No. 15-5399
DEATH PENALTY CASE

United States Court of Appeals for the Sixth Circuit

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ANDREW LEE THOMAS, JR.

Petitioner-Appellant,

v.

BRUCE WESTBROOKS, Warden,

Respondent-Appellee.

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APPEAL OF JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICI CURIAE SUPPORTING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, Amici Curiae National Association of Criminal Defense Lawyers makes the following disclosures:

1. Amicus is not a subsidiary or affiliate of a publicly-owned corporation.

2. There is no publicly-owned corporation with a financial interest in the outcome.

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INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 direct members in 28 countries, and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL files numerous amicus briefs each year in the U.S. Supreme Court, this Court, and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL has consistently maintained that discovery reform in the criminal justice system is essential. In 2014, NACDL published Material Indifference: How Courts are Impeding Fair Disclosure in Criminal Cases,[1] an unprecedented study of withheld exculpatory evidence claims litigated in federal courts over a five-year period. In addition, NACDL regularly files amicus briefs on this issue, arguing that

[1] Available online at www.nacdl.org/discoveryreform/materialindifference

information favorable to the defense must be disclosed as early as possible to enable its effective use.

INTRODUCTION

The legal principles at issue in this case first achieved prominence more than fifty years ago in the case of *Brady v. Maryland*, 373 U.S. 83 (1963). In *Brady*, the U.S. Supreme Court recognized that, as a constitutional imperative, the Government's criminal prosecutors must provide to the accused all favorable information in the Government's possession for the accused's use at trial. The rule has been repeated in countless cases since. Yet, unlike discovery in civil cases, where disclosures are clearly mandated, discovery in criminal prosecutions is left to the discretion of prosecutors, who often operate according to their own cabined reading of *Brady* and fail to disclose favorable information. In these cases, the criminal justice system suffers an increased risk of wrongful conviction and incarceration. Despite Brady's plain mandate and the well-documented violations, *Brady* violations persist and often go undetected and uncorrected for years. This case presents an opportunity for the Court to remedy one such violation and vindicate the right of the criminally accused to receive a fair trial through a fully-informed defense.

ARGUMENT

Under the Due Process Clause of the Fourteenth Amendment, a criminal defendant is entitled to a new trial when the prosecution suppresses evidence that its key witnesses received remuneration for her cooperation, the key witness testifies that the prosecution did not provide remuneration, and the prosecution fails to correct the key witness' false testimony.

The Due Process Clause of the Fourteenth Amendment requires a public prosecutor to disclose favorable evidence to the defendant, including both exculpatory evidence and impeachment evidence. U.S. Const. Amend. 14; *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667, 676 (1985). *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. *Brady* violations have three components: (1) The evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the prosecution, whether willfully or inadvertently; and (3) the defendant must have suffered prejudice. *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

Brady explained that "avoidance of an unfair trial to the accused" is the paramount principle: "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." *Id.* at 87. A prosecutor who withholds exculpatory

evidence is the "architect of a proceeding that does not comport with standards of justice," even though the prosecutor did not act through guile. *Id.*

The Supreme Court has identified two scenarios in which a *Brady* claim may arise. A *Brady* claim may arise where previously undisclosed evidence reveals that the prosecution introduced trial testimony that it knew or should have known was perjured. *United States v. Agurs*, 427 U.S. 97, 103-104 (1976). Also, a *Brady* claim may arise where the prosecution failed to disclose exculpatory evidence, whether or not the defendant asked for it. *United States v. Bagley*, 473 U.S. 667 (1985); *Agurs*, at 104-108.

Each type of *Brady* claim has its own materiality, or prejudice, standard. *Agurs* addresses the standard for the first, explaining that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103; *United States v. Bagley*, 473 U.S. 667, 678-79 (1985). *Agurs* recognized that the knowing use of perjured testiomy represents a "corrpution of the truth-seeking function of the trial process." *Id.* at 104. *Bagley* addresses the materiality standard for the second, holding that "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682. Under this test, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In *Bagley,* the prosecution failed to disclose promises of inducement to two witnesses. The lower courts applied the wrong standard. In remanding the case

for reconsideration, the Supreme Court instructed the Court of Appeals to determine "whether there is a reasonable probabiliy that, had the inducement offered by the Government to [its witnesses] been disclosed to the defense, the result of the trial would have been different." *Id.* at 684.

