

No. 15-5399
DEATH PENALTY CASE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANDREW THOMAS

Petitioner-Appellant

v.

BRUCE WESTBROOKS, Warden

Respondent-Appellee

BRIEF OF APPELLANT
(Corrected)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

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Statement Regarding Oral Argument

Andrew Thomas respectfully requests oral argument in his death penalty case.

Statement of Jurisdiction

Andrew Thomas petitioned the United States District Court for the Western District of Tennessee for a writ of habeas corpus.¹ Thomas sought relief under 28 U.S.C. § 2254 due to his unconstitutional conviction and sentence of death imposed by the Criminal Court of Shelby County, Tennessee. On March 30, 2015, the District Court entered a final judgment: (1) denying Thomas relief as to all claims raised in the petition, (2) denying a certificate of appealability, and (3) denying *in forma pauperis* status on appeal.² On April 21, 2015 Thomas filed a timely notice of appeal.³ Subsequently this Court granted Thomas permission to proceed *in forma pauperis*.⁴ This Court also granted a certificate of appealability as to all claims on which Thomas petitioned for certificates, which are briefed below.⁵ Jurisdiction lies under 28 U.S.C. § 1291 and § 2253.

¹ Petition for Writ of Habeas Corpus, RE 1, Page ID 1-218

² Judgment, RE 103, Page ID 12246

³ Notice of Appeal, RE 104, Page ID 12247

⁴ Order, 6th Cir. Doc. 11-1

⁵ Order, 6th Cir. Doc. 17-1

Issues Presented for Review

- 1. (Brady issue):** Angela Jackson was the State’s key witness linking Thomas to the robbery and shooting of James Day. She was secretly paid \$750 by law enforcement for her “services” in Thomas’ earlier federal trial. The parties have stipulated that the prosecution withheld this exculpatory evidence from the defense. To obtain relief under *Brady v. Maryland*, only one question remains: Is there a reasonable probability that had the \$750 payment to Jackson been disclosed the result of the trial would have been different?
- 2. (False testimony issue):** Prosecutors may not permit a witness to testify falsely. Law enforcement secretly paid \$750 to Angela Jackson, the State’s key witness. During Thomas’ trial, Jackson repeatedly testified that she did not receive a reward or “one red cent.” The Warden concedes that only two points remain in dispute for Thomas to obtain relief on this claim: Was Jackson’s testimony false? If so, could this false testimony have affected the jury verdict?
- 3. (I.A.C. no medical causation defense):** Day died two and a half years after he was shot, due to a massive infection, complicated by diabetes and Coumadin toxicity. A pathologist advised Thomas’ defense counsel to

consult a neurosurgeon to explore whether Day's death was causally related to the gunshot wound. Counsel did not do this. A neurology expert could have testified that Day's death was not was not caused by the gunshot. Was defense counsel ineffective?

- 4. (I.A.C. related to admission and use of Bond's confession):** The Sixth Amendment prohibits the prosecution from introducing the confession of a non-testifying co-defendant as evidence against the other defendant. The prosecution admitted into evidence the confession of Anthony Bond, Thomas' co-defendant, which contained a description of Bond's accomplice that matched Angela Jackson's description of Thomas at trial. Thomas' counsel did not object or even request a limiting instruction. The State courts acknowledged that this evidence should have been inadmissible and counsel erred by failing to request a limiting instruction. Was defense counsel ineffective?

- 5. (Characterization of Thomas as "Greed and Evil"):** During their opening and closing arguments, prosecutors referred to Thomas and Bond as "Greed and Evil" 21 times. The state courts acknowledged that this characterization was improper. Was this prosecutorial misconduct harmless? Was defense counsel ineffective by failing to object and request a curative instruction?

- 6. (I.A.C. for failure to present evidence that Bobby Jackson was the perpetrator):** Was defense counsel ineffective for failing to present evidence to the jury that another individual, Bobby Jackson—and not Thomas— committed the crime with Anthony Bond?
- 7. (I.A.C. – Cumulative error):** Is Thomas entitled to relief due to the cumulative errors of counsel?
- 8. (Failure to instruct as to lesser included offenses):** Due process mandates that a trial court instruct the jury as to lesser included offenses in a capital case. At Thomas’ trial the court refused to instruct the jury as to any lesser included offenses of felony murder. The Tennessee Supreme Court conceded that the trial court erred, but found the error to be harmless. Was this error harmless?
- 9. (Actual innocence):** Thomas has presented compelling evidence that Anthony Bond and Bobby Jackson perpetrated the Walgreen’s robbery and shooting of James Day. Is Thomas actually innocent?
- 10. (Actual innocence – causation):** To be guilty of felony murder, Thomas’ actions must have legally caused the victim’s death. Two and a half years after the Walgreens robbery and shooting, Day died of infection with

complications from diabetes and Coumadin toxicity. Was Day's death caused by the gunshot wound? Is Thomas therefore actually innocent?

Statement of the Case

In 1998, a federal grand jury indicted Andrew Thomas for armed robbery and being a felon in possession of a firearm, in violation of 18 USC § 924(c) and §1951. The charges arose out of the August 1997 robbery and shooting of James Day, an armored car driver, as he exited a Walgreens with the store's deposits. *United States v. Thomas*, Dk # 2:98-cr-20100-JPM (W.D. Tenn.)⁶ Thomas denied any involvement. Anthony Bond, his purported accomplice, struck a deal with the government, confessed to his involvement, and testified that Thomas was the shooter. Thomas' estranged wife, Angela Jackson, also provided critical testimony linking Thomas to the crime. Angela Jackson claimed Thomas admitted to her his involvement while the couple watched a television news report about the Walgreens robbery. She also testified as to Thomas' purported spending of substantial sums of money allegedly acquired after the robbery. Thomas was then

⁶ See also Order on Summary Judgment, RE 102, Page ID 12080

tried, convicted, and sentenced to life imprisonment.⁷ Bond, however, only received a twelve year sentence. *Id.*⁸

Day died, two-and-a-half years after the Walgreens robbery. On March 21, 2000 a Shelby County Grand Jury indicted both Thomas and Bond for felony murder in connection with the robbery and shooting of Day.⁹ The State elected to try them together and noticed its intention to seek the death penalty. Again, Angela Jackson was the State's key witness against Thomas.

Thomas' defense at trial was twofold: (1) he was not involved in the robbery, and (2) the gunshot wound did not cause Day's death.¹⁰ But Thomas' counsel blundered the defense. They did not secure medical experts to refute the State's theory of causation, despite being told by a consulting physician that they needed to further explore causation with an expert. Counsel also ignored available evidence that another individual, Bobby Jackson, was Bond's true accomplice in the Walgreens robbery. Though Bond did not testify, his signed confession implicating Thomas was improperly redacted and admitted as evidence, without objection. And during argument, the prosecutors referred to Thomas and Bond as "Greed and Evil" 21 times—again without objection. The trial court also refused to

⁷ *Id.* at fn. 2

⁸ *See also* Order on Summary Judgment at fn. 3, RE 102, Page ID 12081

⁹ *See* Indictment, RE 12-1, Page ID 262-265

¹⁰ *See State v. Thomas*, 158 S.W.3d 361, 380 (Tenn. 2005)

instruct the jury as to lesser included offenses of felony first degree murder. The jury then convicted Thomas and sentenced him to death.¹¹

Thomas appealed to the Tennessee Court of Criminal Appeals, which affirmed. *State v. Thomas*, 2004 WL 370297 (Tenn. Crim. App. Feb. 27, 2004). On further direct appeal, the Tennessee Supreme Court also affirmed. *State v. Thomas*, 158 S.W.3d 361 (Tenn. 2005), *cert. denied*, 546 U.S. 855 (October 3, 2005). The state supreme court acknowledged that the trial court erred when it refused to instruct the jury as to lesser included offenses, but found the error to be harmless. *Thomas*, 158 S.W.3d at 380. The court also found the prosecutors' "Greed and Evil" epithets unseemly but concluded they were harmless. *Id.* at 414.

On January 26, 2006 Thomas filed a *pro se* petition for post-conviction relief. After securing counsel, he filed an amended petition, alleging several claims of ineffectiveness of trial and appellate counsel. The post-conviction court conducted an evidentiary hearing, and then denied relief. The Tennessee Court of Criminal Appeals affirmed the denial of post-conviction relief. *Thomas v. State*, 2011 WL 675936 (Tenn. Crim. App. Feb. 23, 2011). The court acknowledged that Bond's improperly redacted confession was inadmissible as to Thomas—since the Confrontation Clause bars the admission of out-of-court, testimonial statements

¹¹ Anthony Bond received a life sentence, without parole. Order on Summary Judgment, RE 102, Page ID 12081

made by a witness who is unavailable to testify at trial. *Thomas*, 2011 WL 675936 at *23. The court also acknowledged that there was no legitimate reason for defense counsel's failure to, at the very least, request a limiting instruction to inform the jury that the confession was only admissible as to Bond. *Id.* at *25. But the court found the error harmless, and that Thomas failed to demonstrate prejudice, in light of what it determined was "overwhelming proof" presented by the testimony of the State's key witness, Angela Jackson. *Id.* at *24. The court also held that the failure to secure a neurologist to challenge causation and the failure to present proof that Bobby Jackson committed the robbery instead of Thomas did not amount to deficient performance by defense counsel. *Id.* at *30, 36. The court determined that Thomas was not entitled to relief due to the cumulative errors of counsel. *Id.* at *36.

On August 25, 2011, the Tennessee Supreme Court denied permission to appeal the denial of post-conviction relief. And the United States Supreme Court denied *certiorari* review. *Thomas v. Tennessee*, __ U.S. __, 132 S. Ct. 713 (March 5, 2012).

After the conclusion of all the State proceedings, Thomas' counsel discovered by happenstance that law enforcement secretly paid \$750 to Angela Jackson, in contravention of well-established law that prohibited Angela Jackson

from being paid for her testimony, above and beyond the \$40 witness fee authorized by 28 U.S.C. § 1821(b). This information surfaced in October 2011 during a hearing on a § 2255 petition Thomas filed in the U.S. District Court challenging his federal convictions and sentence.¹² Though this payment was made prior to the State trial, it had not been disclosed to the defense before or during that trial.

Thomas then filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Tennessee, challenging his Tennessee conviction and sentence of death.¹³ The petition raised eleven claims for relief, including a *Brady v. Maryland* claim and false testimony claim arising out of the newly discovered secret payment to Angela Jackson. The parties entered into a stipulation in accordance with 28 U.S.C. § 2254 (b)(3)¹⁴ that the State was waiving exhaustion as it pertains to the *Brady* Claim, the false testimony claim, and the actual innocence claim to the extent it was impacted by the \$750 payment to Angela Jackson.¹⁵ In the stipulation, the parties expressed that it was doubtful whether there were any available state court remedies available to Thomas to

¹² Testimony of S. Sanders in § 2255 hearing, attached as Exhibit 8 to Petition, RE 1-8, Page ID 163-165

¹³ Petition for Writ of Habeas Corpus, RE 1, Page ID 130

¹⁴ 28 U.S.C. § 2254(b)(3) provides: “A state shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.”

