

No. 15-5399  
DEATH PENALTY CASE

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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ANDREW THOMAS

*Petitioner-Appellant*

v.

BRUCE WESTBROOKS, Warden

*Respondent-Appellee*

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REPLY BRIEF OF APPELLANT

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

Kevin Wallace  
Elizabeth Cate  
Mollie Richardson  
WINSTON & STRAWN LLP  
200 Park Avenue  
New York, NY 10166  
(212) 294-6700

Robert L. Hutton  
GLANKLER BROWN, PLLC  
6000 Poplar Avenue, Suite 400  
Memphis, TN 38119  
(901) 525-1322

*Counsel for  
Andrew Thomas*

## Table of Contents

1. Thomas has presented two exceptionally compelling claims for relief subject to <i>de novo</i> review by this Court.....	4
2. The Warden’s assertion that the \$750 payment was made by “federal agents” is contradicted by the factual record.....	6
3. The Warden implies that numerous witnesses other than Angela Jackson identified Thomas—which is untrue .....	7
4. A jury could have reasonably concluded that SSTF agents promised Jackson payment for her testimony when they first met .....	14
5. Thomas never conceded that the defense team successfully impeached Angela Jackson at trial.....	15
6. The Warden mischaracterizes Jackson’s recent deposition testimony as to her understanding of her questioning at Thomas’ trial—but Jackson’s subjective interpretation is not relevant to a false testimony claim .....	16
7. The \$750 payment to Jackson was not a witness fee and far exceeds the \$40 statutorily-authorized witness compensation .....	25
Conclusion .....	27
Certificate of Compliance with Rule 32(A).....	29
Certificate of Service.....	30
Designation of Relevant District Court Documents .....	31

## Table of Authorities

### Cases

<i>Barton v. Warden, Southern Ohio Correctional Facility</i> , 786 F.3d 450 (6th Cir. 2015).....	5
<i>Brady v. Maryland</i> , 373 U.S. 83 (1980) .....	4, 5
<i>Brooks v. Tennessee</i> , 626 F.3d 878 (6th Cir. 2010).....	17
<i>Dickerson v. Bagley</i> , 453 F.3d 690 (6th Cir. 2006).....	4
<i>Robinson v. Mills</i> , 592 F.3d 730 (6th Cir. 2010) .....	16
<i>State v. Thomas</i> , 158 S.W.3d 361 (Tenn. 2005) .....	14
<i>Wogenstahl v. Mitchell</i> , 668 F.3d 307 (6th Cir 2012) .....	17

### Statutes

28 U.S.C. § 1821(b) .....	25
28 U.S.C. § 1825(a) .....	26

### Procedural Rules

Fed. R. App. P. 32(a) .....	29
Fed. R. App. P. 32(a)(5).....	29
Fed. R. App. P. (32)(a)(6) .....	29
Fed. R. App. P. 32(a)(7)(B) .....	29
Fed. R. App. P. 32(a)(7)(B)(iii) .....	29

**1. Thomas has presented two exceptionally compelling claims for relief subject to *de novo* review by this Court.**

The state's key witness, Angela Jackson, was secretly paid \$750 by a joint state-federal task force that investigated and participated in Thomas' death penalty case.<sup>1</sup> During Thomas' trial, when questioned repeatedly by both the prosecutor and defense counsel, Angela Jackson denied ever receiving a reward, or "one red cent" in exchange for her testimony.

This egregious conduct gives rise to two extraordinarily compelling claims for habeas relief, a *Brady* Claim and a false testimony claim. Though all other claims briefed by Thomas are meritorious, there is no need to even address them if the Court grants relief on either the *Brady* or false testimony claim. *See e.g. Dickerson v. Bagley*, 453 F.3d 690, 699-700 (6th Cir 2006) (pre-terminating all other sentencing issues in a death penalty habeas case after granting sentencing relief as to one issue).

