IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

ABU-ALI ABDUR'RAHMAN, ET AL.,	)	
v.	)	No. M2018-01385-SC-RDO-CV
TONY PARKER, ET AL.	)	

REPLY TO RESPONSE TO MOTION TO EXPAND THE RECORD

Appellees' response ignores the extraordinary nature of this appeal, the fact that the new evidence did not exist at the time of trial, and the fact that the unprecedented hydraulic pressure of this appeal lies squarely at their feet. *See* Edmund Zagorski's Resp. Opp'n to State's Mot. For Expedited Execution Dates, Case No. M1996-00110-SC-DPE-DD, pp. 1-11 and Attachments 1-9 (March 1, 2018) (setting forth the State's intentional delay tactics.)

Appellants have done nothing wrong by requesting leave of court to include the new evidence. Appellants have no choice but to bring that evidence to this Court's attention because the failure to do so would undoubtedly be called dilatory if they waited. It is the ultimate Catch-22.

Appellants suggest that no other appeal of this magnitude has ever been adjudicated at this pace. Just at this Court has the authority to suspend the rules, as it has done with the appellate schedule, so too

can this Court allow for the consideration of this new evidence – not to support a new claim –but as proof supporting the merits of the claims adjudicated at the trial court.

If Appellees prefer for this proof to first be presented at the trial court level, they are free to join Appellants in a joint motion to stay Mr. Zagorski's execution, thus alleviating the burden on this Court and all counsel.

Appellants' motion is hardly novel and is supported by precedent from this Court. In *State v. Branam*, 855 S.W.2d 563 (Tenn. 1993) this Court suggested that there is an exception to the general rule for Rule 14 consideration of post-judgment facts where state misconduct or *similar injustice* has occurred:

> The state also contends that an appellate court may not consider evidence which has not been introduced at trial or certified as part of the record by the trial court. We agree with the state's interpretation of Rule 24(g). However, we also conclude that the evidence in question is admissible under Rule 14 of the Tennessee Rules of Appellate Procedure.
>
> Rule 14 specifically authorizes this Court to consider post-judgment facts on appeal. In an opinion interpreting the predecessor to Rule 14, we held that a remand was necessary to gather additional evidence for resolution of an issue which was not previously available to the defendant. *Pruett v. State*, 501 S.W.2d 807, 809 (Tenn.1973). *Pruett* involved a post-conviction appeal raising a double jeopardy defense that had not been recognized at the time of trial. For this reason, facts tending to establish double jeopardy had not been developed at trial. Thus, through no fault of his own, the defendant came before this Court with an apparently valid constitutional claim that was nevertheless lacking in factual support. We

> ordered a remand to the trial court to permit the defendant to introduce facts in support of his claim. We noted that our holding was consistent with the interests of judicial efficiency, given the fact that the appellant could have filed a completely new post-conviction claim based on the recently announced double jeopardy principle. *Id.*
>
> Both before and after the advent of Rule 14, the courts of this state have allowed introduction of post-judgment facts in a number of appeals. *See, e.g., State v. Nance*, 521 S.W.2d 814, 816 (Tenn.1975) (remand appropriate where facts insufficient to review alleged speedy trial violation); *State v. Gourley*, 680 S.W.2d 483, 485 (Tenn.Crim.App.1984) (remand required where record contained "not one shred of competent evidence" regarding search of vehicle); *State v. Crawford*, 783 S.W.2d 573, 578 (Tenn.Crim.App.1989) (remand ordered where procedural confusion from lack of precedent resulted in record devoid of fact); *see also State v. Mitchell*, 593 S.W.2d 280, 285 (Tenn.1980) (remand appropriate where record inadequate to review admissibility of in-court identification). We likewise conclude that remand in order to consider the *Brady* question in this case is required. Indeed, if we declined to review the issue on direct appeal, it would undoubtedly resurface in a petition for post-conviction relief and, perhaps, lead to the necessity of a retrial many years after Branam's original conviction. Accordingly, we remand the case to the trial court for determination of the alleged violation of *Brady v. Maryland* upon a consideration of the post-judgment facts submitted by the appellant.

Id. at 571–72.

Finally, Appellants note that Appellees' 10 page reply does not deny that Appellees' failed to prepare a back-up dose of midazolam which is required by the protocol and which is central to their "contingency" plan. This is proof that Appellees' do not have sufficient

safeguards in place and that therefore, the addition to the record is appropriate and essential in this case.

Appellees' attack on the opinion of Dr. Lubarsky rings hollow. Their doctor endorsed Dr. Lubarsky's credentials, and the Chancery Court credited his testimony. He reviewed the present sense impressions that were made immediately following the execution of Mr. Irick by official media witnesses, who were selected by the State. Mr. Irick moved his head and strained against the straps after the consciousness check, and yet the execution continued and Defendants did not switch to the back up drug. They didn't have it ready.

Appellants' motion should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERIVCE

I, Kelley J. Henry, hereby certify that a true and correct copy of the foregoing document was electronically filed and sent to the following via email on this the 13th day of September, 2018, to:

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