IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	:	
v.	:	CASE NO. 11SC99152
JON THIEME	:	
Defendant.	:	JUDGE DEMPSEY

SUPPLEMENT TO PREVIOUSLY FILED MOTION FOR NEW TRIAL

COMES NOW Defendant in the above styled case, and pursuant to O.C.G.A. Section 5-5-40 files his Supplement to Previously Filed Motion for New Trial. Defendant moves this Court to set aside the guilty verdict returned herein on March 22, 2013, and the sentence entered thereon, and to grant a new trial. Specific references to the trial transcript are made by the letter "T" followed by the page number where the referenced item appears. Defendant offers to show this Court the following:

Defendant was charged in the above referenced indictment with two counts of aggravated child molestation. In count 1 he was charged with placing his penis into the mouth of Curtis Bell, a child under the age of 16 years. In count 2 he was charged with placing his penis into or on the anus of Curtis Bell. A jury returned a verdict of guilty as to count 1 (oral sex count) and not guilty as to count 2 (anal sex count) on March 22, 2013. Defendant was immediately sentenced to serve twenty-five (25) years in prison on count 1. A Motion for New Trial was timely filed on March 26, 2013. A transcript of the trial was prepared. This Supplement follows.

Following the trial, Defendant's attorneys Barry Hazen and Michael Jacobs, were in the jury room talking with some of the jurors. Both Mr. Hazen and Mr. Jacobs heard Demone Lee, the assistant district attorney who tried the case, say that the reason he did not ask Curtis Bell on direct examination about the anal sex allegation, is that Curtis had told him that the anal sex allegation did not happen. He further indicated he nevertheless left the anal sex count in the indictment to see what the jury would do with it.

A hearing on Defendant's Motion for Bail Pending Motion for New Trial was scheduled for May 9, 2013. Instead of having a hearing, Mssrs. Hazen, Jacobs and Lee met with Judge Dempsey in chambers. Mr. Lee was asked directly by Mr. Hazen in Judge Dempsey's presence when did he learn that Curtis Bell said that the anal sex allegation did not happen. Mr. Lee responded that he would have to review his notes to be certain of the date, but it was "about 30 days ago." Judge Dempsey directed Mr. Lee to review his notes and inform defense counsel of the precise day he learned that the anal sex allegation did not happen. Mr. Hazen sent an email to Lee on May 10, 2013 confirming Judge Dempsey's directive. Mr. Lee responded, "I am still trying to nail down the exact date. After speaking with Curtis' mom, I can say that it was about a week before trial." A copy of that email is attached hereto and made a part of this Motion.

At no point before his comment in the jury room following the trial did Mr. Lee inform either defense counsel that Curtis Bell said the anal sex allegation did not happen. There were email transmittals and telephone conversations between Mr. Hazen and Mr. Lee during the week before trial. Further, Mr. Lee actually came to Mr. Hazen's office on March 15, 2013 to view the testimony of a witnesses that had been videoed and stipulated to before Mr. Lee had become

the assistant district attorney in the case. Mr. Hazen wanted to make sure Mr. Lee was aware of it and had the chance to review it. During that meeting and in the emails and telephone conversations Mr. Lee did not inform Mr. Hazen that Curtis Bell said the anal sex allegation did not happen. If Mr. Lee's statement in chambers is true, then he knew about the recantation then. If Mr. Lee knew it about a week before trial per his email, then he might have known it when he visited Mr. Hazen at his office on March 15.

Defendant mailed a Motion For Discovery, Inspection, Production And Copying Of Evidence Favorable To The Accused And In Camera Inspection, With Incorporated Authority to the State on March 29, 2011. The Superior Court Clerk shows it was filed on April 4, 2011, almost two years before trial. That Motion contains the following request :

"Defendant respectfully moves this Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article 1, Section 1, Paragraphs 1, 11 and 14 of the Georgia Constitution, as construed and applied in the case of Brady v. Maryland, 373 U.S. 83 (1970) and its progeny including, Giles v. Maryland, 386 U.S. 66 (1967); Giglio v. United States, 405 U.S. 105 (1972); and Hicks v. State, 232 Ga. 393 (1974), to order the State to produce and permit defense counsel in inspect and copy all evidence in the possession and control of the State which may be favorable to the Defendant, impeaching to the State, and material to the issues of guilt or punishment, or could reasonably weaken or affect any evidence proposed to be introduced against the Defendant at trial or at sentencing. The evidence sought includes, but is not be limited to:

1.

All evidence, including statements of individuals, physical evidence or test results indicating or tending to indicate that Defendant is not guilty of the offense charged or mitigating on the issue of sentence.

2.

All statements of any witness which contradict in any way the statements of any other witnesses, or **which contradict other statements made by the same witness."**

It is clear from the language of the Motion that the defense was requesting the very type of information revealed by Curtis Bell to Mr. Lee, to wit: the anal sex allegation did not happen. *Brady v. Maryland*, 373 U.S. 83 (1970) requires that it be turned over to the defense. This information is impeaching to the State in that any statement by Curtis Bell that anal sex did not

happen directly contradicts his previous statements that it did. It is exculpatory to the defense in that is completely negates the allegations of count 2 of the indictment.

