

No. 17-291

IN THE SUPREME COURT OF THE UNITED STATES

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BRUCE WESTBROOKS, WARDEN

*Petitioner*

v.

ANDREW LEE THOMAS, JR

*Respondent*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Sixth Circuit

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BRIEF IN OPPOSITION

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## Capital Case

### Question Presented

Angela Jackson was the State's key witness linking Andrew Thomas to the robbery and shooting of James Day. She was one of only two witnesses directly implicating Thomas, and the other witness had previously identified two other people as the shooter. The prosecutor portrayed Jackson to the jury as a scared spouse who was testifying because it was the right thing to do. And Jackson denied at trial that she collected a reward or "one red cent."

The parties have stipulated that: (1) Jackson was secretly paid \$750 by law enforcement, (2) this payment was not disclosed to the defense, (3) this payment was exculpatory evidence that should have been disclosed, and (4) the only remaining question to obtain *Brady* relief was whether the payment was material. The parties agree upon the legal standard for materiality being whether there is a reasonable probability that had the \$750 payment to Jackson been disclosed the result of the trial would have been different. The parties also agree that this case is not governed by the deferential standard of review under the A.E.D.P.A. since the payment was not uncovered until after all state proceedings had concluded.

The question presented is whether, on these facts, the payment to Jackson was material under *Brady*.

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## Brief in Opposition to Petition for Writ of Certiorari

### Introduction

Upon request of a multi-agency task force that investigated and participated in both Thomas' federal and state trials for the same shooting, the federal government secretly paid \$750 to Angela Jackson, the state's key witness.<sup>1</sup> She was paid after Thomas' federal trial, but before his state trial commenced. The parties stipulated that: (1) a \$750 payment was made to state's witness, Angela Jackson, (2) the payment was not disclosed to Thomas or his counsel, (3) the payment was exculpatory evidence that should have been disclosed, and (4) knowledge of the payment is imputed to the state prosecutors.<sup>2</sup> Regarding materiality, the parties stipulated that the sole question remaining was whether a reasonable probability existed that, had the suppressed evidence been disclosed, the results of the proceedings would have been different.<sup>3</sup>

These undisputed facts gave rise to the *Brady* claim in Thomas § 2254 petition seeking habeas relief. The Warden expressly waived exhaustion as to this claim because—through no fault of Thomas—the \$750 payment was not discovered until after all state court proceeding had concluded.<sup>4</sup> The parties also agree that the A.E.D.P.A's deferential standard of review does not apply to this case.<sup>5</sup>

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<sup>1</sup> Joint Stipulation ¶¶ 1,2,4,5,7 RE 78, Page ID 11953-11954

<sup>2</sup> Joint Stipulation ¶¶ 1, 2, 7, 9, 10, 11 RE 78, Page ID 11953-11954

<sup>3</sup> Joint Stipulation, ¶ 11 RE 78, Page ID 11954

<sup>4</sup> Stipulation of the Parties, RE 23, Page ID 7891-7893

<sup>5</sup> Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d); see also Petition for Writ of Certiorari, Page 10

Angela Jackson was one of only two witnesses placing Thomas at the scene. And the other witness, Richard Fisher, had previously identified two different people, including initially identifying someone else as the shooter while testifying at Thomas' trial. In fact, during a sidebar conference, the trial judge doubted Fisher's ability to recall accurately what he saw. No forensic evidence implicated Thomas. Angela Jackson denied at trial receiving any reward, or "one red cent" for her testimony. The secret \$750 payment would have been powerful impeachment evidence that would have eviscerated the prosecutor's argument that Jackson was testifying only because it was the right thing to do.

There is simply nothing cert-worthy to review in this case. The parties stipulated to all elements of a *Brady* claim except materiality. And the correct legal standard for materiality was agreed upon by the parties and applied by the court. Rather this case involves a routine application of an agreed legal standard to the particular facts of this case. Taking this case will not resolve any conflict in the circuits or among the states as to any important question of federal law. Certiorari review would not clarify the law, and a merits decision would have little, if no precedential value as it would be so dependent on upon this case's unique facts. And in any event, the Sixth Circuit got the materiality assessment right. Certiorari should therefore be denied.

