exactly what they were discussing; however, because of rumors and other conversations she knew what they were talking about. *Id.* She thought that they were talking in reference to the R. J. Washington murder. Tr. 231. Tamara stated that she heard Moore telling Hackett that he needed to go down to the police department and tell them that he had lied. Tr. 230. Tamara also stated that she heard Moore tell Hackett that he came down there to kill Hackett, but that he needed to go down to the police department and tell them that he lied. Tr. 231. Tamara claimed then Moore pulled out a gun. Tr. 232. However, Moore allowed Hackett to walk away and get in his vehicle. Tr. 233.

Cory Brown (Brown), who is Hackett's cousin, stated that he was with Hackett on February 2, 2008. Tr. 251. Brown testified that Moore came into the pool hall and got Hackett to go outside. *Id.* Brown said that Hackett came back inside and told Brown to come on and hurry up and come outside. *Id.* Brown claimed he walked outside and heard Moore say to Hackett that he had come down there to kill you for my brother. *Id.*

Brown asserted that he did not say anything because the guy had a gun. *Id.* Brown further stated that Moore all of the sudden pointed the gun in Hackett's face and told him that he should kill

him right then. Tr. 252. Brown then got in the truck and finally Hackett was able to get into the truck and they left the pool hall. *Id.*

Officer Reggie Jones (Officer Jones) testified that he received a page from Hackett on the night of February 2, 2008. Tr. 275. Upon talking to Hackett, Officer Jones learned of the incident at the pool hall between Hackett and Moore. Id. Hackett relayed to Officer Jones that he had a confrontation with Moore and that Moore was there to kill him for talking about some charges that had been brought up about Sharrod Moore. *Id.* Officer Jones told Hackett to go down to the Jackson Police Department and file some charges against Moore. Tr. 275-76.

Hackett did not want to testify. However, Hackett did say that someone pulled a gun on him but it was not Moore. Tr. 200. He did not see who pulled a gun on him. *Id.* Hackett furthermore stated that he did not even want to press charges against Moore. Tr. 202. Hackett went down to the Jackson Police Department because someone had pulled a gun on him. Tr. 203. He only thought Moore was the one who pulled the gun on him, but it was not Moore. *Id.*

Hackett told the Jackson Police Department and his probation officer that Moore did pull a gun on him at the pool hall. Tr. 205, 209. Hackett claimed that he thought it was Moore who pulled a gun on him at the pool hall. Tr. 210. The person that pulled a gun on him was short like Moore, but he had a vest and a mask covering his body. Tr. 210-11.

Hackett testified on cross-examination that Moore did not intimidate him. Tr. 212. Moore did not pull a gun on him. *Id.* In fact, Hackett stated that he hugged Moore. *Id.*

SUMMARY OF THE ARGUMENT

The State violated Moore's rights under the Confrontation Clause and the Rules of Discovery for failing to disclose an Immunity Agreement between the State and their material and complaining witness, Hackette. The trial court should have granted Moore's motion for a new trial to allow the

evidence of the Immunity Agreement to be reviewed by the jury. This Court should reverse the trial court and remand the case for a new trial.

The verdict was against the weight of the evidence. The material and complaining witness in Moore's case testified that Moore was not the person who pulled a gun on him. Hackett even continued to state that Moore was his best friend. The verdict was against the overwhelming weight of the evidence and Moore is entitled to a new trial.

ARGUMENT

ISSUE NO. 1

THE TRIAL COURT ERRED IN DENYING MOORE'S MOTION FOR A NEW TRIAL AFTER THE STATE FAILED TO COMPLY WITH DISCOVERY RULES BY FAILING TO DISCLOSE AN IMMUNITY AGREEMENT OF A MATERIAL WITNESS.

Litigation regarding witness leniency/immunity agreements have heretofore arisen in the context of the State's having failed or refused to disclose the agreement. In that context, the law is clear that the immunity deal must be disclosed to the defense. ***Giglio v. United States***, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); ***DeMarco v. United States***, 415 U.S. 499, 94 S.Ct. 1185, 39 L.Ed.2d 501 (1974); ***King v. State***, 363 So.2d 269 (Miss. 1978).