The recantation was relevant to evidence the State presented. The State played two videos of forensic interviews with Curtis Bell. In the first video Curtis described in minute detail being sexually molested anally by his Uncle Clarence. When asked what Defendant did to him he said the same thing that Uncle Clarence did. He said the same body parts were involved when defendant allegedly molested him, as when uncle Clarence molested him, nothing was different. In the second interview Curtis said that Clarence and defendant "raped" me. It is obvious that Curtis was referring to anal sex when he used the word "rape" because he alleged anal molestation only with Uncle Clarence. Curtis said in the video that defendant tried to put his penis in his anus, but it was too big to fit in. Curtis never alleged that Uncle Clarence molested him orally. Thus, the State presented audio recorded evidence to the jury that defendant had committed anal sex molestation when knew that Curtis had recanted. The State had the legal obligation to inform the defense of the recantation so that defense counsel could use it in whatever lawful way it saw fit.

The State may seek to argue that failing to reveal that Curtis Bell recanted regarding the anal sex allegation is harmless because Defendant was acquitted of the anal sex charge. Curtis' original video statement regarding anal sex and his later admission that it did not happen goes directly to his credibility. If he originally lied about one part of the allegation, he might have lied about the other part too. It was not for the State to hide this information and then later express the opinion that it was harmless anyway.

The recantation information was relevant not only to the videos of Curtis' Bell's forensic interviews, but to several of the State witnesses as well. Two of those witnesses are Kathy Burke and Corinna Oliver. Ms. Burke was Curtis' teacher, and was the outcry witness. She testified that Curtis told her, "My uncle had raped me." (T117). The next witness called by the State was Corinna Oliver, who was a counselor at the school Curtis Bell attended. She testified that Ms. Burke told her what Curtis had reported to her (Burke). She questioned Curtis and asked him who did "it" to him (T123). It is obvious they were talking about rape (T123). Curtis said Clarence **and Little Jon** (T123). Little Jon refers to defendant. It should be noted that Curtis in his forensic videos never alleged that uncle Clarence molested him orally. Therefore, there is no doubt that Curtis is referring to anal sex when he uses the word "rape." Thus, the State was introducing evidence through these two witnesses that defendant anally molested Curtis when it knew full well that Curtis said it didn't happen, and failed to notify the defense.

The State also called Curtis' mother Lashunda Bell as a witness. Ms. Bell testified on direct examinations that "ever since everything has been going on, he (Curtis) has been trying to prove himself that he is a boy or that he is not—how can I use the term gay." (T180). The Following questions and answers occurred on direct examination:

Q: "So initially when you were told about Little Jon raping your child, what did you think initially.

A: When it was told to me by Curtis or—

Q; By law enforcement

A; I didn't want to believe it

Q: At what point did that change for you?

A: **When I heard it from my son."** (T190).

Later in her examination Ms. Bell was also asked on redirect "What made you take the allegation of sexual assault seriously?" She answered "when I heard it from my son." (T212). According to Mr. Lee's email to Mr. Hazen, it seems that Ms. Bell knew about the recantation more than a week before she testified to the above. This information could have been used for cross examination purposes by the defense. Had the State revealed the recantation the defense could have revealed that she also heard from her son that it did **not** happen.

The recantation was also central to the expert testimony of State's witness Anique Whitmore, the Director of Forensic Services for the Fulton County District Attorney. Ms. Whitmore's testimony essentially boiled down to observations of forensic interviews, including that of Curtis Bell, that in her opinion are consistent with those of a child who had actually been molested. Whitmore testified, "Little boys, young men are reluctant to share intimate details of sexual offenses because stereotypically they are going to be—they assume people might think they are gay…It's very difficult for young boys to come forward and especially in very explicit details about what happened **especially penetration** with boys it's very difficult for them to expose because it is not what a young man is supposed to experience." (T271). She essentially testified that boys who are sexually penetrated are even more reluctant to reveal it because there is the stigma of homosexuality. Her testimony lends support to Curtis' initial claim of being anally molested. Her opinion could have been challenged by the defense with the knowledge that Curtis Bell had made up the entire story of being anally penetrated, if the recantation had been revealed by the State.

LAW

In *Brownlow v. Schofield*, 277 Ga. 237 (2003), which is a habeas corpus case, issues almost identical to those presented in this case were addressed. Mr. Brownlow was convicted of two counts of child molestation and two counts of aggravated sexual battery. The alleged victim was his grandson. Ten days before trial the child victim was interviewed by the prosecuting attorney and **shook his head negatively** when asked if Brownlow had put his mouth on his penis. The prosecuting attorney considered dropping the charge but decided to keep it in the case. The prosecutor did not inform the defense of the child's negative response.

"Where a prosecutor suppresses evidence favorable to the defense, the State violates the defendant's due process rights. Zant v. Moon, 264 Ga. 93 (1994). To prevail on a claim of denial of due process based on the State's suppression of evidence favorable to the defense, a defendant must show that the State possessed evidence favorable to the defendant; the defendant did not possess the evidence not could he obtain it himself with any reasonable diligence; the prosecution suppressed the favorable evidence; and had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different" *Gulley v. State*, 271 Ga.337, 341-342 (5) (1999)."