The Warden has expressly waived exhaustion with respect to the *Brady* and false testimony claims, as the secret payment was not uncovered until after the conclusion of state post-conviction proceedings.<sup>2</sup> Thus, these two claims are not subject to deferential review standards of the Antiterrorism and Effective Death

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<sup>1</sup> Joint Stipulation ¶¶ 1,2,4,5, RE 78, Page ID 11953

<sup>2</sup> Stipulation of the Parties, RE 23, Page ID 7891-7893

Penalty Act of 1996 (“AEDPA”). *Barton v. Warden, Southern Ohio Correctional Facility*, 786 F.3d 450, 460 (6th Cir. 2015).

The parties have stipulated to every element necessary to establish a *Brady* claim except whether the secret \$750 payment was material.<sup>3</sup> With respect to the false testimony claim, the Warden has expressly conceded the state prosecutors’ knowledge of the undisclosed payment, so that the only remaining questions are whether Jackson’s testimony was actually false and whether it was material.<sup>4</sup>

The Warden’s brief attempts to convince the Court that Thomas can not demonstrate materiality for these claims, allegedly because: (1) there is proof other than Angela Jackson’s testimony supporting the conviction, (2) Thomas impeached Angela Jackson in other ways, and (3) Jackson has consistently implicated Thomas—even before she was actually paid any money. (Appellee’s Brief pp. 29, 33-34) The *Brady* and false testimony claim are thoroughly discussed in Thomas’ opening brief. A reply is necessary since the Warden’s brief contains several red herrings that need to be clarified.

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<sup>3</sup> Joint Stipulation, RE 78, Page ID 11953-11954

<sup>4</sup> Respondent’s Brief Clarifying Issues Regarding Necessity of An Evidentiary Hearing on Count 2, RE 95, Page ID 12043; see also Order on Summary Judgment, RE 102, Page ID 12123.

## **2. The Warden’s assertion that the \$750 payment was made by “federal agents” is contradicted by the factual record.**

Throughout his brief, the Warden attempts to characterize the federal and subsequent state prosecution of Thomas as separate and unrelated events in an attempt to distance the secret payment and Jackson’s testimony concerning the payment from the state proceedings. The Warden repeatedly describes the payment as coming from “federal agents.” (Appellees Brief, pp 22, 29, 30, 38) He characterizes the secret payment as a “federal payment.” (Appellees Brief pp. 30, 32, 37, 38) This characterization is misleading.

The Warden has stipulated that both Thomas’ federal and state cases were investigated by the Safe Streets Task Force (SSTF)—and SSTF agents participated in both the federal and state trials.<sup>5</sup> An SSTF agent requested the \$750 from the FBI to make the secret payment to Angela Jackson.<sup>6</sup> The SSTF is admittedly a multi-agency task force, composed of federal and state law enforcement officers.<sup>7</sup> The SSTF is “a joint operation in which all agencies act as partners in the operation of the task force.”<sup>8</sup> By agreement, the SSTF has exclusive law enforcement jurisdiction over its cases, and no participating agency may take unilateral action

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<sup>5</sup> Joint Stipulation ¶¶ 2,3, RE 78, Page ID 11953

<sup>6</sup> Joint Stipulation ¶ 2, RE 78, Page ID 11953)

<sup>7</sup> Joint Stipulation ¶ 5, RE 78, Page ID 11953

<sup>8</sup> Memorandum of Understanding establishing SSTF, Section III. B., RE 58-7 Page ID 8897

with respect to an SSTF case.<sup>9</sup> The Memorandum of Understanding establishing the SSTF provides that they will work together with state and federal prosecutors to decide whether to prosecute a defendant in the federal or state system (or both) in order to achieve the maximum benefit to law enforcement.<sup>10</sup>

The SSTF is a partnership of federal and state agents working together as a single agency to exclusively investigate and prosecute certain crimes. Therefore SSTF actions are attributable to the state. That is why the state has stipulated that knowledge of the \$750 payment to Angela Jackson is imputed to the state prosecutors—and why the state was required to disclose this information to Thomas’ defense counsel prior to his state trial.<sup>11</sup>