## Statement of the Case

### 1. **Apart from Angela Jackson's testimony, scant evidence implicated Thomas at his state trial.**

On April 21, 1997, an assailant robbed and shot James Day, a Loomis Fargo armored car guard, as he exited a Walgreens in Memphis, Tennessee with the store deposits.<sup>6</sup> The shooter jumped into the passenger side of a white car driven by a second individual, and the two sped away from the scene.<sup>7</sup>

The Walgreens robbery and shooting was investigated by the Safe Streets Task Force (SSTF), a joint federal and state law enforcement partnership that investigates and prosecutes violent crimes in both federal and state court.<sup>8</sup> The getaway car was discovered abandoned close to the scene, and investigators recovered a fingerprint right below the handle of its passenger side door.<sup>9</sup> They also obtained a grainy black and white surveillance video showing the shooter taken from inside the Walgreens.<sup>10</sup> SSTF agents also interviewed several witnesses who were present at the crime scene.<sup>11</sup>

A few months after the Walgreens robbery, Andrew Thomas and Anthony Bond were arrested on unrelated charges. Investigators compared their

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<sup>6</sup> (Pet. App. 3) *See also State v. Thomas*, 158 S.W.3d, 361, 373 (Tenn. 2005) (Pet. App. 258)

<sup>7</sup> *Id.*

<sup>8</sup> Joint Stipulation, RE 78, Page ID 11953-11954; Memorandum of Understanding, Section IV D. RE 58-7, Page ID 8898

<sup>9</sup> Trial Testimony of R. Hulley, RE 12-18, Page ID 1931-1932; Stipulation of the Parties, RE 12-18, Page ID 1995-1996

<sup>10</sup> *See State v. Thomas*, 158 S.W.3d at 374 (Pet. App. 261), Trial Ex. 18, still photo from Walgreen's surveillance video, RE 14-35, Page ID 7792-7793

<sup>11</sup> *See* Witness Identification Statements attached as Exhibit 11 to Petition for Writ of Habeas Corpus, RE 1-11, Page ID 176-183



fingerprints to the fingerprint lifted from the passenger door of the getaway vehicle and determined that it matched Anthony Bond's print.<sup>12</sup> In November 1997 SSTF agents approached Angela Jackson, who was Thomas' girlfriend at the time of the shooting. She provided the agents with a statement implicating Thomas in the crime.<sup>13</sup>

Thomas was then charged in federal court for armed robbery and being a felon in possession of a firearm in violation of 18 USC § 922(g), § 924(c) and §1951. (Pet. App. 360) Angela Jackson provided critical testimony linking Thomas to the crime. Thomas was convicted and sentenced to life imprisonment.

After the federal trial concluded, James Day died. The State then indicted Thomas and Bond, charged them both with murder, and sought the death penalty. Thomas' defense at trial was twofold: (1) he was not involved, and (2) the gunshot wound did not cause Day's death—as Day died two and a half years after the shooting.

***A. Angela Jackson's trial testimony was pivotal.***

The key evidence against Thomas in the state trial was the testimony of Angela Jackson. Her testimony consisted of recounting Thomas' purported admission to her that he shot Day—in a conversation that occurred after Thomas and Jackson watched a television news report on the robbery.<sup>14</sup> Jackson also

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

<sup>13</sup> Statement of Angela Jackson, RE 15-1, Page ID 7848

<sup>14</sup> *State v. Thomas*, 158 S.W.3d at 374 (Pet. App. 259)

testified as to Thomas' disposition of the alleged robbery proceeds.<sup>15</sup> And she identified Thomas as the shooter from a still photograph taken from a grainy surveillance video that captured the shooter's back.<sup>16</sup>

The prosecutors portrayed Angela Jackson as a scared spouse whose only motivation in testifying was to make right by putting Thomas behind bars.<sup>17</sup> 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.<sup>18</sup>

No forensic or physical evidence placed Thomas at the scene of the crime. And the only other witness implicating Thomas was Richard Fisher, who was present at the scene of the Walgreens robbery, but who had previously identified *two other individuals, including Anthony Bond*, as the shooter.<sup>19</sup>

***B. Thomas attempted to impeach Angela Jackson at trial with evidence of her infidelity and her grudge against Thomas.***

The State's entire case rested on the testimony of Angela Jackson. And defense counsel used the only evidence they possessed to try and impeach her, namely Jackson's contentious relationship with Thomas and her romantic relationship with another man at the time.<sup>20</sup> Angela Jackson was upset with Thomas during their marriage for having girlfriends.<sup>21</sup> And she was cruel to

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<sup>15</sup> *State v. Thomas*, 158 S.W.3d at 374 (Pet. App. 259)

<sup>16</sup> *State v. Thomas*, 158 S.W.3d at 375 (Pet. App. 261)

<sup>17</sup> Trial testimony of A. Jackson, RE 12-17, Page ID 1733, 1746-1747, 1753, 1805