In this case it is obvious both from Mr. Lee's admission to Judge Dempsey in chambers, and from his subsequent email to Mr. Hazen that the State did indeed possess evidence favorable to the defendant. Thus, the first prong of *Brady* and *Gulley* has ben satisfied.

It is also obvious that the State failed to disclose this information. The failure to disclose the recantation was more than just an oversight. In fact, it appears that the State made an effort to suppress the recantation by avoiding any live testimony concerning the anal sex allegation.

Avoiding any testimony concerning the anal sex allegation is good strategy because it minimizes the risk that any witness will blurt out anything about the recantation. Reading the trial transcript in retrospect, now knowing that the State knew about the recantation, it become obvious that the State tried to avoid any live testimony regarding the anal sex allegation.

The first clue is the State never mentioned anal sex in its opening statement to the jury. It specifically mentioned oral sex, but skirted the issue of anal sex entirely.

The second clue is the State avoided eliciting live testimony about anal sex. For example, Curtis Bell was never asked on direct examination anything about anal sex with defendant. If Curtis Bell was asked about it on direct examination there is the risk that he might reveal that it didn't happen.

The third clue is the State avoided asking Curtis' mother Lasunda Bell on direct examination anything about anal sex. It is inconceivable that the mother of Curtis Bell would not be asked about the anal sex allegation unless the State was deliberately avoiding any mention of it. Given Mr. Lee's May 10, 2013 email to Mr. Hazen where he said "**After speaking with Curtis' mom,** I can say it was about a week before trial", it is obvious that Ms. Bell knew that her son had recanted. The State had to avoid questioning her about the anal sex allegation because if she was going to testify truthfully she would have had to reveal the recantation.

Thus, a second prong of *Brady* and *Gulley* is satisfied.

This case took almost two years to reach trial. During that extended time Mr. Hazen attempted to interview almost all witnesses in the case. He interviewed Curtis' mother, Lashunda Bell by telephone. She did not indicate to Mr. Hazen that Curtis had ever told her that the anal sex allegation did not happen. She would not allow Mr. Hazen to interview Curtis in

person, or on the telephone. When she was asked by Mr. Hazen if he could telephone her again if he needed to she told him she had told him all she was going to say, and to not call her again. Mr. Hazen respected her request. Further, according to Mr. Lee's email to Mr. Hazen, he didn't know about the favorable evidence until approximately a week before trial. There is no evidence that Curtis Bell prior to that time revealed to anyone that the anal sex allegation did not happen. Thus, even if defense counsel was able to interview Curtis he would have to have been lucky enough to conduct the interview during the precise time period Curtis decided to "come clean." Thus, there was no reasonable way defendant could have obtained the suppressed evidence. The third prong of *Brady* and *Gulley* is established.

The last prong is that a reasonable probability exists that the outcome of the proceeding would have been different. In *Brownlow*, our Supreme Court has interpreted this **not** to mean 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. A reasonable probability of a different result is accordingly shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. *Nikitin v State*, 257 Ga. App 852,865(1)(C). Curtis Bell was the only witness whose words implicated defendant. His suppressed recantation undermines confidence in the outcome of this trial.

O.C.G.A. Section 5-5-20 provides that "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury. In this case, the suppressed evidence that Curtis said the anal sex allegation did not happen goes directly to the videoed forensic interviews of Curtis where he claimed that it did. Note that the entire case rests on the credibility of Curtis Bell.

Defendant has alleged in his Preliminary Motion for New Trial that the verdict is contrary to evidence and the principles of justice and was decidedly and strongly against the weight of the evidence. O.C.G.A. Section 5–5–20 and 5–5–21. 'afford the trial court broad discretion to sit as a "thirteenth juror" and weigh the evidence on a motion for new trial alleging these general grounds.' *Walker v. State*, 292 Ga. 262(2), 737 S.E.2d 311 (2013).

A trial court, in reviewing a motion for new trial based on the grounds alleged by defendant here "has a duty to exercise its discretion and weigh the evidence **and consider the credibility of the witnesses**. *Alvelo v. State*, 288 Ga. 437 (2011); *Brockman v. State*, 292 Ga. 707 (2013); Walker v. State supra, 292 Ga.at 294.

WHEREFORE, Defendant requests that this Court:

a. schedule a hearing when inquiry may be had into the issues raised above;

b. set aside the verdict in this case;

c. grant defendant a new trial.

Respectfully submitted this 11th day of October, 2013.

Lawrence Zimmerman
Attorney for Defendant
Georgia Bar No. 785198

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CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the foregoing Supplement to Previously Filed Motion for New Trial by mailing same with sufficient postage attached to assure delivery to:

Demone Lee, ADA
Office of the Fulton County District Attorney
Lewis Slaton Courthouse, Third Floor
136 Pryor St. SW
Atlanta GA 30303

This 11th day of October, 2013.

Lawrence Zimmerman
Attorney for Defendant
SBN: 785198