¹⁵ Stipulation of the Parties, RE 23, Page ID 7891-7893

exhaust these newly discovered claims—but by expressly waiving exhaustion the federal court was unquestionably free to consider these claims on the merits.¹⁶

Thomas then sought discovery to explore (1) the joint federal-state nature of the Safe Streets Task Force (“SSTF”) that investigated the Walgreens robbery, and (2) to develop proof concerning the circumstances surrounding the secret payment to Angela Jackson.¹⁷ The District Court granted limited discovery, authorizing subpoenas to the FBI and other agencies for records and granting leave to take Angela Jackson’s deposition.¹⁸ Thomas also requested an evidentiary hearing with respect to the *Brady*, false testimony, and actual innocence claims.¹⁹

After negotiation, the parties entered into stipulations which rendered moot the need for an evidentiary hearing. First, the State stipulated to the facts and circumstances surrounding the \$750 payment.²⁰ As part of this stipulation, the State eventually conceded that all elements of the *Brady* claim were met, except for whether the undisclosed \$750 payment to Jackson was material.²¹ Later, the State conceded that the prosecutors had constructive knowledge of the Jackson

¹⁶ *Id.*

¹⁷ Motion for Leave to Conduct Discovery, RE 25, Page ID 8049

¹⁸ Order Granting in Part Petitioner’s Motion for Discovery, RE 30, Page ID 8157

¹⁹ Motion for an Evidentiary Hearing, RE 66, Page ID 11863

²⁰ Joint Stipulation of the Parties, RE 78, Page ID 11953-11954

²¹ *Id.*

payment with respect to the false testimony claim—so all that remained were questions as to whether Angela Jackson’s testimony was actually false and whether it was material.²² Since questions of falsity and materiality could be answered as a matter of law upon review of the State court record—in light of these stipulations—the District Court denied Thomas’ request for an evidentiary hearing as moot.²³

The parties both filed motions for summary judgment. The District Court then granted summary judgment for the State and denied Thomas habeas relief.²⁴ The court concluded that Thomas failed to establish that the \$750 secret payment was material.²⁵ The court additionally held that Jackson’s testimony denying that she had received a reward was not indisputably false.²⁶ Alternatively the court held that the testimony, if it was false, could not have affected the jury verdict.²⁷ Finally, the District Court held that state court findings with respect to Thomas’ ineffective assistance of counsel claims were not unreasonable applications of

²²Respondent’s Brief Clarifying Issues Regarding necessity of an Evidentiary Hearing on Count 2, RE 95, Page ID 12043

²³Order Denying Petitioner’s Motion for Evidentiary Hearing, RE 97, Page ID 12050

²⁴ Order on Summary Judgment, RE 102, Page ID 12079

²⁵ Order on Summary Judgment, RE 102, Page ID 12122

²⁶ Order on Summary Judgment, RE 102, Page ID 12126

²⁷ Order on Summary Judgment, RE 102, Page ID 12130

clearly established law.²⁸ The District Court denied relief upon the failure to instruct lesser included offenses, since it determined the evidence does not support the conclusion that a reasonable juror would acquit Thomas of felony murder in lieu of a conviction for a lesser included offense.²⁹ The court also found that the proof presented does not meet the extraordinarily high threshold to establish a claim of actual innocence.³⁰ In conclusion, the District Court refused to grant a certificate of appealability on all claims and denied Thomas the ability to proceed *in forma pauperis* on appeal.³¹

Thomas timely appealed³² and requested permission to proceed as a pauper.³³ He then sought a certificate of appealability from the United States Court of Appeals, particularly briefing six meritorious claims. This Court granted permission to proceed *in forma pauperis*.³⁴ It also granted a certificate of appealability as to the claims that are addressed in this brief.³⁵

²⁸ Order on Summary Judgment, RE 102, Page ID 12146, 12159, 12162, 12181, 12214,

²⁹ Order on Summary Judgment, RE 102, Page ID 12193

³⁰ Order on Summary Judgment, RE 102, Page ID 12136

³¹ Order on Summary Judgment, RE 102, Page ID 12245

³² Notice of Appeal, RE 104, Page ID 12247

³³ Unopposed Motion to Proceed *In Forma Pauperis* On Appeal, 6th Cir. Doc 3-1

³⁴ Order, 6th Cir. Doc. 11-1

³⁵ Order, 6th Cir. Doc. 17-1

Statement of Facts

Thomas was not involved in the Walgreens robbery.

On April 21, 1997, an assailant robbed and shot James Day, a Loomis Fargo armored car guard, as he exited a Walgreens on Summer Avenue in Memphis, Tennessee with the store's deposits.³⁶ The shooter jumped into the passenger side of a white car driven by a second individual, and the two sped away from the scene.³⁷

The Walgreens robbery and shooting was investigated by the SSTF, a joint federal and state law enforcement coalition that investigates and prosecutes violent crimes.³⁸ The getaway car was discovered abandoned close to the scene. Investigators recovered a fingerprint right below the handle of the passenger side door of the getaway vehicle³⁹ and obtained a grainy black and white surveillance video showing the shooter taken from inside the Walgreens.⁴⁰ SSTF investigators

³⁶ *See State v. Thomas*, 158 S.W.3d, 361, 373 (Tenn. 2005)

³⁷ *Id.*

³⁸ Joint Stipulation, RE 78, Page ID 11953-11954

³⁹ Trial Testimony of R. Hulley, RE 12-18, Page ID 1931-1932; Stipulation of the Parties, RE 12-18, Page ID 1995-1996

⁴⁰ *See State v. Thomas*, 158 S.W.3d at 374, Trial Ex. 18, still photo from Walgreen's surveillance video, RE 14-35, Page ID 7792-7793

interviewed several witnesses who were present at the crime scene and who consistently described the driver of the getaway car as a heavysset black male.⁴¹

On July 21, 1997—exactly three months after the Walgreens robbery—Bobby Jackson, accompanied by Terrance Lawrence, attempted to rob another Loomis Fargo guard at the Southbrook Mall in Memphis, before fleeing the scene.⁴² Lawrence testified that this robbery was Bobby Jackson’s idea, including the suggestion of targeting an armored car.⁴³ Bobby Jackson also admitted to Steven Briscoe that he committed the Southbrook Mall robbery—and that it was not the first time he had robbed an armored car.⁴⁴

After Bobby Jackson was apprehended, the SSTF investigators showed a photographic spread including Jackson’s picture to witnesses of the Walgreen’s robbery. One of those witnesses, Robert Fisher, reviewed a photographic spread containing Jackson’s photograph on July 29, 1997. After “carefully viewing” it, he identified Bobby Jackson as the driver of the getaway vehicle.⁴⁵ On August 4, 1997, Robert Fisher was once again shown a photographic spread, and once again

⁴¹ See Witness Identification Statements attached as Exhibit 11 to Petition for Writ of Habeas Corpus, RE 1-11, Page ID 176-183

⁴² Post Conviction Hearing Exhibit 9, Deposition of T. Lawrence, RE 14-9, Page ID 5553

⁴³ See Post Conviction Hearing Exhibit 9, Deposition of T. Lawrence, RE 14-9, Page ID 5554-5557, 5560-5561

⁴⁴ See Post Conviction Hearing Exhibit 17, Letter from Briscoe to AUSA Tony Arvin (9/17/97), RE 14-5, Page ID 5092-5093

⁴⁵ See FBI statement of Robert Fisher (7/29/97), attached as Exhibit 14 to the Petition for Writ of Habeas Corpus, RE 1-14, Page ID 192-193

he selected the photograph of Bobby Jackson as the man he saw driving the getaway vehicle.⁴⁶

A few months after the Walgreens robbery, Andrew Thomas and Anthony Bond were arrested on unrelated charges. Investigators compared their fingerprints to the fingerprint lifted from the passenger door of the getaway vehicle and determined that it matched Anthony Bond's print.⁴⁷ Bond subsequently told the investigators he was the driver of the getaway vehicle for the Walgreens robbery and claimed that Thomas was his accomplice and Day's shooter.⁴⁸ Thomas denied any involvement.

Witnesses to the Walgreens robbery had consistently described the driver of the getaway car as a heavyset black male.⁴⁹ Neither Andrew Thomas nor Anthony Bond weighed more than 155 pounds at the time.⁵⁰ In contrast, Bobby Jackson stands six feet tall and weighed 240 pounds at the time of the Walgreens robbery.⁵¹

⁴⁶ See FBI Statement of Robert Fisher (8/4/97), attached as Exhibit 15 to the Petition for Writ of Habeas Corpus, RE 1-15, Page ID 195

⁴⁷ Trial testimony of R. Hulley, RE 12-18, Page ID 1931-1932; Stipulation of the Parties, RE 12-18, Page ID 1995-1996

⁴⁸ See Bond's unredacted confession (11/5/97), State trial Ex. 57, RE 12-9, Page ID 751-754

⁴⁹ See witness identification statements attached as Exhibit 11 to Petition for Writ of Habeas Corpus, RE 1-11, Page ID 176-183

⁵⁰ See Prosecutive Report of Investigation attached as Exhibit 12 to Petition for Writ of Habeas Corpus, RE 1-12, Page ID 186

⁵¹ See Federal Pen Pak for Bobby Jackson, attached as Exhibit 13 to the Petition for Writ of Habeas Corpus, RE 1-13, Page ID 189

Bond's involvement in the Walgreens robbery is undisputed. He confessed to the police to being one of the perpetrators.⁵² He also pled guilty in federal court to being one of the perpetrators.⁵³ But while Bobby Jackson comfortably fits the description of the driver offered by several eyewitnesses, Anthony Bond certainly does not. And Bond's fingerprint was found on the passenger door of the getaway car, not on the driver's side.⁵⁴ Of course, Bond had ample motivation to minimize his role in the Walgreens robbery and shooting, confessing to being the getaway driver rather than Day's shooter. The fact that police found Bond's fingerprint on the getaway vehicle gave him little choice upon confrontation but to acknowledge some role in the crime. And by asserting he was involved, but not the shooter, he was able to strike a deal with Assistant U.S. Attorney Tony Arvin that allowed him to testify against Thomas in exchange for a lighter sentence.⁵⁵

After Day's death, the State then indicted Thomas and Bond, and sought to convict them both and sentence them to death for Day's murder. The key evidence against Thomas in the State trial was the testimony of his estranged wife, Angela Jackson, who was never alleged to be a witness to the robbery or shooting. Angela Jackson's testimony consisted of recounting Thomas' purported admission to

⁵² See Bond's unredacted confession (11/5/97) State Trial Exhibit 57, RE 12-9, Page ID 751-754

⁵³ Order on Summary Judgment, RE 102, Page ID 12081

⁵⁴ Trial Testimony of R. Hulley, RE 12-18, Page ID 1931-1932; Stipulation of the Parties, RE 12-18, Page ID 1995-1996

⁵⁵ See Order on Summary Judgment, RE 102, Page ID 12081

shooting Day after Thomas and Jackson saw a television news report on the robbery.⁵⁶ She also testified concerning Thomas' disposition of the alleged robbery proceeds.⁵⁷ Angela Jackson also identified Thomas as the shooter from a still photograph taken from a grainy surveillance video that captured the shooter's back⁵⁸ (since the photograph was so poor the jury could not have determined, in the absence of testimony, the identity of the shooter). There was no forensic or physical evidence that even arguably placed Thomas at the scene of the crime. The only other witness implicating Andrew Thomas in the shooting was Richard Fisher, who was present at the scene of the Walgreens robbery, and who had previously identified *two other individuals* as the shooter.⁵⁹

Clearly, the State's entire case rested on the testimony of Angela Jackson. And defense counsel used the only evidence he possessed to attempt to impeach her testimony: her contentious relationship with Thomas and her romantic relationship with Bobby Jackson, the other individual potentially implicated in the shooting. Numerous witnesses testified that Angela Jackson had dated Bobby Jackson in 1997 when federal agents were investigating the Walgreens robbery.⁶⁰

⁵⁶ *State v. Thomas*, 158 S.W.3d at 374

⁵⁷ *State v. Thomas*, 158 S.W.3d at 374

⁵⁸ *State v. Thomas*, 158 S.W.3d at 375

⁵⁹ See Trial Court comment, RE 12-19, Page ID 2053

⁶⁰ Trial Testimony of S. Williams, RE 13-1, Page ID 2773; Trial Testimony of W. Upchurch, RE 13-1, Page ID 2778; Post-Conviction Testimony of B. Brown, RE 14-10, Page ID 5652; Post-Conviction Testimony of T. Gentry, RE 14-11,

Although Angela Jackson initially denied knowing Bobby Jackson, she later grudgingly acknowledged “seeing” him.⁶¹ Such a romantic relationship would have given Angela Jackson a motive to lie to protect Bobby Jackson. Further, at the time Angela Jackson first gave her signed statement implicating Andrew Thomas, she was embroiled in a bitter divorce from him.⁶² It was well known that Angela Jackson was upset with Thomas during their marriage for having girlfriends.⁶³ As a result of this anger, she was cruel to Thomas’ son—conduct about which Thomas openly confronted her.⁶⁴ After Thomas broke up with Angela Jackson due to this and other reasons, she told people that she “was gonna pay him back”—and if she could not have him, no one would.⁶⁵ All of these facts point to a clear motive for Angela Jackson to lie on the stand implicating Thomas.

After being convicted and sentenced to death, Thomas received a handwritten letter from Anthony Bond, in which Bond admitted that he and Angela Jackson falsely implicated Thomas as Bond’s partner in the Walgreens robbery.⁶⁶ Bond also admitted that he committed the Walgreens robbery with Bobby

Page ID 5822-5823; Post-Conviction Testimony of S. Williams, RE 14-12, Page ID 6021-6022

⁶¹ Trial Testimony of A. Jackson, RE 13-1, Page ID 2805

⁶² Trial testimony of A. Jackson, RE 12-17, Page ID 1716-1717

⁶³ Trial Testimony of A. Jackson, RE 12-17, Page ID 1812-1813

⁶⁴ Trial Testimony of A. Jackson, RE 12-17, Page ID 1813

⁶⁵ Trial testimony of S. Williams, RE 13-1, Page ID 2772; Trial Testimony of R. Carpenter, RE 13-1, Page ID 2784-2785

⁶⁶ See Bond letter (1/10/02), attached as Exhibit 3 to Petition for Writ of Habeas Corpus, RE 1-3, Page ID 138-139

Jackson⁶⁷ and falsely accused Thomas of shooting Day because Thomas had pursued Bond's girlfriend.⁶⁸ Additionally, Bond explained why Angela Jackson lied to the authorities and at trial—she was protecting Bobby Jackson, Bond's true accomplice—because she was romantically involved with him.⁶⁹

The state post-conviction court found that Anthony Bond wrote the letter to Thomas, a fact that was uncontested by the State at the post-conviction hearing.⁷⁰ But the court found the testimony of Angela Jackson “compelling” and declared the letter “highly suspicious” (an odd conclusion given the fact that the court found Bond authored the letter), and noted that Bond pointed to nothing to corroborate the letter.⁷¹

After the conclusion of all state post-conviction proceedings, Thomas' counsel discovered by chance that the SSTF secretly paid Angela Jackson \$750 after her testimony in the federal trial and before her testimony in the state trial. The fact of this payment had been concealed from Thomas until it was revealed at an evidentiary hearing in October 2011, in connection with Thomas' §2255 proceeding challenging his federal life sentence.⁷² In paperwork documenting the

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Post-Conviction Trial Court Opinion, RE 14-2, Page ID 4605

⁷¹ Post-Conviction Trial Court Opinion, RE 14-2, Page ID 4603-4604.