Kyles provided guidance for application of *Bagley*. *Kyles v. Whitley*, 514 U.S. 419 (1995). Materiality does not require a showing that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. *Id.* at 434. Indeed, the resulting verdict is not considered: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Moreover, the materiality test is not a sufficiency-of-the-evidence test. *Id.* Instead, the question is whether disclosure of the suppressed evidence would put "the whole case in a different light as to undermine confidence in the outcome." *Id.* at 434-435. Furthermore, *Kyles* explained that the "individual prosecutor has a duty to learn of favorable evidence known to . . . the police. But whether the prosecutor succeeds or fails in meeting this obligation, the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." *Id.* at 437-438.

Kyles demonstrated these points by looking to the effect the suppressed evidence would have had on the value of evidence admitted in the case, asking if the value of the admitted evidence "would have been substantially reduced or destroyed."

Id. at 441. More broadly, *Kyles* asked if the suppressed evidence would make the prosecution's case "markedly weaker" or the defendant's "markedly stronger." *Id.* At the practical level, *Kyles* asked whether the suppressed evidence would have troubled the jury and whether through a "withering cross-examination" it would have destroyed confidence in a witness' story or given rise to questions concerning witness coaching by the prosecution. *Id.* at 443. *Kyles* also looked to the impact the suppressed evidence had on the credibility of the police investigation. *Id.* at 445-446. *Banks* reiterated the nature of the evaluation, looking to the prominence of the witness in the prosecution's case and the emphasis placed on the witness by the prosecution. *Banks v. Dretke*, 540 U.S. 668 (2004). In other words, the *Bagley* materiality test subjects the weight and credibility of the prosecution's case to careful scrutiny to determine the degree of damage done, given the significance of the suppressed evidence.

1. When suppressed evidence of the prosecutor's use of a paid witness is uncovered and demonstrates that the paid witness lied under oath, the case unquestionably presents itself in a different light than the evidence presented at trial.

This case presents circumstances in which the protections afforded by the Due Process Clause, *Brady*, and its progeny are of utmost importance. This case does not present the more common *Brady* claim scenario in which evidence is simply suppressed from the evidence presented to the jury. Instead, this case involves the suppression of witness compensation coupled with the witness' subsequent perjury at

trial concerning the receipt of compensation and the prosecutions' failure to correct the false testimony. Not only did the suppression of the evidence prevent Mr. Thomas' counsel from effectively cross-examining Ms. Jackson about her remuneration-induced bias, but the suppression also enabled Ms. Jackson to deny that she had even received the remuneration. In other words, the suppression of favorable evidence facilitated false testimony, which remained uncorrected. Thus, a paid informant was allowed to falsely present herself as a financially disinterested witness and the jury was left ignorant of her true role in Mr. Thomas' prosecution. If the jury had been informed that Ms. Jackson had been paid for her performance, the jury may have assessed the evidence differently. Here, like *Banks*, "one could not plausibly deny the existence of the requisite reasonable probability of a different result had the suppressed information been disclosed to the defense." 540 U.S. at 703. Using a paid witness unquestionably presents a case in a different light than proceeding with unpaid witnesses.

2. The prosecutor's suppression of favorable evidence coupled with the introduction of false testimony has always been considered a Due Process violation that warrants a new trial.

Brady's application to this case should not be carried to conclusion without consideration of its historical development. *Brady* extended *Mooney* and *Pyle*. *Mooney v. Holohan*, 294 U.S. 103, 110 (1935); *Pyle v. Kansas*, 317 U.S. 213, 215-216 (1942). Mooney challenged the constitutionality of his confinement under the Due Process Clause on the grounds that his conviction was founded exclusively on the

prosecutor's knowing use of perjured testimony and that the prosecutor deliberately suppressed evidence that would have impeached and refuted the convicting testimony. Mooney argued that the knowing use of perjured testimony to obtain the conviction and the deliberate suppression of impeachment evidence constituted a denial of due process of law. *Mooney,* 294 U.S. at 110. The Supreme Court explained that the requirement of due process "in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Id.* at 112 (citing *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).[2] The Court continued:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the state, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.'

Id. at 112-113.

Likewise, *Pyle* challenged his conviction under the Due Process Clause of the Fourteenth Amendment, claiming that the prosecution suppressed evidence and

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[2] In *Hebert*, the Supreme Court explained that "[t]he due process of law clause in the Fourteenth Amendment . . . require[s] that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.'" *Id.* at 316-317.

admitted perjured testimony. In that case, the Supreme Court stated the rule in broader terms:

> Petitioner's papers . . . set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody.

Pyle, at 86.