**3. The Warden implies that numerous witnesses other than Angela Jackson identified Thomas as participating in the Walgreens robbery—which is untrue.**

The Warden argues that Angela Jackson’s testimony “was not essential to petitioner’s conviction” because “there was substantial evidence of the petitioner’s guilt apart from her testimony.” (Appellee’s Brief p. 29, 33). He then lists other evidence apart from Jackson that purportedly inculpates Thomas. But the

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<sup>9</sup> Memorandum of Understanding establishing SSTF, Section V.D, RE 58-7, Page ID 8899

<sup>10</sup> Memorandum of Understanding establishing SSTF, Section IV. D. RE 58-7, Page ID 8898

<sup>11</sup> Joint Stipulation ¶¶ 9-10, RE 78, Page ID 11954

underlying state trial transcript reveals no other credible evidence implicating Thomas and leads to the inescapable conclusion that the case against Thomas hinged upon Angela Jackson's critical testimony.

First, the Warden's brief relays that "a car identified as belonging to the petitioner's ex-wife was seen parked a short distance from the crime scene." (Appellee's Brief p. 33) The brief fails to mention that the ex-wife who presented this evidence and identified her red car as being near the scene was Angela Jackson.<sup>12</sup> Notably, two witnesses identified the red car near the crime scene as a Toyota MR2.<sup>13</sup> It was Angela Jackson who testified at trial that the red car was hers, despite her admission that the car she owned at the time was a red Suzuki Swift and not a Toyota MR2.<sup>14</sup>

But even if it was Angela Jackson's car that was sighted near the Walgreen's robbery, this fact does not implicate Thomas, apart from Jackson's testimony. Thomas has demonstrated that Angela Jackson was romantically involved with

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<sup>12</sup> Trial Testimony of Angela Jackson, RE 12-17, Page ID 1716, 1717, 1719, 1720, 1723

<sup>13</sup> Trial Testimony of Christopher Sains, RE 12-16, Page ID 1649; Trial Testimony of Gary Craig, RE 12-16, Page ID 1656-1657

<sup>14</sup> Trial Testimony of Angela Jackson, RE 12-17, Page ID 1719. One would also assume that state's witness Gary Craig—who demonstrated his knowledge of cars when he identified the make, model, and year of the white Bonneville getaway car the perpetrators were driving, and who then testified that the perpetrators switched into a red Toyota MR2—would have been able to distinguish between a Suzuki Swift (a hatchback) and a Toyota MR2 (a sports car).

Bobby Jackson, who most likely committed the crime with Anthony Bond. Thomas received a hand-written note from Anthony Bond admitting that Angela Jackson falsely implicated Thomas in the robbery, as Angela Jackson was protecting Bobby Jackson, her boyfriend and Bond's true accomplice. (See generally, Appellant's Brief, pp. 25-26) Bobby Jackson had attempted to rob another Loomis Fargo guard previously at the Southbrook Mall in Memphis.<sup>15</sup> Numerous witnesses testified that Angela Jackson had dated Bobby Jackson in 1997 at the time SSTF agents were investigating the Walgreens robbery.<sup>16</sup> And although Angela Jackson initially denied at trial even knowing Bobby Jackson, she later grudgingly admitted "seeing" him.<sup>17</sup> Thus, Angela Jackson's car being near the crime scene is not evidence of wrongdoing by Thomas. It is just as plausible that Angela Jackson aided Bobby Jackson in facilitating the Walgreen's robbery. The only implication that the car inculpates Thomas is Angela Jackson's testimony that Thomas had borrowed her car the day of the Walgreens robbery.

The Warden's brief twice implies that numerous people other than Angela Jackson identified Thomas as involved in the crime. (Appellees Brief, pp. 33, 44)

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<sup>15</sup> Post Conviction Hearing Exhibit 17, Letter from S. Bricsoe to AUSA Tony Arvin, RE 14-5, Page ID 5092-5093

<sup>16</sup> 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.