⁷² Testimony of S. Sanders at § 2255 hearing attached as Exhibit 8 to Petition, RE 1-8, Page ID 163-165

secret payment, the SSTF officer requesting the payment wrote that without the testimony of Angela Jackson, “it is the opinion of investigating Agents that Thomas would not have been successfully prosecuted in this matter.”⁷³ As noted above, the fact that a \$750 payment was made to Angela Jackson is not in dispute.⁷⁴ The parties have also stipulated that the payment is exculpatory, knowledge of the payment is imputed to the state prosecutors, and the prosecutors failed to disclose this payment to the defense counsel.⁷⁵ Thus, the only issue in dispute as to Thomas’ *Brady* claim is whether the payment is material.

At Thomas’ state trial, the prosecutors portrayed Angela Jackson as a scared spouse whose only motivation in testifying was to make right by putting Thomas behind bars.⁷⁶ Jackson testified three times in Thomas’ state trial that she had not received any “reward,” or “one red cent” in connection with her testimony against Thomas.⁷⁷ This testimony is false, since Angela Jackson had received the secret \$750 payment prior to her testimony in the state trial.⁷⁸ And as the State has conceded that knowledge by the prosecutors of the payment is not an issue in the case, the only questions remaining for Thomas to obtain relief for his false

⁷³ See Request for funding attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID 7852

⁷⁴ Joint Stipulation, RE 78, Page ID # 11953-11954

⁷⁵ Joint Stipulation, RE 78, Page ID # 11953-11954

⁷⁶ Trial testimony of A. Jackson, RE 12-17, Page ID 1733, 1746-1747, 1753, 1805

⁷⁷ Trial testimony of A. Jackson, RE 12-17, Page ID 1732, 1764, 1824

⁷⁸ Joint Stipulation, RE 78, Page ID 11953-11954

testimony claim are whether Jackson's testimony was false and whether it is material.⁷⁹

Day's death was not caused by the gunshot wound.

Day died two and a half years after the Walgreens robbery from sepsis, a massive bacterial infection of the blood.⁸⁰ Day's diabetes and toxic levels of Coumadin were the likely causes of this infection.⁸¹

The State theorized that the infection was attributable to Day's neurogenic bladder which developed after his gunshot wound inflicted during the Walgreens robbery. Day required catheters to empty his bladder, which the State contended was the likely source of the infection which led to sepsis. Dr. O.C. Smith, the Shelby County medical examiner, opined that the infection from the ruptured bladder could be directly related back to the gunshot wound.⁸² The evidence adduced at the post-conviction hearing, however, establishes (1) the neurogenic bladder was not caused by the gunshot wound, but rather by gross negligence of the Regional Medical Center, and (2) the infection which killed Day resulted from his diabetes and Coumadin toxicity and was thus not related to the neurogenic bladder.

⁷⁹ See Order on Summary Judgment, Document 102 at Page ID 12123; Respondent's Brief Clarifying Issues Regarding the Necessity of An Evidentiary Hearing on Count 2, Document 95, Page ID 12043

⁸⁰ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5939-5940

⁸¹ *Id.* at RE 14-11, Page ID 5939-5940

⁸² *State v. Thomas*, 158 S.W.3d at 374

Day's neurogenic bladder resulted from a lesion on his lower spinal cord. The gunshot did not cause this lesion. In fact, Day's own doctor concluded that "*this neurologic deficit was unexplained by any CT scan findings or injury inflicted by the gunshot wound.*"⁸³ Likewise, Dr. Steven Horowitz—the only neurology expert to have testified in any of Thomas' proceedings—testified at Thomas' post-conviction evidentiary hearing that "there was no connection between the bullet wound and Day's subsequent neurological deficits and ultimate death."⁸⁴ Rather, the lesion on Day's lower spinal cord was caused by the hospital's grossly negligent administration of anti-hypertensive medications to Day, who was not hypertensive at the time those medicines were given to him.

On the day of the Walgreens robbery, Day sustained a gunshot wound to the back of his head. The bullet did not enter his brain, but lodged in the area of the head known as the posterior fossa.⁸⁵ Upon his admission to the Regional Medical Center, Day was awake with the highest possible Glasgow Coma Score, 15, which indicated that Day was alert and conscious with proper eye, verbal and motor responses.⁸⁶ Importantly, Day was able to move his arms and legs, indicating that

⁸³ Day's Medical Discharge Summary (5/28/97), attached as Exhibit 1 to the Petition for Writ of Habeas Corpus, RE 1-1, Page ID 132

⁸⁴ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5850-5851

⁸⁵ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5851

⁸⁶ Day's Medical Discharge Summary (5/28/97), attached as Exhibit 1 to Petition for Writ of Habeas Corpus, RE 1-1, Page ID 132-133

the gunshot wound had not damaged his spinal cord.⁸⁷ Day's condition was not that critical, so rather than immediately operating to remove the bullet, medical personnel opted to keep him under observation.⁸⁸

The standard of care is to treat a patient in Day's condition as hypertensive only if his blood pressure exceeds 180 for a sustained period of time.⁸⁹ Day's medical records reveal, however, that contrary to the standard of care, his doctors sought to keep very tight control on his blood pressure in an effort to get it below 160.⁹⁰ Although Day was not hypertensive and was exhibiting relatively normal blood pressure for a patient in his condition, doctors aggressively treated him for hypertension. They administered six different major anti-hypertensive medications, some of which were contra-indicated for each other and some of which were specifically contra-indicated for Day's condition. Not surprisingly, Day's blood pressure plummeted.⁹¹ This drop in blood pressure caused a decrease in blood flow to his lower spine, resulting in the lesion that left him with paraparesis (a profound weakness in the legs) and a loss of bladder and bowel functions.⁹²

⁸⁷ *Id.*

⁸⁸ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5950-5951

⁸⁹ *Id.* at RE 14-11, Page ID 5866

⁹⁰ *Id.* at RE 14-11, Page ID 5872

⁹¹ *Id.* at RE 14-11, Page ID 5883

⁹² *Id.* at RE 14-11, Page ID 5883-5918

Upon his discharge from the hospital, Day was transferred to a HealthSouth rehabilitation center where he remained until July 3, 1997, when he returned home.⁹³ By January 28, 1998, Day had recovered sufficiently so that he could walk on his own a short distance, and he was deemed independent of a wheelchair. Further, Day was capable of performing a sedentary job.⁹⁴

More than two and a half years after the Walgreens robbery, on September 29, 1999, Day's wife called his urologist and advised him that Day had large amounts of blood in his urine.⁹⁵ The next morning Day was admitted to the hospital. Exploratory surgery revealed a large tear in the wall of his bladder. The tear was repaired, but Day's condition did not improve.⁹⁶ Day died on October 2, 1999, shortly after his wife requested that he be removed from life support.⁹⁷

Day died from sepsis, a massive bacterial infection of the blood.⁹⁸ In testimony that the State did not dispute Dr. Horowitz identified two major causes of this infection—Day's diabetes and toxic levels of Coumadin.⁹⁹

⁹³ HealthSouth Rehab Discharge Summary (7/27/97) State Trial Exhibit 73, Doc 14-18, Page ID 6550-6555

⁹⁴ *See id.* (office notes), RE 14-18, Page ID 6555

⁹⁵ Trial Testimony of F. Cain, RE 12-19, Page ID 2173

⁹⁶ State Trial Exhibit 78 (Methodist Death Summary), RE 14-18, Page ID 6562

⁹⁷ *Id.* at RE 14-18, Page ID 6563

⁹⁸ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5939-5940

⁹⁹ *Id.* at RE 14-11, Page ID 5939-5940

Blood sugar levels over 125 generally indicate diabetes.¹⁰⁰ Even when Day was admitted to the regional medical center in 1997 on the day of the shooting, his blood sugar levels were already ranging from 133-166.¹⁰¹ Yet the physicians did not treat Day for this condition, even though at this point it needed to be watched.¹⁰² When Day was admitted to the hospital in 1999 he showed sugar levels of 699.¹⁰³ As a consequence of the diabetes Day had sugar in his urine. Because bacteria can feed off this sugar, individuals in a diabetic state are “more susceptible to infection, and especially urinary tract infections.”¹⁰⁴

Day’s urinary tract infection only escalated to life-threatening sepsis after his bladder ruptured. The rupture was caused by excessive bleeding in the bladder walls, which was itself caused by the over-administration of Coumadin, a strong anti-coagulant that thins blood and reduces its clotting properties.¹⁰⁵ When admitted to the hospital in 1999, Day was Coumadin toxic, his blood was too thin, and his bleeding was difficult to stop.¹⁰⁶ Doctors found one liter of blood in Day’s

¹⁰⁰ *Id.* at RE 14-11, Page ID 5920

¹⁰¹ *Id.* at RE 14-11, Page ID 5921-5922

¹⁰² *Id.* at RE 14-11, Page ID 5925

¹⁰³ *Id.* at RE 14-11, Page ID 5920-5921

¹⁰⁴ Post-Conviction Testimony of S. Horowitz, RE 14-11, Page ID 5932

¹⁰⁵ *Id.* at RE 14-11, Page ID 5937

¹⁰⁶ *Id.*

abdomen, bleeding around his eyes and nose, bleeding in the lining of his brain, and bleeding into the bladder wall.¹⁰⁷

In the end, the gunshot wound that Day sustained April 21, 1997, to the back of his head did not cause Day's paralysis or result in his death on October 2, 1999. Rather, as Dr. Horowitz concluded, Day died two and a half years later, from an overwhelming infection, diabetic keto-acidosis, and Coumadin toxicity¹⁰⁸

Summary of Argument

(*Brady claim*) The parties have stipulated that a secret \$750 payment was made by law enforcement to Angela Jackson prior to her testimony in Thomas' State trial. They have also stipulated that the payment is exculpatory, knowledge of the payment is imputed to the state prosecutors, and the prosecutors failed to disclose this payment to Thomas' defense counsel.¹⁰⁹ The only remaining element to establish relief under *Brady v. Maryland* is whether the payment is material—or whether there is a reasonable probability that, had the payment been disclosed, the result of the proceeding would have been different. Given that Angela Jackson's testimony was the key evidence against Thomas, defense counsel's ability to expose her motivation for lying is material, and *Brady* relief is warranted.

¹⁰⁷ *Id.* at RE 14-11, Page ID 5937-5938

¹⁰⁸ *Id.* at RE 14-11, Page ID 5939-5940

¹⁰⁹ Joint Stipulation, RE 78, Page ID # 11953-11954

(False testimony claim) To establish a false testimony claim, a petitioner must demonstrate that (1) a witness testified falsely, (2) that prosecutors knew the testimony was false, and (3) the testimony was material. The State has conceded that prosecutors had constructive knowledge of the Jackson payment, and the only remaining questions are whether the testimony was false and material. Angela Jackson's testimony was false because she had received the secret \$750 payment prior to her testimony in Thomas' State trial, yet denied any such payment when questioned broadly about receiving money or a reward for her testimony. Her testimony was also material because, had the jurors known that she had lied under oath about being paid, this information reasonably could have affected the verdict.

(I.A.C.-no medical causation) Defense counsel was advised by a pathologist to consult a neurosurgeon to explore whether Day's death was causally related to the gunshot wound. They failed to do this. A neurology expert could have testified that Day's neurogenic bladder was not caused by the gunshot wound, but by malpractice on behalf of the treating physicians. Defense counsel not only failed to consult with an expert as recommended, but, in absence of expert guidance, actually ended up agreeing with the State's experts that Day's neurogenic bladder was caused by the gunshot wound. Counsels' performance violated the standards set forth in *Strickland v. Washington*, and Thomas is entitled to relief. The State court's finding to the contrary is unreasonable.

(I.A.C. for admission of Bond's confession) The Sixth Amendment prohibits the prosecution from introducing the confession of a non-testifying co-defendant as evidence against the other defendant. However, Thomas' counsel failed to object or request a limiting instruction when the prosecution admitted into evidence Bond's confession, which contained a description of his accomplice's clothing that matched Angela Jackson's description of what Thomas was wearing the day of the robbery. The State courts acknowledged that admission of the confession violated the Sixth Amendment, and the failure of Thomas' counsel to request a limiting instruction was error. The State court's finding that counsel made an appropriate tactical decision in admitting the confession is an unreasonable application of *Strickland v. Washington*.