Alcorta also preceded and informed *Brady*. *Alcorta v. Texas*, 355 U.S. 28 (1957). Alcorta, like Mooney and Pyle, challenged his conviction under the Due Process Clause of the Fourteenth Amendment, claiming that his conviction was invalid because the prosecution suppressed favorable evidence and relied upon perjured testimony in seeking his conviction. Alcorta killed his wife when he found her and a paramour in flagrante delicto in a parked car late at night. He admitted that he killed her but claimed he acted in the heat of passion. At trial, the paramour testified that his relationship with Alcorta's wife was platonic. In fact, he had been philandering with Alcorta's wife and the prosecutor knew it. But the prosecutor instructed him not to volunteer that information at trial. Additionally, before trial, the prosecutor did not disclose to Alcorta the paramour's admission. Applying *Mooney* and *Pyle*, the Supreme Court ruled:

> It cannot seriously be disputed that [the paramour's] testimony, taken as a whole, gave the jury the false impression that his relationship with petitioner's wife was nothing more than that of casual friendship. This

> testimony was elicited by the prosecutor who knew of the illicit intercourse between [the paramour] and petitioner's wife. Undoubtedly [the paramour's] testimony was seriously prejudicial to petitioner. It tended squarely to refute his claim that he had adequate cause for a surge of 'sudden passion' in which he killed his wife. If [the paramour's] relationship with petitioner's wife had been truthfully portrayed to the jury, it would have, apart from impeaching his credibility, tended to corroborate petitioner's contention that he had found his wife embracing [the paramour]. If petitioner's defense had been accepted by the jury, as it might well have been if [the paramour] had not been allowed to testify falsely, to the knowledge of the prosecutor, his offense would have been reduced to 'murder without malice' precluding the death penalty now imposed upon him.

Id. at 31-32. Thus, Alcorta got relief.

Napue also preceded and informed *Brady*. *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Napue challenged his conviction under the Due Process Clause on the ground that the prosecution elicited false testimony and allowed it to stand uncorrected. The facts revealed that Napue, Hamer, and two others entered a lounge intent upon robbing its patrons. A shootout ensued and a police officer was killed. The state tried and convicted Hamer before Napue was caught. At Napue's trial, Hamer, who was serving a 199-year sentence, served as the prosecution's primary witness and provided critical testimony. He claimed that the prosecutor had not promised him any consideration in return for his testimony. In fact, the prosecutor had promised to recommend that Hamer's sentence be reduced. Yet the prosecutor did not correct Hamer's false testimony. In finding Napue entitled to relief, the Supreme Court explained:

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

Id. at 269. Moreover, drawing upon an opinion from the New York Court of Appeals, the Court continued:

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

Id. at 269-270 (citing *People v. Savvides*, 136 N.E.2d 853, 854-855 (1956)). The Court concluded that, if the jury had known the truth, it might have concluded that Hamer had fabricated his testimony to please the prosecutor in anticipation of a reduced sentence. Moreover, in rejecting the prosecution's plea to accept the state court's determination that the false testimony was harmless, the Supreme Court noted that its duties flowed from its "solemn responsibility for maintaining the Constitution inviolate." *Id.* at 271. The prosecution could not escape the constitutional infirmity that necessarily followed the uncorrected false testimony. Thus, Napue got relief.

Here, *Strickler*'s summation of the import of the *Brady*-line of cases is apropos:

> These cases, together with earlier cases condemning the knowing use of perjured testimony, illustrate the special role played by the American prosecutor in the search for truth in criminal trials. Within the federal system, for example, we have said that the United States Attorney is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Strickler v. Greene, 527 U.S. 263, 281 (1999) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). "When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight." *Banks v. Dretke*, 540 U.S. 668, 675-76 (2004). Here, the prosecution did not set the record straight. Consequently, the jury's verdict is not deserving of confidence, and Mr. Thomas is entitled to relief.

3. The age of exoneration has demonstrated that *Brady* violations and false testimony are often the culprits in wrongful convictions.

Compensation paid to witnesses is a clear example of impeachment evidence that should be disclosed to the defense. In most circumstances, payments are conditioned upon the witness's cooperation with law enforcement and prosecutors, and they may even be tied to a conviction. *See* Vida B. Johnson, *When the Government Holds the Purse Strings But Not the Purse: Brady, Giglio, and Crime Victim Compensation Funds*, 38 N.Y.U. REV. L. & SOC. CHANGE 491, 495 (2014). This scenario can provide a powerful incentive for witnesses to provide the testimony that law enforcement is looking for, even if that means fabricating some or all of their story. *Id.* This is especially true where the witness is of limited means or otherwise under financial

pressure. *See id.* at 492, 495. A witness in this circumstance may be willing to do whatever is necessary to gain access to these funds as quickly as possible. *Id.* at 495.