<sup>18</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1732, 1764, 1824

<sup>19</sup> See Trial Court comment, RE 12-19, Page ID 2053

<sup>20</sup> Trial Testimony of S. Williams, RE 13-1, Page ID 2773; Trial Testimony of W. Upchurch, RE 13-1, Page ID 2778

<sup>21</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1812-1813

Thomas' son—conduct about which Thomas openly confronted her.<sup>22</sup> 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.<sup>23</sup>

***C. The jury convicted Thomas and the Tennessee Supreme Court affirmed, extensively referencing Angela Jackson's testimony.***

The jury convicted Thomas and sentenced him to death.<sup>24</sup> The Tennessee Supreme Court affirmed. To see how central Angela Jackson's testimony was to convicting Thomas, one only needs to read the guilt-phase factual summary from the Tennessee Supreme Court's opinion. A cursory view of the summary reveals that, other than one reference to Richard Fisher, it is Angela Jackson that established Thomas' involvement—as there are seven explicit references to her testimony. *State v. Thomas*, 158 S.W.3d 361, 373-376 (Tenn. 2005) (Pet. App. 256)

**2. After state proceedings concluded, it was by happenstance discovered that law enforcement secretly paid \$750 to Angela Jackson for her services.**

Soon after the conclusion of all state post-conviction proceedings, Thomas' counsel discovered that the SSTF secretly paid Angela Jackson \$750 after her testimony in the federal trial and before her testimony in the state trial. The payment had been concealed from Thomas until it was by happenstance revealed at an evidentiary hearing in October 2011, in connection with Thomas' § 2255

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<sup>22</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1813

<sup>23</sup> Trial testimony of S. Williams, RE 13-1, Page ID 2772; Trial Testimony of R. Carpenter, RE 13-1, Page ID 2784-2785

<sup>24</sup> Anthony Bond received a life sentence, without parole. Order on Summary Judgment, (Pet. App. 26)

proceeding challenging his federal life sentence.<sup>25</sup> In paperwork documenting the 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.”<sup>26</sup>

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 death sentence.<sup>27</sup> The petition raised eleven claims for relief, including a *Brady v. Maryland* claim arising out of the newly discovered secret payment to Angela Jackson. The parties stipulated under 28 U.S.C. § 2254 (b)(3)<sup>28</sup> that the State was waiving exhaustion as to the newly uncovered *Brady* claim.<sup>29</sup> In the stipulation, the parties expressed that it was doubtful whether there were any state-court remedies available to Thomas to exhaust the newly discovered claims—but by expressly waiving exhaustion the federal court was unquestionably free to consider the *Brady* claim *de novo* on the merits.<sup>30</sup> *See Cone v. Bell*, 556 U.S. 449, 472 (2009) (Because the Tennessee courts did not reach the merits of the *Brady* claim, federal habeas review is not subject to the deferential standard that applies under the A.E.D.P.A., 28 U.S.C. § 2254(d)).

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<sup>25</sup> Testimony of S. Sanders at § 2255 hearing attached as Exhibit 8 to Petition, RE 1-8, Page ID 163-165

<sup>26</sup> *See* Request for funding attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID 7852

<sup>27</sup> Petition for Writ of Habeas Corpus, RE 1, Page ID 130

<sup>28</sup> 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.”

<sup>29</sup> Stipulation of the Parties, RE 23, Page ID 7891-7893

<sup>30</sup> *Id.*

Thomas then sought discovery to explore (1) the joint federal-state nature of the SSTF and (2) to develop proof concerning the circumstances surrounding the secret payment to Angela Jackson.<sup>31</sup> He also requested an evidentiary hearing to develop the *Brady* claim.<sup>32</sup>

**A. *The parties stipulated to all elements of a Brady claim except materiality.***

After negotiation, the parties entered into the following stipulation concerning the *Brady* claim:

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.

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<sup>31</sup> Motion for Leave to Conduct Discovery, RE 25, Page ID 8049

<sup>32</sup> Motion for an Evidentiary Hearing, RE 66, Page ID 11863

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.