Counsel testified at the post-conviction hearing that no other witnesses described the shooter as wearing shorts and a striped shirt as contained in Bond's confession, and as a matter of strategy he wanted to get another inconsistent description before the jury. But counsel's testimony was not accurate—as Angela Jackson had provided the same description. Thus, there was no need to introduce the confession, and by doing so it had the effect of corroborating the testimony of the State's key witness. And admittedly there was no strategy involved in counsel's failure to request a limiting instruction. In the absence of such instruction, the prosecution actually argued in closing that the description

contained in Bond's confession corroborated Jackson's description of what Thomas was wearing. Given that counsels' actions were outside the realm of plausible strategy, and there was substantial prejudice, Thomas is entitled to relief.

(I.A.C. other errors) During their opening and closing arguments prosecutors referred to Thomas as "Greed and Evil" 21 times. Counsel did not object to this characterization—which the state courts agreed was improper. And though Thomas' counsel had ample evidence that Anthony Bond was the actual shooter and Bobby Jackson's accomplice, he failed to present any of this evidence to the jury. These errors were unreasonable under *Strickland*, and individually, or cumulatively with the other counsel errors, warrant relief under *Strickland*.

(Failure to instruct lesser included offenses) Due Process requires a trial court to instruct the jury as to lesser included offenses upon request in a capital case. At Thomas' trial, the court failed to instruct the jury as to any lesser included offenses of felony murder. The state court conceded the trial court erred, but found the error to be harmless. The decision of the state court is unreasonable as the jury was not bound to believe the State's theory of the case that Thomas was the shooter. A reasonable jury could have believed Bond to be the shooter, and Thomas to be an accomplice, given that: (1) Bond's fingerprint was found on the passenger door where the shooter entered, and (2) several witnesses described the shooter wearing blue jeans, which is consistent with what Bond admitted he was

wearing, but inconsistent with the shorts Bond asserted Thomas was wearing at the time.

Additionally, Thomas has presented a compelling case of actual innocence, in that (1) he was not involved in the robbery, and (2) no murder occurred since Day's death was not caused by the gunshot wound he received two and a half years earlier.

Standard of Review

The court of appeals reviews *de novo* a decision of the District Court refusing to grant habeas relief. *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450,460 (6th Cir. 2015). Typically any factual findings by the district court would be reviewed for clear error. But when the district court does not itself conduct an evidentiary hearing and relies instead exclusively on the state court record, the appellate court reviews the district court's factual findings *de novo*. *Barton*, 786 F.3d at 460. Since the District Court did not conduct an evidentiary hearing in Thomas' case, all aspects of the District Court decision therefore are reviewed *de novo*. *Id.*

Additionally, the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d), ("AEDPA") further restricts the availability of federal habeas relief for claims that have been adjudicated on the merits in state court. *Barton*, 786 F.3d at 459. In those circumstances, federal habeas relief is available when the

state court decision denying relief was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. 28 U.S.C. § 2254(d)(1). Alternatively, habeas relief is available if the state court decision was based upon an unreasonable determination of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(2); *see also Barton*, 786 F.3d at 459-460. But where there has been no adjudication on the merits by a state court, then AEDPA.'s deferential standard of review does not apply. *Barton*, 786 F.3d at 460.

The facts underlying the *Brady* and false testimony claims were not discovered until after conclusion of the state court proceedings through no fault of Thomas and are therefore reviewed purely *de novo*. The actual innocence claim is also reviewed *de novo* to the extent that the court considers the newly discovered evidence of the secret \$750 payment to Angela Jackson. The remaining claims presented in this brief are reviewed *de novo*, but subject to the AEDPA's deferential review.

Argument

1. Thomas is entitled to relief on his *Brady* claim because the secret \$750 payment to Angela Jackson was material.

The State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a \$750 payment made by the SSTF to Angela Jackson, the key witness testifying against Thomas.¹¹⁰ In *Brady*, the Supreme Court held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. *Banks v. Dretke*, 540 U.S. 668, 691 (2004). There are three components of a *Brady* claim: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; (2) that evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). Prejudice exists when the suppressed evidence is “material” for *Brady* purposes. *Banks v. Dretke*, 540 U.S. at 691.

The State entered into the following stipulations concerning Thomas’ *Brady* claim. First, the State stipulated that exhaustion of the newly discovered *Brady* claim was expressly waived under 28 U.S.C. 2254(b)(3).¹¹¹ Because the claim was never considered by the state courts, the deferential AEDPA standard of

¹¹⁰ See Claim 1, Petition for Writ of Habeas Corpus, RE 1, Page ID 32-44

¹¹¹ Stipulation of the Parties, RE 23, Page ID 7891-7893

review does not apply. *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 460 (6th Cir. 2015). Second, the State stipulated that the \$750 Jackson payment was exculpatory and that the State withheld evidence of that payment from defense counsel. The complete stipulation is set forth below:

The Parties hereby stipulate to the following:

1. On or about December 18, 1998 Angela Jackson was paid \$750.00 by the Federal Government in connection with her testimony in Petitioner's federal criminal trial involving the robbery and shooting of Loomis Fargo armored car courier James Day, in a case styled *United States of America v. Andrew Thomas*, Dk# 2:98-cr-20100-JPM (W.D. Tenn.).
2. The \$750 payment was requested by Deputy U.S. Marshal Scott Sanders, a Safe Streets Task Force member. The Safe Streets Task Force investigated and assisted in the prosecution of Petitioner in the federal trial.
3. After Petitioner's federal trial concluded, Mr. James Day died. Petitioner was subsequently tried in the Criminal Court of Shelby County, Tennessee in September 2001 for the murder of James Day, in *State of Tennessee v. Andrew Thomas*, Dk # 00-03095.
4. Members of the Safe Streets Task Force investigated and participated in the State trial as well.
5. The Safe Streets Task Force is a multi-agency task force, composed of federal and state law enforcement officers.
6. Angela Jackson testified for the State of Tennessee in Petitioner's State trial.
7. Neither Petitioner nor his state trial counsel were informed of, nor did they have knowledge of, the \$750 payment to Angela Jackson.
8. Had Petitioner's state trial counsel known about the \$750 payment, he would have used this information in cross examining Angela Jackson.

9. Knowledge of the payment of \$750 to Angela Jackson is imputed to the state prosecutors for purposes of Petitioner's claim under *Brady v. Maryland*, 373 U.S. 83 (1963).
10. The \$750 payment to Angela Jackson constitutes exculpatory evidence under *Brady v. Maryland* 373 U.S. 83 (1963).
11. With respect to Petitioner's *Brady* claim, set forth as Claim 1 in the Petition for Writ of Habeas Corpus, the only remaining question for this Court is whether the undisclosed payment is material; i.e. whether there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different.¹¹²

Stipulations are judicial admissions that eliminate the need for evidence on the subject matter of the admission—as admitted facts are no longer at issue. *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 550-551 (6th Cir. 1986). Stipulations are binding before the trial court, and on appeal as well. *Id.* Given these stipulations concerning the secret payment, the only remaining issue to resolve for Thomas to obtain relief on the *Brady* claim was whether the secret \$750 payment to Angela Jackson was material.¹¹³

Under *Brady v. Maryland*, and as stipulated by the parties, withheld evidence is material if there is a reasonable probability that, had the suppressed evidence been disclosed, the result of the proceeding would have been different. *Strickler v. Greene*, 527 U.S. 263, 289 (1999). “The question is not whether the

¹¹² Joint Stipulation, RE 78, Page ID# 11953-11954

¹¹³ Order on Summary Judgment, RE 102, Page ID 12099 (“The Court need only address the materiality of the \$750 payment because the parties have stipulated to the other elements of the *Brady* claim.”)

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 worthy of confidence.” *Id.* at 289-90 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *see also Banks v. Dretke*, 540 U.S. at 685, 700-701 (evidence of a \$200 payment to a key witness was material due to the probability that the jury would have discounted the witness’ testimony if it had known of his added incentive to cooperate at trial).

The District Court acknowledged its task was “to look at the totality of the evidence presented against Thomas at trial with specific attention paid to Jackson’s statements and testimony to determine whether the evidence of the \$750 payment would undermine confidence in the verdict.”¹¹⁴ In finding the payment immaterial, it concluded that “there was substantial evidence linking Thomas to the crime, other than [Angela] Jackson’s testimony.”¹¹⁵ Specifically the District Court referenced the testimony of Richard Fisher, and the fact that a car was purchased and a bank account was opened, both in Jackson’s name, shortly after the robbery.¹¹⁶ The court also found it relevant that Angela Jackson had consistently testified concerning Thomas’ involvement in both the earlier federal proceedings

¹¹⁴ Order on Summary Judgment, RE 102, Page ID 12104-12105

¹¹⁵ Order on Summary Judgment, RE 102, Page ID 12119

¹¹⁶ Order on Summary Judgment, RE 102, Page ID 12119

and in the state proceedings three years later.¹¹⁷ The District Court remarked that the original statement implicating Thomas was given to the FBI before the secret \$750 payment had been given to Jackson.¹¹⁸ The District Court then denied relief on this claim, finding that the undisclosed payment was not material.¹¹⁹

The District Court's decision was wrong. Aside from Angela Jackson's testimony, the State had virtually no evidence against Thomas. There was no forensic evidence linking Thomas to the crime. In fact, police found Anthony Bond's fingerprint on the passenger side of the vehicle, but Thomas' prints were nowhere to be found.¹²⁰

Of the many witnesses at the scene, only Richard Fisher identified Thomas as a participant. His identification lacks credibility, however, because he identified Thomas only after first identifying *two other people*. In a photographic lineup, Richard Fisher identified another individual as the person that he saw in the passenger side of the getaway car as it sped away from the crime scene.¹²¹ Then,

¹¹⁷ Order on Summary Judgment, RE 102, Page ID 12120-12121

¹¹⁸ Order on Summary Judgment, RE 102, Page ID 12121

¹¹⁹ Order on Summary Judgment, RE 102 Page ID #12122

¹²⁰ Trial Testimony of R. Hulley, RE 12-18, Page ID 1931-1932; Stipulation of the Parties, RE 12-18, Page ID 1995-1996

¹²¹ Confusingly, two men with the same last name, Richard Fisher and Robert Fisher, both testified at Thomas' trial—and both men had previously identified other individuals as the shooter. Richard Fisher identified Andrew Thomas under unusual circumstances in response to aggressive questioning by Bond's attorney during trial, after having previously identified Terrence Lawrence and Anthony Bond as the shooter. Robert Fisher, however, never identified Thomas, but twice

on direct examination at Thomas' trial, Richard Fisher identified Anthony Bond as the passenger in the getaway car.¹²² This prompted the trial court, in a sidebar with counsel, to question Richard Fisher's ability to identify anyone accurately:

So I think it can be safely assumed and properly argued to the jury that Mr. Fisher, while he was doing the best that he could, as he said from the witness stand a moment ago, wasn't real sure of any identification. He identified, tentatively, somebody in a photospread that was not either of these defendants. He identified, apparently, from what people are saying today, from a distance, Mr. Andrew Thomas in federal court. And in court today, he tentatively identified Bond. Even today he didn't say, "Yes, that's the guy. I'm positive. I'll never forget his face. I have nightmares every night." He said "Yeah, that look like him to me."

Trial court comment, RE 12-19, Page ID 2053.

When Richard Fisher subsequently switched his in-court identification from Bond to Thomas as the passenger in the getaway car, he did so while being cross-examined by Anthony Bond's attorney. After asking Fisher what he remembered about the passenger in the car, Bond's attorney made Fisher come down from the witness chair and stand at defense counsel's table, directly in front of Thomas, and instructed him to look very closely at Thomas, who was instructed to remove his

identified Bobby Jackson as the driver. *See* FBI Statements of Robert Fisher (7/29/97 and 8/4/97) attached as Exhibits 14 and 15 to Petition for Writ of Habeas Corpus, Docs. 1-14 and 1-15, Page ID 192-195

¹²² Trial Testimony of R. Fisher, RE 12-19, Page ID 2038-2044

glasses.¹²³ Only under those extremely suggestive circumstances did Richard Fisher change his identification from Bond to Thomas.