In ***Suan v. State***, 511 So.2d 144 (Miss. 1987), the Mississippi Supreme Court stated the following:

> "Two related premises established in our law coalesce here. Evidence that a material witness has received favored treatment at the hands of law enforcement authorities, particularly where that witness is himself subject to prosecution, is probative of the witness' interest or bias and may be developed through cross-examination or otherwise presented to the jury. *See* ***Malone v. State***, 486 So.2d 367, 368-69 (Miss. 1986); ***Hall v. State***, 476 So.2d 26, 28 (Miss. 1985); ***Barnes v. State***, 460 So.2d 126, 131 (Miss. 1984); ***King v. State***, 363 So.2d 269, 274 (Miss. 1978); ***Sanders v. State***, 352 So.2d 822, 824 (Miss. 1977). More generally, one accused of a crime has the right to broad and extensive cross-examination of the witnesses against him, and especially is this so with respect to the principal prosecution witness. *See* ***Foster v. State***, 508 So.2d 1111 (Miss. 1987); ***Miskelly v. State***, 480 So.2d 1104, 1108-12

(Miss. 1985); ***Myers v. State***, 296 So.2d 695, 700 (Miss. 1974). Not only is this right secured by our rules of evidence, *see* **Rule 611(b), Miss.R.Ev.**, it is a function of the confrontation clauses of federal and state constitutions."

The Mississippi Supreme Court has held in numerous decisions that evidence of an immunity agreement between a key witness and the State is reversible error when the immunity agreement is removed from the jury's consideration. ***King***, 363 So.2d at 274; ***Suan***, 511 So.2d at 146-48; ***Foster***, 508 So.2d at 1112-15; ***Malone***, 486 So.2d at 367-69; ***Fuselier v. State***, 468 So.2d 45, 51-52 (Miss. 1985).

The Mississippi Supreme Court explained in a lengthy discussion about the importance in disclosing an immunity agreement to the defense in ***King***. The Court in ***King*** held[2]:

> "[t]he testimony of Romanus, whether true or untrue, was purchased by a grant of immunity, . . . specifically, freedom from life imprisonment. We, of course, do not know what effect the grant of freedom had upon his testimony, but the potential of its affecting the witness's credibility is so great that it cannot be ignored. A jury always has great responsibility in resolving factual disputes and its responsibility in cases of this nature is awesome. It needs, and the courts must afford, every proper assistance to the jury in its search for the truth. Essential to this effort is knowledge of the inducements likely to affect the witness's credibility so it may be considered by the jury in its deliberations . . .
>
> [T]he truthfulness of Romanus' testimony could not likely be ascertained, in our opinion, without consideration of the witness's credibility. The importance of his testimony is obvious and it is also incriminating, but its effect, however material and relevant, could be instantly swept away if the jury believed it to be untrue, the product of purchase rather than material evidence honestly expressed.
>
> A witness's credibility is of such importance in our system of justice that all courts recognize the great need for, and grant, broad scope upon cross-examination, but even then at times, regardless of the skillfulness of the cross-examination, essential facts, regretfully, do not come to the jury's attention. Presently, the court had knowledge of the immunity and in our opinion should have responded affirmatively to the motion to disclose rather than leave its discovery to the less certain standard of cross-examination."

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[2] While this discussion is quite lengthy, the Mississippi Supreme Court's analysis of the importance of disclosing an immunity agreement was stated with great profoundness.

King v. State, 363 So.2d 269, 274 (Miss. 1978).

Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), is the seminal case and informative on the relief sought. While there are occasions that newly discovered evidence, post trial, may not always require a reversal of the conviction, the United States Supreme Court in ***Giglio***, supra, stated the following:

> While newly discovered impeachment evidence is not usually sufficient grounds for a new trial, a new trial is required when the State has failed to disclose evidence of an agreement for the testimony of a material witness and there is a reasonable likelihood the non-disclosure affect the verdict. *Id* at 204 n. 3.

Thereafter ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S.Ct 1194, 1196-97, 10 L.Ed. 2d 215, 218 (1963), held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." *See* American Bar Association, Project on Standards for Criminal Justice, Prosecution function and the Defense Function3.11 (a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.