<sup>17</sup> Trial testimony of A. Jackson, RE 13-1, Page ID 2805

The brief states that: “Bond and his partner were observed getting into the car and driving away by several witnesses, including Betty Gay (who profiled the shooter as a person matching petitioner’s description), Christopher Sains, Gary Craig, and Richard Fisher.” (Appellees Brief, p 33) This mistakenly leads one to believe that several other witnesses identified Thomas at the scene—which can be demonstrated as false by reviewing each witnesses’ trial testimony.

First of all, the prosecutor questioned Betty Gay as to whether she could identify the person participating in the robbery:

Q. When you say, “This man,” was that a—would you be able to identify that person today?

A. No, ma’am.

Q. Were you—would you have been able to identify that person back in April of ’97?

A. No, ma’am.

(Trial Testimony of Betty Gay, RE 12-15, Page ID 1430)

Thus, Betty Gay expressly testified she could not identify the shooter. The next witness referenced by the Warden is Christopher Sains. But his testimony also makes clear he could not identify the culprits involved:

Q. Did you get any kind of look at the individuals in the car?

A. No. They was going too fast. It happened too fast.

Q. I'm sorry.

A. It happened too fast. No, I didn't. They was going so fast, I didn't see nothin' but a car and people that was in the car.

(Trial Testimony of Christopher Sains, RE 12-16, Page ID 1643)

The third witness listed by the Warden is Gary Craig, who like the others was unable to identify the individuals he saw:

Q. Did you get any kind of look at the people or persons that got out of the white car and into the red car?

A. No, I didn't.

(Trial Testimony of Gary Craig, RE 12-16, Page ID 1655)

Finally, the Warden cites the identification of Richard Fisher. The Warden points out that Richard Fisher was within four feet of the getaway car, identified Mr. Thomas in court, and testified he was sure of the identification. (Appellee's Brief p. 33-34). But the Warden fails to point out that Richard Fisher identified Thomas only after previously identifying *two other people* as the passenger in the getaway car—including identifying Anthony Bond (not Thomas) during his same trial testimony. His confusion led the trial court judge to remark at a sidebar 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 photo-spread 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)

Richard Fisher only switched his testimony and identified Thomas after being asked by Bond's attorney on cross-examination to come off the witness chair, stand directly in front of Thomas at counsel table, and look at him.<sup>18</sup> Only under these extremely suggestive circumstances did Richard Fisher switch his identification from Bond to Thomas.

The Warden also asserts that the jury had the still photograph from the Walgreen's security camera at their disposal as evidence of Thomas' involvement:

[T]heir testimony was further corroborated by the Walgreen's surveillance video tape, which showed the robbery and shooting. That video was itself reduced to still images so the jury could more closely determine the identity, profile and actions of the shooter.

(Appellees Brief p 23)

However, it was Angela Jackson who testified at trial that she could identify Andrew Thomas in the still photo—despite the photo being a poor quality, partially obstructed security camera shot of the perpetrator's back. But the Warden intimates Jackson's testimony was unnecessary, as somehow the jury could have discerned that the photograph was of Thomas by just looking at the fuzzy picture. The best response is simply to look at the photo:

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<sup>18</sup> Trial Testimony of R. Fisher, RE 12-19, Page ID 2062-2067



(Trial Exhibit 18, Still photograph, RE 14-35, Page ID 7792)

It is self-evident that this security camera photo—by itself—is absolutely worthless for identifying anyone.

The Appellee’s Brief also mentions that “30 other witnesses testified at the guilt state of the trial.” (Appellee’s Brief p. 34) This is irrelevant. At issue is what proof the state mustered that *Andrew Thomas* participated in the Walgreens robbery and shooting of James Day. There was no forensic evidence placing Thomas at the scene. The state presented only two witnesses who implicated Thomas—Richard Fisher and Angela Jackson. And since Richard Fisher had previously identified two other people, Angela Jackson was the key witness. Thus, the Warden’s argument that the payment and Angela Jackson’s denial of payment

are not material given other corroborating evidence is plain wrong. Angela Jackson's testimony was critical to this case.<sup>19</sup>