Thus, in light of Fisher's equivocal identification, Angela Jackson provided the key testimony against Thomas that the State desperately needed. Angela Jackson testified that Thomas was wearing a striped shirt and shorts on the day of the Walgreens robbery.¹²⁴ This testimony provided a critical link to Anthony Bond's improperly redacted confession, which contained an identical description of the shooter's clothing.¹²⁵

Angela Jackson's testimony also provided the link that the State needed between Thomas and the State's photographic evidence—a grainy black and white surveillance video taken from inside the Walgreens. The surveillance video is extremely fuzzy, the shooter's face cannot be seen, and the crime was partially obstructed because the surveillance video was captured from inside the store. Nevertheless Angela Jackson purported to identify Thomas' *back* when she was shown a still photograph taken from the surveillance video.¹²⁶ Without Angela Jackson's testimony, the video had little evidentiary value due to its abysmal quality. But with Jackson's testimony to shape the jurors' perception of the

¹²³ Trial Testimony of R. Fisher, RE 12-19, Page ID 2062-2067

¹²⁴ Trial Testimony of A. Jackson, RE 12-17, Page ID 1733-1734

¹²⁵ Trial Exhibit 58, A. Bond redacted confession, RE 12-9, Page ID 756

¹²⁶ Trial Testimony of A. Jackson, RE 12-17, Page ID 1754, 1816-1817; Trial Exhibit 18, still photo from Walgreens surveillance video, RE 14-35, Page ID 7792-7793

video's amorphous figures, the State was able to transform its otherwise useless physical evidence into a critical part of its case against Thomas.

Additionally, Angela Jackson's testimony provided circumstantial evidence that Thomas was involved in the Walgreens robbery, including testimony about statements that Thomas allegedly made about the crime and about how she and Thomas spent money that the State claimed was obtained from the Walgreens robbery.¹²⁷ It is undisputed that Angela Jackson opened a savings account at First American Bank.¹²⁸ However, Angela Jackson's testimony is the only evidence that the \$2,400 deposited in the account came from Thomas, and that Thomas supposedly waited outside in the car.¹²⁹ Likewise, Angela Jackson purchased the fancy pink Chevy with gold rims, and the car was titled in Jackson's name only.¹³⁰ Again, Angela Jackson's testimony is the only evidence that the money to purchase the car came from Thomas.¹³¹

In short, the State's case turned almost exclusively on the jury's perception of Angela Jackson's credibility. Knowing this, the State sought at trial to bolster her credibility by eliminating any suggestion that Angela Jackson may have had an ulterior motive for cooperating with the government, repeatedly characterizing

¹²⁷ Trial Testimony of A. Jackson, RE 12-17, Page ID 1725-1730, 1735, 1739-1747, 1803

¹²⁸ Trial Testimony of A. Jackson, RE 12-17, Page ID 1744

¹²⁹ Trial Testimony of A. Jackson, RE 12-17, Page ID 1744-1745

¹³⁰ Trial Testimony of A. Jackson, RE 12-17, Page ID 1735-1737

¹³¹ Trial Testimony of A. Jackson, RE 12-17, Page ID 1735-1737

Angela Jackson as a scared spouse who was not proud of her actions, but who finally was trying to make right by testifying against her former spouse.¹³² In fact, Jackson testified three times that she never received any reward or compensation in connection with her testimony against Thomas.¹³³

Because the State did not disclose the \$750 payment, Thomas' attorney was unable to impeach her with this information. Had he known of this payment, the jury would have heard of the importance of this payment to Jackson, whose car had already been repossessed, and who at the time of the trial was still paying the legal fees from her divorce from Thomas.¹³⁴ This information would have exposed Angela Jackson's bias and motive for testifying against Thomas again in his State trial and would have raised questions about whether she was again motivated by a possible—or even promised—cash payment for her state court testimony. Had the jury known about the payment, they may have suspected that Angela Jackson had not been truthful at the federal trial and that she was now repeating bought testimony to avoid charges of perjury. Moreover, defense counsel could have used evidence of the payment to show not only that Angela Jackson had a material motive for testifying, but that she was a liar—having testified falsely about not

¹³² Trial Testimony of A. Jackson, RE 12-17, Page ID 1733, 1746-1747, 1753, 1805

¹³³ Trial Testimony of A Jackson, RE 12-17, Page ID 1732, 1764, 1824

¹³⁴ Trial Testimony of A. Jackson, RE 12-17, Page ID 1717, 1732; Post-Conviction Testimony of A. Jackson, RE 14-10, Page ID 5806-5807

receiving any payments. All of this evidence would have substantially destroyed the credibility of the State's key witness in the eyes of the jury in a way that the other impeachment evidence presented at trial did not, which is why it is material rather than cumulative.

In *Robinson v. Mills*, the Sixth Circuit granted habeas relief for a *Brady* violation in a similar paid-informant case. 592 F. 3d 730 (6th Cir 2010). In that case, defendant David Robinson was sentenced to life imprisonment for the murder of Gerald Irwin. *Id.* at 731. Robinson claimed that he shot Irwin, a known drug dealer, in self-defense. *Id.* at 733. The State's case rebutting Robinson's claim of self-defense was established principally by Kim Sims, the only eyewitness to the crime. *Id.* Sims testified that she never saw Irwin reach for a gun as Robinson had testified. Although she had been with Irwin for several hours that night, she testified that she had never heard him threaten Robinson. *Id.* But the prosecution did not disclose that Sims had been a confidential informant for the police. Sims had been paid \$70 for providing information concerning the victim's sister, a witness in the Robinson case. *Id.* In granting habeas relief, the Sixth Circuit noted that Sims' testimony was the basis of the State's case, and the only testimony that challenged Robinson's self-defense theory. *Id.* at 736. Thus, "impeachment of Sims by the defense was crucial to the outcome of the case"—as "the determination of Robinson's guilt or innocence hinged on the jury's determination

of Sims’s truthfulness and reliability.” *Id.* In response, the State argued that the undisclosed impeachment evidence would have been cumulative, because defense counsel impeached Sims by pointing out discrepancies between her trial testimony and preliminary hearing testimony. *Id.* The court rejected this argument, finding that this type of impeachment differed in kind—and the suppressed evidence would have offered insight into Sims’ motive for the inconsistent testimony. *Id.* Furthermore, her status as a paid informant could demonstrate a prosecution bias at the time of trial. *Id.* at 736-737. The court then went on to say it makes little sense to argue that because Robinson tried to impeach Sims and failed that any further impeachment would be useless—rather, the court found that it was more likely that Robinson failed to impeach Sims because the more damning impeachment evidence was in fact withheld by the government. *Id.* at 737. Hence, the court focused on the quality of the withheld impeachment evidence, rather than considering it merely another piece of the impeachment pie, and thus cumulative.

Following *Robinson*, this court should grant Thomas relief. Like in *Robinson*, the key testimony against Thomas came from one witness—Angela Jackson. And Angela Jackson was a bought witness who had a powerful motive to lie because she had been paid a significant amount of money by law enforcement for her cooperation in implicating Thomas. The fact that Thomas was able to impeach Jackson in other ways does not make the secret \$750 payment to

Jackson immaterial—it is still the most damning impeachment evidence and had been withheld by the government. The State cannot absolve itself from its egregious violation of *Brady* by pointing to defense counsel’s use of bits of other impeachment evidence. Rather, the Court must carefully consider the impeachment value of the withheld evidence, irrespective of the other impeachment evidence adduced at trial.

In *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450 (6th Cir. 2015), this Court recently reversed the district court and granted habeas relief due to the State’s failure to turn over exculpatory evidence in violation of *Brady v. Maryland*. Mr. Barton had been convicted of involuntary manslaughter and aggravated burglary relating to the death of his wife. Prosecutors theorized that Barton hired someone to stage a burglary of his home to frighten his wife—but things went awry when the burglar was surprised by Barton’s wife’s unexpected presence at home, and he killed her. The burglar/murderer subsequently died. The State’s key witness at Barton’s trial was Gary Henson, who testified that originally Barton had tried to hire Henson to stage the burglary. The State failed to disclose to defense counsel evidence that could have been used to impeach Henson’s credibility. Specifically, Henson testified that he had previously been hired by someone else to stage a home burglary. But the State failed to disclose that the purported homeowner who allegedly hired Henson to stage the first burglary

adamantly denied it occurred—which meant Henson was lying. Even though the homeowner was threatened with criminal prosecution unless he testified at Barton’s trial that Henson had also been hired by him to stage a burglary, the homeowner remained steadfast in his denial, and all criminal charges against him were ultimately dropped. The Sixth Circuit found that the failure to disclose this impeachment evidence was exculpatory, as it could have been used to call into question Henson’s bias, self-interest, and motive to lie. *Id.* at 466. In analyzing prejudice, the Sixth Circuit addressed that (as in the present case) the correct standard was the reasonable probability standard. *Id.* at 468. The district court had found the evidence was superfluous, since Henson was impeached in other ways through cross examination. *Id.* at 469. But this Court disagreed, finding that the evidence at issue addressed whether the key witness against Barton was telling the truth. *Id.* at 468-69. Similar to *Barton*, Angela Jackson was the State’s key witness. Evidence of her being paid \$750 for her testimony discredited whether she was telling the truth. *Barton* therefore compels a similar result in Thomas’ case.

Law enforcement’s admitted conduct in this case is absolutely shocking. If the roles in this case were reversed—if, for example, it had been discovered after Thomas’ acquittal that the defense counsel’s investigator secretly paid a witness \$750—that defense attorney and his investigator would be indicted for obstruction

of justice, bribery, and a host of other charges. But here, the State's response is, essentially, that a secret \$750 payment to the key fact witness in a death penalty case was not a big deal. The cornerstone of due process is the right to a fundamentally fair trial. Thomas is presumed innocent and entitled to have the government fairly prove him guilty beyond a reasonable doubt. There is no question that, if the jury had known about this a secret substantial payment by law enforcement to Angela Jackson and then heard her lie about receiving payment on the stand, it would cast doubt upon whether Thomas "received a fair trial, understood as a verdict worthy of confidence." *Banks* 590 U.S. at 702-703.

Supreme Court Justice John McLean famously remarked that "of the courts of republican America let it ever be said that here the stream of justice flows pure and uninfluenced by affection, un-intimidated by power, and undefiled by corruption." *United States v. Cole*, 5 McLean 513, 25 F.Cas. 493, 496 (1853). It is stipulated that agents secretly paid Jackson \$750. It is stipulated that knowledge of payment is imputed to the prosecution. It is stipulated that the payment was exculpatory and withheld from the defense. Law enforcement has polluted the streams of justice. Thomas is entitled to relief.

2. Thomas is entitled to relief on his false testimony claim because Jackson's testimony was both false and material.

Angela Jackson testified three times at Thomas' murder trial that she had not received any reward money for helping with Thomas' prosecution.¹³⁵ First, under direct examination by the State, Angela Jackson testified as follows:

Q. When did the FBI agents come to your house?

A. I don't remember the date, but it was in November of '97.

Q. Did you ask them for your reward money?

A. No.

Q. Did you ever get any reward money?

A. No.

(Trial Testimony of A. Jackson, RE 12-17, Page ID 1732.)

Then, while being cross-examined by Thomas' counsel, Angela Jackson further testified:

Q. You said you were here today to testify because it was the right thing to do. Is that correct?

A. Yes.

Q. And that's your only motivation in testifying today. Is that right?

A. Yes, sir.

Q. You haven't receiving [sic] a reward for any of this?

¹³⁵ See Claim 2, Petition for Writ of Habeas Corpus, RE 1, Page ID 44-50

A. No, sir.

(Trial Testimony of A. Jackson, RE 12-17, Page ID 1764)

Then on redirect examination the prosecutor solicited from Angela Jackson a third denial that she received any type of payment for her testimony:

Q. Have you collected one red cent for this?

A. No, ma'am I have not.

(Trial Testimony of A. Jackson, RE 12-17, Page ID 1824)

It is undisputed that the SSTF paid Jackson \$750.00¹³⁶ for her “services” in connection with the investigation of the Walgreens robbery and her testimony at Thomas’ federal trial.¹³⁷ This payment was received by Jackson before she testified at Thomas’ state trial, where she gave the testimony quoted above denying ever having received such a payment.

The Supreme Court has long held that it is constitutional error for a state prosecutor to present false evidence, or allow false evidence to go uncorrected when it appears. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Well-established Supreme Court precedent shows that the use of false testimony can be critical to the result of a trial where it affects the credibility of a key witness. *Id.* The jury’s

¹³⁶ As a fact witness Angela Jackson could not lawfully be paid for her testimony, other than the \$40 witness fee authorized by 28 U.S.C. § 1821(b).

¹³⁷ See Receipt, Declaration of Scott Sanders, attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID7852-7853; see also Joint Stipulation, RE 78, Page ID 11953-11954

estimate of the truthfulness and reliability of a 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.* To establish a false testimony claim, a defendant must show (1) the statement is actually false; (2) the statement was material; and (3) the prosecution knew it was false. *Brooks v. Tennessee*, 626 F.3d 878, 894-95 (6th Cir. 2010).