[Joint Stipulation, RE 78, Page ID# 11953-11954]

Thus, the Warden conceded that all elements of the *Brady* claim were met, except for whether the undisclosed \$750 payment to Jackson was material.<sup>33</sup> Since questions of materiality could be answered as a matter of law upon review of the

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<sup>33</sup> In two footnotes the Warden claims that the prosecutors lacked actual knowledge of the \$750 payment. See Petition for Certiorari, notes 5 & 6. This assertion is misleading. With respect to the *Brady* claim at issue before this Court, the parties expressly stipulated that knowledge of the payment was imputed to the State. Joint Stipulation #9, RE 78, Page ID 11953-11954. A *Brady* claim does not require proof of actual knowledge by the prosecutor—as any evidence possessed by law enforcement is imputed to the prosecution. Whether the state prosecutor had actual knowledge of the payment was only relevant to the separate, false testimony claim (Claim 2), which was discussed by the Sixth Circuit in its opinion, but not decided. Before the district court, the Warden conceded the knowledge prong of the false testimony claim. See District Court Opinion, Pet App. 77-78; see also Respondent's Brief Clarifying Issues, RE 95, Page ID 12043. Thus, to the extent that actual knowledge was required to prove a false testimony claim, it was in fact conceded. But since that claim was not adjudicated and is not before this Court, the actual vs. imputed knowledge distinction is simply not relevant.

state court record—in light of these stipulations—the district court denied Thomas’ request for an evidentiary hearing as moot.<sup>34</sup>

***B. The district court denied relief, but the Sixth Circuit reversed, finding that the secret \$750 payment to Angela Jackson was material.***

The district court then granted summary judgment for the State and denied Thomas habeas relief.<sup>35</sup> It believed the payment to be immaterial, stating that “there was substantial evidence linking Thomas to the crime, other than [Angela] Jackson’s testimony.”<sup>36</sup> 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.<sup>37</sup> The court also found it relevant that Angela Jackson had consistently testified concerning Thomas’ involvement in both the earlier federal proceedings and in the subsequent state proceedings.<sup>38</sup>

On appeal, the Sixth Circuit reversed. In assessing materiality, it determined that Thomas’ case was factually similar to its precedent, *Robinson v. Mills*, where an undisclosed payment of \$70 to a witness was found to be material and warranted habeas relief. (Opinion, Pet. App. 9-10 discussing *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2010)) As in *Robinson*, the Sixth Circuit concluded that Angela Jackson’s testimony was pivotal. (Opinion, Pet. App. 10) It emphasized that Jackson was only one of two witnesses placing Thomas at the scene of the

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<sup>34</sup> Order Denying Petitioner’s Motion for Evidentiary Hearing, RE 97, Page ID 12050

<sup>35</sup> Order on Summary Judgment, (Pet. App. 23)

<sup>36</sup> Order on Summary Judgment, (Pet. App. 74)

<sup>37</sup> Order on Summary Judgment, (Pet. App. 74)

<sup>38</sup> Order on Summary Judgment, (Pet. App. 75)

crime. And the other witness, Richard Fisher, initially identified the co-defendant, Anthony Bond, as the person he saw at the scene—not Andrew Thomas. (Opinion, Pet. App. 10-11) Jackson was also the only witness linking Thomas to his co-defendant, Bond. (Opinion, Pet. App. 10) The court further discussed that the other circumstantial evidence presented did not overwhelmingly suggest that Thomas was the shooter. (Opinion, Pet. App. 11) And it emphasized the importance of impeachment for pecuniary bias in contrast to other forms of impeachment evidence and rejected arguments that evidence of Jackson’s payment by the joint task force would have been cumulative, since no other impeachment evidence was presented at the trial that showed Angela Jackson’s pecuniary bias. (Opinion, Pet. App. 11-14) Finally, the court found that Thomas’ case was more compelling than Robinson’s since the payment was made in connection with a case against the same defendant involving the exact same facts. (Opinion, Pet. App. 12)<sup>39</sup>

The Warden sought rehearing *en banc*, which was denied without a single judge voting to rehear the case *en banc*. (Order, Pet. App. 378)

## **Reasons for Denying the Writ**

### **I. This case fails to meet any criteria for Supreme Court review.**

The Warden asks this Court to review the Sixth Circuit’s determination that admittedly withheld exculpatory evidence was material for *Brady* purposes. But the

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<sup>39</sup> The Sixth Circuit rejected Thomas’ § 2255 appeal, thus affirming his life sentence in the federal system. (§ 2255 Opinion, Pet. App. 358) It distinguished the two cases by pointing out that the \$750 payment occurred after the federal trial, and thus at the time of the federal trial it could not have been disclosed. (Id. at Pet. App. 359)



question presented is simply not cert-worthy. The Warden does not even claim there is a conflict among the circuits or state courts of last resort as to an important question of federal law that has not been, but should be, settled by the Supreme Court. And that's because there is none. Thus, the typical reasons this Court grants certiorari are not present here. *See* Sup. Ct. R. 10.