Police and prosecutors control the distribution of compensation to witnesses in these cases, creating a motive for the witness to please them. *See id.* at 496. This creates clear bias, an important form of impeachment evidence that must be made available to the defense. *Id.* Recognizing the impact that a witness's incentive to testify may have upon the jury's view of the witness's testimony, the Supreme Court of the United States has said: "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

"Testimony from 'motivated' witnesses is notoriously unreliable." *Id.* at 497. Jailhouse informants, for example, have been proven unreliable in many cases. *See id.* The Innocence Project reports false testimony from informants in more than fifteen percent of cases involving DNA exonerations. *Id.* (citing *Understand the Causes: Informants,* THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand /Snitches-Informants.php). Another study shows that, as of 2005, at least fifty innocent men had been sentenced to death due in whole or in part to testimony of "witnesses with an incentive to lie." *Id.* (citing Survey, The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row,

Northwestern University School of Law, CENTER ON WRONGFUL CONVICTIONS 3 (Winter 2004-2005), http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf). For some people, money can be just as powerful a motivator as the quest for freedom from incarceration. *Id.*

The effect that evidence of bias may have on the jury may be particularly strong in cases relying heavily on witness testimony rather than DNA or other forensic evidence. *Id.* at 496. Likewise, evidence of bias related to the government's main witness may be particularly important. *Id.*

In this case, the testimony of Mr. Thomas' estranged wife, Angela Jackson, represented key evidence against him. *Brief of Appellant*, Doc. 22, pp. 23-24. She testified that Mr. Thomas admitted to shooting Day, and she identified him as the shooter from a surveillance photo taken of the shooter's back. *Brief of Appellant*, Doc. 22, p. 24. As there was no forensic or physical evidence which could have placed Mr. Thomas at the scene of the shooting, *Brief of Appellant*, Doc. 22, p. 24, Ms. Jackson's testimony was crucial to the State's case. In turn, because Ms. Jackson's testimony is so significant, the financial motivation for her cooperation weighs heavily upon her credibility. But the prosecution deprived Mr. Thomas of the ability to present that evidence to the jury for an accurate assessment of Ms. Jackson's testimony.

The additional evidence offered at trial by the prosecution does not render evidence impeaching Jackson's testimony any less significant. In *Tassin v. Cain*, the Court of Appeals for the Fifth Circuit overturned the defendant's conviction where

the State had failed to disclose information related a key witness's expectancy of leniency in sentencing. 517 F.3d 770 (5th Cir. 2008). Robert Tassin, Jr., was convicted of first degree murder and sentenced to death in connection with his involvement in the shooting of two victims, one of whom died as a result. *Id.* at 773. At Tassin's trial, his wife Georgina testified that she, Tassin, and a third individual developed a plan to rob the victims. *Id.* at 772.

Though indicted for first degree murder, Georgina pleaded guilty to armed robbery and received a sentence of ten years. *Id.* at 773. Before Tassin's trial, Tassin asked the State to disclose whether Georgina received a deal for a lenient sentence in exchange for her testimony against him. *Id.* The State told Tassin that it had no information of any deal. *Id.* At trial, Georgina testified that, for armed robbery, she faced a sentence of five to ninety-nine years. *Id.* When asked in front of the jury whether her testimony would affect her sentence, she testified that the State made no promises and that she did not know if her testimony would affect her sentence. *Id.* In fact, the State had told her that if she waived the marital privilege and testified consistently with her police statement, her sentence may be as short as ten years. *Id.* at 774. Georgiana testified at post-conviction proceedings that, at the time of the trial, she believed she would receive a ten-year sentence. *Id.*

In its opinion granting Tassin's habeas corpus petition, the Court observed that "*Giglio* and *Napue* set a clear precedent, establishing that where a key witness has received consideration or potential favors in exchange for testimony and lies about

these favors, the trial is not fair." *Id.* at 778. The Court found that a "promise" was unnecessary. *Id.* Rather, it was sufficient that "Tassin presented evidence of an 'understanding or agreement' between Georgina Tassin and the State" — more than a mere "hope or expectation" of consideration — and that "the State failed to correct Georgina's testimony that no agreement existed." *Id.* at 779.

The Court rejected the State's argument that Georgina's testimony that Tassin had planned to commit a felony was not the only evidence supporting Tassin's conviction:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict . . . . One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. at 780 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434-35 (1995)). The Court found that "if the jury had known of Georgina's sentencing deal, there is a reasonable likelihood that they may have chosen to believe Robert's story over his wife's." *Id.* at 780-81. Because Georgina's testimony was central to the State's case, and the jury was not informed of consideration to Georgina which hinged on her testimony, the Court found that Tassin's conviction represented "a Fourteenth Amendment violation under the clear precedent of *Giglio*, *Napue*, and *Brady*." *Id.* at 781.