The state has expressly waived exhaustion of this recently discovered claim.¹³⁸ Furthermore, the State has conceded that the prosecution had constructive knowledge of the Jackson payment, and that the only issues remaining were whether Angela Jackson's testimony was false and whether it was material.¹³⁹ Admissions in pleadings are judicial admissions that eliminate the need for evidence on the subject matter of the admission—as admitted facts are no longer at issue. *Ferguson v. Neighborhood Housing Services*, 780 F.2d 549, 550-551 (6th Cir. 1986). They are binding before the trial court and on appeal. *Id.*

A. Angela Jackson's testimony was false

Courts are routinely called upon to interpret language, and typically begin by looking at the plain meaning of the words. *Nat. Air Traffic v. Secretary of Dept. of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (“ Our...analysis begins by examining

¹³⁸ Stipulation of the Parties, RE 23, Page ID 7891-7893

¹³⁹ See Order on Summary Judgment, RE 102, Page ID 12123; see also Respondent's Brief Clarifying Issues Regarding the Necessity of an Evidentiary Hearing on Count 2, RE 95, Page ID 12043

the language of the statute itself to determine if its meaning is plain.); *Moyer v. Mutual Ben. Health & Accident Ass'n*, 94 F.2d 457, 458 (6th Cir. 1938) (“The... contract...is to be construed like other contracts, according to the plain, ordinary meaning of its words.”). A fundamental canon of construction is that, words will be interpreted as taking their ordinary, contemporary, common meaning. *Franklin v. Kellogg Co.*, 619 F.3d 604, 615 (6th Cir. 2010). Additionally, a court must interpret a statute as a whole, making every effort not to interpret a provision in a manner that renders other provisions inconsistent, meaningless or superfluous. *Greenpeace Inc. v. Waste Technologies Indus.*, 9 F.3d 1174, 1179 (6th Cir. 1993). By analogy the same principles should apply here in determining whether Angela Jackson testified falsely. The first question for the court is: what are the plain and ordinary meanings of “reward” and “one red cent?” The closely related second question is what meaning do these words have in the context of the rest of Angela Jackson’s testimony? Here, Angela Jackson was asked by the prosecutor “Did you get any reward money?” The Oxford English dictionary defines the word “reward” as “a thing given in recognition of one’s service, effort, or achievement” or “a sum offered for [*inter alia*] the giving of information.”¹⁴⁰ Thus, the common meaning found in the dictionary exactly describes what occurred here. Moreover, the prosecutor’s question was broad, as the word “reward” was prefaced by the

¹⁴⁰ www.oxforddictionaries.com/us/definition/american_english/reward

adjective “any.” Then, on redirect, Angela Jackson was asked whether she “collected one red cent for this?” This expression is a colloquialism, which again, according to the Oxford dictionary, means “the smallest amount of money”¹⁴¹ Thus, the plain meaning of the prosecutor’s questions, taken as a whole, was to ask Jackson whether she received any money at all for her cooperation—which she denied. Given that it is stipulated she was paid \$750, her testimony is therefore false.

The District Court concluded Jackson’s denial of receiving a reward was not indisputably false for two reasons: (1) the documentation of the payment does not refer to the payment as a reward, and (2) Jackson could have believed the \$750 payment was for helping with Thomas’ federal prosecution—thus she could have understood the questioning in the State case to be limited to whether she received any money in connection with her testifying against Thomas in the State case.¹⁴²

First of all, it does not matter what words were used when Jackson received the payment from the SSTF officer. If a citizen was indicted for bribery for slipping a \$100 bill to a policeman after being pulled over for a speeding ticket—does it really matter whether the citizen called it a “bribe” when handing the

¹⁴¹ www.oxforddictionaries.com/us/definition/american_english/redcent

¹⁴² Order on Summary Judgment, RE 102 at Page ID 12126

officer the money? No: the question is the purpose of the payment. What is said at the time of payment, though certainly relevant, is not dispositive.

From the record, it is clear that the payment to Jackson was in fact a reward. SSTF Agent Scott Sanders' sworn declaration asserts that the payment was made to Angela Jackson "for the assistance she provided" in the case.¹⁴³ The memorandum submitted by SSTF requesting authorization for the payment provides that "it is the opinion of the investigating Agents that Thomas would not have been successfully prosecuted in this matter" without Jackson's assistance.¹⁴⁴ The memorandum then states that based "upon the above" (i.e. Jackson's help with Thomas' prosecution), SSTF was requesting authority to pay Jackson \$750.¹⁴⁵ Sanders' declaration also states "the \$750 payment that was subsequently given to Jackson was not anticipated, planned, or discussed with her at all prior to the payment being made."¹⁴⁶

On its face, a gratuitous payment to Jackson following her providing substantial assistance to law enforcement sounds precisely like what is commonly understood as a reward. It fits exactly within the plain meaning of the term. If a woman finds a wallet full of cash in the mall, looks at the identification contained

¹⁴³ Declaration of Scott Sanders, attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID 7846

¹⁴⁴ See Memorandum attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID 7852

¹⁴⁵ *Id.*

¹⁴⁶ Declaration of Scott Sanders, RE 15-1, Page ID 7846

therein and returns the wallet to the owner, and if the owner in gratitude then gives her \$50, it would be correct in common English to say the woman received a \$50 *reward* for returning the wallet. A “reward” as “a thing given in recognition of one’s service, effort, or achievement” or “a sum offered for [*inter alia*] the giving of information.”¹⁴⁷ Given this common understanding of the meaning of “reward,” how can a payment to Jackson for providing information to prosecute Thomas be considered anything else? The District Court’s finding ignores the plain meaning of the word “reward.”

The court curiously remarks that the fact Thomas relies upon a dictionary definition of “reward” weakens the argument of the testimony’s falsity.¹⁴⁸ To the contrary, the dictionary definition shows that the payment to Jackson falls squarely within the plain meaning of the word “reward.” Courts routinely look to the dictionary to confirm that plain meaning of words. For example, in *Franklin v. Kellogg Co.*, this court was called upon to interpret the meaning of the word “clothing” in a case brought under the Fair Labor Standards Act. 619 F.3d 604 (6th Cir. 2000). The court relied upon a dictionary definition of the word “clothing” even though the Department of Labor urged the court that use of dictionaries to determine the plain meaning of words was inappropriate. In rejecting this contention, Judge Siler wrote for the panel: “Based upon the DOL’s

¹⁴⁷ www.oxforddictionaries.com/us/definition/american_english/reward

¹⁴⁸ Order on Summary Judgment, RE 102, Page ID 12126

reasoning, we would never look to the dictionary definition of a word. That idea is simply inconceivable, given our extensive history of consulting dictionaries in defining undefined words in a statute.” *Franklin v. Kellogg*, 619 F.3d at 615. And if the word “reward” were ambiguous, Jackson’s redirect testimony that she did not receive “one red cent” makes her meaning crystal clear. There is no way to interpret Jackson’s testimony, other than she received absolutely no compensation, in any way, in connection with her cooperating with law enforcement, and testifying against Thomas.

Alternatively, the court held the testimony is not necessarily false since Angela Jackson could have understood the reward to have been paid solely in appreciation for her federal testimony, and that she might have understood the questioning in her state trial as limited to whether she had received any compensation for her current testimony in state court. This is an odd finding that is not supported by the record. In her deposition, Jackson incredibly remained steadfast in not recalling any payment at all.¹⁴⁹ Jackson did not testify that she thought the payment related to her federal court testimony. Rather she unbelievably said she didn’t remember at all whether it occurred.

A false testimony claim is a type of prosecutorial misconduct claim. The question is not subjectively whether Jackson actually believed the testimony to be

¹⁴⁹ Deposition testimony of A. Jackson. RE 54, Page ID 8291 *et. seq.*

false, but rather whether the fair implication of her testimony as objectively understood by the jury and the prosecutor would be that the testimony is false if the jury had been subsequently apprised of all the relevant facts. *See, e.g., Rosencrantz v. Lafler*, 568 F.3d 577, 583 (6th Cir. 2009)(the claim focuses upon whether the *prosecutor* failed to correct testimony that the *prosecutor* knew or should have known to be false). Thus, if a witness testified in such a way to assert a fact that the prosecution knew not to be true, the prosecution must correct this misrepresentation of the facts, regardless of whether the witness intentionally testified falsely or mistakenly testified falsely.

Angela Jackson was asked three separate times in her testimony about whether she received any compensation, twice of which were upon the questioning of the prosecutor. The questions directed to Angela Jackson about compensation were broad, asking whether she had received a reward for “any of this.” And on redirect, the prosecutors solicited an answer that she had not “collected one red cent.” This line of questioning was intended to bolster Angela Jackson’s credibility to the jury, and eliminate one possible source of bias—that she had been paid. In this context, a jury would not reasonably understand the testimony limited to whether she had received any money only in connection with her current testimony—but instead the fair import of the testimony would be that she had not

received anything at all in connection with her testimony regarding the Walgreens robbery.

This payment was a large sum for Angela Jackson. A \$750 payment in 1998 would be equivalent to more than \$1,100 today (over 17 years later). Furthermore, Angela Jackson testified in her deposition that her hourly wage in 1998 was approximately \$7 per hour and her gross salary was approximately \$1,130 per month.¹⁵⁰ Thus, the \$750 payment would have been equivalent of more than two weeks' wages at the time she was paid this sum. Is it believable that when asked about whether she had received "one red cent" or a reward for "any of this" that she would have forgotten the government giving her a surprise payment of over two weeks' wages? And more appropriately, given that the prosecutor's knowledge of the payment has been conceded, the question is whether the prosecutors should have corrected Jackson's testimony, after she testified that she did not receive a reward, and did not collect one red cent.

The plain meaning of Jackson's testimony is clear and it is evident her testimony was false.

B. Angela Jackson's false testimony was material

Alternatively, the District Court held that the false testimony was not material, with an argument similar to that it made for purposes of the *Brady* claim:

¹⁵⁰ Deposition Testimony of A. Jackson, RE 54, Page ID 8311-8312

The Court notes that: (1) Jackson's credibility was thoroughly tested in the state court proceedings; (2) Jackson's testimony has been consistent throughout all the proceedings in which she has testified; (3) there is no credible, reliable evidence to dispute Jackson's version of events; (4) there is corroborating evidence for Jackson's testimony about the purchase of the pink car; (5) both a federal jury and a state jury have found Thomas guilty based upon the same incident; (6) the payment was made after the statement and the federal trial with none of the parties able to foresee that a second state court trial would be held more than two years later; and (7) there is no clear nexus between the payment and Jackson's testimony at the second trial. Any false testimony was not associated with Thomas' guilt, but Jackson's motive for testifying, which was thoroughly addressed at trial.¹⁵¹

First of all, Angela Jackson was the key to the State's case against Thomas. It is true that defense tested her credibility, for example by introducing evidence as to statements Jackson had made earlier that she had threatened to "pay Thomas back."¹⁵² But evidence that Jackson was lying under oath, before the jury, about receiving a reward is a far more powerful type of impeachment. In a capital-murder trial, the defense had the right to bring all impeachment to bear on the State's key witness—particularly when it is powerful impeachment evidence such as lying under oath about secretly being paid by law enforcement.

Jackson's consistency in retelling the false statement is not evidence of her truthfulness. Having been paid by the agents after her testimony in the federal trial, she could have likewise anticipated a similar reward after her false testimony

¹⁵¹ Order on Summary Judgment, RE 102, Page ID 12130

¹⁵² Order on Summary Judgment, RE 102, Page ID 12128

in the state trial. And she very well could have been afraid to change her story out of fear of perjury charges. The corroboration about the purchase of a pink car is also of little worth—as it is dependent upon Jackson. At trial the State’s evidence established Jackson—not Thomas—bought the car, and it was titled in Jackson’s name.¹⁵³ It is Angela Jackson who testified that the money for the car came from Thomas.¹⁵⁴

The District Court’s finding that both a state and federal jury convicted Thomas upon similar testimony is also irrelevant, as neither jury had the benefit of knowing that Angela Jackson received a secret \$750 payment and then lied about it under oath.

Materiality for purposes of a false testimony claim is even less stringent than required for *Brady* claims—as the question is whether there is any reasonable likelihood that the false testimony could have affected the verdict. *Rosencrantz v. Lafler*, 568 F.3d 577, 584 (6th Cir. 2009). The difference between these standards is not mere semantics. The Supreme Court has opined that the “any reasonable likelihood” standard is much less burdensome than the “reasonable probability” standard applicable to *Brady* claims. *United States v. Agurs*, 427 U.S. 97 (1976). As stated in *Agurs*, the Supreme Court has “consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair.” 427

¹⁵³ Trial testimony of Angela Jackson, RE 12-17, Page ID 1736-1737

¹⁵⁴ *Id.*

U.S. at 103. Eliciting or failing to correct false testimony is not only gross “prosecutorial misconduct” but is also a “fundamental corruption of the truth-seeking function of the trial process” *Id.* at 103-104.

Given this light standard, it is evident that Angela Jackson’s lying under oath about receiving payments for her testimony were material. Thomas is entitled to relief on this claim.

3. Thomas was denied effective assistance of counsel.

Effective assistance of counsel, as guaranteed by the Sixth Amendment to the United States Constitution, entails certain basic duties, including “a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, a petitioner must show that counsel failed to act “reasonably considering all the circumstances,” and that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694.