Rather, the Warden attempts to convince the Court that the Sixth Circuit failed to apply the correct legal standard for determining materiality under *Brady*. The Warden admits (as he must) that the Sixth Circuit opinion articulates the correct legal standard for materiality.<sup>40</sup> But he tries to argue that in reality a more watered down materiality standard was applied.<sup>41</sup>

The Sixth Circuit's opinion properly articulated the materiality standard for *Brady* claims when it cited this Court's decision in *Strickler v. Greene*<sup>42</sup> and then specifically quoted from *Kyles v. Whitley*.<sup>43</sup> (Pet. App. 7-8) The opinion correctly states that evidence is material for *Brady* purposes when, in view of all relevant evidence, its absence deprives the defendant of a fair trial, "understood as a trial resulting in a verdict worthy of confidence." (Opinion, Pet. App. 8) It acknowledges that satisfying the standard requires more than a mere possibility, but less than proof by a preponderance of the evidence that the disclosure of the suppressed evidence would have resulted in the defendant's acquittal. (Opinion, Pet. App. 8, quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)) The Warden asserts the wrong

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<sup>40</sup> Petition for Certiorari, Page 17

<sup>41</sup> Petition for Certiorari, Page 17

<sup>42</sup> *Strickler v. Greene*, 527 U.S. 263, 281-282 (1999)

<sup>43</sup> *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)

standard was applied because, after reviewing the state court record to determine whether the undisclosed evidence would have affected the outcome, the Sixth Circuit found Richard Fisher's testimony lacked credibility given that he had previously identified two other people. The Warden also believes the Sixth Circuit failed to consider the consistency of Angela Jackson's testimony before and after she received the payment.

While the Warden's analysis is wrong on the merits as will be shown in the next section, what is evident is the Warden is really complaining about how the Sixth Circuit analyzed different proof in the record in order to determine whether the materiality standard was met—not an application of a different legal standard altogether. In almost every federal appeal the losing party invariably believes that the court of appeals failed to correctly apply the federal law to the facts of the case. As stated in Supreme Court Rule 10: “A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. Here, there is no misstatement of a rule of law. Thus, even if the Sixth Circuit had incorrectly applied the law to the record of this case (which it hasn't), the misapplication of facts to a correctly stated rule of law is not grounds for certiorari review. Having a third merits review of this detailed record to evaluate materiality will not clarify the law. And such a fact intensive review will offer no precedential guidance for lower courts in other cases. Certiorari should therefore be denied.

## **II. The Sixth Circuit correctly determined that the secret payment to Angela Jackson was material.**

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. *Brady v. Maryland*, 373 U.S. 83 (1963); *Banks v. Dretke*, 540 U.S. 668, 691 (2004). 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*, 527 U.S. at 289. “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 worthy of confidence.” *Id.* at 289-90 (quoting *Kyles*, 514 U.S. at 434); *see also Banks*, 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 Sixth Circuit began its *Brady* materiality analysis by acknowledging that the dispositive question is whether the guilty verdict entered against Thomas is worthy of confidence in absence of the suppressed evidence. (Opinion, Pet. App. 8-9). It compared the facts of Thomas’ case to *Robinson v. Mills*,<sup>44</sup> its own published precedent, wherein the Sixth Circuit had previously held an undisclosed \$70 payment to a key witness to be material and warranted *Brady* relief. (Opinion, Pet. App. 9) The court noted that, as in *Robinson*, Jackson’s testimony was pivotal.

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<sup>44</sup> *Robinson v. Mills*, 592 F.3d 730 (6th Cir. 2010)

(Opinion Pet. App. 10) Jackson provided the only credible identification placing Thomas at the scene of the crime. (Id.) She also provided the only testimony linking Thomas to his co-defendant, Bond, on the day of the shooting. (Id.) And she provided the only testimony affirmatively attributing Thomas with responsibility for the transactions cited by the State as circumstantial evidence of his involvement in the shooting. (Id.)

The Warden's petition claims that the Sixth Circuit failed to appropriately consider the following factors when determining that the \$750 payment was material:

- Richard Fisher's identification of Thomas;
- Surveillance video from a security camera;
- Evidence of Thomas making purchases after the robbery;
- The consistency of Angela Jackson's state testimony with her prior federal testimony and statement;
- Thomas counsel had other evidence to impeach Angela Jackson.

These will be addressed below.