To see how central Jackson's testimony was to convicting Thomas, one only needs to read the guilt phase factual summary from the Tennessee Supreme Court's opinion, which is copied verbatim in the Warden's Brief. (Appellee's Brief pp.15-17), quoting *State v. Thomas*, 158 S.W.3d 361,373-376 (Tenn. 2005). A cursory view of the guilt phase summary reveals that, other than one reference to Richard Fisher, it is Jackson's testimony that established Thomas' involvement. There are seven explicit references in the summary to Jackson's testimony. *Id.* Angela Jackson was undoubtedly the lynchpin. Without her testimony, there was simply no credible evidence establishing beyond a reasonable doubt Thomas' participation in the crime.

**4. A jury could have reasonably concluded that SSTF agents promised Jackson payment for her testimony when they first met.**

The consistency of Jackson's pre-payment statements implicating Thomas does not defeat materiality as suggested by the Warden. (Appellee's Brief pp. 29-32) Coupling the highly unusual nature of the payment with Jackson's lying about

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<sup>19</sup> In fact, in the companion federal case, it was the opinion of the Assistant U.S. Attorney, Tony Arvin, "that successful prosecution was not likely without the aide [sic] of Jackson" See Memo attached to Sander's Declaration, RE 15-1, Page ID 7852

receiving it, the jury could have determined that SSTF agents had promised Jackson payment for her cooperation from the time of their first meeting. In fact, the receipt provided by the SSTF for the payment acknowledges it is for “services” and provides a date range for the services starting in April 1997, well before her first statement.<sup>20</sup> The Warden argues that Thomas’ suggestion of a bribe is “baseless.” (Appellees Brief p. 41) Law enforcement is not in the habit of giving fact witnesses large gifts of money shortly after they testify. The SSTF affidavit which states, in careful terms, that this payment was wholly unanticipated and unforeseen is simply not believable. Why would the SSTF want to pay a fact witness generously except to reward her for testifying a certain way? The jury could have reasonably believed that Angela Jackson was promised a payment from the beginning.

**5. Thomas never conceded that the defense team successfully impeached Angela Jackson at trial.**

The Warden’s brief incorrectly asserts that Thomas “concedes that his defense team was able to impeach Ms. Jackson.” (Appellee’s brief, p. 35). This point was not conceded. Admittedly, defense counsel was able to muster *some* evidence of Jackson’s bias—such as witnesses testifying that Jackson had promised to “pay back” Thomas for treating her poorly. But this does not mean

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<sup>20</sup> Receipt for \$750 payment, RE 15-1, Page ID 7853

that the undisclosed, incredibly damning evidence of Jackson's bought testimony and her lying under oath would not have been critical to eviscerating her credibility. It makes little sense to argue that because defense counsel tried to impeach Jackson with the bits of evidence they had and failed, that any further impeachment would be useless. Rather, what follows is that the defense team failed to impeach Jackson because the more damning impeachment evidence was withheld. *Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010). Evidence of the key witness being paid, and lying about it on the stand is far superior in quality than the minimal impeachment evidence defense counsel had available.

**6. The Warden mischaracterizes Jackson's recent deposition testimony, but Jackson's subjective interpretation is not relevant to a false testimony claim.**

The Warden argues that Angela Jackson's testimony about receiving a reward was not false, since he posits that she understood the question to be asking only whether she received a "reward" from the armored truck company.

(Appellee's Brief, pp. 40-41) The Warden cites a small portion of Jackson's 2014 deposition testimony to support this conclusion. On cross examination by the Assistant Attorney General, Jackson provides a string of "yes" answers to leading questions, including whether she thought the question posed to her at Thomas' trial about receiving a reward was limited in scope to the armored car company.<sup>21</sup>

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<sup>21</sup> Deposition of Angela Jackson, RE 54, Page ID 8316

(Appellee’s Brief p. 41) In doing so the Warden has mischaracterized Jackson’s deposition testimony—as will be discussed in more detail below. Jackson began her deposition by testifying emphatically that she never received any payment from SSTF. And then, after being confronted with her signed receipt for the payment, she switched to saying she did not remember receiving any payment.