As in *Tassin*, the State will argue here that the undisclosed evidence of compensation paid to Jackson is immaterial to Mr. Thomas' conviction because there

was other evidence supporting Mr. Thomas' conviction. That other evidence was offered, e.g., identification of Mr. Thomas by Richard Fisher, who had previously identified two other individuals as the shooter, is irrelevant to the *Brady* analysis. The question is whether there is a reasonable likelihood that, if presented with evidence of compensation paid to Ms. Jackson in exchange for her testimony, the jury may have chosen not to believe her. The answer to that question is clearly yes. Ms. Jackson testified multiple times in Mr. Thomas' trial that she had not received any "reward," or "one red cent" in connection with her testimony. *Brief of Appellant*, Doc. 22, p. 26. This testimony is false. Certainly, it is reasonably likely that, if provided uncontroverted evidence that Ms. Jackson testified falsely under oath, the jury could have chosen not to believe her testimony about Mr. Thomas.

Further, the record establishes that Ms. Jackson was under a significant amount of financial strain at the time of her testimony, a fact which further evidences and reinforces the bias created by the compensation provided by the prosecution. *Appellant's Brief*, Doc. 22, p. 46. Indeed, there is a reasonable likelihood that, if presented with evidence of the funds paid to Ms. Jackson and her need for such funds, the jury would have found her testimony less credible. Because Ms. Jackson's testimony was a critical element of the State's case against Mr. Thomas, impeachment evidence related to her testimony is undoubtedly material to Mr. Thomas' conviction. The State's failure to disclose it was an egregious violation of *Brady* and of Mr. Thomas' constitutional rights.

Brady and its progeny have been the law for over fifty years. Yet, prosecutors continue to violate it's plainly stated command. When *Brady* violations are discovered but go uncorrected, prosecutors are left with no incentive to comply with *Brady* in the future. In this death penalty case, the validity of Mr. Thomas' conviction and sentence rest upon the materiality of Ms. Jackson's testimony, for which the prosecution paid $750 (R. 78, Joint Stipulation, ¶ 11, PageID# 11954). The parties have stipulated that the prosecution possessed exculpatory evidence of the $750 payment and that the prosecution suppressed it (R. 78, Joint Stipulation, PageID# 11954).

The Tennessee Supreme Court's summary of the evidence, as recounted in the District Court's order on summary judgment (R. 102, Order, PageID 12079), demonstrates the materiality of Ms. Jackson's testimony: Ms. Jackson testifed about Mr. Thomas' appearance and conduct immediately after the robbery. Ms. Jackson testified that he wanted to flee to a hote room. Ms. Jackson testified that he made incriminating statements. Ms. Jackson testified that he told her not to tell anybody about the robbery. Ms. Jackson testified that she could identify Mr. Thomas on the surveillance video. (R. 102, Order, PageID# 12083-12085).

Without Ms. Jackson's testimony, Mr. Thomas' connection to this crime is reduced to the highly-suspect identification made by a single witness. (Id.) Mr. Thomas was his third choice. Mr. Thomas was not otherwise connected to the robbery.

Here, there is a reasonable probability that, had the payment to Ms. Jackson been disclosed, the result of the trial would have been different. Without Ms. Jackson's testimony, the prosecution's case against Mr. Thomas is weak and lacks credibility. Violations such as this cannot be allowed to stand, especially in a death penalty case. A condemned prisoner's life should not remain in the balance when the prosecution's primary witness was paid for her testimony, the state suppressed evidence of the payment, and the witness lied about it.

CONCLUSION

The prosecution failed in its obligation to discover favorable evidence held by the police and, consequently, failed to disclose that favorable evidence to Mr. Thomas' trial counsel. As a result, Mr. Thomas proceeded to trial not knowing that one of the prosecution's key witnesses had received remuneration in exchange for her cooperation. Making matters worse, when Mr. Thomas' counsel blindly questioned the witnesses about it, the witness committed perjury, which the prosecution failed to correct. Under the circumstances, Mr. Thomas' trial may be called many things, but it cannot be called fair. This Court should reverse the district court's decision and remand this matter to the Disctrict Court

Repectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 23rd day of November 2015, I filed this Brief of National Association of Criminal Defense Lawyers as Amici Curiae Supporting Reversal electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

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ADDENDUM:
Designation of Relevant District Court Documents

Relevant documents in the electronic record are designated below, pursuant to Sixth Circuit Rule 30(g).

R.	Description	PageID#
78	Joint Stipulation	11953

("R." = Record-Entry Number from District Court Docket)