**A. Richard Fisher's multiple, inconsistent identifications rendered his testimony suspect.**

Of the many witnesses at the scene, only Richard Fisher identified Thomas as a participant. The Warden points out that Richard Fisher was within four feet of the getaway car, identified Thomas in court, and testified he was very sure of the identification.<sup>45</sup> The Warden also complains that the Sixth Circuit opinion

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<sup>45</sup> Petition for Certiorari, Pages 6, 18

concluded that Fisher's testimony lacked credibility, which the Warden characterizes as speculative. (Opinion, Pet. App. 10)<sup>46</sup>

But Fisher's identification did lack credibility, since he identified Thomas only after first identifying *two other people*. In a photographic lineup (closer in time to the crime), 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.<sup>47</sup> Then, on direct examination at Thomas' trial, Fisher identified Anthony Bond as the passenger in the getaway car.<sup>48</sup> This prompted the trial court, in a sidebar with counsel, to question 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]

Fisher only switched his testimony and identified Thomas after being led by Bond's attorney on cross examination to leave the witness chair, stand directly in

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<sup>46</sup> Petition for Certiorari, Page 18

<sup>47</sup> Trial Testimony of R. Fisher, RE 12-19, Page ID 2039-2040; Trial Court Comment, RE 12-19, Page ID 2052-2053; Trial Exhibit 55, RE 14-35, Page ID 7762-7765. Actually, Richard Fisher twice identified Terrance Lawrence as the perpetrator after review of two photographic spreads on two separate dates. On July 29, 1997 Fisher "positively" identified Terrance Lawrence as the perpetrator after reviewing his profile picture. (RE 14-35, Page ID 7762) Then, on August 4, 1997 he again identified Terrance Lawrence, and this photo-spread identification was admitted into Evidence as Exhibit 55.

<sup>48</sup> Trial Testimony of R. Fisher, RE 12-19, Page ID 2038-2044

front of Thomas at counsel table, and look at him.<sup>49</sup> Only under those extremely suggestive circumstances did Richard Fisher change his identification from Bond to Thomas. Thus, the Sixth Circuit correctly concluded that Richard Fisher's testimony lacked credibility. (Opinion, Pet. App. 10)

**B. The poor quality surveillance video was worthless without Angela Jackson's testimony.**

The Warden also mentions that the jury had the still photograph and video from the Walgreen's security camera at their disposal as evidence of Thomas' involvement.<sup>50</sup> But 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.<sup>51</sup> The Warden intimates Jackson's testimony was unnecessary, as if somehow the jury could have independently 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>49</sup> Trial Testimony of R. Fisher, RE 12-19, Page ID 2062-2067

<sup>50</sup> Petition for Certiorari, Page 6

<sup>51</sup> 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



[Trial Exhibit 18, RE 14-35, Page ID 7792]

It is self-evident that this security camera footage—by itself—is absolutely worthless for identifying anyone. But with Jackson’s testimony to shape the jurors’ perception of the video’s amorphous figures, the state prosecutor was able to transform its otherwise useless physical evidence into a critical part of its case against Thomas.

**C. Evidence of purchases by Thomas after the robbery depends upon Angela Jackson’s testimony.**

The Warden posits that evidence of Thomas spending money soon after the robbery corroborates his involvement.<sup>52</sup> But this circumstantial evidence stems from Jackson’s testimony, and depends upon Jackson to link it to Thomas.<sup>53</sup>

Undoubtedly Angela Jackson opened a savings account at First American Bank

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<sup>52</sup> Petition for Certiorari, Page 6

<sup>53</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1725-1730, 1735, 1739-1747, 1803

after the robbery.<sup>54</sup> But 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.<sup>55</sup> Likewise, Angela Jackson purchased the fancy pink Chevy with gold rims, and the car was titled in Jackson’s name only.<sup>56</sup> Again, Angela Jackson’s testimony is the only evidence that the money to purchase the car came from Thomas.<sup>57</sup> And it was Jackson who bought a shotgun and told the jury that Thomas instructed her to buy it.<sup>58</sup> The Sixth Circuit concluded that none of this evidence overwhelmingly suggests that Thomas was the shooter—at most it suggests that either Thomas or Jackson came into substantial wealth around the time of the shooting. (Opinion, Pet. App. 11) Without Jackson’s testimony, the Sixth Circuit correctly found this evidence to be far less persuasive of Thomas’ guilt. (Opinion, Pet. App. 11)

**D. The jury could have believed that Jackson was promised payment from the beginning.**

The consistency of Jackson’s pre-payment statements implicating Thomas does not defeat materiality as suggested by the Warden. Coupling the highly unusual nature of the \$750 payment with Jackson’s lying about 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

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<sup>54</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1744

<sup>55</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1744-1745

<sup>56</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1735-1737

<sup>57</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1735-1737

<sup>58</sup> *State v. Thomas*, 158 S.W.3d at 374 (Pet. App. 259)



range for the services starting in April 1997, well before her first statement.<sup>59</sup> 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? What “services” had she provided since April 1997 warranting such a large payment?