But all of this misses the point. Regardless of the confusing and conflicting testimony Angela Jackson gave in her deposition in 2014, the real question is how Angela Jackson’s testimony would have been perceived by the jury at Thomas’ trial. As conceded by the Warden in his brief: “*Giglio* ...holds that a state violates due process by knowingly presenting false material evidence.” (Appellee’s Brief pp. 38-39) To establish a false testimony claim, the defendant does not have to demonstrate that the witness knew her testimony was false. Rather, the defendant must demonstrate the testimony was *actually false* and that the *prosecution* knew it was false. *Brooks v. Tennessee*, 626 F.3d 878, 894-895 (6th Cir. 2010); *Wogenstahl v. Mitchell*, 668 F.3d 307, 323 (6th Cir. 2012). The Warden’s brief erroneously states that these authorities require establishing that the witness statement was “knowingly false.” (Appellee’s Brief p. 39). The Warden is mistaken. These cases only require the witness testimony to be actually false, and for the prosecutor (not the witness) to have knowledge of its falsity. Thus, suppose a witness mistakenly testified falsely as to a material fact in a trial and the

prosecution knew the testimony presented to the jury was false. The prosecution would nonetheless be obligated to correct the record.

In this case, the Warden has stipulated that the prosecutor had knowledge of the payment.<sup>22</sup> The salient question is therefore whether Jackson's trial testimony conveyed to the jury false information—such that the prosecutor would have had a constitutional obligation to correct the record. Would a jury have understood the questioning as conveying that Jackson did not receive any reward or compensation? The answer is yes.

All three instances where Jackson was asked at trial about receiving money were in the context of whether she received any compensation at all. The prosecutor first asked Jackson whether she asked law enforcement for a reward. When Jackson denied this, the next question was whether she ever received one:

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.**

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<sup>22</sup> Respondent's Brief Clarifying Issues Regarding Necessity of An Evidentiary Hearing on Count 2, RE 95, Page ID 12043; see also Order on Summary Judgment, RE 102, Page ID 12123.

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

Nothing about this questioning would lead the jury to believe the prosecutor was merely asking whether Jackson had received a reward from the armored truck company.

Then, on cross examination, Jackson again denied receiving any payment, where the context of the questioning is whether she would have any financial motivation to testify falsely:

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?**

**A. No, sir.**

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

Again, there is nothing about this questioning that would lead a jury to believe that the questioning is limited to whether Jackson received a reward from the armored truck company. The question is broader—as to whether there was any motivation influencing her testimony other than “it was the right thing to do.”

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)

Again, this question was not limited to whether Jackson received a reward for her testimony. The jury could have fairly understood from this testimony that Jackson did not receive *any* money for her cooperation and testimony, which was objectively false.

A false testimony claim focuses upon the conduct of the prosecutor. The prosecutor had an obligation to correct the record—so that the jury would not have been misled by Jackson's testimony. The state has stipulated as to the prosecution's knowledge of the payment to Jackson for purposes of the false testimony claim. The excerpts from Jackson's trial testimony demonstrate that the jury was led to believe Jackson had no financial gain by testifying. Thus, Thomas has proven a false testimony claim.

And in any event—a review of Angela Jackson's total deposition testimony eviscerates the state's position that Jackson credibly denied receiving a reward at trial because she thought the questioning was limited to whether she received money from the armored truck company. No, Jackson's deposition testimony was

far more incoherent and confused—switching from unequivocal denial of receipt of compensation, to complete memory lapse, to stating on cross while being led that she thought the reward question concerned the armored truck company, to finally admitting that she understood the questioning to be asking whether she received any money at all. The following excerpts from her deposition make that clear—starting with the beginning of her deposition testimony:

Q. ... So you don't have any documents reflecting any payments from the Safe Streets task Force?

A. No, never received any payments from them.

.....

Q. Okay. Now let me ask you this: Did you receive any payment from the federal government after you testified in 1998 in the federal case?