In the case at hand, Moore filed and served the District Attorney's Office with a motion for Discovery on April 8, 2008. The trial commenced on August 7, 2008. Moore learned during discussions with the trial judge that a lengthy transcribed statement was taken from the material and complaining witness, Harold Hackett, that had not been previously turned over to Moore. The trial was continued until August 17, 2008.

On January 23, 2009, Moore's defense counsel was handed an Immunity Agreement that was signed on June 24, 2008, by material and complaining witness, Harold Hackett, his attorney, and District Attorney, Robert Smith. The agreement was approved by Circuit Court Judge W. Swan Yerger. The Immunity Agreement was never before given as discovery in the against Moore or to Moore's counsel.

The Immunity Agreement grants Harold Hackett "full use, transactional, and absolute immunity from prosecution for any part he may have played in the commission of any such crime investigated." Moore was one of the parties whose criminal activities were being investigated.

The District Attorney had a duty to timely disclose to Moore the existence of the Immunity Agreement and failed to do so. The failure of the State to disclose the immunity agreement between the State and Howard Hackett violated Moores' rights under the Confrontation Clause and the rules of discovery. A new trial is mandated by the United States Supreme Court and applicable Mississippi cases.

ISSUE NO. 2

THE TRIAL COURT ERRED IN DENYING PAUL MOORE'S MOTION FOR A NEW TRIAL BECAUSE THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

"When reviewing a denial of a motion for a new trial based on an objection to the weight of the evidence, we will only disturb a verdict when it is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Herring v. State***, 691 So.2d 948, 957 (Miss.1997)). In reviewing such claims, the Court "sits as a thirteenth juror." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(citing ***Amiker v. Drugs For Less, Inc.***, 796 So.2d 942, 947 (Miss.2000)(footnote omitted)).

"[T]he evidence should be weighed in the light most favorable to the verdict." ***Herring***, 691 So.2d at 957. "A reversal on the grounds that the verdict was against the overwhelming weight of the evidence, 'unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict.'" ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)). It means that "as the 'thirteenth juror,' the court simply disagrees

with the jury's resolution of the conflicting testimony," and "the proper remedy is to grant a new trial." ***Bush v. State***, 895 So.2d 836, 844 (Miss. 2005)(quoting ***McQueen v. State***, 423 So.2d 800, 803 (Miss.1982)(footnote omitted)).

The material and complaining witness, Hackett, unwillingly testified before the court. Hackett stated that Moore was not the person that pulled a gun on him at the pool hall. Tr. 200. Hackett continued to say that someone walked into the pool hall and pulled a gun on him but he does not know who that person was with the gun. Tr. 202

Hackett went to the police department after the alleged incident and told the police that Moore was the person he thought had pulled the gun. Tr. 203. However, in his testimony Hackett told that Moore was not the person that pulled the gun. *Id.*

Hackett continued to state that the statement he had previously made was a lie. Tr. 208. Hackett even said that he did not remember making that previous statement claiming that the someone else even wrote or typed the statement. *Id.*

Even on cross-examination, Hackett testified that Moore was his best friend and that he even hugged Moore. Tr. 212. Hackett continued that at the time he thought that it was Moore, but it was not him. *Id.* Hackett even claimed that the person with the gun had on a mask. Tr. 210.

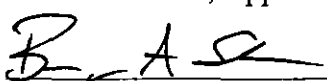
The verdict was against the overwhelming weight of the evidence. Paul Moore therefore respectfully asserts that the foregoing facts demonstrate that the verdict was against the overwhelming weight of the evidence, and the Court should reverse and remand for a new trial.

CONCLUSION

Paul Moore respectfully requests that his conviction for intimidating a witness be reversed and remanded for a new trial.

Respectfully submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS
For Paul Moore, Appellant

BY: 

BENJAMIN A. SUBER
MISSISSIPPI BAR NO. 102214

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 N. Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200

CERTIFICATE OF SERVICE

I, Benjamin A. Suber, Counsel for Paul Moore, 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:

Honorable W. Swan Yerger
Circuit Court Judge
P. O. Box 2332
Jackson, MS 39205

Honorable Robert Schuler Smith
District Attorney, District 7
Post Office Box 22747
Jackson, MS 39225

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

This the 10 day of November, 2009.

Benjamin A. Suber
COUNSEL FOR APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201
Telephone: 601-576-4200