Counsel’s performance is deficient under *Strickland* if it falls below an objective standard of reasonableness, as defined by prevailing professional norms and “as reflected in [the] American Bar Association standards and the like.” *Id.* at 687-88. Although counsel is given wide latitude with respect to strategic choices made in the course of representation—this latitude is not without limits. The

legitimacy of counsel's strategic choices depends on the thoroughness of counsel's investigation, and that "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691 (emphasis added).

Counsel's deficient performance will be deemed prejudicial if, but for counsel's error, there is "a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 513 (2003). When assessing prejudice it is necessary to examine counsel's errors in the context of the facts of the case:

Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland, 466 U.S. at 695-696.

A habeas claim of ineffective assistance of counsel reviewing a decision of a state court not only involves an application of *Strickland v. Washington*, but also

requires application of AEDPA. Therefore, a “double deference” standard applies—deference to counsel’s informed choices per *Strickland* –and deference to the state court judgment unless it is “unreasonable” per AEDPA. *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009).

However, no AEDPA deference is afforded state court judgments which are “based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. §2254(d)(2). In *Wiggins v. Smith*, 539 U.S. 510, 528-529 (2003), the court not only found the state court’s conclusion that counsel had conducted an adequate investigation to be an unreasonable application of *Strickland* under §2254(d)(1), it also found that the state court had based its conclusion, in part, on a clear factual error, which constituted an unreasonable determination of the facts under §2254(d)(2). The court held that “[t]he requirements of §2254(d) thus pose no bar to granting petitioner habeas relief.” *Id.*

A. Trial Counsel failed to present a medical causation defense.

A crucial issue at trial, which the State had to prove beyond a reasonable doubt, was whether the gunshot wound that Day sustained on April 1, 1997, ultimately caused his death from a bladder infection two and a half years later. Despite the obvious importance of this issue, Thomas’ counsel failed to adequately

investigate and present a medical causation defense, and therefore deprived him of effective assistance of counsel.¹⁵⁵

Lead counsel, Michael Scholl, by his own admission, did very little work on Thomas' medical defense. Instead, Scholl delegated this critical responsibility to co-counsel.¹⁵⁶ Co-counsel testified that he did not independently contact a medical expert and that he had no recollection of talking to any medical expert at all.¹⁵⁷ Instead of conducting their own review, Thomas' counsel decided to ride the coattails of the attorneys appointed to represent Anthony Bond.¹⁵⁸

Bond's counsel consulted with Dr. Steven Hayne, the Chief Medical Examiner of Mississippi and a forensic pathologist, to see if he would reach a different conclusion than the State's medical experts on the issue of causation. Dr. Hayne advised Bond's counsel that a gunshot wound was only one possible cause for Day's neurological injuries.¹⁵⁹ Dr. Hayne stated that it was "critical" for counsel to consult with an expert in the field of neurology to determine the cause of Day's death and to evaluate the impact of Day's medical treatment on his

¹⁵⁵ See Claim 4a, Petition for Writ of Habeas Corpus, RE 1, Page ID 76-84

¹⁵⁶ Post-Conviction Testimony of M. Scholl, Docs. 14-11, 14-12, Page ID 5982, 6097

¹⁵⁷ Post-Conviction Testimony of J. Glatstein, RE 14-10, Page ID 5679; Post-Conviction Testimony of M. Scholl, RE 14-11, Page ID 5982

¹⁵⁸ Post-Conviction Testimony of J. Glatstein, RE 14-10, Page ID 5695

¹⁵⁹ Letter from Dr. Hayne to Manis (8/29/01), attached as Exhibit 2 to Petition for Writ of Habeas Corpus, RE 1-2 Page ID 136

injuries.¹⁶⁰ Despite this express instruction, neither Thomas' counsel nor Bond's counsel ever followed up and spoke with an expert in neurology. Rather, they proceeded to trial without an expert.¹⁶¹

Had counsel consulted with an expert, they would have been able to present testimony at trial like that of neurologist Dr. Steven Horowitz, who testified at Thomas' post-conviction hearing that Day's medical records show that his paraplegia and neurogenic bladder were not caused by the gunshot, but instead by the Medical Center's grossly negligent administration of multiple, contra-indicated anti-hypertensive medications to Day when he was not medically hypertensive.¹⁶² Dr. Horowitz's testimony called into question critical points of the State's causation proof, but no such evidence was presented at trial. Additionally, because counsel failed to consult with a qualified expert to assist in their understanding of the medical issues, they failed to cross-examine the State's experts with even one medical record, even though the records contradicted the State's theory of causation. Instead, the uninformed and unprepared Scholl actually conceded in

¹⁶⁰ *Id.*

¹⁶¹ Scholl also testified at the Post-Conviction hearing that he recalled Manis spoke with a urologist, Dr. Alabaster, who did not dispute the State's theory of causation with respect to Day's urological issues. Scholl did not recall any conversations or meeting with either doctor. *See* Post-Conviction Testimony of M. Scholl, RE 14-12, Page ID 6127-6129

¹⁶² *See also* Section discussing Claim 3(b), *supra*.

front of the jury that Day's neurogenic bladder was caused by the gunshot wound.¹⁶³

Even if trial counsel's failure to present an adequate medical causation defense constituted a deficiency, the state court alternatively found Thomas was not prejudiced by that failure because he could not prove that Dr. Horowitz's testimony established an affirmative defense of a break in the chain of causation:

It is without dispute that, without medical treatment on April 21, 1997, Day would have died from the injuries sustained as a result of the gunshot wound. Thus it was reasonably foreseeable that Day would have died from the gunshot wound inflicted by Petitioner. Petitioner cannot establish any prejudice resulting from the alleged failure of counsel to consult a neurologist or otherwise more effectively challenge the State's expert witnesses.

Thomas v. State, 2011 WL 675936, at *30.

Under *Strickland*, the central question in the prejudice inquiry is not whether Thomas could definitively prove that the hospital's negligence broke the causal chain. Instead, to prove prejudice under *Strickland*, Thomas needs only to show a "reasonable probability" that, had trial counsel presented expert medical testimony, one juror would have concluded that the State failed to prove that the gunshot wound caused Day's death. *Strickland*, 466 U.S. at 694. Thus, Dr. Horowitz need not provide an airtight defense that there was a break in the chain of causation; rather, his testimony should have been deemed sufficient to show prejudice so long

¹⁶³ Trial Testimony of C. Gardner, RE 12-22, Page ID 2619, 2623-2624, 2642

as it exposed sufficient weakness in the State's causation argument such that one juror might have believed that the State failed to prove its case against Thomas. The state court's finding that trial counsel appropriately elected not to pursue causation as a defense is unreasonable. Thomas is entitled to relief.

B. Trial and appellate counsel were ineffective for failures as to the admission and use of Bond's confession as evidence against Thomas.

Additionally, trial and appellate counsel were ineffective for failing to object to the inappropriately redacted statement of Anthony Bond, admitted at Thomas' trial, and for failing to raise these issues on appeal.¹⁶⁴ In November 1997, Anthony Bond signed a written confession claiming that he was the driver of the getaway car in the Walgreens robbery and that Thomas was the shooter.¹⁶⁵ Before the commencement of Thomas' and Bond's joint trial for the Walgreens robbery, the State informed the court and defense counsel that it intended to introduce and rely upon Bond's confession at trial.¹⁶⁶ To protect Thomas' confrontation clause rights, redaction of the confession was necessary under the Supreme Court's opinion in *Bruton v. United States*, 391 U.S. 123 (1968). The court held a pretrial conference to discuss the form and content of the redacted confession, at which Scholl

¹⁶⁴ See Claim 4c and 4e, Petition for Writ of Habeas Corpus, RE 1, Page ID 86-97, 99-100

¹⁶⁵ See Bond's unredacted confession (11/5/97) State Trial Exhibit 57, RE 12-9, Page ID 751-754

¹⁶⁶ Letter from Weirich to Scholl (8/10/01), Post-Conviction Exhibit 10, RE 14-9, Page ID 5566

specifically requested that Bond's description of his accomplice's clothing during the robbery remain unredacted. From the context of the rest of the redacted confession, it was clear that Bond's accomplice, referred to the as "the other person" in his confession, was the shooter.¹⁶⁷ The redacted confession also contained the following:

Q. What was the other person wearing during the robbery?

A. A striped shirt. I think it was yellow and blue. And he might have had some shorts on.¹⁶⁸

The phrase "the other person" was handwritten onto the redacted confession to replace a typewritten reference to Thomas' nickname.¹⁶⁹ The confession was otherwise redacted by replacing text with big blocks of empty space and replacing other words with handwritten words.¹⁷⁰

Other than his request for not redacting Bond's description of what Thomas was purportedly wearing during the robbery, Scholl did not object to the State's introduction or use of the confession against Thomas at trial, nor did he request a limiting instruction to instruct the jury that Bond's confession could only be considered as evidence against Bond, not Thomas.

¹⁶⁷ Bond's Redacted Confession (11/5/97), RE 12-9, Page ID 755-758

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

Thus, Scholl committed the following errors, each of which constitutes a separate instance of ineffective assistance of counsel under *Strickland*: (1) Scholl failed to object to the improper introduction of Bond's confession at the joint trial despite the fact that, even as redacted, Bond's confession implicated Thomas as the shooter in the Walgreens robbery in violation of *Bruton*; (2) Scholl failed to object to the State's repeated improper use of Bond's confession during its closing argument as proof of Thomas' participation and role in the Walgreens robbery; and (3) Scholl failed to request a limiting instruction be given to the jury to inform them that Bond's confession could not be considered as evidence in determining the guilt or innocence of Thomas, or to object to the court's failure to issue any such instruction. These failures, viewed individually or collectively, resulted in a violation of Thomas' right of confrontation and his right to the effective assistance of counsel, and deeply prejudiced his defense.

A criminal defendant is deprived of his right of confrontation when the confession of a non-testifying co-defendant that incriminates him is introduced at their joint trial, or when a properly redacted co-defendant's confession is admitted without a limiting instruction that informs the jury that the confession cannot be used as evidence of the non-confessing co-defendant's guilt or innocence. *Bruton*, 391 U.S. at 127-28, *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

The Tennessee Court of Criminal appeals correctly found that Bond's confession was improperly redacted and that its introduction without a limiting instruction violated Thomas' Sixth Amendment Confrontation Rights under *Bruton*. It held that: "The law regarding redacted confessions under *Bruton* was in place well before [Thomas'] trial. We can reach no conclusion other than that the redacted statement which replaced 'Bowlegs' with 'other person' violated the mandates of *Bruton* and its progeny." *Thomas v. State*, 2011 WL 675936 (Tenn. Crim. App. 2011), at *24.

Nevertheless, despite concluding that the redacted confession violated *Bruton*, the Court of Appeals excused Scholl's failure to object to the unconstitutional use of the confession against Thomas on the basis that Scholl made a tactical decision to leave the description of the accomplice's clothing in the statement to "amplify the inconsistencies" of the various descriptions of the shooter. *Id.* at *25. But the Court of Criminal Appeals acknowledged that there was no tactical basis for Scholl's failure to request a limiting instruction. *Id.*¹⁷¹ And Scholl's trial strategy is flatly contradicted by the record. At the post-conviction hearing, Scholl claimed that "no one ever matched the description that

¹⁷¹ "Notwithstanding, our deference to trial strategy does not extend to the failure to request a limiting instruction. We fathom no legitimate tactical reason to explain counsel's failure to request a limiting instruction." *Id.*

Anthony Bond gave [of the other person].¹⁷² However, Angela Jackson also said that Thomas was wearing a striped shirt and shorts on the day of the robbery.¹⁷³ Therefore, not only was the inclusion of Bond's description of the shooter's clothing totally unnecessary (because Angela Jackson gave the same exact description of Thomas' alleged clothing, which also contradicted the eyewitness accounts of the shooter), but in matching Jackson's description of what Thomas was wearing, it suggested to the jury that Thomas himself was the other person/shooter referred to in Bond's confession. In fact, the prosecutor in closing argument asserted that Angela Jackson corroborated the identity of Thomas as the other shooter in Anthony Bond's confession.¹⁷⁴ The court's opinion blindly deems Scholl's conduct reasonable because it was cloaked in the trappings of strategy. But the mere invocation of the term strategy is not a blanket justification to cover deficient performance. *See Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). In other words, even deliberate trial tactics may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance. *Martin v. Rose*, 744 F.2d 1245, 1249 (6th Cir. 1984). And in any event, deficient performance was admitted at least with respect to the failure of Scholl to request a limiting instruction.