A \$750 payment in 1998 would be equivalent to more than \$1,100 today (over 19 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.<sup>60</sup> Thus, the \$750 payment would have been equivalent of more than two weeks’ wages at the time she was paid.

Tellingly, the SSTF affidavit that was prepared after the payment was revealed fails to state any reason why they paid Jackson, other than for “assistance” she provided.<sup>61</sup> By contrast, the original paperwork submitted by the SSTF seeking authorization for the payment justifies the request by indicating that Thomas would not have been successfully prosecuted without Angela Jackson’s testimony.<sup>62</sup> Thus, the Warden cannot credibly deny the nexus between the \$750 payment and

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<sup>59</sup> Receipt for \$750 payment, RE 15-1, Page ID 7853. Angela Jackson’s first statement to the SSTF was taken in November 1997. Statement of Angela Jackson, RE 15-1, Page ID 7848

<sup>60</sup> Deposition Testimony of A. Jackson, RE 54, Page ID 8311-8312

<sup>61</sup> SSTF Agent Scott Sanders Affidavit, ¶ 7, RE 15-1, Page ID 7846

<sup>62</sup> See Request for funding attached as Exhibit B to Response to Petition for Writ of Habeas Corpus, RE 15-1, Page ID 7852

Jackson's helping the SSTF with the "successful" prosecution of Thomas. Secretly paying a fact witness shockingly defies any civilized notion of justice and fairness. No legitimate explanation justifies the payment. The jury could have reasonably believed that Angela Jackson was promised a payment from the beginning—particularly in light of receipt showing payment for a time period commencing before her first statement, evidence of the connection of the payment to the successful prosecution of Thomas, and Jackson's denial under oath that she received one red cent.

**E. The impeachment evidence that trial counsel possessed was of little worth.**

Thomas' counsel did the best they could to impeach Angela Jackson with what little evidence they had available. They did point out that Jackson was angry at Thomas, due to his cheating on her,<sup>63</sup> and that she likewise cheated on him.<sup>64</sup> They pointed out that Jackson was cruel to his son,<sup>65</sup> and she had told others that she was going to get him back.<sup>66</sup> But as the Warden concedes in his petition, this impeachment evidence—which is all Thomas' trial counsel had at his disposal to present to the jury—was provided by friends of Thomas.<sup>67</sup> Thus its value was diminished.

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

<sup>64</sup> Trial Testimony of S. Williams, RE 13-1, Page ID 2773; Trial Testimony of W. Upchurch, RE 13-1, Page ID 2778

<sup>65</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1813

<sup>66</sup> Trial testimony of S. Williams, RE 13-1, Page ID 2772; Trial Testimony of R. Carpenter, RE 13-1, Page ID 2784-2785

<sup>67</sup> Petition for Certiorari, Page 8

As the Sixth Circuit points out, there was no other impeachment evidence presented to the jury of Angela Jackson having been paid in connection with the case. (Opinion, Pet. App. 13-14) Evidence of Jackson's financial interest was of a fundamentally different character than the impeachment evidence trial counsel had available. 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. The Sixth Circuit rightly concluded that, in the absence of this evidence, Thomas' trial was fundamentally unfair. (Opinion, Pet. App. 15).

**F. The Sixth Circuit correctly determined that Thomas was denied a fundamentally fair trial when the State withheld evidence of the \$750 payment to Jackson.**

Although the Warden admits the Sixth Circuit opinion articulates the correct standard for assessing materiality, he argues that in fact the court applied a watered down version.<sup>68</sup> Under *Brady* evidence is material if its absence deprives the defendant of a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Kyles*, 514 U.S. at 434. Satisfying this standard requires more than a mere possibility, but less than proof by a preponderance of the evidence that the disclosure of the evidence would have resulted ultimately in the defendant's acquittal. *Id.* The Sixth Circuit correctly found the withheld evidence to be material under this standard.