A. No.

Q. Let me ask this a different way, on or about December 18, of 1998, did you receive any money from any federal or state agency after you testified?

A. No.

Q. Did you receive a check for \$750 from Agent Sanders on or about December 18, 1998 after your testimony in the federal trial?

A. No.

(Deposition Testimony of Angela Jackson, RE 54, Page ID 8286, 8291)

The above excerpts demonstrate that Angela Jackson initially denied being paid at all. Then, after Jackson was confronted with her signed receipt for the \$750 payment, she changed her testimony to not remembering anything:

Q. I'm talking about back in 1998, did you receive a check for \$750 from Agent Scott Sanders after you testified in the federal case against Andrew Thomas?

A. I don't recall receiving a check, no.

....

Q. Now, Ms. Jackson, in 1998, having looked at this particular receipt, is it your testimony that you received no money from the federal government following your testimony?

A. I don't remember this, no, I don't.

(Deposition Testimony of Angela Jackson, RE 54, Page ID 8293, 8295)

At this point, the district court judge suggested that perhaps she was confusing the questioning as limited to not remembering whether she received a check. Jackson was then questioned more broadly about whether she received any compensation:

Q. Ms. Jackson, let me ask this a different way. Do you recall receiving \$750 in cash from any agent from the federal government or any other law enforcement after your testimony in the trial in November of 1998?

A. No, sir.

Q. So you don't recall receiving anything of value, cash, check, money order, gifts, anything of value equating to approximately \$750 in value?

A. No, sir.

...

Q. From whether federal agents or state agents or prosecutors or anybody like that?

A. No, Sir.

(Deposition Testimony of Angela Jackson, RE 54, Page ID 8303.

Thus, at this point in her deposition, Jackson's testimony could not have been more emphatic: she remembered nothing at all about a payment.

On cross examination, the Assistant Attorney General then asked Ms. Jackson a series of leading questions to which she replied "yes." This list of leading questions included whether she interpreted her questioning at Thomas' state trial to be limited to whether she received a reward from the armored car company:

Q. ...do you recall if when you were asked about reward money after that, you interpreted the question to refer to reward money from the armored car company?

A. Yes.

Q. You did interpret the question as meaning reward money from the armored car company?

A. Yes.

(Deposition Testimony of Angela Jackson, RE 54, Page ID 8316)

The Warden's assertion that Angela Jackson opined in her deposition that her trial testimony about a reward was limited to the armored car company is incomplete. Rather, the fair characterization of her deposition testimony is that she first flat-out denied receiving any money, until she was shown a receipt where she signed for a payment—then her testimony changed to not remembering receiving any such payment. Then, only when led by the Assistant Attorney General did Jackson answer “yes” to whether she thought she had been asked at trial if the \$750 came from the armored car company. Does it make sense that Jackson, who testified nine times in the same deposition that she either did not receive a payment or does not remember receiving a payment, could credibly rehabilitate herself on cross examination by stating that she understood the questioning about a reward as only limited to whether she received a reward from the armored truck company? It does not.

But even when led on cross examination, Jackson did not testify so narrowly about how she understood the question at trial as to whether she received “one red cent.” When she was asked in her deposition what she understood the state

prosecutor to be asking when inquiring whether she received “one red cent,” her reply was that she understood the question to be asking whether she received “any money”:

Q. When you heard the word red cent, did you understand what that phrase was intended to convey?

A. When they said red cent, I just took it as any money.

(Deposition testimony of Angela Jackson, RE 54, Page ID 8317.)

Thus, since Angela Jackson testified at trial that she did not receive one red cent and understood that that testimony to mean that she received no money at all, the Warden cannot credibly make the argument that she understood the question as limited to payments from the armored truck company. And perhaps more disturbingly, the inconsistent, incoherent deposition testimony powerfully demonstrates that Angela Jackson is not credible. This is frightening, given that it is upon Angela Jackson’s testimony that Thomas’ conviction and death sentence is predicated.