¹⁷² Post-Conviction Testimony of M. Scholl, RE 14-12, Page ID 6047

¹⁷³ Trial Testimony of A. Jackson, RE 12-17, Page ID 1733-1734

¹⁷⁴ Prosecution's Closing Argument, RE 13-1, Page ID 2854

And despite the findings of a *Bruton* violation, and deficient performance by Scholl with respect to failure to request a limiting instruction, the Court of Criminal Appeals made the sweeping conclusion that Thomas was not prejudiced by any potential deficiencies because the error was purportedly harmless. This finding was founded on the supposed fact that “the evidence of ... [Thomas’s] guilt, even absent the redacted statement, was overwhelming.”¹⁷⁵ The Court of Criminal Appeals recounted that Angela Jackson’s testimony was powerful, such that he would have been convicted even in the absence of the statement. But a more complete look at the evidence introduced during Thomas’ trial shows the State lacked any forensic evidence placing Thomas at the scene, its case leaned heavily on Angela Jackson, and Bond’s improperly admitted confession acted as powerful corroboration to this testimony. This is especially true in light of the evidence we now know that Angela Jackson was paid for her testimony and lied under oath about the payment in Thomas’ trial.

The state court findings were therefore an unreasonable application of *Strickland*, and Thomas is entitled to relief.

¹⁷⁵ *Thomas v. State*, 2011 WL 675936 (Tenn. Crim. App. 2011), at *24

C. Trial Counsel failed to object to the prosecutor's repeated characterization of Thomas and Bond as "Greed and Evil."

During its opening and closing statements, the State referred to Bond and Thomas as "Greed" and "Evil" a total of 21 times.¹⁷⁶ Trial counsel failed to object to this characterization and no curative instruction was issued by the trial court. Both the Court of Criminal Appeals and the Tennessee Supreme Court acknowledged that the prosecutor's repeated characterization of Thomas and Bond as "Greed" and "Evil" was improper. *See State v. Thomas*, 158 S.W.3d, 361, 414 (Tenn. 2005).

Thomas raised this claim both as an ineffective assistance of counsel claim, due to trial counsel's failure to object to the abusive characterization of Thomas, but also as a substantive prosecutorial misconduct claim. The District Court did not dispute that the comments were improper, or that it was deficient performance for Scholl to fail to object to the characterization or request a curative instruction. Rather, the District Court dismissed both claims, asserting that Thomas could not demonstrate prejudice resulting from the error.¹⁷⁷

In *Berger v. United States*, the Supreme Court recognized that a prosecutor's words carry great weight with the jury, and if pronounced and persistent, improper

¹⁷⁶ See Claims 4d and e, Petition for Writ of Habeas Corpus, RE 1, Page ID 97-99, 112-113. The transcript of the prosecution's opening and closing is reprinted in the Order on Summary Judgment, RE 102, Page ID 12195-12211.

¹⁷⁷ Order on Summary Judgment, RE 102, Page ID 12162, 12214

suggestions and insinuations can have a “probable cumulative effect which cannot be disregarded as inconsequential.” *Berger v. United States*, 295 U.S. 78, 88-89 (1935); *see also United States v. Payne*, 2 F.3d 706, 712-15 (6th Cir. 1993) (reversing an obstruction of mail conviction because the prosecution characterized the defendant as a bad individual, thereby misleading the jury). Simply by referring to Thomas and Bond as “Greed” and “Evil” a total of 21 times during her opening and closing statements, there can be no doubt that her repeated use of those improper characterizations affected the jury. The State court’s finding that there was no prejudice is an unreasonable application of *Berger* and *Strickland*, and Thomas is entitled to relief.

D. Trial Counsel failed to present evidence that Bobby Jackson committed the Walgreens robbery with Anthony Bond.

Scholl’s primary defense at trial was that Anthony Bond was involved in the Walgreens robbery with another individual—Bobby Jackson.¹⁷⁸ Despite the fact that there was a significant evidentiary basis for this theory, Scholl presented scant evidence to support it.¹⁷⁹ First, although Robert Fisher identified Bobby Jackson as one of the perpetrators of the Walgreens robbery on two different occasions, Scholl only introduced evidence of one such identification—and he did so without any

¹⁷⁸ Post-Conviction Testimony of M. Scholl, RE 14-11, Page ID 6006

¹⁷⁹ *See* Claim 4g, Petition for Writ of Habeas Corpus, RE 1, Page ID 103-

mention of Bobby Jackson's name, meaning that the jury only knew that Robert Fisher had identified *someone* besides Thomas as the perpetrator of the robbery, without having any idea *who* that someone was.¹⁸⁰

Second, even though multiple witnesses gave descriptions of the getaway driver that matched Bobby Jackson and of the shooter that matched Bond, Scholl did not call any of these witnesses (besides Robert Fisher) to testify about what they had seen. Scholl dismissed this error as a tactical decision to avoid having one of the witnesses potentially identify Thomas as a perpetrator of the robbery.¹⁸¹ However, Scholl's purported fear that this witness would identify Thomas is without merit because: (1) at least one of the eyewitnesses, Gail McDonald, had actually viewed a photo-spread containing Thomas' picture, but she did not identify him as the perpetrator in the Walgreens robbery; (2) Scholl called Robert Fisher to testify, apparently without fearing that he would identify Thomas; and (3) Thomas does not fit any of the descriptions given by the other witnesses.

Third, while Scholl introduced some evidence that Angela Jackson and Bobby Jackson had been romantically involved, he did not offer any evidence of the fact that they were dating in 1997, when Angela Jackson gave her statement to

¹⁸⁰ See Trial Testimony of R. Fisher, RE 12-22, Page ID 2718-2719

¹⁸¹ Post-Conviction Testimony of M. Scholl, RE 14-12, Page ID 6082

investigators implicating Thomas and protecting Bobby Jackson, or when Angela Jackson testified in Thomas' federal trial.¹⁸²

Fourth, and most critically, Scholl failed to introduce evidence that just three months after the Walgreens robbery, Bobby Jackson admittedly attempted to rob another Loomis Fargo guard at the Southbrook Mall in Memphis.¹⁸³

The District Court found Scholl's performance to constitute reasonable trial strategy.¹⁸⁴ However, the evidence is to the contrary and counsel's actions were unreasonable under *Strickland*, warranting habeas relief.

E. Trial Counsel's cumulative errors amounted to ineffective representation

Thomas also argued in his habeas petition that he was entitled to habeas relief because of the cumulative errors in his counsel's performance.¹⁸⁵

Consideration of the cumulative effect of counsel's errors is mandatory under *Strickland*. See *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (state court properly considered the entire post-conviction record, viewed as a whole and cumulative of

¹⁸² See Trial Testimony of S. Williams, RE 13-1, Page ID 2773; Trial Testimony of W. Upchurch, RE 13-1, Page ID 2778; Post-Conviction Testimony of B. Brown, RE 14-10, Page ID 5652; Post-Conviction Testimony of T. Gentry, RE 14-11, Page ID 5822-5823; Post-Conviction Testimony of S. Williams, RE 14-12, Page ID 6021-6022

¹⁸³ See Post Conviction Hearing Exhibit 17, Letter from S. Briscoe to AUSA T. Arvin, RE 14-5, Page ID 5092-5093

¹⁸⁴ Order on Summary Judgment, RE 102, Page ID 12180-12181

¹⁸⁵ See Claim 4h, Petition for Writ of Habeas Corpus, RE 1, Page ID 107-108

mitigation evidence presented originally in finding ineffective assistance.) The District Court denied relief.¹⁸⁶ As explained above, collectively, all of counsel's actions prejudiced Thomas' right to effective counsel, warranting habeas relief.

4. Thomas is entitled to relief due to the trial court's failure to instruct the jury on lesser included offenses.

In a capital case, the jury must be instructed on lesser included offenses when there is evidence to support the instruction.¹⁸⁷ Failure to give such instructions violates due process. *Beck v. Alabama*, 447 U.S. 625, 638 (1980). At Thomas' trial, the court instructed the jury as to felony murder only. The jury was not instructed as to the lesser included offenses of second degree murder, reckless homicide, or criminally negligent homicide.

On direct appeal, both the Tennessee Supreme Court and the Court of Criminal Appeals correctly found—and the State conceded—that the failure to instruct the jury on lesser included offenses was error. The court acknowledged that the evidence presented at trial supported the existence of lesser included offenses, and a jury rationally could have found Thomas guilty of one or more of those offenses instead of felony murder. *See State v. Thomas*, 158 S.W.3d 361, 380 (Tenn. 2005). But the state court nonetheless determined that the failure to give the instructions was harmless beyond a reasonable doubt. *Id.*

¹⁸⁶ Order on Summary Judgment, RE 102, Page ID 12182

¹⁸⁷ *See* Claim 5, Petition for Writ of Habeas Corpus, RE 1, Page ID 108-112

The District Court began its analysis of the issue by finding that Thomas had properly raised the issue as a question of federal law.¹⁸⁸ It then opines that to obtain habeas relief for errors found by the State court to be harmless, the proper standard of review is whether the error had a substantial and injurious effect on the verdict.¹⁸⁹ The District Court then continued its review by examining the facts of the case. It asserted that Thomas' mode of executing the robbery was to hide, approach the guard from behind and shoot him to disable him and take the money. It opined that the evidence does not support the conclusion that a reasonable juror would acquit Thomas of felony murder in lieu of a conviction for one of the lesser included offenses.¹⁹⁰ The District Court then held that the state court's decision was not contrary to or an unreasonable application of clearly established law, and was based upon a reasonable determination of the facts.

The District Court opinion overlooks the fact that, even if the jury was convinced that Thomas was involved in the Walgreens robbery, it was not bound to accept the State's theory of the crime, which was that Thomas was the shooter and that Bond was the driver of the getaway car. Indeed, there was evidence that Bond was the shooter, including the fact that Bond's fingerprint, and not Thomas', was found on the passenger side of the getaway car where witnesses saw the

¹⁸⁸ Order on Summary Judgment, RE 102 at Page ID 12186

¹⁸⁹ *Id.* at Page ID 12189

¹⁹⁰ Order on Summary Judgment, RE 102 at Page ID 12193

shooter sitting. Additionally, various eyewitness descriptions of the shooter matched the clothes that Bond admitted to wearing on the day of the robbery. For example, Gail McDonald and Bobbie Fleming both described the shooter as wearing blue pants or jeans—a description that matches the blue jeans that Bond admitted to wearing, but not the shorts he claimed Thomas wore.¹⁹¹ And had the jury known, as we now do, that Angela Jackson received a significant payment in connection with her testimony and then lied about it to the jury, the jury would certainly have questioned the truthfulness of the rest of her testimony, including her testimony on statements that Thomas allegedly made about the crime.

5. Thomas is actually innocent.

The Supreme Court has announced that the “execution of a legally and factually innocent person would be a constitutionally intolerable event.” *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O’Connor, J. concurring).¹⁹² To obtain relief for a claim of actual innocence, the petitioner must make a “truly persuasive demonstration” of actual innocence “based upon all the evidence... without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *Cf. House v. Bell*, 547 U.S. 518, 537-38 (2006) (discussing actual

¹⁹¹ Gail McDonald FBI statement (4/21/97) and Bobbie Fleming FBI statement (4/21/97), attached as Exhibit 11 to the Petition for Writ of Habeas Corpus RE 1-11, Page ID 180-181, 183-184; *see also* Bond’s redacted confession (11/5/97), attached as Exhibit 9 to the Petition for Writ of Habeas Corpus, RE 1-9, Page ID 168

¹⁹² Claim 3, Petition for Writ of Habeas Corpus, RE 1, Page ID 51-75

innocence in the related context of excusing procedural default). There are two different arguments raised as to why Thomas is actually innocent. First, Andrew Thomas did not participate in the robbery. And second, Day's death was not caused by the gunshot wound he received during the Walgreens robbery.

The District Court's opinion provides little analysis of Thomas' actual innocence claims. The court's opinion provides a cursory review of the facts supporting Thomas' claim of innocence.¹⁹³ The court then opines that the Sixth Circuit has rejected free-standing actual innocence claims based upon newly discovered evidence where the evidence false short of the "extraordinarily high" threshold set by *Herrera*.¹⁹⁴ Then, with no further analysis, the District Court finds the claim without merit and dismisses it. The facts as set forth above make a compelling case that the Walgreens robbery and shooting of James Day was perpetrated by Anthony Bond and Bobby Jackson. The facts also establish a compelling case that Day did not die as a result of the gunshot wound years earlier, but due to infection caused by diabetes and Coumadin toxicity. Thomas has met the high burden of establishing innocence, and relief should be granted.

¹⁹³ Order on Summary Judgment, RE 102, Page ID 12130-12136

¹⁹⁴ Order on Summary Judgment, RE 102, Page ID 12136

Conclusion

Thomas respectfully requests this court reverse the District Court and remand with instructions to grant a writ of habeas corpus vacating his conviction and sentence of death, and for such further relief as the court deems warranted.

Respectfully submitted,

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/s/ Robert L. Hutton
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Certificate of Service

I certify that on October 27, 2015, a true and correct copy of this Corrected Brief of Appellant was filed via the Court's electronic filing system, which will forward a copy to Appellee's counsel and all other counsel of record.

/s/ Robert L. Hutton

Robert L. Hutton

Designation of Relevant District Court Documents

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