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<sup>68</sup> Petition for Certiorari, Page 7

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. It repeatedly characterized 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.<sup>69</sup>

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.<sup>70</sup>

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. And 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 receiving any payments. All of this evidence

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<sup>69</sup> Trial Testimony of A. Jackson, RE 12-17, Page ID 1733, 1746-1747, 1753, 1805

<sup>70</sup> 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

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.

At its core, our Constitution safeguards the right of an accused to a fundamentally fair trial. As the Sixth Circuit aptly noted:

By focusing on the fairness of defendant’s trial, we protect his constitutional right to present a complete and full-throated defense. As the Supreme Court noted in *Brady*: “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” 373 U.S. at 87

(Opinion, Pet. App. 15)

But Thomas was denied a fundamentally fair trial for his life by the withholding of evidence that Jackson was a paid witness. The Sixth Circuit got it right. Certiorari should be denied.

### **III. There is no reason to remand for reconsideration in light of *Turner v. United States*.**

The Warden alternatively requests that this Court grant, vacate, and remand Thomas’ case to the Sixth Circuit in light of this Court’s recent decision in *Turner v. United States*, \_\_U.S.\_\_, 137 S. Ct. 1885 (2017). But a remand is not warranted, since *Turner* does not set forth any new rule of law that would in any way affect the Sixth Circuit’s analysis of Thomas’ case. In *Turner*, the Petitioner was charged with participation in a mob beating that ended in murder. Later, evidence was

uncovered that could have supported an alternate theory of the victim being killed by a couple of people. Both the district court and the court of appeals denied relief, finding that the evidence was too remote to be material. After carefully reviewing the record, this Court affirmed.

First of all, *Turner* sets forth no new rule of law. The standard of materiality articulated in *Turner* is the exact same standard cited in previous Supreme Court cases and cited by the Sixth Circuit in its opinion below. And while under the facts of *Turner* this Court found the withheld impeachment evidence to be cumulative, this Court went out of its way to clarify that it was not suggesting that impeachment evidence is *per se* immaterial because a witness has already been impeached with other evidence:

We of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other evidence. See *Wearry v. Cain*, 577 U.S. \_\_\_, 136 S. Ct. 1002, 1006-1007, 194 L.Ed.2d 78 (2016)(*per curiam*) We conclude only that in the context of this trial, with respect to these witnesses, the cumulative effect of the withheld evidence is insufficient to “undermine confidence” in the jury’s verdict...

*Turner, v. U.S.*, 137 S. Ct at 1895

Thus, *Turner* acknowledges that its holding concerning materiality is specific to the facts of the case, and does not set forth some new or modified rule of law.

Andrew Thomas’ case is much more akin to other recent Supreme Court decisions finding *Brady* violations to be material. In *Wearry v. Cain*, for example, the state’s capital conviction largely depended on the testimony

of a star eyewitness, Sam Scott. *Wearry v. Cain*, 136 S.Ct. 1002 (2016). The state presented no physical evidence at trial. But it did produce other circumstantial evidence linking Wearry to the victim, including witnesses seeing him in the victim's car the night of the murder, and him possessing the victim's class ring after the murder. *Id.* at 1003. The defense was able to impeach Scott at trial, as Scott had significantly changed his account of how the crime occurred since he first gave a statement to the police. *Id.* at 1003. Despite counsel's efforts at impeachment, Wearry was still convicted and sentenced to death. After the conviction became final, it emerged that the prosecution had withheld evidence that would have impeached Scott's credibility. This included an inmate reporting that Scott wanted to "make sure Wearry gets the needle cause he jacked over me." *Id.* at 1004. This Court reversed and granted *Brady* relief finding that "[b]eyond doubt, the newly revealed evidence suffices to undermine confidence in Wearry's conviction." *Id.* at 1006.

Thus *Wearry* shows that *Brady* evidence can be material even if the defense had access to some impeachment evidence. After all, in most cases the defense is able to muster *some* type of impeachment against key witnesses. And while in some cases withheld impeachment evidence might be immaterial in light of other compelling evidence available at trial, it is not so in this case. Here Jackson was one of only two witnesses implicating Thomas, and the other witness had previously identified two other people.

Jackson was the State's case, and the prosecutors went out of their way to portray her as an innocent spouse coming forward only because it is the right thing to do. Can it really be questioned whether or not Thomas death penalty trial was fair in the absence of this damning evidence against the state's key witness? This Court's *Brady* jurisprudence has been settled for years.

*Turner* does not change the law, and a remand for reconsideration in light of *Turner* is not warranted.

### Conclusion

Because this case fails to meet any criteria for review, certiorari should be denied.

Respectfully submitted,

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