**7. The \$750 payment to Jackson was not a witness fee and far exceeds the \$40 statutorily-authorized witness compensation.**

The Warden argues that because witnesses are entitled to a \$40 per diem fee for trial testimony and mileage under 28 U.S.C. § 1821(b), there is nothing shocking about Jackson receiving a \$750 payment. (Appellees Brief p. 37) First

of all, the \$40 witness fee is to be paid by the United States Marshal—not the SSTF—so the \$750 Jackson received would have been in addition to the statutory witness fee. *See* 18 U.S.C. § 1825(a) (“In any case in which the United States is a party, the United States marshal for the district shall pay all fees of witnesses on the certificate of the United States attorney...”). And Angela Jackson, as a Memphis resident who did not require an overnight stay to testify in Memphis court, would only have been paid \$40 by the local marshal’s service for her day of testimony plus reimbursement for mileage to the local district court. In this case, the \$750 came from the FBI for her “services from April 21, 1997 to November 20, 1998”—as is reflected on the receipt.<sup>23</sup> This time period dates back to the first interview with Angela Jackson—and thus is not remunerating her solely for attendance at Thomas’ federal trial. Scott Sanders’ affidavit asserts that the \$750 payment was for “assistance she provided in the case” upon authorization of the Special Agent in charge of the FBI in Memphis and was not planned or anticipated.<sup>24</sup> Agent Joel Siskovic II, Chief Division Counsel, Supervisory Special Agent, FBI Memphis, referred to the \$750 payment to Angela Jackson as a “source payment.”<sup>25</sup> The FBI provides source payments for matters investigated by the

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<sup>23</sup> Receipt for \$750 payment, RE 15-1, Page ID 7853

<sup>24</sup> Sanders Declaration, RE 15-1, Page ID 7846

<sup>25</sup> Affidavit of Robert Hutton, RE 66-1, Page ID 11874

SSTF, with authorization for the payments coming from the Attorney General.<sup>26</sup>

Thus, the record is clear that the \$750 payment is not a routine reimbursement check from the local marshal—but a special source payment authorized by the Attorney General out of the FBI’s budget for Jackson’s favorable testimony against Thomas.

### **Conclusion**

Thomas was placed on trial for his very life. It is now known that the state’s key witness was paid for her testimony, and she lied about it under oath.

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.

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<sup>26</sup> Id.

Respectfully submitted,

/s/ Robert L. Hutton

Robert L. Hutton  
GLANKLER BROWN, PLLC  
6000 Poplar Avenue, Suite 400  
Memphis, TN 38119  
Ph: (901) 525-1322  
Fax: (901) 525-2389  
rhutton@glankler.com

Kevin Wallace  
Elizabeth Cate  
Mollie Richardson  
WINSTON & STRAWN LLP  
200 Park Avenue  
New York, NY 10166  
(212) 294-6700  
[kwallace@winston.com](mailto:kwallace@winston.com)  
[ecate@winston.com](mailto:ecate@winston.com)  
[mrichardson@winston.com](mailto:mrichardson@winston.com)

## **Certificate of Compliance with Rule 32(A)**

This reply brief complies with the type volume limitation of Fed. F. App. P. 32(a)(7)(B) and 6<sup>th</sup> Cir. Rule 22(c)(8) because it contains 5,160 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced type face using Microsoft Word 2010 in fourteen point, Times New Roman type style.

/s/ Robert L. Hutton  
Robert L. Hutton

## **Certificate of Service**

I certify that on February, 10 2016, a true and correct copy of this Reply 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**

<b>File Date</b>	<b>RE #</b>	<b>Page ID #</b>	<b>Description</b>
8/6/12	12-15	1430	Trial Testimony of Betty Gay
8/6/12	12-16	1643, 1649	Trial Testimony of Christopher Sains
8/6/12	12-16	1655-1657	Trial Testimony of Gary Craig
3/24/14	58-7	8896-8904	Memorandum of Understanding Creating SSTF
4/17/14	66-1	11873-11874	Affidavit of Robert L. Hutton in support of Motion for Evidentiary Hearing.

4812-4159-6206, v. 1